A CRITICAL ANALYSIS OF THE RIGHT TO FAIR LABOUR PRACTICES

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by

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Declaration

I, Maralize Conradie, hereby declare that this dissertation, submitted by myself for the degree *Magister Legum*, is my independent work and was not previously submitted to another university/faculty in order to obtain a qualification.

I also willfully renounce copyright in this dissertation in favour of the University of the Free State.

_____ _____

Signature Date

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The dear Lord – Need I say anything more?

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CHAPTER 1
INTRODUCTION AND GENERAL ORIENTATION

"*The fair labour practice jurisdiction allows for a labour law dispensation that pays due regard to the needs and interests of both employer and employee. Neither employer nor employee benefits from a static employment concept where their respective rights and obligations are cast in stone at the commencement of the employment relationship. What the employer bargains for is the flexibility to make decisions in a dynamic work environment in order to meet the needs of the labour process. What the employee exacts in return is not only a wage, but a continuing obligation of fairness towards the employee on the part of the employer when he makes decisions affecting the employee in his work*".[1]

1. Introduction

The most fundamental of all human rights is the right of every person to existence – the right to exist physically and emotionally –. In ancient times this right was subdivided into 7 categories:[2] the right to fish; the right to hunt; the right to work land; the right to harvest; the right to associate; the right to be free from troubles; and the right to loot. But an increase in the population on earth and a decrease of natural resources led to the exchange of the first 4 rights (fish, hunt, cultivation and harvesting) for a right where independent existence was lost forever: labour.[3]

1 *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 1997 ILJ 361 (LAC):365I-366A.
2 Wiehahn 1982:par 2.1.
3 Wiehahn 1982:par 2.1.

Any relationship between two or more parties must be legally regulated to ensure the fairness and the protection of the parties' interests in such a relationship. The employment relationship between an employer and a worker is no different. In order to maintain a labour economy that provides conclusive proof of the prospering stability of labour relations and the enforcement of fair labour practices, measures to that effect must be in place. Van Niekerk *et al* quote the following passage from Davies' and Freedland's *Kahn Freund's Labour and the Law*: "The main object of labour law [is] to be a countervailing force to counteract the inequality in bargaining power which is inherent and must be inherent in the employment relationship".[4] Van Jaarsveld *et al* describes the aim and purpose of labour law as follows: "…the regulation of the rendering of services by means of common law, case law and statutory measures, which are applicable to, on the one side, the employees and, on the other side, management, in such a manner that labour harmony and efficiency is created, so that the country and all its people may enjoy a prosperous and democratic co-existence".[5]

2. Theme of the study

Parties to the employment relationship have been subjected to unfair labour practices since the beginning of time. The position in South African labour law was no different. Many attempts (both legislative and judicial) have been made in the sphere of labour law to regulate the fairness of the employment relationship – some of these attempts being ill-motivated at times.[6] Initially in 1993, and finally in 1996, these attempts were rounded off by a constitutional attempt to regulate the fairness of the employment relationship.

4 Van Niekerk *et al* 2008: 4.
5 Van Jaarsveld *et al* 2001: 1-6.
6 For examples of these, refer to Chap 2 par 7 of this study.

Section 23 of the Constitution[7] is an embodiment of fundamental labour rights. Section 23(1) reads as follows:

> "(1) Everyone has the right to fair labour practices."

In order to provide meaning to, and an insightful understanding of abovementioned constitutional right, legislation such as the Labour Relations Act[8], the Basic Conditions of Employment Act[9] and the Employment Equity Act[10] must be interpreted. But, because of the fact that the Constitution was not only enacted to establish a society based on democratic values, social justice and fundamental human rights, also not only to lay foundations for a democratic and open society, not only to recognise the will of the people, not only to improve the quality of life of all citizens and not only to build an united and democratic SA but also to heal past divisions, reference must also be made to the general history of fair labour practices. Understanding the history of unfair labour practices will lead to a much better understanding of the current right to fair labour practices. But similarly, an analysis of the current constitutional right as interpreted by the courts and other authorities will be equally important.

3. Purpose of the study

The "fair labour practice concept" is a rather recent development in South African labour law[11] and is it therefore still required to attempt to provide meaning to this concept. It further becomes essential to provide meaning to the concept if it is acknowledged that when this concept was introduced in 1979, the unfairness of the concept was regulated by labour legislation and the Industrial Court's equity jurisprudence; currently, not only the unfairness of this concept is legislatively regulated but is the fairness of this concept

7 The Constitution of the Republic of South Africa, Act 108/1996.
8 The Labour Relations Act 66/1995.
9 The Basic Conditions of Employment Act 75/1997.
10 The Employment Equity Act 55/1998.
11 It is regarded as recent if it is taken into consideration that our legal system is rooted in a law of which the origin can be traced back to 753 B.C. The concept of unfair labour practices was only introduced in 1979 by the Wiehahn Commission of Enquiry.

embedded as a constitutional guarantee in the Constitution of South Africa. It has therefore become necessary to determine the exact scope of this constitutional right in order to determine the relation between the legislative concept and the constitutional right and to investigate whether there is any room for an extended view of this right and to which limitations (if any) it should be subjected to.

Prior to analysing the right to fair labour practices, a comprehensive investigation will be led into the historical position preceding the introduction of this right. It is suggested that the history of fair labour practices plays an immensely important role in analysing this constitutional right. The events, motivations and circumstances which consequently led to the introduction of this right, without any doubt, will provide a useful guideline as to the interpretation of the right. In this study more emphasis will be placed on the historical analysis due to the fact that the need for such an analysis with regards to fair labour practices was identified on more than one occasion also due to the fact that the remainder of the analysis has been addressed, to a certain extent, by the courts.

This study, furthermore, aims to critically analyse the right to fair labour practices, firstly by giving meaning to the word everyone. An analysis of the different beneficiaries protected by the word everyone will be conducted. In order to enjoy protection or to seek a remedy in terms of labour legislation, one should usually be regarded as a worker/employee in terms of the Act itself. Until recently the existence of a contract of employment was conclusive proof for being regarded as an employee. However, certain recent decisions of the courts indicate the possibility of a more general approach, not necessarily requiring a contract of employment, when determining whether a person is an employee or not. Consequently the definition of a worker/employee will be investigated. In order to attempt defining a worker/employee, reference must be made to certain criteria: a contract of employment and/or an employment relationship. From this premise a study will be conducted between the differences (if any) in the aforementioned criteria in order to provide a meaningful definition of the term everyone.

An investigation into the general fairness-concept will also be lodged. In the last instance this study has a purpose to ask whether the right refers to protection of all incidences of labour regulated by legislation or whether its import is much narrower.

Recommendations for determining whether and when a person will be entitled to protection of fair labour practices in the employment relationship will also be proposed. In view of the current uncertainties, the proposed recommendations will hopefully shed some light on this issue.

This study is concerned with the right to fair labour practices and shall the focus accordingly be concentrated around individual labour law.

4. Method of work and exposition of chapters

4.1 General method of work

This study entails a critical analysis of the constitutional right to fair labour practices.

An attempt is firstly made to establish the general meaning intended to be attached to this right. To succeed in this aim it was important to conduct a thorough analysis of the necessitating events that led to the birth of the concept of fair labour practices.

After a general meaning is ascribed to this concept, the legislative framework pertaining to the elements of the right is investigated and analysed, the elements being:

- Everyone
- Fairness
- Labour practices

The analysis of the general intended meaning of the concept of fair labour practices as well as the legislative principles regulating this concept will hopefully shed some light as to the correct application of this right.

4.2 Exposition of chapters

Chapter 2 comprehensively explores the history pertaining to labour practices pre 1977. Chapter 3 continues with a historical exploration of labour practices after 1977. These two chapters comprise the major part of this study due to the following reasons: Not only is it intended to provide in the need expressed for a historical oversight dedicated to the development of the ideal of fair labour practices in an employment relationship but will it be attempted to indicate the past events which explain the true meaning intended to be attached to this concept. It is only upon discovering the true meaning intended to be attached to this concept that due effect will be given to this right. This chapter also indicates many past mistakes pertaining to fair labour practices which must be addressed by the legislature to ensure true fairness in the employment relationship.

Following the above, the constitutional right's elements are analysed in a critical fashion in order to determine the exact scope of application of the right and to complement the analysis on the true meaning of the concept. Chapter 4 analyses the word everyone, chapter 5 the concept of fairness and chapter 6 provides an analysis on the concept of labour practices.

The study is concluded by a conclusion and recommendations in chapter 7.

4.3 Foreign jurisdictions

Due to the limited extent allowed for this study and due to the fact that South Africa is not only regarded as a current leader in the field of fair labour practices in employment

law but also due to South Africa's distinctive history, reference was not made to the positions in another jurisdictions.

4.4 Technical aspects

The Journal of Juridical Science's reference method was used throughout the study.

CHAPTER 2

HISTORICAL BACKGROUND PRE 1977

> "*Any attempt to outline a brief history of labour relations in South Africa is difficult. This is a problem with any history which attempts to record and analyse past events. Even at the time of happening, these events may have been value-laden, contradictory and difficult to judge objectively. Under these circumstances the question may be posed: does history reflect a reality, or is it an interpretation influenced by the views of the historian, or conflicting views of a number of historians? Whatever the reality, it is accessed through the eyes of historians and thus the process is flawed, particularly by selective interpretation or choosing to emphasise only certain aspects. But, it is how people see history (that is their selection and interpretation) and not the reality itself that decides their reaction to it*".[12]

1. Purpose of this chapter

It is believed that history has such an enormous impact, not only on current occurrences but also on future happenings and developments. As a scholar of Roman history, the author of this study came to the following conclusion: History is repeating itself over and over again. A study of the history of any relevant theme is therefore extremely important: not only does it explain the past but does it also provide insight into the present.

[12] Finnemore 2006: 21.

In this chapter it will be attempted to provide a brief outline of the history of (individual) labour law before 1977 and will the different highlights that impacted on the right to fair labour practices be discussed.[13] It will also be attempted to be proven that many of the challenges that are currently being faced in labour law, especially with regards to the right to fair labour practices, stem from the past and the manner in which labour was approached in the past.

2. Introduction

South Africa's regulation of labour relations and fair labour practices originated from a variety of sources such as the Roman-Dutch law, the British model of trade unionism, conventional labour practices as applied in a free-market economy, political ideologies applied by consecutive governments and labour standards of the International Labour Organisation.[14]

Forced labour (slavery) and free labour have existed as two forms of labour since ancient times.[15] This study's main focus will be on free labour. Initially the common law contract of employment regulated the position between employer and employee in a fairly sufficient manner: mostly due to the fact that South Africa's economy was rural-orientated and the majority of employees were employed on farms.[16] After the discovery of gold and diamonds, however, the employment relationship became increasingly complicated and protection provided to employees by the individual contract of employment proved to be inadequate. Up until then the employment relationship was mainly based on the contract of employment with very little, if any, statutory regulation.

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13 The reason for distinguishing the historical position before 1977 from that thereafter is based on the fact that the notion of fair labour practices made its first appearance only after 1977.

14 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.5.

15 Wiehahn 1982:par 2.5. India, Babylonia, Egypt, Judea, Greece and Rome provide examples of this.

16 Van Jaarsveld and Van Eck 1996:5. Van Jaarsveld ea 2001a:1-4 believe this also to be true of the South African position up until the discovery of minerals (see par 3 hereunder).

Thereafter statutory enactments gradually gained a more prominent influence over the employment relationship.[17]

De Kock provides the following summary of the historical regulation of labour relations from 1918-1956:[18]

- Conditions of labour were for the first time in 1918 seriously regulated by the Factories Act[19] and the Regulation of Wages, Apprentices and Improvers Act[20].
- The first Industrial Conciliation Act[21] came into operation in April 1924.
- During 1915 – 1930 the employers and employees doubled. A more comprehensive Industrial Conciliation Act[22] came into operation in December 1937.
- During 1930 – 1948 the employers and employees were again doubled. The Black Labour Relations Regulation Act[23] regulated black employees' labour relations.
- The Industrial Conciliation Act of 1956[24] was promulgated on 11 May 1956.

Although the legislative regulation of labour relations increased from 1918, the concept of fair labour practices was not addressed until 1977. The employment relationship was predominantly regulated by the contract of employment and little attention was afforded to the fairness of labour practices between employer and employee.

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17 For a more comprehensive discussion see par 3 and further hereunder. It must be noted that the employment relationship is based on the individual contract of employment (private law) although it is also regulated (sometimes to an enormous extent) by legislation (public law).
18 De Kock 1956:68-69.
19 Factories Act 28/1918.
20 Regulation of Wages, Apprentices and Improvers *Act* 29/1918.
21 Industrial Conciliation Act 11/1924.Herein after referred to as the 1924-ICA.
22 Industrial Conciliation Act 36/1937. Herein after referred to as the 1937-ICA.
23 Black Labour Relations Regulation Act 48 of 1953. Hereinafter referred to as the 1953-BLRRA.
24 Industrial Conciliation Act 28/1956. Herein after referred to as the 1956-LRA

3. The common law[25]

3.1 Continued relevance and importance of common law

Joubert JA stated the following: "…it is necessary to consider the legal nature and characteristics of a contract of service (*dienskontrak*) at common law…"[26]

The common law bears importance mainly due to four reasons:[27]

a) Firstly, as indicated above, the common law provides the basis for the contract of employment and the general employment relationship (and will be referred to in the absence of other rules).[28] Common law may even be referred to despite legislative or constitutive regulation, as long as it is not in conflict with the Constitution or other legislation.[29] Common law has been equated with "death and taxes": Legislation addresses *lacunae* where common law proves to be unsatisfactory but common law remains the basis of our (labour) law.[30]
b) Secondly, it is required by the Constitution[31] that courts interpret common law principles in accordance with constitutional values in order to adapt to current needs of the society.[32]

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25 Common law refers to Roman law and Roman-Dutch law. South African law developed from both of these.

26 *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 A:56.

27 Du Plessis and Fouche 2006:6-7.

28 Du Plessis and Fouche 2006: 5 & 9. Van Jaarsveld ea 2001a: 1-9 reiterate, however, that "conflicts in the area labour law are no longer solved by application of common-law principles but by application of the basic principles of individual labour law".

29 Le Roux and Jordaan 2009:E1-1.

30 Bosch 2006:29. Common law "…permeates through labour legislation, remaining available where it has not been statutorily superseded".

31 Section 39(2) of the Constitution reads as follows: "*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights*".

32 Van Jaarsveld ea 2001a:2-14 – 2-15 recognize the employee's and employer's right to fair labour practices as a basic right in terms of the common law contract of employment. In *Jonker v Okhahlamba Municipality & others* 2005 26 ILJ 782 LC:569-570 it was stated that "…Labour and employment law under the Constitution compels a mind shift from a linear common law approach to a polycentric socio-economic approach. After all, labour rights fall under the broad family of socio-economic rights. Not to treat them as such would defeat the aims of the Constitution". This was

c) Thirdly, the common law will always be referred to where it provides more beneficial terms than current legislation, e.g. more favourable basic conditions of employment contained in a contract of employment compared to the 1997-BCEA and collective bargaining.[33]
d) Fourthly, although some people may be excluded from certain legislation like the 1997-BCEA and the 1995-LRA, their employment will be regulated by other legislation, the Constitution and their individual common law contracts of employment.[34]

For quite some time the common law contract of employment was of enormous importance because almost all employment relationships involved a contractual component.[35] Moreover, until recently the contract of employment was regarded as the only basis to establish an employer-employee relationship. Van Niekerk *et al*, however, suggest that the importance of the common law contract of employment as the basis of the employment relationship is slowly but surely lavishing.[36] This is mainly due to the changing circumstances of modern-time working relationships and also because of the fact that common law is "…largely blind to the unequal status and bargaining power of employers and their employees".[37] It is also important to note that contracts of employment, although it is based on the common law, will override the common law.[38] But it is also emphasized that although the common law may be overridden by

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confirmed in *Denel (Pty) Ltd v Vorster* 2004 25 ILJ 659 SCA:par 16. The court, however, pointed out that although "…the new constitutional dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly it does not follow that it deprives contractual terms of their effect". The interpretation of common law principles (e.g. the common law contract of employment) in accordance with constitutional values and the consequent development of the contract of employment (to give recognition to *inter alia* the right to fair labour practices) therefore may have far-reaching consequences although the common law will not be disregarded if it proves to be in line with constitutional values and if it also supports fair labour practices. This view was confirmed in *Fedlife Assurance Ltd v Wolfaardt* 2001 22 ILJ 2407 SCA.

33 Le Roux and Jordaan 2009:E1-2.

34 Le Roux and Jordaan 2009:E1-2.

35 Van Jaarsveld and Van Eck 2006: 36. Also see Du Plessis and Fouche 2006: 9. Brassey 1998: C1:6 also supports this argument.

36 Van Niekerk ea 2008: 5. In the 2nd edition Van Niekerk ea 2012:5 confirm this and add that the essentials of the employment relationship itself should be relied on rather than the contract of employment.

37 Van Eck ea 2004:904.

38 Du Plessis and Fouche 2006: 5.

legislation and the Constitution, common law did not entirely disappear from the scene. Although not the only basis for constituting an employment relationship anymore, the common law contract of employment remains one of the most important sources for the legal basis for the employment relationship.[39] Where an employee is entitled to a right in terms of common law, legislation and the Constitution, nothing prevents the employee from utilising the common law if that is going to secure a more favourable position.[40] The *Fedlife*-case indeed contains a declaration by the court that it is unafraid to apply the common law where it overlaps with legislation.[41]

3.2 Roman law

Although services were mainly performed by slaves in the Roman Empire, Roman law comprised a "surprisingly sophisticated body of employment law".[42] Literally speaking, no contract of employment existed in common law.[43] This was mainly due to the fact that labour was provided by slaves and was it only on rare occasions that payment was rendered for services delivered.[44] Instead, reference was made to the contract of lease in terms of which services could be hired out.[45] Three contracts of lease could be distinguished:[46]

a) ***Locatio conductio operarum*** In terms of this contract the personal services (*operae suae*) of free men (*liberi*) could be let to someone else (*conductor operarum*) for a certain period of time.[47] Payment was made for services so

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39 Le Roux and Jordaan 2009:E1-3.
40 *Fedlife Assurance Ltd v Wolfaardt*:para 22.
41 Reference can also be made to *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 SCA:para 76 and *Denel v Vorster*. This point is also discussed and confirmed in Le Roux and Jordaan 2009:E1-1.
42 Brassey 1998:A:10.
43 Van Jaarsveld and Van Eck 1996:8. Also see Van Jaarsveld ea 2001a:1-8.
44 This is also confirmed in Grogan 2009: 2 and Van Jaarsveld and Van Eck 2006:6.
45 Du Plessis & Fouche 2006: 3 & 9.
46 Du Plessis & Fouche 2006: 9. Du Plessis 1982: 2 states that this distinction was based on the type of performance rendered for the payment of money. Also refer to Van Zyl 1977:299. These contracts were based on *bona fides*.
47 Van Jaarsveld and Van Eck 2006:6. Also see Du Plessis 1982:2.

rendered and this payment was similar to the amount paid as rent by a lessee.[48] The employer was the lessee and the employee was the lessor. The employee could be held liable if he was not competent to render the services he agreed to.[49] This can be equated to our modern contract of employment. Interestingly enough the ordinary principles applicable on lease agreements also find application in the present instance.[50] This contract was not very common and the majority of service-related agreements were classified under the *locatio conductio operis*.[51]

b) ***Locatio conductio operis*** The workman agreed, as an employee, to perform a specific job for the employer in consideration of a fixed amount of money.[52] Note that the employee was considered the lessee and the employer was considered the lessor.[53] The result of the free man's services was compensated.[54] Also note that the workman was not bound to follow the instructions of the employer but was only bound to complete the work properly.[55] This contract was utilised in the building industry, the manufacturing industry, the craftsmen industry, with the transportation of goods and in the training of slaves.[56] The *locatio conductio operis* can be equated with the modern contract of letting and hiring of work.[57]

c) ***Locatio conductio rei*** This contract regulated the lease of things like buildings, land, a horse and the like.[58] Voet[59] is of the opinion that this type of lease agreement was also applicable to the lease of services. Brassey agrees with

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48 Van Jaarsveld and Van Eck 1996: 8-9.Also see Van Jaarsveld ea 2001a:1-9 and *Potchefstroom Municipal Council v Bouwer* 1958 4 SA 382 T.

49 Brassey 1998: A1:1.

50 Du Plessis 1982: 2. Although the current lease agreement can be equated with that of the contract of employment, it is suggested by the current author that this equation undervalue the human element present in a contract of employment…and that precisely this undervaluation caused the need for the present constitutionalisation of labour law.

51 Van Jaarsveld ea 2001a:1-8.

52 Brassey 1998: A1:2. Also see Du Plessis 1982: 2.

53 Brassey 1998: A1:2. Brassey puts it as follows: "What the parties to the contract contemplated was not the supply of services or a certain amount of labour but the execution or performance of a certain specified work as a whole".

54 Van Jaarsveld and Van Eck 1996:8.

55 Brassey 1998: A1:2.

56 Brassey 1998: A1:2.

57 Du Plessis & Fouche 2006: 10.

58 Du Plessis 1982: 2.

59 Voet: 19.2.6.

> Voet on this matter: a slave's owner could let the slave (who was regarded as "a mere thing") out to someone else.[60] This contract is similar to our current contract of mandate.[61]

It is therefore safe to state that this relationship between employer (master) and employee (servant) was contractual in nature almost from the start.[62] "At heart it was an arrangement by which the employee, as the lessor of services, was entitled to be paid the agreed wage (or rent) for the services rendered or to be rendered but for some occurrence falling within the sphere of the employer".[63] This was in sharp contrast with other jurisdictions where the employment relationship originated as a status relationship (master and servant).

The *locatio conductio operarum* applied only to menial workers e.g. painters and sculptors.[64] Professionals could not conclude contracts of employment and could only claim an honorarium for their services.[65] Roman-Dutch writers like Voet and Grotius did not deal with the *locatio conductio operarum* as they believed that the principles of the *locatio conductio rei* applied fully to the *locatio conductio operarum*.[66] It resulted in the colonial courts turning to English law for guidance.[67]

The common law contract of employment was based mainly on contractual freedom and the employer could pressurise the employee into agreeing to almost anything.[68] The

60 Brassey 1998: A1:1.
61 Du Plessis & Fouche 2006: 10.
62 Brassey 1998: A1:10.
63 Brassey 1998: A1:10.
64 Grogan 2009: 2. Brassey 1998: A1:1 describes these menial services as unskilled services.
65 Grogan 2009: 2.
66 Van Jaarsveld and Van Eck 2006:7.
67 Grogan 2009: 3.
68 This is confirmed in Van Niekerk *et al* 2008: 4 where the relationship between employer and employee is described as "inherently unequal". There are, however, currently two interventions attempting to balance the relationship: firstly there is legislation providing for minimum standards of employment. Secondly the bargaining position of the employee is strengthened by creating structures (e.g. the right to bargain collectively) to countervail this imbalance.

employment relationship was regarded as a purely contractual relationship and was based on the individual contract between employer and employee.[69] The common law also did not provide employees any "…say in those management decisions which directly affect their working conditions and legitimate interests."[70]

3.3 Roman-Dutch law

In Roman-Dutch labour law the contract of employment was commonly referred to as a *dienstcontract / huur en verhuur van diensten*.[71] The *dienstcontract* covered a whole range of employees including domestic servants, workmen, apprentices, sailors and a number of other employees and this *dienstcontract* also regulated the rights between employer and employee.[72]

Legislation in the form of local ordinances and general placaats altered the Roman law applicable to the relationship between employer (master) and employee (servant).[73] The general placaats which had the most fundamental influence in Roman-Dutch law was the following:[74]

a) **Placaat of 2 September 1597** It only dealt with apprentices.[75]
b) **Placaat of 1 May 1608** It was only applicable in The Hague.[76] It was not only applicable to servants in general but also to journeymen (*ambacht-gezellen*).
c) **Placaat of 29 November 1679** It was based on the placaat of 1608 and only applied to *dienstboden*[77].[78]

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69 Grogan 2008: 6.
70 Grogan 2009: 3. Also see Du Plessis & Fouche 2006: 14.
71 *Smit v Workmen's Compensation Commissioner*: 58.
72 *Smit v Workmen's Compensation Commissioner*: 59. Skilled services were therefore also included under the contract of employment although liberal services rendered by professional men were excluded.
73 *Spencer v Gostelow* 1920 AD 617: 627.
74 *Spencer v Gostelow*: 627-643.
75 Although this placaat mainly determined the law on contracts of employment in Roman-Dutch law, Innes CJ stated in *Spencer v Gostelow*: 628 that it was never recognized/enforced in South African law.
76 Although this placaat mainly determined the law on contracts of employment in Roman-Dutch law, Innes CJ stated in *Spencer v Gostelow*: 628 that it was never recognized/enforced in South African law.

The most important characteristic of the common law contract of employment was the duty of the employee to obey lawful commands and instructions of his employer regarding the performance of the agreed-upon services.[79]

3.4 The extent to which fairness is addressed in common law

It seems safe to state that common law did not specifically make provision for fair labour practices in the employment relationship.[80] Recently, however, it appeared as if the courts were willing to develop the common law to specifically address the fairness-concept.[81] In *Boxer Superstores Mthatha & another v Mbenya*[82] and in *Murray v Minister of Defence*[83] it was held that all contracts of employment contain an implied term that employers must treat employees fairly. Consequently it was found in *Jonker v Okhahlamba Municipality & others*[84] that an ordinary breach of contract may infringe the employee's wider constitutional right to fair labour practices. In *Tsika v Buffalo City Municipality*[85] as well as *Mogothle v Premier of the Northwest Province*[86] it was held that employers owe a general duty of fairness to employees in terms of the contract of employment. Freund *et al* also make reference to the case of *Globindlal v Minister of Defence & others*[87] where it was decided that in a situation where an employee is not covered by the 1995-LRA, "it could be argued that it was an implied term of the contract

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77 Servants who either lived in the house or who were in an intimate relationship with the master/mistress. (This is similar to our current domestic servants.)

78 Although this placaat mainly determined the law on contracts of employment in Roman-Dutch law, Innes CJ stated in *Spencer v Gostelow*: 628 that it was never recognized/enforced in South African law.

79 *Smit v Workmen's Compensation Commissioner*: 60.

80 Grogan 2010: 5. Also see Grogan 2008: 2. This general conclusion stands despite the fact that the general concept of fairness was explored and prevalent as an ideal and ideology since the beginning of time.

81 The common law should not only be developed to address the fairness-concept but also to be brought in line with the Constitution.

82 *Boxer Superstores Mthatha & another v Mbenya* 2007 28 ILJ 2209 SCA.

83 *Murray v Minister of Defence* 2008 29 ILJ 1369 SCA.

84 *Jonker v Okhahlamba Municipality*:568-569.

85 *Tsika v Buffalo City Municipality* 2009 30 ILJ 105 E.

86 *Mogothle v Premier of the Northwest Province & another* 2009 30 ILJ 605 LC.

87 *Globindlal v Minister of Defence & others* 2010 31 ILJ 1099 NGP.

that the rights enshrined in section 23 of the Constitution, form an integral part of the contractual relationship".[88]

This position was overturned by the decision in *SA Maritime Safety Authority v McKenzie*[89] where it was held that the common law contract of employment contains no implied duty of fairness, and more specifically not an implied right not to be unfairly dismissed. Such an implication can only be drawn from common law or legislation. It is, however, possible that parties expressly/tacitly agree on the inclusion of such a duty. The court, however, accepted the possibility that the common law should be developed in the case of employees not covered by the 1995-LRA.

4. The position up until 1924

4.1 Introduction

The arrival of the first Dutch settlers in 1652 did not only bring with them the Roman-Dutch law[90] but also earmarked the first fundamental demand for labour in South Africa.[91] Similar to the past situation in Rome, slavery was the dominant mode of service in the Cape.[92] Surprisingly, as will be attempted to be proven in this study, the ignorance of the human element in the rendering of services, as well as the continuance thereof, was possibly the main reason why the South African law is currently progressing towards a constitutional approach when it comes to contracts of

88 Freund *et al* 2010: 5.
89 *SA Maritime Safety Authority v McKenzie* 2010 31 ILJ 529 SCA.
90 Brassey 1998: A1:9. Brassey, very aptly, describes Roman-Dutch law as a law "…being rooted in Justinian's *Corpus Iuris Civilis* but shaped by the statutory and customary law of Holland and the United provinces…"
91 Finnemore 2006: 21.
92 Brassey 1998: A1:10.

employment and the general rendering of services. Brassey quotes Fiscal Denyssen, who, in 1813, cited Roman law as precedent:[93]

> "*Slaves have not any of those rights and privileges which distinguish the state of the free in civil society; they cannot marry, they do not possess the right of disposing of their children, even if they be minors, they cannot possess any money or goods in property, they cannot enter into any engagement with other persons, so that they can compel them to the fulfilment of such engagements, they cannot make a will, and they are therefore considered in the civil law as not existing*".

The Cape Colony commenced taking part in East African and East Indies slave trade, so much so that by 18th century "slavery had become an integral part of the Cape Colony".[94] These slave-practices were transferred to the interior by nomadic Boer farmers and this is believed to be the most influential factor that led to the idea of "channelling blacks into the unskilled and semi-skilled labour force".[95] Finnemore furthermore states that the indigenous population was "subordinated to provide labour" for the settlers.[96] Initially the indigenous Khoikhoi was utilised as herdsmen. They were completely dispossessed and were largely dependent on the rural burghers for a livelihood.[97] The law in general did not protect them and was the whip of the master almost a given. From 1702 the Dutch also engaged the services of Xhosa-men (as herders) and Xhosa-women (as domestic workers) although a proclamation was issued in terms of which the Xhosa had to be discharged and repatriated across the border when the English took control in 1795.[98] Despite this proclamation and other measures, however, the employment of Xhosas increased.

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93 Brassey 1998: A1:10-11.
94 Finnemore 2006: 21.
95 Finnemore 2006: 21.
96 Finnemore 2006: 21.
97 Brassey 1998: A1:11.
98 Brassey 1998: A1:11.

4.2 British occupation (1806-1867)

The British occupation in 1806 did not affect the legal system in force in South Africa at that time. The Articles of Capitulation of 1806 guaranteed that Roman-Dutch law would remain in force.[99] Although that was the legal position, reality, however, was a different story altogether. South African law was greatly influenced by English law due to different factors: English judges and magistrates presided in courts and were much more comfortable and familiar with English law; local jurists preferred to study abroad and especially in Great Britain; English decisions served as a point of reference in many instances;[100] the majority of the new South African legislation enacted during the British occupation was modelled on English legislation; and, the final court of appeal was the Privy Council in England. Another way in which English law found a way into South African law was by means of the fact that most skilled workers, who had trade union experience, were immigrants from the United Kingdom.[101] Foreign employment relations systems of worker representation were therefore imported into South Africa. This British influence on South African law (and Roman-Dutch law by implication) led to one fundamental result: The Roman-Dutch law many a time did not serve as the basis for regulating the different legal positions and reference was made rather to English law. Solving legal issues in a legal system with another system which does not share the same basis can cause future discrepancies.

In the mean while the Earl of Caledon issued a proclamation in 1809 in an attempt to encourage the Khoikhoi to take up employment in the Cape. The Khoikhoi were also relieved from the obligation to wear passes and passes were issued to Xhosas who could never take up employment before.[102] Slavery was only abolished in 1833[103]

99 Brassey 1998: A1:12. In terms of the Articles of Capitulation the laws of a conquered country continue in force until altered by the conqueror. This was later confirmed by the First Charter of Justice of 1827 and the Second Charter of Justice of 1832.

100 *Spencer v Gostelow*: 620. Wessels J protested against this British influence in the following manner: "…we have been gradually slipping away from Roman-Dutch law in regard to *locatores operarum* (i.e. employees), and have been too much influenced by English decisions".

101 Nel 2012:81.

102 Brassey 1998:A1: 13.

although the continued working relationships of the Khoikhoi and Xhosa resembled much of the disrespect for people rendering the services that were so typical of the whole notion of slavery.

Workers were imported from China from 1850 – 1910 and in 1859, Indian labour was also imported. More shortages of cheap labour also necessitated importing labour from Mozambique.[104]

4.3 Master-and-Servants Acts

The natural increase in the country's population, the large number of freed slaves and the expansion of the economy necessitated the formal regulation of employer/worker relations.[105] The so-called Master-and-Servants Acts of the different provinces reflected the first attempt in South Africa to regulate the employment relationship.[106] These acts regulated bilateral individual relationships and no provision was made for collective bargaining, trade unions and the like.[107] These acts were repealed only in 1974.[108] The proclamations, acts and ordinances applicable were as follows:[109]

a) **Proclamation of 26 June 1818** It was applicable to apprentices and persons brought into the Colony under contracts of service and dealt with the duties, rights and position of workmen and apprentices.

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103 Nel 2012:80 indicates the year as 1834. It is, however, submitted that it was indeed 1833. See, *inter alia*, Brassey 1998 A1: 13.

104 Brassey A1: 13-14. It is submitted that the import of labour took place mainly due to the fact that it was firstly the easiest way of acquiring cheap labour and secondly because of the fact that South Africa's black people were not allowed to penetrate the labour market for fear of threatening the white people's employment opportunities.

105 Nel 2012:80.

106 Van Jaarsveld and Van Eck 1996:11. Also see Grogan 2009:4.

107 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981:par 4.8.

108 Repealed by the Second General Law Amendment Act 94/1974.

109 *Spencer v Gostelow*:627-643.

b) **Ordinance, No. 50 of 1828** It was applicable only to coloured servants. It repealed previous enactments and also empowered magistrates to impose short terms of imprisonment to direct a limited abatement of wages.

c) **Cape Ordinance of 1 March 1841** It repealed prior laws relating to master and servant. It was also provided that principles, regulating bilateral contracts, should apply in cases where this ordinance did not find application. This ordinance aimed to cover the whole area of the relationship between master and servant. Some of the provisions included the definition of a servant; authority of magistrates to impose punishment[110] for misconduct and to fix wages; rights of resident servants.

d) **Ordinance, No 2 of 1850** This was the earliest law in Natal regulating the relationship between master, servant and apprentice and was modelled on the Cape Ordinance of 1841.

e) **Act 15 of 1856** It repealed the Ordinance of 1841 and regulated the rights of masters and servants in the Cape province. This Act led to negative consequences for employees in as far as nearly any form of negative conduct by an employee resulted in an offence in terms of the Act which was punishable with imprisonment and/or hard labour.[111]

f) **Law 1 of 1873** It regulated the relationship between master and servant in the Free State. Punishment of offences was also broadened to include imposing hard labour, spare diet and solitary confinement.[112]

g) **Law 13 of 1880** The first general law in the Transvaal dealing with masters and servants.

4.4 Industrialisation and the mining revolution (1867-1901)

Abovementioned Master-and-Servants Acts proved to be insufficient[113] and it became necessary for government to intervene. With the discovery of diamonds and gold South

[110] Punishment included imprisonment for breach of contract.
[111] Nel 2012:80.
[112] Brassey 1998:A1:14.

Africa experienced a pouring in of artisans and skilled workers from Europe.[114] Diamonds were discovered in the Orange River valley in 1867 and gold was also discovered in 1872 (although active mining thereof only started after 1886). This led to the industrialisation of the country. Although natural resources were readily available at that stage and although the growth in the labour force was enormous,[115] South Africa could not provide adequate skilled and unskilled labour to work the resources.[116]

Scarce-skilled employees were recruited mainly from Europe and Australia, these, mainly white employees, occupying elite positions requiring skills that could not be provided by white or black South Africans at that stage.[117] Recruited employees needed a pass to leave the diamond fields although the white workers were somewhat relieved form this restriction and this soon led to differences between the different races,[118] which in turn, led to the first recorded strike by black workers in 1883.[119] In 1884 South African experienced its first official strike in which 5 white miners died and 40 were injured.[120] The commencement of mining of gold on the Witwatersrand in 1886 brought even more uproar.

Western and European tradesmen introduced South African workers to principles of British trade unionism such as protective labour legislation, trade unions, safe working conditions and basic worker protection.[121] Workers became aware of principles such as exploitation and unfairness. The entry of employees from abroad resulted in the

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113 Van Jaarsveld ea 2001a:1-4. Up until the discovery of minerals in South Africa and the accompanying labour – and economical explosion, the common law contract of employment sufficiently regulated the employment relationship between employer and employee.

114 Employment opportunities did not only exist on the mines but labour was also wanted in the road and rail services and on the farms supplying those areas.

115 Brassey 1998: A1:15. By 1874 there were 10 000 black workers employed on the Kimberley mines.

116 Finnemore 2006: 21.

117 Finnemore 2006: 21.

118 Brassey 1998: A1:16.

119 McGregor 2012:82.

120 McGregor 2012:82. Also refer to Finnemore 2006:23. African workers had to be strip-searched when going off shift. When this practice was resented by white workers, 5 strikers were shot by the Mine Manager and other men hiding behind a truck.

121 McGregor 2012:3.

establishment of the first trade union on 22 December 1881.[122] It was, however, a mere branch of the English trade union called the "Amalgamated Society of Carpenters and Joiners of Great Britain". The main objective of this and other unions was to protect the status of their members.[123] The first locally based union, the Durban Typographical Society, was established in 1886 and it combined forces with similar trade unions in 1898 to form the first true South African trade union, namely the South African Typographical Union.[124]

There was, however, a shortage of unskilled labour. At that stage most black peasants were subsisting of the land although a small number resorted themselves to the mines for the following reasons:[125]

a) Earning of a livelihood.
b) Earning money to buy guns in order to protect themselves against depravation of their land.
c) Those who were already deprived of their land[126] had to find other means of income.
d) Hoping to find fortunes.

The Chamber of Mines was established in 1887 by mine owners. The Transvaal government was called in to regulate conditions of service on the mines in 1894 and the Chamber of Mines formed the Rand Native Labour Association.[127] In 1896 pass laws were introduced in terms of which black workers had to wear a metal badge signifying their right to be present at the workplace.[128] The Glen Grey Act[129] was also passed to

[122] The so-called "Carpenters' and Joiners' Union". See Nel 2012:81 and http://www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm (3 March 2011)
[123] Finnemore 2006: 21-22. Initially it was not only black workers who were excluded from the benefits of these unions, but also Afrikaans-speaking workers.
[124] Nel 2012:81. Afrikaans-speaking workers were not excluded anymore. Only black workers were excluded.
[125] Finnemore 2006: 22.
[126] E.g. the Sotho and Griqua.
[127] Brassey 1998: A1:17.
[128] Brassey 1998: A1:18. Also refer to other legislation in this regard: Act 23/1879 entitled an occupier of property to summarily arrest people found wandering on property without permission. Act 30/1895

introduce a poll tax.[130] The Native Labour Agent Bill was drafted in 1899 with the main purpose of regulating labour agents in the recruitment of employees. Furthermore, the Native Lands Act[131] was promulgated to limit black land ownership to 13% of the total land area of South Africa.

4.5 Post-Anglo-Boer War (1902-1924)

In an attempt to reduce labour costs, unskilled workers were required to perform skilled work. This posed a threat to white miners and after a strike in 1902, these miners formed the Transvaal Miners' Association.[132] Another strike by white miners at the Knights Deep Mine took place in 1907 due to their dissatisfaction after employers proposed to extend skilled work to black workers as well.

New labour-related legislation was enacted and included the Railways Regulation Act,[133] the Railways and Harbour Service Act,[134] the Industrial Disputes Prevention Act,[135] the Mines and Works Act (*Mijnen en Bedrijvenwet*),[136] the Native Labour Regulation Act (*Naturellearbeid Regelingswet*),[137] the Workmen's Wages Protection

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empowered local authorities to limit the movement of Africans in urban areas between 21:00 and 04:00. The Master and Servants Act 49/1901 required of all workers working and living in urban areas to be issued with passes that had to be carried at all times.

[129] Glen Grey Act 25/1894.

[130] Brassey 1998: A1:18 explains the purpose of this Act with the word of Cecil Rhodes: "To remove 'Natives from that life of sloth and laziness, teaching them the dignity of labour, and [make] them contribute to the prosperity of the state and…give some return for our wise and good government'".

[131] Native Lands Act 27/1913.

[132] Brassey 1998: A1:20.

[133] Railways Regulation Act 13/1908. This act regulated conditions of service in this sector but was also the first act which placed a ban on striking.

[134] Railways and Harbour Service Act 28/1912. This act extended the Railways Regulation Act's provisions to the whole of the Union.

[135] Industrial Disputes Prevention Act 20/1909 (T). Provision was made for a board of conciliation and investigation. This board could be approached, *inter alia*, in the event of unilateral changes to conditions of employment, for conciliation of disputes prior to strike/lock-out being permissible etc.

[136] Mines and Works Act 12/1911. Racially discriminatory legislation consolidating previous legislation.

[137] Native Labour Regulation Act 15/1911. Although this act regulated the conditions of service of black employees to a certain degree, it also prohibited collective bargaining and strikes by black employees.

Act[138] and the Workmen's Compensation Act (*Werklieden Loonsverzekering Wet*)[139].[140] The first legislation truly regulating employment conditions were the Factories Act[141] and the Regulation of Wages, Apprentices and Improvers Act (*Wet tot Regeling van Lonen, Leerlingen en Ambachtgezellen*)[142].[143] These were then followed by the Apprenticeship Act (*Vakleerlingen Wet*),[144] the Natives (Urban Areas) Act,[145] the first Industrial Conciliation Act[146] and the Wages Act of 1925.

Despite the prohibition of strikes, 13 000 black mineworkers went on strike in 1913 with a resultant intervention by the army.[147] This was followed by a strike of both white and black miners during July 1913.[148] Another strike was repelled by government in January 1914. Ghandi also called for a general strike by all Indian workers in Natal. Government followed with the Riotous Assemblies Act.[149] Protest action reoccurred in 1918 with a strike by sanitary workers and mineworkers boycotting mine stores in protest at high prices and also in 1919 with a strike by 71 000 black mineworkers.[150] In January 1922 as many as 22 000 mineworkers went on strike which eventually developed into a revolt[151] and which was later referred to as the Rand Rebellion.[152]

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[138] Workmen's Wages Protection Act 15/1914.

[139] Workmen's Compensation Act 25/1914.

[140] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.8.3. Also see Brassey 1998: A1:20–A1:24.

[141] Factories Act 28/1918.

[142] Regulation of Wages, Apprentices and Improvers Act 29/1918.

[143] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.8.3. Also refer to Brassey 1998: A1:24. These two statutes regulated basic conditions of employment and minimum wages for the first time.

[144] Apprenticeship Act 26/1922.

[145] Natives (Urban Areas) Act 21/1923. This act was promulgated mainly to control labour peace after the strikes ad to tighten control on black labour. The Stallard Commission described the purpose of this act as follows: "[the] Native should only be allowed to enter the Urban Areas, which are essentially the white man's creation, when he is willing to enter and to minister to the needs of the white man and should depart therefrom when he ceases so to minister".

[146] 1924-ICA.

[147] Brassey 1998: A1:23.

[148] Brassey 1998: A1:23. The strike involved strikers setting fire to the Johannesburg railway station, the *Star* offices as well as the Rand Club.

[149] Riotous Assemblies Act 27/1914 which prohibited government to disperse public gatherings and to close public places in the event of any likelihood of a breach of peace.

[150] Brassey 1998: A1:25; Finnemore 2006:25. The Industrial and Commercial Union was also established in 1919 and it is believed that this strike was largely organized by the ICU.

[151] Brassey 1998: A1:26. Jan Smuts fought this revolt with the use of aircraft bombing, field guns, tanks and trench warfare.

[152] Nel 2012:84.

5. The Industrial Conciliation Act 11 of 1924

The revolt of white mineworkers during the Rand Rebellion in 1922 resulted not only in the bloodiest civil revolt with almost 250 deaths,[153] 687 injuries, 4 750 arrests, 18 condemnations to death and 4 hangings but also in the 1924-ICA.[154] The 1924-ICA was intended to serve as a vehicle to ensure labour peace and to provide machinery for bargaining over conditions of employment and resolution of disputes. The most important trendsetting principle of this Act was that of self-regulation in the employer-employee relationship.[155] This act was recognised to include prominent features including, but not limited to, registration of employers' organisations and trade unions for white employers and employees, industrial councils (or an *ad hoc* conciliation board)[156] promoting voluntary collective bargaining[157], a dispute resolution mechanism (with the emphasis on settlement of collective disputes) and its dual system of industrial relations.[158] This dual system was due to the fact that most Africans were not included in the definition of an employee as an employee was defined as excluding a person whose contract of service or labour was regulated by any black pass laws[159] and regulations or by the Native Labour Regulation Act, or by any regulation or amendment of the latter.

153 Van Jaarsveld and Van Eck 1996:11. Brassey A1:26 refers to 153 deaths.
154 Du Toit *et al* 2006: 6.
155 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.10.
156 Brassey 1998: A1:28 compares this to our current bargaining council.
157 Similar to our current position, strikes and lock-outs were not permissible during the conciliation process. Municipal – and other essential service employees were also prohibited to strike.
158 Du Toit *et al* 2006: 6-7. The dual system was characterised by exclusion of African workers from the definition of employee (and therefore from membership of trade unions etc.).
159 According to Nel 2012:85 black females were not compelled to carry passes. A Supreme Court decision in 1944 confirmed this and held that black women could gain membership of registered trade unions. The 1956-ICA, however, explicitly excluded all black people.

6. The period between 1924 and 1933

At first, protection (in a limited sense) was only afforded to an exclusive group of employees[160] while very little protection was afforded to other people performing services. This was due to the fact that African workers were excluded from the definition of an employee (in terms of the 1924-ICA). It is noteworthy to make mention of South Africa's "civilized labour policy" at that time: "Civilized labour" was defined as "labour…rendered by persons, whose standard of living conforms to the standard…tolerable from the usual European standpoint".[161] "Uncivilized labour" was defined as "…[people who] enjoyed a standard of living 'restricted to the bare requirement of the necessities of life as understood among underdeveloped people'".[162] In terms of the civilized labour policy then not only did state departments received instruction to give preference to civilized labour but the Board of Trade and Industries was empowered to withhold import rebates from firms that employed too few white workers in terms of the Customs Tariff and Excise Duties Amendment Act[163].[164] The Wage Act[165] was promulgated with the purpose of fixing minimum wages and working conditions for certain employees and, although it did not provide any warrant for racial discrimination, authorities found many ways to mainly benefit white workers by this act.[166] Another act which worsened the position of black workers was the Mines and Works Amendment Act[167] which made express provision for discrimination on the mines.[168]

The SA Trade and Labour Council was formed in 1925.[169] Although non-white employees were not allowed union-membership in terms of the 1924-ICA, unregistered

[160] It was mainly white employees that were recognised as employees in terms of the 1924-ICA.
[161] Brassey 1998: A1:29.
[162] Brassey 1998: A1:29.
[163] Customs Tariff and Excise Duties Amendment Act 36/1925.
[164] Brassey 1998: A1:29.
[165] Wage Act 27/1925 and hereinafter referred to as the 1925-Wage Act.
[166] Brassey 1998: A1:29-30. Wage Boards were manipulated, determinations were made for only certain grades of workers and a ceiling was put on the number of unskilled workers who might be employed.
[167] Mines and Works Amendment Act 25/1926.
[168] Brassey 1998: A1:31.
[169] Brassey 1998: A1:31.

industrial unions were emerging and in 1928 the SA Federation of Non-European Trade Unions was formed.[170]

In 1928 the Pact Government proposed amendments to the 1924-ICA:[171]

- Industrial council agreements had to remain in force until the expiry-time arrived or those were replaced by new agreements.
- Industrial councils should have the power to solve both individual – and collective disputes.
- Membership of conciliation boards had to be open to people other than employers, employees and collective bargaining representatives.
- There should be no need for formal declaration of a strike.
- Special arrangements had to be in place for the recovery of unpaid wages.
- Industrial council agreements must be open to be suspended in native areas.
- Industrial council agreements must be capable of covering blacks excluded from the 1924-ICA.

Slight improvements in the form of widened functions of councils and conciliation boards also occurred.[172]

The Native Administration Act[173] was amended by the Native Administration Amendment Act[174] and pass laws were extended to blacks outside the urban areas in order to ease recruitment and controlling of these people.

African workers' position was slightly improved in 1930 when the Minister was authorised to specify minimum wages and maximum working hours for persons excluded from the definition of employee.[175]

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170 Brassey 1998: A1:31-32.
171 Brassey 1998: A1:28.
172 These amendments only occurred during 1930 with the Industrial Conciliation (Amendment) Act 24/1930 (and hereinafter referred to as the 1930-ICAA). See Du Toit *et al* 2006: 7 and Brassey 1998: A1:29.
173 Native Administration Act 38/1927.
174 Native Administration Amendment Act 9/1929.

7. 1933 – 1948

The United South African National Party came to power in 1933. An Investigation-Commission (Van Reenen-Commission) was established in 1934 to investigate matters pertaining to industrial-conciliation and to re-examine the 1924-ICA, the 1925-Wage Act and other labour legislation.[176] This led to the replacement of the 1924-ICA by a new consolidated in 1937-ICA. According to Du Toit *et al* this, however, "did not solve the major problems inherent in the dual industrial relations system".[177] The 1937-ICA's major aim was to promote and attain industrial peace between employers and employees. Major strikes, however, characterised this period. It is interesting to note that from as early as 1935 the need for protecting workers' interests was identified: one of the recommendations of the Van Reenen Commission was that workers' interests should be represented. This could be achieved by forming industrial unions representing employees. However, Africans were still excluded from joining unions although the Commission also proposed that African workers' interests be represented by government officials.[178]

The 1931-Factories Amendment Act's counterpart in the commercial sector, the Shops and Offices Act[179], was enacted in 1939. It regulated, *inter alia*, hours of work, overtime and holiday pay and annual leave. By 1940 the severe consequences of "The Great Depression" amongst whites had almost disappeared.[180]

In 1941 the 1918-Factories Act (and so amended by the 1931-Factories Amendment Act) was replaced by the Factories, Machinery and Building Work Act[181] which made

[175] Du Toit *et al* 2006: 7. Du Toit, however, suggests that this was not principally intended to protect African workers but to benefit white workers from being undercut by cheaper African labour.
[176] Brassey 1998: A1:32.
[177] Du Toit *et al* 2006: 8. This is also confirmed by Brassey 1998: A1:32.
[178] Du Toit *et al* 2006: 8.
[179] Shops and Offices Act 41/1939. This act was repealed and replaced by the Shops and Offices Act 75/1964.
[180] Mainly because of the "Civilized labour policy" of South Africa.
[181] Factories, Machinery and Building Work Act 22/1941.

provision for the regulation of working conditions in factories, the supervision of machinery and for general safety and the taking of precautions against accidents.[182]

The shortage of skilled workers, however, continued and even worsened. Government replied to this problem by declaring "dilution" as permissible.[183] In essence, dilution was a relaxation of the "civilized labour policy". It allowed unqualified black workers outside the mines permission to perform skilled work under white supervision.[184] Ironically enough, it was found that the performance of skilled labour by unskilled black employees had no detrimental effect on the quality of production.[185]

In 1941, a conference of 41 organisations convened by the Transvaal branch of the ANC established the African Mine Workers Union.[186] As a result of this, the Landsdown Commission was appointed to consider the wages and conditions of black miners and, although certain recommendations over the improvement of wages and working conditions were made, it was not enough. In 1942 the Council of Non-European Trade Unions' members went on a series of strikes over minimum wages. These strikes were very violent and a War Measure[187] was promulgated to penalize black employees who went on strike. Trade union membership then only increased with rapid strides and by 1945 the Council of Non-European Trade Unions stood at 119 affiliates representing 158 000 workers on the Witwatersrand.[188] In 1944 another War Measure[189] also prohibited gatherings of more than 20 persons on proclaimed mining ground. But, despite this, the largest strike ever in South Africa broke out in 1946.[190]

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182 Brassey 1998: A32-33. This act continued in operation until its replacement with the Basic Conditions of Employment Act 3/1983 and the Machinery and Occupational Safety Act 6/1983.

183 Brassey 1998: A34.

184 The discrimination on mines, although, continued under auspices of the Mines and Works Amendment Act.

185 Brassey 1998: A1:34. The Board of Trade and Industries actually made the following remark: "Blacks, it was able to report, were better at performing skilled and semi-skilled work than was generally thought".

186 Brassey 1998: A1:35.

187 War Measure145 of December 1942. In the next two years, however, almost 60 breaches of this Measure occurred.

188 Brassey 1998: A1:34.

189 War Measure Proc 1425 of 1944.

190 Brassey 1998: A1:35.

The Fagan Commission was appointed to find a solution but the report only created more confusion.[191] The 1948 election was won by the National Party. Discrimination became state policy.

8. 1948 – 1953

The Industrial Legislation Commission of Inquiry of 1948 (Botha Commission) was appointed in 1948 and made various recommendations.[192] Brassey suggests that the Commission was appointed "…in the hope that it would provide a blueprint for the introduction of apartheid in the workplace and the suppression of black unions".[193] These recommendations included separation of races in trade unions, the establishment of the principle of work-reservation, the creation of an industrial court and the prohibition on Africans to join registered trade unions.[194] It was, however, recommended that black unions should be regulated by special legislation.[195]

The Native Labour (Settlement of Disputes) Act[196] provided for internal works committees in industrial establishments employing 20 or more black workers. The main purpose of these committees was that such a committee should serve as a vehicle

[191] Brassey 1998: A1:36.
[192] Du Toit *et al* 2006: 8.
[193] Brassey 1998: A1:36.
[194] Van Jaarsveld and Van Eck 1996:13. What is very interesting, though, is the fact that there was very much opposition to this idea within the Commission. But despite this fact, the Commission still continued with mentioned recommendations. Brassey 1998:A1: 36 fn 7 quotes from the Commission's report: "Admittedly the majority of witnesses favoured the retention of mixed organizations. It does not follow, however, that they should remain because the majority supported them; truth is not necessarily based on the number of persons holding a certain view. Some witnesses who were in favour of mixed unions were so for ideological reasons: they were either communists or communistically inclined. A second group desiring the perpetuation of multi-racial unions was swayed by political reasons, believing or fearing that, if they favoured racial separation, this would be tantamount to supporting the present government's apartheid policies. A third group of witnesses, again, did not express the views or sentiments of the people, or the majority of people, they claimed to represent".
[195] Government felt a need for regulation of these separate unions in fear that white wages would be undercut or trouble would be caused in the absence of regulation.
[196] Native Labour (Settlement of Disputes) Act 48/1953.

through which white employers could communicate with black workers – these committees were therefore only consulted in the event of a dispute in that workplace.[197] The Act also made provision for Regional Native Labour Committees, chaired by a white official, to regulate labour within communities. These Committees were overseen by a white only Central Native Labour Board.[198]

The Native Laws Amendment Act[199] restricted the movement of labour from farms to factories. Local municipal officers and native commissioners also had to control the influx of blacks into urban areas.[200]

9. The Black Labour Relations Regulation Act 48 of 1953, the Industrial Conciliation Act 28 of 1956 and other legislation

9.1 The Black Labour Relations Regulation Act 48 of 1953[201]

The 1953-BLRRA was initially enacted as a measure to serve as an alternative for the acknowledgement of Black unions. Employees were not really encouraged to participate directly in the determination of their conditions of employment. Provision was made for the establishment of work-committees. These committees consisted of representatives of black employees who were intended to serve as spokespersons in negotiations on matters of mutual interest with employers.[202] Revolt in reaction to the racially segregated system and the absence of promotion of certain workers' interests,[203] resulted in strikes by unorganised African workers in Durban in 1973.[204] The strikes were followed by the establishment of numerous unorganised unions for African

197 Brassey 1998: A1:37-38.
198 Brassey 1998: A1:38.
199 Native Laws Amendment Act 54/1952.
200 Brassey 1998: A1:39.
201 Hereinafter referred to as the 1953-BLRRA.
202 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.15.1.
203 Du Toit *et al* 2006:10.
204 Du Toit *et al* 2006:10.

workers. As Du Toit *et al* puts it: "…the new unions grew rapidly and increasingly won recognition."[205] In reaction to this the 1953-BLRRA was drastically amended in 1973 to make provision, *inter alia*, for a Central Black Labour Council. This Council played an important role in representing black employees' interests pertaining to conditions of employment and wage determinations at meetings of industrial councils and the Wage Board.[206]

9.2 The Industrial Conciliation Act 28 of 1956

With the promulgation of the 1956-ICA much of the 1924-ICA was kept intact.[207] The weaker position of the non-white employees remained as this Act was applicable to whites in the private sector only.[208] Provision was made for the registration of unions, employers' organisations and industrial councils.[209] Much more use was made of this Act than its predecessor insofar as more employees, especially black employees, belonged to internal work committees. Although this may have seemed more favourable than previously, it must be born in mind that these committees were not totally independent and also did not possess the same degree of collective bargaining powers than unions did.[210] Moreover, certain limitations were placed on mixed unions[211] and African workers were still prohibited from joining unions. It is therefore safe to state that employees, or at least some employees', interests were not adequately promoted. Therefore, up until then there was not adequate protection of employees' interests and the right to fair labour practices has never surfaced.

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205 Du Toit *et al* 2006:10. Also see Van Jaarsveld and Van Eck 1996:14. At the end of 1975 more than 608 000 Africans belonged to these committees.

206 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981:par 4.15.1-4.15.2.

207 Du Toit *et al* 2006: 9.

208 Du Plessis & Fouche 2006:199 and Nel 2012:87. An employee was defined as "…any person (other than a Bantu) employed by, or working for any employer and receiving, or being entitled to receive, any remuneration, and any other person whatsoever (other than a Bantu) who in any manner assists in the carrying on or conducting of the business of an employer".

209 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981:par 4.16.

210 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981:par 4.17.4.

211 Unions with both white and coloured members. The registration of any more multi-racial unions was, in fact, prohibited.

Section 77 of the Act endorsed job reservation (as seen on the mines especially) and it was applied in the industry in full force.[212] Section 77 was only repealed in 1979.[213]

Problems were experienced with the control over bargaining by unregistered unions.[214] The SA Trades and Labour Council, the SA Federation of Trade Unions and the Western Province Federation of Labour Unions collaborated in 1954.[215] In 1955, 14 erstwhile affiliates of the South African Trade Union Council and 19 members of the Council of Non-European Trade Unions formed the South African Congress of Trade Unions (SACTU) in order to mobilise the black working class for securing political liberation.[216] In the same year, SACTU entered into an alliance, the Congress Alliance, with the ANC.[217] In response to these and many other problems, like discriminating labour practices, the Wiehahn Commission of Inquiry into Labour Legislation was appointed in 1977.[218]

10. 1956 – 1977

In 1961 the 1956-ICA was amended to provide that no objections to registration of white unions by mixed unions would be entertained if the mixed union's membership of coloured people exceeded one half of the number of white persons employed in that workplace.[219]

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212 A few examples can be provided: In 1958 the positions of ambulance drivers, firemen and traffic police in Cape Town were reserved for whites. In 1959 the operation of lifts (other than for the conveyance of non-Europeans or for goods only) in Bloemfontein, Johannesburg and Pretoria reserved for whites. The distribution of races within the clothing industry was frozen in 1960.

213 The repeal was effected by the Industrial Conciliation Act 94/1979:section 17.

214 Du Toit *et al* 2006: 10.

215 Brassey 1998: A1:39.

216 Brassey 1998: A1:39.

217 Brassey 1998: A1:39. This alliance disintegrated by 1965, due to its neglect of shop floor issues.

218 Du Toit *et al* 2006: 10.

219 Industrial Conciliation Amendment Act 18/1961 as contained in GN 6661 *Government Gazette* 1961:CCIII(528).

In 1964 black people were allowed to perform some work reserved for whites only after the owners of 12 gold mines applied for an applicable concession.[220] This was necessitated by an expansion of South Africa's economy. Although this proved to increase productivity, government put an end to it. In 1967 black miners were permitted to participate in "reserved work" again but under the conditions that white miners should not be retrenched as a result of this and that whites were to receive the majority share of this increase in productivity.[221]

The need for labour was worsened in 1974 when Malawi and Mozambique recalled its nationals working in South Africa.[222] Much labour was also lost due to prevailing strikes during these times.[223] As a result of this trade unionists were banned, placed under house arrest or detained without trial.[224]

In 1974 the South African government came to realise that much-needed changes in the labour market should take place.[225] As mentioned in par 4.3 above, the Master and Servant legislation was repealed by the Second General Law Amendment Act. A Wage Board was appointed to investigate the wage rates of the lower paid workers in Natal.[226] The Unemployment Insurance Act[227] which previously only operated to the benefit of white employees was amended to include black workers as well.[228] The Native Labour (Settlement of Disputes) Act was renamed the Bantu Labour Relations Regulations Act[229] and expanded the internal works committees' powers, made provision for liaison committees representing employers and employees and introduced new mechanisms for regulating of wages…especially black wages.[230] Prohibitions on strikes by black

[220] Brassey 1998: A1:40.
[221] Brassey 1998: A1:40.
[222] Brassey 1998: A1:40. This amounted to a loss in more than 80 000 workers.
[223] Brassey 1998: A1:40-41. 160 000 black and Indian workers took part in strikes in Natal in 1973. In 1974 189 strikes occurred and in 1975 there were a number of 119 strikes taking place.
[224] Brassey 1998: A1:41.
[225] Weissman 1985:169. One of the final factors leading to this realization was probably the threatened American Mineworkers Union coal boycott of 1974.
[226] Brassey 1998: A1:41.
[227] Unemployment Insurance Act 30/1966.
[228] Unemployment Insurance Amendment Act 12/1974.
[229] Bantu Labour Relations Regulations Amendment Act 70/1973.
[230] Brassey 1998: A1:41.

employees were also amended so as to place black employees in the same position as white employees under the 1956-ICA.[231]

The Erasmus Commission was appointed in 1976 to investigate matters relating to health and safety in the workplace and the following shortcomings were identified:[232]

- Occupational diseases were widespread although employers did not reveal any real concerns over it.
- Health services were inadequate.
- Legal regulation and control was non-existent.
- No reliable statistics were available.

Abovementioned shortcomings were only partially addressed in 1983.

11. International perspective – The International Labour Organisation

The importance of international labour standards should not be underestimated. It is imperative to have regard to these standards for the following reasons:

- The constitutional dispensation recognises "the role of international law as a foundation of democracy."[233]
- International labour standards serve as a benchmark for the evaluation of South African labour legislation.[234]
- The Conventions of the ILO serve as points of reference for the interpretation of labour legislation.[235]

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231 Compare this with the previous prohibition/ban on strikes. Refer, for example, to GN 1771 *Government Gazette* 1966:22(1585).

232 Brassey 1998: A1:50.

233 Van Niekerk ea 2008:19.

234 Van Niekerk ea 2008:19. (Lagrange and Mosime 1996:71 are of the opinion that after the enactment of the Constitution and the consequent revision of labour legislation, South African labour legislation is, for the first time, on par with the standards of the ILO.)

235 Van Niekerk ea 2008:19. Refer to the following cases where specific reference was made to the standards of the ILO: *South African National Defence Union v Minister of Defence and Another* 1999 20 ILJ 2265 CC (hereinafter referred to as the SANDU I-decision); *NUMSA & others v Bader Bop*

Daniel le Grand had an idea of the inclusion of international labour standards in universally acceptable legislation.[236] The International Labour Organisation[237] was established in 1919 in terms of the Treaty of Versailles and South Africa was also one of the founding members of the ILO.[238] The ILO has a tripartite structure where employers, employees and governments of the member states are represented. The ILO's labour standards are casted in the form of a convention, a recommendation or a declaration. A convention can then be ratified by a member state. In a South African perspective the ratification of a convention would then bind the country to enact legislation that gives effect to the content of the convention or to vary current legislation in order to conform to the convention. Recommendations serve as mere guidelines for national policy and conduct. A declaration is a formal instrument seeking "to enunciate universal and significant principles".[239]

It is submitted that although the concept of fair labour practices has not yet surfaced in our legislation until 1977, that by ratification of abovementioned Conventions, thereby supporting and underwriting certain minimum standards, South Africa had already indicated its intention of providing some form of protection against certain unfair labour practices.[240] Also, the Wiehahn-Commission stated that although South Africa has not necessarily ratified many Conventions, legislation already made provision for the following regulations:[241]

- Working hours
- Minimum age
- Night work by younger people
- Workmen's Compensation

(Pty) Ltd & another 2003 24 ILJ 305 CC; *Minister of Defence & others v SA National Defence Force Union & others* 2006 27 ILJ 2276 SCA.

236 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/198:par 3.1.

237 Hereinafter referred to as the ILO.

238 Van Jaarsveld ea 2001a:1-19.

239 Van Niekerk ea 2012:22.

240 It is interesting to note that until 1964 South Africa had not ratified the ILO's Discrimination (Employment and Occupation) Convention 111 of 1958. This, coupled with the fact that South Africa did not have a constitutional or other legislative basis for standards pertaining to fair labour practices, was a definite obstacle for adequate protection of employees' rights to fair labour practices.

241 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing.* Deel 5. RP 27/1981: par 3.11.2.

- Painting
- Weekly rest periods
- Medical examination of employees
- Illness insurance
- Forced labour
- Surviving spouse insurance
- Underground work
- Paid annual leave
- Safety measures
- Protection of wages

From 1959 the ILO became increasingly hostile towards South Africa. Member states, especially those from the second – and third-world, demanded South Africa's banning from the ILO.[242] This was mainly due to South Africa's apartheid policy. In the early 1960's relations deteriorated to such an extent that South Africa decided to withdraw from the ILO and gave notice of its withdrawal on 11 March 1964.[243] Despite the fact that South Africa forfeited many benefits of membership, the greatest disadvantage of the withdrawal from the ILO was definitely the fact that South Africa could not ratify any more Conventions. This also implied that South Africa could not necessarily ensure further compliance with international standards on e.g. fair labour practices. Although South Africa could not ratify international Conventions on labour standards anymore, the Wiehahn-Commission submitted that South Africa was actually found to be in a good stead regarding compliance with international labour standards.[244] Furthermore,

[242] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing.* Deel 5. RP 27/1981: par 3.11.3. According to Van Niekerk ea 2012:20 the ILO adopted a resolution in 1961 calling for the withdrawal of SA from the ILO.

[243] Van Niekerk ea 2012:20 South Africa initially did not want to withdraw voluntarily. But after SA noticed the ILO adopting its constitution to allow suspension and expulsion of member states, SA gave notice of its intention to withdraw from the ILO. Also refer to *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing.* Deel 5. RP 27/1981: par 3.11.4. Note that section 2 par 5 of the Constitution of the ILO required two years notice of withdrawal. South Africa however, due to the unilateral resolution taken by the ILO and the ILO's disregard of basic membership-rights, did not regard itself bound to the two years notice.

[244] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing.* Deel 5. RP 27/1981: par 3.12.3.

international standards influenced the Industrial Court in the development of its unfair labour practice jurisprudence.[245]

In 1992 COSATU laid a complaint at the ILO regarding the 1988-amendments to the 1956-LRA.[246] A Fact-finding and Conciliation Commission visited South Africa to investigate the complaint. A subsequent report, containing specific recommendations, was filed. This report served a very important role when the 1995-LRA was drafted.[247]

It was only on 26 May 1994 that South Africa re-entered as a member of the International Labour Organisation.[248] It can be safely stated that, since its re-entrance, South Africa conforms to international labour standards and utilise it to a great extent as a comparative measure when formulating and interpreting labour law principles.[249]

South Africa has ratified the following Conventions[250] (the fundamental Conventions are marked with an asterisk):

- * Convention 29 of 1930 (Forced Labour Convention) and ratified on 5 March 1997.
- * Convention 87 of 1948 (Freedom of Association and the Right to Organise) and ratified on 19 February 1996.
- * Convention 98 of 1949 (Right to Organise and Collective Bargaining) and ratified on 19 February 1996.
- * Convention 100 of 1951 (Equal Remuneration) and ratified on 30 March 2000.

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245 Van Niekerk *et al* 2008: 19. The case of *MAWU & others v Stobar Reinforcing (Pty) Ltd & another* 1983 4 ILJ 84 IC served as the first record of the court's willingness to seek guidance in the instruments of the ILO.

246 Van Niekerk *et al* 2008: 20.

247 Van Niekerk *et al* 2008: 20.

248 Van Jaarsveld ea 2001a:1-20. South Africa's readmittance was preceded by informal contact between influential groups in SA and representatives of the ILO. A commission of the ILO visited SA in 1992, where after a comprehensive report pertaining to prevailing labour practices and standards was published.

249 Van Jaarsveld ea 2001a:1-17. The new constitutional dispensation also recognises the role of international law.

250 http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102888 (07 December 2012)

- * Convention 105 of 1957 (Abolition of Forced Labour) and ratified on 5 March 1997.
- * Convention 111 of 1958 (Discrimination – Employment and Occupation) and ratified on 5 March 1997.
- * Convention 138 of 1973 (Minimum Age) and ratified on 30 March 2000.
- * Convention 182 of 1999 (Worst Forms of Child Labour) and ratified on 7 June 2000.
- Convention 144 of 1976 (Tripartite Consultation on International Labour Standards) and ratified on 18 February 2003.
- Convention 2 of 1919 (Unemployment) and ratified on 20 February 1924.[251]
- Convention 19 of 1925 (Equality of treatment pertaining to Accident Compensation) and ratified on 30 March 1926.[252]
- Convention 26 of 1928 (Minimum Wage-Fixing Machinery) and ratified on 28 December 1932.
- Convention 27 of 1929 (Marking of Weight pertaining to Packages Transported by Vessels) and conditionally ratified on 21 February 1933.
- Convention 42 of 1934 (Workmen's Compensation pertaining to Occupational Diseases) and ratified on 26 February 1952.
- Convention 45 of 1935 (Underground Work pertaining to Women) and ratified on 25 June 1936.
- Convention 63 of 1938 (Statistics of Wages and Hours of Work) and ratified (excluded Parts II & IV) on 8 August 1939.
- Convention 80 of 1946 (Final Articles Revision) and ratified on 19 June 1947.
- Convention 89 of 1948 (Night Work pertaining to Women) and ratified on 2 March 1950.
- Convention 116 of 1961 (Final Articles Revision) and ratified on 9 August 1963.
- Convention 155 of 1981 (Occupational Health and Safety) and ratified on 18 February 2003.

[251] Brassey 1998: A1:48 fn 3 indicates the date of ratification as 30 January 1924.
[252] Brassey 1998: A1:48 fn 6 indicates the date of ratification as 12 March 1926.

- Convention 176 of 1995 (Safety and Health in Mines) and ratified on 9 June 2000.

South African has also endorsed the Decent Work Country Programme of the ILO.[253] Due to the fact that this program encourages committed members to improve job creation, rights at work, social protection and social dialogue, South Africa will have to ensure that existing labour practices and laws comply with this program and other international standards.

12. Conclusion

A brief outline of the history of (individual) labour law up until 1977 has been provided and the different highlights that impacted on and necessitated the right to fair labour practices were discussed. History is indeed repeating itself over and over again.

History in general, the history of labour law and especially the history pertaining to fair labour practices until 1977 have indeed impacted on the current regulation of the right to fair labour practices. Many of the challenges that are currently being faced in labour law, especially with regards to the right to fair labour practices, stem from the past and the manner in which labour was approached in the past:

- **Disregarding the human element present in the employment relationship** Slavery is defined as the slave being the property of another person(s) and owing unlimited obedience to his or her owner.[254] Slavery also greatly involves the ignorance and disregard of the human element in the employment relationship. Slavery was the dominant mode of service in the Roman Empire and the Netherlands. It was also brought to South Africa and continued to exist locally until 1833. The relevance of this concept is that it not

[253] http://www.ilo.org/jobs-pact/resources (07 December 2012). This program runs from 2010-2014.
[254] Odendaal ea 1983:999.

only influenced legislation and regulation of services while being in existence but continued to survive for a long time after the abolishment thereof – in the mindsets of people, in the manner in which employers treated (some) employees and in (un)written policies.

- **Common law and common law contract of employment** Both the common law and the common law contract of employment have, for a long time, served as the only basis for establishing an employment relationship. The common law continuously forms an important part of the establishment and regulation of the relationship between employer and employee. Circumstances may even prove that protection or regulation in terms of common law is sometimes more beneficial than constitutional or legislative protection. But, despite the continued importance of it, it has been proven that it is not the only factor that will lead to the establishment of an employment relationship. Regards will rather be haven to all the circumstances surrounding the relationship between a person rendering services and the person paying for the services in order to establish the true nature of the relationship. In the end, protection for either of these parties is not solely dependent on a contract of employment anymore, but rather on the fact whether an employment relationship was proven or not. In terms of the Constitution, courts may therefore develop common law in terms of section 23(1) in order to provide protection if protection is lacking in legislation. The main reason for this new approach is rooted in the fact that the contract of employment, being an ordinary commercial contract in its core, may not always serve the principle of fairness to its fullest. And it is then when the other approach will prove to be the preferential approach for ensuring fairness in the employment relationship.
- **Yardstick or criterion for the validity and fairness of labour-regulation** For quite a long time labour regulation in general as well as labour legislation in particular were based on the ideologies of the ruling political party (parliamentary sovereignty). These political ideologies and policies reflected and impacted enormously on the regulation of relationships between people,

the employment relationship no different from that. This was quite unfortunate as it is an undisputed fact that most of these ideologies were stained with discriminatory principles. Due to the fact that certain people enjoyed a higher standing in society and increased protection against unfairness other people suffered a great deal, especially in the employment context. For these people unfairness was a common and daily occurrence.

- **Limiting legislative protection** Before the enactment of the Constitution, protection in an employment context was literally limited to legislation providing protection. Many employers and workers suffered from this limitation when certain technicalities excluded them from protection: e.g. not being regarded as an employee or the certain practice complained of not being contained in legislation. Legislation should be interpreted according to the Constitution and common law should be developed in terms of the Constitution. Based on this premise everyone can currently enjoy the right to fair labour practices based on section 23(1), even if excluded by legislation or common law and even in the absence of regulation by legislation or common law.

Legislation and regulations are usually enacted to address and regulate problem-areas which were not sufficiently regulated until such an enactment and therefore caused the need for such regulation. In the majority of instances it is therefore a previous occurrence or problem rather than a foreseeable future occurrence or problem that gives rise to the enactment of proper regulation or amended regulation. If the historical position of labour law prior to the regulation of the fairness of labour practices is analysed, it follows that the reason for the regulation – the previous problems if we may – should dictate the true meaning of such regulation. It is, after all, the main driving force beyond such regulation. Taking note therefore of the realities of history until 1977 which influenced the current situation, and addressing *lacunae* and problems stemming from the past, will not only provide valuable meaning into the true intent of the legislature but can also have a considerable positive influence on the current regulation of the constitutional right to fair labour practices.

CHAPTER 3

HISTORICAL BACKGROUND POST 1977

"*When you make a mistake, don't look back at it long. Take the reason of the thing into your mind and then look forward. Mistakes are lessons of wisdom. The past cannot be changed. The future is yet in your power.*".[255]

1. Purpose of this chapter

In this chapter it will be attempted to provide a brief outline of the history of (individual) labour law after 1977 and will the different highlights that impacted on the right to fair labour practices be discussed.[256] It will also be attempted to be proven that many of the challenges that are currently being faced in labour law, especially with regards to the right to fair labour practices, stem from the past and the manner in which labour was approached in the past.

2. Introduction

Du Toit and Potgieter state that labour evolution only started in 1979.[257] Up until then individual labour law was limited to the contract of employment[258] and collective labour law was only known and applicable to a select group of workers.[259] Following political

[255] Hugh White.

[256] The reason for distinguishing the historical position before 1977 from that thereafter is based on the fact that the notion of fair labour practices made its first appearance only after 1977.

[257] Du Toit & Potgieter 2007: par 4B1.

[258] The employer and employee had almost complete contractual freedom and were limited by only a minimum of statutory provisions.

[259] Du Toit & Potgieter 2007: par 4B1. Collective bargaining was only applicable to the private sector and excluded African workers. The current situation is somewhat different. See Van Jaarsveld ea

unrest and the Wiehahn Commission's report, the 1956-ICA was amended[260] to include African workers within its ambit and also to establish an Industrial Court.[261] This court's function was, *inter alia*, to give meaning to the term unfair labour practices and to adjudicate matters resulting in unfair labour practices.[262] Up until the enactment of the interim Constitution[263] in 1994 it was the Industrial Court which gave meaning to the term unfair labour practices.[264]

Labour legislation was in conflict with the interim Constitution. It resulted in the amendment of the 1956-LRA[265] and the new Labour Relations Act[266] took effect in September 1995. Meanwhile, the interim Constitution was replaced with the Constitution.[267] Other labour legislation, giving effect to the Constitution[268], also followed.[269] As Du Toit and Potgieter puts it: "…the criterion for deciding labour disputes was no longer the court's interpretation of fairness but the letter and spirit of the LRA, the Bill of Rights and international law."[270] To this the Occupational Health and Safety Act,[271] the Compensation for Occupational Injuries and Diseases Act,[272] the Basic

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2001a:1-5 in this regard. Collective labour relations are regulated by "a sophisticated system of statutory labour measures". Individual relations are regulated by "a less complicated system of principles based on the common-law contract of employment and statutory measures".

260 The amendment was effected by the Industrial Conciliation Act 94/1979.

261 Du Toit & Potgieter 2007: par 4B1. The Industrial Court was established in terms of the Industrial Conciliation Act 94/1979:section 17.

262 Du Plessis & Fouche 2006: 199.

263 Act 200 of 1993 and hereinafter referred to as the interim Constitution.

264 Refer to Du Toit and Potgieter 2007: par 4B10 "The unfair labour practice jurisdiction of the Industrial Court created an almost unlimited power of judicial intervention in employment relations. Many criticized what was called the juridification of labour relations on ideological as well as practical grounds." Also see Grogan 2010: 91 in this regard.

265 The Industrial Conciliation Act was renamed in 1981 by section 60 of the Labour Relations Amendment Act 57/1981 (as contained in GN 1822 *Government Gazette* 1981:195(7763).

266 Labour Relations Act 66/1995 and hereinafter referred to as the 1995-LRA.

267 The Constitution, Act 108/1996 and hereinafter referred to as the Constitution.

268 More specifically: the right to fair labour practices (section 23 of the Constitution) and the right to equal treatment (section 9 of the Constitution).

269 The Basic Conditions of Employment Act 75/1997 and the Employment Equity Act 55/1998 are good examples.

270 Du Toit & Potgieter 2007:par 4B1.

271 Occupational Health and Safety Act 85/1993 and hereinafter referred to as the 1993-OHASA.

272 Compensation for Occupational Injuries and Diseases Act 130/1993 and hereinafter referred to as the 1993-COIDA.

Conditions of Employment Act,[273] the Skills Development Act,[274] the Employment Equity Act[275] and the Unemployment Insurance Act[276] can be added.[277]

3. Wiehahn Commission- and Riekert Commission Reports

Following circumstances and vexatious matters during the seventies, South Africa's position in the international world, South Africa's economic advancement during the preceding twenty years, the role of multi-national enterprises in South Africa, the dualistic system of collective bargaining, the shortage of skilled manpower and dubious labour practices, South Africa was compelled to establish two commissions of investigation into labour-legislative measures.[278] The Wiehahn Commission was established in 1977 and it was chaired by Professor Nic Wiehahn.[279] The principle task of this commission was to investigate industrial relations. The Riekert Commission, also appointed in 1977, had to consider the influx laws.[280]

[273] Basic Conditions of Employment Act 75/1997 and hereinafter referred to as the 1997-BCEA.
[274] Skills Development Act 97/1998 and hereinafter referred to as the 1998-SDA.
[275] Employment Equity Act 55/1998 and hereinafter referred to as the 1998-EEA.
[276] Unemployment Insurance Act 63/2001 and hereinafter referred to as the 2001-UIA.
[277] Grogan 2010:10 states that principal labour statutes in SA, including the 1995-LRA, the 1998-EEA and the 1997-BCEA, were designed to give effect to the general constitutional right to fair labour practices.
[278] Van Jaarsveld and Van Eck 2006:4-5. Also refer to Van Jaarsveld ea 2001a:1-5. Landman 2004:805 states that it was indeed Prof Wiehahn who "…persuaded the government of the day to establish a commission to investigate labour legislation with specific reference to the 'methods and means by which a foundation for the creation and expansion of sound labour relations may be laid for the future of South Africa'".
[279] Van Niekerk *et al* 2008: 11.
[280] Brassey 1998: A1:42.

3.1 Riekert Commission

In 1979 the Riekert Commission proposed relaxation of the restrictions on urban black workers.[281] In time it was proven, however, that this system was beyond repair. It was eventually abolished by the Abolition of Racially Based Measures Act.[282]

3.2 Wiehahn Commission

3.2.1 Inclusion of African workers in joining unions

The most important recommendation of the Commission was the inclusion of African workers to join registered trade unions[283] and the abolishment of the system of job reservation.[284] The reasons supporting this recommendation were two-fold:[285]

- Due to the "economic boom of the late 1960's, the increased rate of industrialisation and the demand for skilled labour" black employees increasingly occupied more skilled occupations.[286]
- The labour unrest of 1973 regarding the revolt of black employees against the racist legislative dispensation.[287]

Government accepted some of these proposals by way of changes during 1979-1983: During 1979 urban blacks were also included in the definition of an employee in terms of the 1956-ICA[288] and African workers were also afforded the right to freedom of

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281 Brassey 1998: A1:42. Black workers in rural areas were, so recommended, to be restricted even more severely.
282 Abolition of Racially Based Measures Act 108/1991.
283 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 1. RP 47/1979: par 3.38, 3.72 and 3.153.2.
284 Landman 2004:805-806.
285 Van Niekerk *et al* 2008: 11.
286 Van Niekerk *et al* 2008: 11.
287 Van Niekerk *et al* 2008: 11.
288 Industrial Conciliation Amendment Act 94/1979:section 1(c). See GN 1435 *Government Gazette* 1979:169(6543). Section 1(c)(b) stated: "…Provided further that no differentiation on the basis of race or colour shall be made." (People not legally residing in South Africa, residing in a self-governing

association.[289] In 1981 more black employees were included[290] and in 1983 all workers in industry and commerce were recognised as employees and thus the colour of the employee was not the deciding factor anymore.[291] It is submitted that these changes were not brought about to mainly recognise employees' rights to fair labour practices but rather to avoid further labour unrest.

3.2.2 Legalisation of all unions and regulation of all unions

The Wiehahn Commission recommended stricter control over unions. The fact that black workers' unions were not recognised and therefore not registered resulted in many problems:[292] These unions were not obliged to compel with general legislation regulating unions due to the fact that they were not recognised. These unions also served as the vehicles for subversive political activities, were free to receive money from political parties and also to participate in party politics.

The Commission proposed that all unions should register under the Act.[293] This would have resulted in a win-win situation: Government could exercise the same control over all unions and all employees would enjoy the same organizational and collective bargaining rights.[294]

The Commission, however, reiterated the fact that all unions should continue to be barred from affiliating to a political party or taking part in political activity.[295]

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territory in South Africa or a non-citizen carrying out a contract of service in the Republic were still excluded from the definition of an employee.)

289 Du Toit *et al* 2006: 10-11.

290 Industrial Conciliation Amendment Act 57/1981:section 1(f) also recognized black migrants and frontier-commuters as employees under the 1956-ICA.

291 Labour Relations Amendment Act 2/1983:section 1(a) (as contained in GN 399 *Government Gazette* 1983:212(8557).

292 Brassey 1998: A1:43.

293 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 1. RP 47/1979: par 3.110, 3.157.5 and 3.157.6.

294 Brassey 1998: A1:43.

295 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 1. RP 47/1979: par 3.38, 3.72 and 3.153.2.

In 1983, after several amendments to the 1956-ICA, "…emergent unions knocked loudly on the doors of industrial councils, which greeted them unenthusiastically but mostly gave them entry".[296]

3.2.3 Legislation regulating fair labour practices

Another recommendation was to make provision for legislation regulating fair labour practices.[297] The regulation of unfair labour practices, as addressed by the Wiehahn Commission, was certainly one of the most important matters in the labour dispensation to come.[298]

The Wiehahn Commission confirmed the need for providing protection against unfair labour practices. This need for guarantees of freedom, rights, welfare, security and dignity of the individual was the consequence of change, instability and uncertainty.[299] It seemed as if the freedom, security and dignity of the individual had become irreconcilable with growth and development, with the aims of the State or with the public interest. It was due to these circumstances that many countries felt the need for protective measures when regulating labour practices relating to, *inter alia*, remuneration, working hours and leave. And this need, according to the Commission, would be answered to by the notion of "protection against unfair labour practices" as the

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296 Brassey 1998: A1:45.

297 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 1. RP 47/1979: par 3.137.10 and 3.159.2.10. In paragraph 3.137 the need was expressed to secure individual employees' interests because the principle of work-reservation was not adequate anymore. Development of legislation pertaining to fair labour practices was one of the proposed ways to achieve it. This was confirmed in the White Paper on Part 1 of the Wiehahn Commission's Report (Wiehahn 1982: 149). Also see par 4.28.5.2. Last-mentioned paragraph contained only an indirect reference insofar as the actual recommendation only entailed a reference to the effect that an Industrial Court should have the jurisdiction to hear cases of "irregular and undesirable" labour practices. See however later recommendations in this regard in *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127. Reference can also be made to Du Plessis and Fouche 2006: 199 and also to Van Jaarsveld and Fourie 1995:par 402.

298 Van Jaarsveld and Fourie 1995:par 402.

299 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.2.

purpose of the newly created unfair labour practice appears clearly from the commission's report:

> "The Commission is convinced that the abovementioned measures, either individually or in combination, will provide better protection for employees against unfair displacement than the existing measure of statutory work reservation contained in section 77 of the Act[300] – particularly if the National Manpower Commission remained alert to the need for such protection and if appropriate measures were incorporated in fair employment practices legislation".[301]

The protection of employees against unfair labour practices, as recommended by the Commission, was, however, not only to be found in legislation addressing (preventing) the unfair labour practices. The Commission also recommended that the Minister of Manpower "be empowered to reinstate employees or restore their terms and conditions of employment in the case of disputes between employers and employees including 'irregular or undesirable labour practices'".[302]

Initially fairness in labour practices was addressed by a definition of what an unfair[303] labour practice was:

> "…any labour practice which in the opinion of the industrial court is an unfair labour practice….".[304]

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300 Statutory job reservation for white employees was only scrapped in 1987 by an amendment to the Mines and Works Act (Mines and Works Amendment Act 83/1987).

301 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 1. RP 47/1979: par 3.138.

302 Landman 2004:806.

303 Note that it was initially known in Afrikaans as an "improper labour practice. (Also see Landman 2008:806 in this regard.) In 1979 the word "improper" was replaced with "unfair" by section 1(b) of the Industrial Conciliation Amendment Act 95/1980. Van Jaarsveld ea 2001a:13-4 state that the formulation of this concept caused it to be controversial from its inception. This is also confirmed in Van Jaarsveld and Fourie 1995:par 402 as well as in Van Jaarsveld ea 2001b:par 684.

304 Industrial Conciliation Amendment Act 94/1979: section 1(f). Du Toit *et al* 2006: 481. Also refer to Du Plessis & Fouche 2006: 301 in this regard. The authors describe the concept of an unfair labour practice under the 1956-LRA as catch-all category of conduct by employers, employees and their organisations which, in the opinion of the Industrial Court, fell within the definition of an unfair labour practice.

Up until 1979, therefore, the need for such legislation was expressed in very general terms without reference to the content of such legislation and the only certain aspect was the fact that employees' rights should be expressly provided for and should be protected. Grogan describes it as a remedy for the "absence of fairness in the common-law employment regime".[305] The concept of unfair labour practices was very wide and was focussed on the prevention of unfair labour practices between employer and employee. The main aim of this wide definition was to enable the courts[306] to develop an "equity-based jurisprudence for the South African workplace".[307] However, the person complaining of an unfair labour practice had to prejudge his problem because the complainant had to consider whether the industrial court would be of the opinion that the complained conduct did indeed result in an unfair labour practice.[308] The first case exploring this definition of an unfair labour practice was *MAWU v A Mauchle (Pty) Ltd t/a Precision Tools*.[309] The court held that in establishing whether an act resulted in an unfair labour practice it had to "…establish the true relationship between the parties and the issues in dispute and then, in the light thereof, form an opinion as to whether any act [of the employer] constitutes an unfair labour practice".[310]

The concept was radically changed in 1980 by way of intervention of the legislature and it was defined in terms of four consequences which might have arisen out of the committing of an unfair labour practice.[311] An unfair labour practice was defined as follows:[312]

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305 Grogan 2010:91.

306 The reference to courts includes the Industrial Court, the later Labour Appeal Court and the Appellate Division of the then Supreme Court.

307 Grogan 2010:91. Grogan also states that this equity-jurisprudence "presaged the constitutional revolution that was to follow".

308 Ehlers 1982:12.

309 *MAWU & another v A Mauchle (Pty) Ltd t/a Precision Tools* 1980 1 ILJ 227 IC.

310 *MAWU & another v A Mauchle (Pty) Ltd t/a Precision Tools*: 246F-G.

311 Van Jaarsveld ea 2001a:13-4 and also Van Jaarsveld and Fourie 1995:par 402 describe this revised definition as "still in general and non-specific/general terms". Landman 2004:806 quotes Brassey to state that this 1980-definition (the second definition) may have been more lengthy but certainly not more enlightening.

312 Industrial Conciliation Amendment Act 95/1980: section 1(c) as contained in GN 1523 *Government Gazette* 1980:182(7148).

"any labour practice or any change in any labour practice, other than a strike or a lockout or any action contemplated in section 66(1) which has or may have the effect that –

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardized thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby; or

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

Ehlers submitted that the emphasis fell on the words unfair and unfairly.[313] It is interesting to note that the State, the employer and the employee could all have been guilty of an unfair labour practice.[314]

Part V of the Wiehahn Commission's report was published in 1981.[315] This part included, amongst others, recommendations on bringing South African labour legislation in line with international labour conventions and to accept legislation regarding fair labour practices.[316]

In an attempt to provide meaning to the concept of fair labour practices the Commission pointed out that various international ground rules had to be consulted. The

313 Ehlers 1982:13.

314 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.11. Reichman and Mureinik 1980:1 indicate that although an unfair labour practice could be committed by all of these parties, the Industrial Court could remedy only "employer unfair labour practices" as "union unfair labour practices" were unknown to the South African law.

315 Van Jaarsveld and Van Eck 1996:16.

316 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981 : par 3.13.1, 4.127 and 4.129.

Commission had to consult international ground rules due to the fact that South Africa's Constitution did not provide guidance as it was not sufficiently individual-orientated. Also it only had the 1956-ICA's 1980-definition of an unfair labour practice and was still awaiting perspectives from the newly instituted Industrial Court.

It was also found that anti-discrimination and equality were central themes in international codes of fair labour practices.[317] South Africa, according to the Commission, still had a long way to go in addressing discrimination.[318] It was pointed out that discrimination could not be eradicated by the mere revocation of legislation. It involved the laborious evolution of other attitudes within the community.[319] The Commission advised that South Africa, as a country with heterogeneous labour forces, had to take much more purposeful and progressive action.[320] It was also foreseen that, pertaining to labour at least, discrimination would be declared illegal and would be criminalised in the future.[321]

It proposed that the National Manpower Commission[322] could play an important role as an advisory body in revising legislation in this regard.

The Wiehahn Commission also drew attention to the fact that, as a current solution, industrial council agreements could serve as source for standards of fair labour practices.[323] On the labour front, Industrial Councils formed the second level of government. In utilising their legislative powers these councils could give full expression

317 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.5. Also refer to a brief discussion on equality in par 15.2 hereunder.

318 See *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.12-4.127.15 in this regard.

319 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.12.

320 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.13.

321 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.14: "The Commission cannot avoid the conclusion that in due course discrimination in the field of labour and on the grounds of race, colour, sex, political opinion, religious belief, national extraction or social origin will have to be outlawed and criminalised in South Africa's labour dispensation".

322 This Commission was established in terms of the Industrial Conciliation Amendment Act 94/1979:section 2A.

323 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.15-4.127.16.

to the principle of self-management by setting standards of fair labour practices within broad policy guidelines.[324]

It was stated that a code for fair labour practices should be developed on the foundation of the tripartite character of South African labour – the State, employers and employees.[325] In developing such a code of fair labour practices the Commission advised certain responsibilities for these three role players:[326]

- **The State** Discriminating provisions in legislation had to be eradicated. Labour legislation had to be applied in a fair and reasonable manner. Freedom of association, the right to collective bargaining and strikes and lockouts had to be acknowledged. Sufficient protection for employers and employees had to be provided. Employers and employees had to be monitored with a view to ensure industrial peace. Training – and development programmes had to be encouraged. Labour practices pertaining to remuneration, working hours, safety, leave and termination of employment had to be fair and in accordance with modern practices.
- **Employers** Properly qualified people had to be appointed. A work environment in which the physical, social and moral welfare, the economic security and the job satisfaction of employees was not threatened had to be maintained. Full enjoyment of employees' right to freedom of association had to be guaranteed. *Bona fide* participation in collective bargaining had to be ensured. Conduct resulting in strikes had to be prevented and where strikes were inevitable, such action had to be respected. Employees had to be protected against conduct negatively affecting their social, physical and moral welfare. Unfair conduct negatively affecting the character, security, opportunities and health of employees had to be avoided. Training programmes had to be provided. All

[324] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.15. In terms of the 1956-LRA (section 23(1)) industrial councils had jurisdiction to conclude agreements and settle disputes relating to any matter of mutual interest to employer and employee. This included unfair labour practices as well.

[325] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.19.

[326] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.20.

legislation and conventions pertaining to fair labour practices had to be complied with.

- **Employees** Services had to be adequately provided. Conduct resulting in damage or disadvantage for the employer should be avoided. Maximum allowance of freedom of association of co-employees. *Bona fide* participation in collective bargaining had to be undertaken. Strikes and other forms of industrial action should have only been utilised as a last resort. The employer's interests also had to be protected. Training opportunities had to be utilised.

But the Commission also identified other possible aspects that could be included in the concept of fair labour practices: remuneration, working hours, annual – and sick leave, safety-practices, termination of employment, the business of the employer and all other aspects concerning the relationship between an employer and its employee.[327]

In conclusion: South Africa had to accept legislation based on the six basic elements of working rights: the right to work, the right to associate, the right to bargain collectively, the right to withhold labour, the right to be protected and the right to develop.[328]

3.2.4 The establishment of the Industrial Court

The Wiehahn Commission proposed the establishment of an Industrial Court as a vehicle for the implementation of changes to the industrial relations system.[329] The Commission proposed that the court should be given a broad equitable jurisdiction with very wide powers, e.g. to interpret the concept of unfair labour practices in a broad way in order to protect employees against such practices during the course of employment.

[327] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.5.
[328] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.129.6.
[329] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 1. RP 47/1979:par 4.24. Also see Brassey 1998: A1:45.

The Commission suggested that such an industrial court should adjudicate in the following matters (amongst others):

- Irregular and undesirable labour practices.[330] (Specific mention was made of changes of labour patterns in an undertaking, industry, trade or occupation by the employer without consultation with his employees.)
- Unfair dismissals or changes in conditions of employment.[331]
- Underpayment of wages and unfair treatment.[332]

4. Industrial Court

Before the establishment of the Industrial court, it was the function of industrial councils to attempt settlement of unfair labour practice disputes.[333] The Industrial Court was created in 1979.[334] Following certain recommendations of the Wiehahn Commission's Report, one of the functions of the newly created Industrial Court was to determine[335] and eliminate unfair labour practices.[336] The court had carte blanche to act as watchdog over the concept of unfair labour practices.[337] If the attempt to settle such an unfair labour practice by an industrial council therefore failed, it could be referred to the

330 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 1. RP 47/1979:par 4.24.2 and 4.28.

331 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 1. RP 47/1979:par 4.24.3 and 4.28.5.3.

332 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 1. RP 47/1979:par 4.28.5.3.

333 Ehlers 1982:17.

334 1956-ICA:section 17 (as effected by Industrial Conciliation Amendment Act 94/1979).

335 Ehlers 1982:17. This is in contrast with the attempt to settle function of the industrial council. But, according to Ehlers (on p.18), the Industrial Court was still not a court of first instance relating to unfair labour practices. Conciliation-procedures (by the industrial council) had to be exhausted prior to turning to the Industrial Court.

336 See Du Toit *et al* 2006:481 and fn2 in this regard. Following the 1979 amendments to the 1956-LRA, the Industrial Court developed an equity-based labour jurisprudence. Du Toit *et al* also quotes Brassey with regards to the term equity by stating that it involves opinions current from the time being rather than being a just regulation of the mutual rights and duties of a civilized society. Also see Du Plessis and Fouche 2006:199; Poolman 1988:105-110 in this regard.

337 Van Eck ea 2004:903.

Industrial Court for adjudication. The adjudication process involved two stages of enquiry:[338]

a) Firstly the Industrial Court had to establish whether such an unfair labour practice did indeed exist in fact.
b) Secondly the court had to determine the unfair labour practice. (It would only have been referred to the Industrial Court for determination if the allegation of a practice was indeed proven, if the industrial council could not settle the dispute and if "…the aggrieved party alleges facts, that, if proved, would establish a labour practice that the industrial court has already determined to be unfair".[339])

Adjudication of an unfair labour practice in terms of the 1979-amendment, therefore implied a judicial act by the Industrial Court. The judicial act was rooted in the determination of the dispute.[340] But in that elimination/adjudication process it was inevitable that the concept of unfair labour practices was also to be given meaning and definition, especially in light of the extremely open-ended definition of an unfair labour practice at that time.[341] And in defining the concept the court was in fact making rules. (This could, however, only be based upon current legislation of that time and (unfortunately) no reference could be made to the Report of the Wiehahn Commission when interpreting statutory provisions such as an unfair labour practice.) The function to define was a legislative function, as the court was enacting delegated legislation, and was the definitions of the Industrial Court therefore subject to the test of reasonableness.[342] It is argued by Mureinik, and his argument is supported by writer hereof, that although the Industrial Conciliation Amendment Act of 1980[343] indeed broadened the court's discretion, [344] the legislative function of the Industrial Court was

338 Ehlers 1982:19-21.
339 Reichman and Mureinik 1980:19.
340 Reichman and Mureinik 1980:22.
341 Grogan 2008:6. It is pointed out that the open-ended definition "…provided ample scope for the development by that court of a new set of principles relating to dismissal and other forms of labour practice".
342 Reichman and Mureinik 1980:22.
343 Industrial Conciliation Amendment Act 95/1980.
344 Mureinik 1980:113-114.

replaced by a function to interpret the definition as provided by the 1980-amendment and the process therefore changed to a "question of law" process.[345]

But in 1982 the court was also endowed with the power to reverse unfair unilateral acts pending the final determination of the issue in a full hearing.[346] The Industrial Court, therefore, laid the foundation for the concept of fair and unfair labour practices.[347] (It must be born in mind, however, that the current meaning is much different from that which the Industrial Court has developed.)[348]

The Industrial Court, Labour Appeal Court[349] and Appellate Division of the Supreme Court developed an equity-based approach to labour and employment law.[350] The Industrial Court was competent to take decisions based on justice and fairness.[351] It was stated that in determining fairness, the Court should have had regard to socio-economic and socio-political policy. More importantly, decisions based on justice and fairness should be regarded as a rectification of legislation in circumstances where the legislation was lacking due to its universalism or where the legislation was silent due to its conservatism.[352] A landmark decision, signifying the court's willingness to eradicate all forms of unfair labour practices, no matter if it was a legal exercising of rights, was *Marievale Consolidated Mines v NUM*:[353]

> "In my opinion, the approach of [the mine's] counsel to labour relations demonstrates a lack of appreciation of the nature and purpose of the Act. It

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345 Mureinik 1980:117.

346 Labour Relations Amendment Act 51/1982: section 8 (as contained in GN 676 *Government Gazette* 1982:202(8140). The first time this new power was applied was in the case of *MAWU & others v Stobar Reinforcing (Pty) Ltd & another*.

347 See Le Roux 1987:197. Du Toit and Potgieter 2007:par 4B1 describes the Industrial Court as "the principal vehicle by which the fundamental concepts of modern labour law, including the substance of many instruments of the International Labour Organisation (ILO), found their way into our legal system over the next decade and a half."

348 Du Toit and Potgieter 2007:par 4B15. This is due to the fact that the current definition is much more limited than the definition contained in the 1956-LRA.

349 The Labour Appeal Court was established by the Labour Relations Amendment Act 83/1988:section 17A(1) (as contained in GN 1388 *Government Gazette* 1988:277(11405).

350 Grogan 2008:1.

351 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981:par 4.127.17.

352 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981:par 4.127.18.

353 *Marievale Consolidated Mines v NUM* 1986 2 SA 472 W:498D-E and 499H-J.

> assumes that any lawful act, no matter how fair or inequitable, may not be queried or interfered with by the industrial court…[The] submission that an unfair labour practice cannot include or refer to a lawful exercise of rights by an employer is not supported by the wording of the relevant provisions, or by the authority I have referred to or by the patent intention and underlying philosophy of the Act".

For the first time courts moved beyond the narrow confines of contract law to the uncertain realms of equity. The courts started asking not merely whether an employer was entitled to do what he has done but rather whether he acted fairly by so doing.[354]

Fact of the matter is that the Industrial Court has played an enormous role in the development of the South African labour law in general and the elimination of unfair labour practices.[355] Le Roux states: "…the impact of the court on our industrial relations during the last few years has been tremendous. This has been achieved through the court's jurisdiction to determine disputes concerning alleged unfair labour practices and to issue status quo orders reinstating dismissed workers and preventing alleged unfair labour practices. Through exercising these functions the court has built up a new jurisprudence relating especially to the dismissal of workers, where the harshness of common-law contract principles has been nullified and where principles of equity and fairness within the context of the employment sphere have been formulated and applied."[356]

Until its dissolution in 2000 the Industrial Court, *inter alia*, determined the fairness of all forms of labour practices.[357]

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354 Grogan 2008: 1.
355 Brassey 1998: A1:47 states that in 1985 800 new cases were launched and in 1986 the number nearly trebled.
356 Le Roux 1987: 197.
357 Grogan 2008: 7.

5. 1981-1993

Nel *et al* make the following statement: "South Africa's major employment relations problems during the period 1948 to 1979 were created by the promulgation of the Black Labour Relations Regulation Act No. 48 of 1953 and the Industrial Conciliation Act No. 28 of 1956. These Acts embodied the racial policies of the then government."

A summary of the most important legislation enacted (mainly due to the fact that the then Labour Relations Act was applicable to the private sector only, thereby excluding many employees[358]) is as follows:[359]

- In 1982 the Intimidation Act[360] was enacted in terms of which the range of coercive acts for which strikers could be prosecuted, was extended.
- A separate Basic Conditions of Employment Act[361] laid down minimum conditions of service with which all employers in the private sector were bound to comply with[362] and laid down principles regarding the manner of payment of employees, working hours and leave (annual, maternity and sick leave).[363] Agricultural and domestic workers were excluded from this and were only included in 1993.
- The Machinery and Occupational Safety Act[364] provided provisions for the maintenance of occupational safety.
- The Agricultural Labour Act[365] brought the agricultural sector under the jurisdiction of the Agricultural Labour Court.
- The Public Service Relations Act[366] and the Education Labour Relations Act[367] provided regulative measures for the public service and the educational sector.

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358 Although many employees were included under new enactments, domestic workers, teachers at private schools and lecturers at tertiary educational institutions were still excluded. See Du Plessis & Fouche 2006: 199 in this regard.

359 Schaeffer 1975:3-10 provided a useful summary of the basic provisions contained in these legislation.

360 Intimidation Act 72/1982.

361 Basic Conditions of Employment Act 3/1983.

362 Grogan 2009: 4.

363 Brassey 1998: A1:50.

364 Machinery and Occupational Safety Act 6/1983. Brassey 1998 A1:50 states that although many shortcomings were addressed by the new Act (e.g. demanding from employers to take more comprehensive steps in ensuring the health and safety in the workplace), the one ultimate failure proved to be the failure of acknowledging the employee's responsibility in the process.

365 Agricultural Labour Act 147/1993.

The National Union of Mineworkers (NUM) was formed by the Council of Unions of SA in August 1982.[368] NUM formed the Federation of SA Trade Unions (FOSATU) and in 1985, FOSATU regrouped as the Congress of SA Trade Unions (COSATU).

The Mines and Works Act Statutory was amended in 1987 and job reservation for white employees was scrapped.[369]

COSATU fought broader political battles in the interest of the working class. Government proposed some changes to legislation and COSATU orchestrated the June 1988 stayaway.[370] Despite of negotiations with all the major unions, government proceeded with the changes (controversial and not-so-controversial)[371] in September 1988. The changes made it easier for racially exclusive unions to register, imposed further restrictions on strikes and extended the liability of unions in the event of strikes. The 1988-definition of an unfair labour practice[372] dealt with fourteen specific labour practices that were regarded as unfair by the Industrial Court since 1980 and also curtailed the court's power to review individual dismissals and retrenchment. The definition read as follows:

> "unfair labour practice means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee, and shall include the following:
>
> (a) The dismissal, by reason of any disciplinary action against one or more employees, without a valid and fair reason and not in compliance with a fair procedure: Provided that the following shall not be regarded as an unfair labour practice, namely:
>
> (i) The dismissal of an employee during the first six months of his employment with a particular employer or during such shorter period

366 Public Service Labour Relations Act 105/1994.
367 Education Labour Relations Act 146/1993.
368 Brassey 1998: A1:51. Also see http://www.saha.org.za/news/2010/May/may_day (3 March 2011).
369 Mines and Works Amendment Act 83/1987.
370 Brassey 1998: A1:51.
371 Brassey 1998: A1:51 fn 6.
372 The third definition of an unfair labour practice since its introduction in 1979.

as may have been agreed upon: Provided that such dismissal does not take place without compliance with a fair procedure;

(ii) the dismissal of an employee where an employer fails to hold a hearing or a disciplinary enquiry and the industrial court thereafter decides that it could not reasonably have been expected of an employer to hold such a hearing or enquiry;

(iii) the dismissal of an employee where an employer fails to hold a hearing or a disciplinary enquiry and the industrial court thereafter decides that such employee was granted a fair opportunity to state his case and a hearing or enquiry would in the opinion of the court not have had a different effect on the dismissal;

(iv) any dismissal which takes place after substantial compliance with the terms and conditions of an agreement relevant to the dismissal; or

(v) the selective re-employment of dismissed employees providing such re-employment takes place in accordance with fair criteria and not on the ground of an employee's trade union activities;

(b) the termination of the employment of an employee on grounds other than disciplinary action, unless –

(i) such termination of employment takes place during the first six months of such employee's employment with a particular employer or during such period as may have been agreed upon, and in accordance with any applicable agreement, wage regulating measure or contract of service; or

(ii) (aa) prior notice of such termination of employment in accordance with any applicable agreement, wage regulating measure or contract of service, has been giver either to the employee, or if such employee is represented by a trade union or body which is recognized by the employer as representing the employees or any group of them, to such trade union, body or group; and

(bb) prior consultation in regard to such termination of employment took place with either such employee or where the employee is

represented by a trade union or body recognized by the employer as representing the employees or any group of them, with such trade union, body or group; and

(cc) such termination of employment takes place in compliance with the terms of an agreement or contract of service, regulating the termination of employment of the employee whose employment is terminated; and

(dd) such termination of employment takes place in a case where the number of employees in the employment of an employer is to be reduced, according to a reasonable criteria with regard to the selection of such employees, including, but not limited to, the ability, capacity, productivity and conduct of those employees and the operational requirements and needs of the undertaking, industry, trade or occupation of the employer;

(c) the unfair unilateral suspension of an employee or employees;

(d) the unfair unilateral amendment of the terms of employment of an employee or employees, except to give effect to any relevant law or wage regulating measure;

(e) the use of unconstitutional, misleading or unfair methods of recruiting members by any trade union, employers' organization, federation, member, office-bearer or official of any trade union, employers' organization or federation: Provided that the refusal of a trade union in accordance with the provisions of such trade union's constitution to admit an employee as a member, shall not constitute an unfair labour practice;

(f) the refusal or failure by any trade union, employer's organization, federation, member, office-bearer or official of any trade union, employer's organization or federation to comply with any provision of this Act;

(g) any act whereby an employee or employer is intimidated to agree or not to agree to any action which affects the relationship between an employer and employee;

(h) the incitement to, support of, participation in or furtherance of any boycott of any product or service by any trade union, federation, office-bearer or official of such trade union or federation;

(i) the unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed: Provided that any action in compliance with any law or wage regulating measure shall not be regarded as an unfair labour practice;

(j) subject to the provisions of this Act, the direct or indirect interference with the right of employees to associate or not to associate, by any other employee, any trade union, employer, employer's organization, federation or members, office-bearers or officials of that trade union, employer, employer's organization or federation, including, but not limited to, the prevention of any employer by a trade union, a trade union federation, office-bearers or members of those bodies to liaise or negotiate with employees employed by that employer who are not represented by such trade union or federation;

(k) the failure or refusal by an employer, employee, trade union or employers' organization, to comply with an agreement;

(l) any strike, lock-out or stoppage of work, if the employer is not directly involved in the dispute which gives rise to the strike, lock-out or stoppage of work;

(m) any strike, lock-out or stoppage of work in respect of a dispute between an employer and employee which dispute is the same or virtually the same as a dispute between such employer an employee which gave rise to a strike, lock-out or stoppage of work during the previous 12 months;

(n) any strike, lock-out or stoppage of work in contravention of section 65;

(o) any other labour practice or change in any labour practice which has or may have the effect that –

    (i) any employee's or class of employee employment opportunity or work security is or may be unfairly prejudiced or unfairly jeopardized thereby;

(ii) the business of any employer or class of employer is or may unfairly be affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected;

(v) any employee is dismissed or otherwise unfairly prejudiced in his conditions of service by an employer solely or principally on the grounds of any compulsory service or training performed or undergone or to be performed or undergone by such employee in terms of the Defence Act, 1957 (Act No. 44 of 1957);"[373]

Landman states that the 1988-definition was introduced because the 1980-definition was experienced by government as too liberal.[374] Van Jaarsveld *et al* criticize the 1988-definition in the light of the omnibus-clause found in paragraph (o).[375] Government defended the new 1988-definition by holding that it was merely the product of everything that was regarded as unfair labour practices by the Industrial Court up until then. It is, however, respectfully submitted that there is agreement with Landman and Van Jaarsveld: the 1988-definition, although much more detailed, limited the protection afforded by the original idea behind the notion of unfair labour practices, in an overwhelming manner. The 1988-definition, which in fact contributed to oppression[376]

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373 Labour Relations Amendment Act 83/1988:section 1(h).

374 Landman 2004:806-807.

375 Van Jaarsveld and Fourie 1995:par 402 as well as Van Jaarsveld ea 2001b:par 685. They also state that this omnibus-clause corresponded mainly with the 1980 definition.

376 Weissman 1985:151-155 and 162. On the date of publication (Spring 1985), Weissman was a staff consultant to the American House Foreign Affairs Subcommittee on Africa and visited South Africa in 1985 as part of a House Foreign Affairs Committee staff study mission. The purpose of the study mission was to compile a report for the American government which had to decide whether the USA was also going to impose sanctions on South Africa. Weissman published an unofficial report containing his own views after meeting and interviewing several South Africans. (Amongst others were Herman Gija (political activist), Wilson Fanti (Chairman of the Mgwali Residents Association), Leonard "Skates" Sikhakhane (Union General Secretary), Trevor Manuel (Housing activist), Willie Breytenbach (Secretary of the Special Cabinet Committee on Black Constitutional Development), Bishop Desmond Tutu (Secretary General of the South African Council of Churches), Ntatho Motlana (Soweto Civic Association leader), JJ Cloete (Group economist for Barclays Bank) and Commodore Jacobis de Beer (Director of departmental strategy of the South African Defense Force). Much evidence of oppression of black South Africans was given during these meetings/interviews: Detention of any person who appeared to be a threat to the SA government; Forced relocations of black South Africans to rural areas, squatter settlements which were located a safe distance from city

and the limitation of black employees' right to fair labour practices[377], was the government's reaction to the recent labour unrest and its fear of liberalising the apartheid-ideology.

Ignorance of the union's objections to the 1988-amendments was the main cause of a three-day stayaway in June 1989 and a further stayaway on 6 and 7 September 1989.[378]

Due to objections by COSATU and others in 1990[379] as well as the conclusion of the Laboria Minute on 2 February 1990[380], South Africa reverted back to the 1980-definition of an unfair labour practice after an accord was entered into with COSATU, NACTU and SACCOLA.[381] The final version of the definition of an unfair labour practice of the 1956-LRA read as follows:[382]

> "'unfair labour practice' means any act or omission, other than a strike or lock-out, which has or may have the effect that-
>
> (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby;
>
> (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
>
> (iii) labour unrest is or may be created or promoted thereby;

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centers and independent black homelands; Prohibition of public meetings by black people; Denial of any aid with drought relief programmes; Arrests of black people for violations of the pass laws.

377 Weissman 1985:155-.It is described how American companies, which operated in South Africa, were bound by the Sullivan Principles of Fair Employment. The Sullivan Principles made provision for desegregated facilities, equal and fair employment, increased training for blacks and improvement in the quality of life of employees outside the workplace. Evidence was provided to prove the non-implementation of these principles: Black employees were prohibited to participate in collective bargaining, did not enjoy a right to fair labour practices and did not have any recourse to a political process.

378 Brassey 1998: A1:51 fn 7. More than 3 000 000 employees participated in these stayaways and South Africa had lost more man-days in 1990 due to strike action than ever before.

379 Grogan 2008:7. These objections were mainly based on the fact that the unions were of the opinion that the 1988-definition restricted their new-found rights.

380 This being the day when the government committed itself to a transition of power.

381 Van Jaarsveld and Van Eck 2006:136 and also Van Jaarsveld and Fourie 1995:par 403.

382 1956-LRA:section 1(1) as amended by the Labour Relations Amendment Act 9/1991: section 1(a) (as contained in GN 741 *Government Gazette* 1991:310(13145).

(iv) the labour relationship between employer and employee is or may be detrimentally affected thereby."

Section 1(4) was also added to the 1956-LRA:

> "The definition of 'unfair labour practice' referred to in subsection (1), shall not be interpreted either to include or exclude a labour practice which in terms of the said definition is an unfair labour practice, merely because it was or was not an unfair labour practice, as the case may be, in terms of the definition of 'unfair labour practice', which definition was substituted by section (1) of the Labour Relations Amendment Act, 1991: Provided that a strike or lock-out shall not be regarded as an unfair labour practice".[383]

According to Van Jaarsveld *et al* the 1991-definition of the 1956-LRA limited unfair labour practices to the following three cases:[384]

a) acts or omissions prejudicing employees in unfair manners;
b) acts or omissions prejudicing the business of employers in unfair manners; and
c) acts or omissions prejudicing or disrupting the employment relationship.

COSATU was still not satisfied with the 1991 amendments and lodged a complaint with the ILO. A Fact Finding and Conciliation Commission was appointed and, after being converted to a general commission of enquiry into South African industrial relations law, issued a comprehensive set of recommendations in 1992 that were to play a major part in the development and drafting of the 1995-LRA.[385]

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383 Labour Relations Amendment Act 9/1991:section 1(b). The Act therefore provided that the 1991-definition of an unfair labour practice in its application should disregard the 1988-definition. The consequence of this was that the unfair labour practices listed in the 1988-definition would not necessarily constitute unfair labour practices in terms of the 1991-definition.

384 Van Jaarsveld ea 2001a:13-8 and also Van Jaarsveld and Fourie 1995:par 403.

385 Brassey 1998:A1:52.

6. Interim Constitution

Dendy[386] quotes Etienne Mureinik in order to introduce the (interim) Constitution to South Africa:

> "…a bridge away from a culture of authority…to a culture of justification – a culture in which every exercise of power is expected to be justified".

The principle of fairness, as introduced by the Wiehahn Commission, was carried into the new democratic dispensation. The interim Constitution introduced a new era with specific labour rights entrenched in it: the right to fair labour practices;[387] the right to form and join trade unions and employer organisations;[388] the right to collective bargaining;[389] the right to strike for purposes of collective bargaining;[390] the right to lock-outs;[391] the right to recognition of union security arrangements contained in collective agreements; the right to freedom of economic activity;[392] the right to property;[393] the right to protection against abuse and exploitation;[394] insulation against constitutional scrutiny;[395] the right to equality;[396] the right to dignity;[397] the right to freedom of association;[398] the right to privacy;[399] the right to freedom of expression;[400] the right of access to information.[401] One of the most profound developments, however, was the fact that, for the first time in South Africa, any Act of Parliament was subject to judicial review.[402]

386 Dendy 2009:7.
387 Interim Constitution:section 27(1). Cheadle 1997:212 suggests that this right was included to secure the support of the public service for the new constitutional dispensation.
388 Interim Constitution:section 27(2).
389 Interim Constitution:section 27(3).
390 Interim Constitution:section 27(4).
391 Interim Constitution:section 27(5).
392 Interim Constitution:section 26.
393 Interim Constitution:section 28.
394 Interim Constitution:section 12 & 30.
395 Interim Constitution:section 33(5).
396 Interim Constitution:section 8.
397 Interim Constitution:section 10.
398 Interim Constitution:section 17.
399 Interim Constitution:section 13.
400 Interim Constitution:section 15.
401 Interim Constitution:section 23.
402 Brassey 1998:A1:52. This means that parliamentary sovereignty officially came to an end.

The fair labour practices, as upheld by the Industrial Court, had to be reconciled with these. It meant that the concept of unfair labour practices, as laid down by the Industrial Court, had to be interpreted in accordance with the Bill of Rights of the interim Constitution.[403] "The generic entitlement to 'fairness', however, was not abolished but continued to provide a basis for upholding labour rights not specifically contained in either the previous LRA or the Bill of Rights."[404]

Section 27(1) (as opposed to section 23(1) of the Constitution) provided:

> "(1) Every person shall have the right to fair labour practices."

Every person referred to every employee, employer or any other entity involved in labour relations.[405]

Section 26 (as opposed to section 22 of the Constitution) provided that:

> "(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.[406]
>
> (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality."

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403 Du Toit and Potgieter 2007:par 4B15.

404 Du Toit and Potgieter 2007:par 4B15. And this was mainly the reason for the inclusion of the right to fair labour practices. According to Cooper (in Woolman 2009 : 53-10) this general right to fair labour practices was included to ensure public sector employees access to the unfair labour practice law on dismissals developed under the 1956-LRA.

405 Van Jaarsveld and Van Eck 1995:317.

406 Du Toit and Potgieter 2007:par 4B3 discuss the narrowing down by the Constitution of the protection afforded by the Interim Constitution. This narrowing down mainly revolves around the fact that not every person can claim protection of this right anymore but only citizens and then only natural persons.

With the enactment of the Interim Constitution, and more specifically section 27(1) thereof, the unfair labour practice jurisdiction was not limited to the Industrial Court anymore.[407]

7. The Occupational Health and Safety Act 85 of 1993

In terms of both the common law as well as the right to fair labour practices, employees also have a right to healthy and safe working conditions.

This Act imposes certain duties on employers including the general duty to provide a safe and healthy working environment, to provide the necessary supervision, to provide protective clothing, to provide training and to report incidents in which people are hurt or die to a health and safety inspector.

Duties are also imposed upon employees, e.g. the duty to obey instructions, to report unsafe or unhealthy conditions and the duty not to interfere with equipment provided for the maintenance of safety.

Health and safety representatives must be appointed in certain circumstances. These representatives have many functions in the interest of health and safety and also establish a link between the employer and the employees. If there are more than one representative, health and safety committees must also be established.

Health and safety inspectors have certain general powers like the power to enter a workplace to conduct an inspection, certain special powers like barricading of a dangerous area and certain powers pertaining to incidents at work like investigating the incident.

[407] Van Jaarsveld and Fourie 1995:par 403 fn 4.

8. The Compensation for Occupational Injuries and Diseases Act 130 of 1993

In terms of the right to fair labour practices employees have a right to be compensated for injuries sustained or diseases contracted in the performance of their duties.

Compensation can only be claimed if the injured was employed in terms of a contract of employment, if the accident happened suddenly and if the accident happened within the scope of the injured employee's employment.

9. Labour Relations Act 66 of 1995

The transition from apartheid to democracy may be described as a miracle but unfortunately the socio-economic damage of the past resulted in long-term consequences: Workplaces and labour relations were affected by factors like the racial divisions between skilled and unskilled workers, racial wage gaps, poorly educated workers, dictatorial management styles, lack of protection for vulnerable workers and widespread poverty.[408] These socio-economic problems, *inter alia*, necessitated a reform of labour legislation.

Due to the multiplicity of laws at that stage, the lengthy and expensive dispute resolution procedures, the obligations incurred from ratifying certain core conventions of the ILO and a number of other inadequacies, the Minister of Labour introduced a five-year plan for the revision of labour legislation.[409] The 1956-LRA was the first to be reviewed. In the light thereof the Minister appointed a task team, chaired by Professor Halton Cheadle,[410] on 8 August 1994 to draft a new Labour Relations Bill.[411] Du Plessis and

[408] Finnemore 2006:36.
[409] Du Plessis & Fouche 2006: 199; Dupper 2004:21. Legislation had to be brought in line with ILO Conventions and the interim Constitution.
[410] Van Niekerk *et al* 2008: 12.

Fouche provide a summary of the process followed until the Labour Relations Bill was adopted as the new Labour Relations Act:[412] The draft Bill and accompanying explanatory memorandum were tabled before NEDLAC, the Public Service Bargaining Council and the Education Labour Relations Council and were consequently published in February 1995.[413] NEDLAC's report was tabled during June 1995. NEDLAC proposed the adoption of the Bill, subject to the necessary amendments.[414] The Bill was finally adopted by Parliament on 13 September 1995. On 11 November 1996 the 1995-LRA came into operation.[415]

The 1995-LRA is a reflection of innovations which had been developed by more enlightened employers and trade unions by means of private agreements, principles evolved by the labour courts under the previous 1956-LRA and an attempt to settle matters that have been left moot.[416] The 1995-LRA was drafted against the interim Constitution. It was also designed to acknowledge and realise the principles of the Reconstruction and Development Programme of government.[417] Furthermore, one of the primary objectives of the 1995-LRA is as follows:

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –
>
> (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;…"[418]

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411 Du Plessis & Fouche 2006: 200. This task team was also assisted by the International Labour Organisation and specialist practitioners. Also see Van Jaarsveld ea 2001a:1-5 in this regard.

412 Du Plessis & Fouche 2006: 200.

413 This was published in the *Government Gazette* No. 16292 on 10 March 1995.

414 The proposed amendments reflected agreements between negotiating parties, public submissions, the Public Service Bargaining Council's submissions and the Education Labour Relations Council's submissions.

415 Van Niekerk *et al* 2008:13.

416 Grogan 2009:7.

417 Du Plessis & Fouche 2006:200. This fact may also serve as support of ensuring compliance with the Constitution.

418 1995-LRA:section 1(a). This is in accordance with the draft Bill and accompanying explanatory memorandum. See GN 97 *Government Gazette* 1995:356(16259):section 2(a). Lagrange and Mosime 1996:71 state that the 1995-LRA will indeed assist employees and their unions to eliminate unfair labour practices and to democratise the workplace.

Bearing the labour unrest of the previous era in mind, it logically followed that much emphasis was placed on dispute resolution. The bargaining council, as did the industrial council in terms of the 1956-LRA, remained the cornerstone of the Act.[419] Workplace forums, designed to assist in the process of joint problem-solving, could also be established at the instance of a representative union and when complying with all the necessary requirements.[420] All disputes of right had to be referred to bargaining councils, and in the absence thereof, to the Commission for Conciliation Mediation and Arbitration (CCMA).

Most of the fair labour practices laid down by the Industrial Court were codified into statutory rights.[421] Provision was even maid for specific unfair labour practices.[422] Du Toit *et al* provide a summary of this codification of unfair labour practices:[423]

a) Unfair dismissals were codified in chapter 8 of the 1995-LRA.
b) Unfair conduct relating to freedom of association was codified in chapter 2 of the 1995-LRA.
c) Unfair practices regarding organisational rights were codified in chapter 3 of the 1995-LRA.
d) Unilateral changes to terms and conditions of employment were codified in section 64(4) of the 1995-LRA.
e) Four other residual unfair labour practices were codified in Schedule 7 to the 1995-LRA.

The 1995-LRA, although regulating some individual relations, was mainly enacted to deal with collective relations. The initial regulation of unfair labour practices was not guaranteed as a general right to fair labour practices.[424] Instead “interim-protection” was

419 Brassey 1998:A1: 53.
420 1995-LRA:chap 5.
421 Du Toit & Potgieter 2007:par 4B15. This was mainly in an effort to give effect to the right to fair labour practices.
422 Section 186(2) of the LRA which deals with specific forms of unfair labour practices.
423 Du Toit *et al* 2006:482. Also see Du Plessis and Fouche 2006:301. It therefore means that these separately regulated aspects are still considered to be labour practices and they can consequently also be regarded as unfair labour practices BUT they are not termed as unfair labour practices anymore.
424 This was confirmed in *Nawa v Department of Trade & Industry* 1998 7 BLLR 701 LC.

afforded to employees against any unfair conduct arising during the existence of the employment contract, except for unfair dismissals,[425] known as residual unfair labour practices.[426] Interim protection was afforded because it was believed that legislation dealing with unfair labour practices was going to be introduced on a later stage.[427] The then Item 2 of Schedule 7 read as follows:[428]

> "(2)(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving:
>
> (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
>
> (b) the unfair conduct of the employer relating to promotion, demotion or training of an employee or relating to the provision of benefits to an employee;
>
> (c) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;
>
> (d) the failure to reinstate or re-employ a former employee in terms of any agreement.
>
> 2(2) For the purposes of sub-item (1)(a):
>
> (a) "employee" includes an applicant for employment;
>
> (b) an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve adequate protection and advancement of persons or groups or

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425 Unfair dismissals were regulated separately. Van Jaarsveld ea (2001a:13-4) and Van Jaarsveld ea 2001b:par 688 explains that the ministerial task team scaled down the unfair labour practice jurisdiction and recommended that it should apply as an interim measure only to discriminatory practices arising during the existence of the employment contract.[425] Refer to GN 97 *Government Gazette* 1995:356(16259).

426 Van Jaarsveld ea 2001a:13-4.

427 Fouche 2003:ULP-5.

428 1995-LRA:Sch 7 Item 2. This was in fact the fifth definition of an unfair labour practice.

categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms; and

(c) any discrimination based on an inherent requirement of the particular job does not constitute unfair discrimination."

With the advent of the 1998-EEA, the provisions pertaining to unfair discrimination was removed from Item 2 and included in the 1998-EEA.[429] On 1 August 2002 the 1995-LRA was amended as the "residual unfair labour practices" were removed from Schedule 7 and were placed in Chapter 8 of the Act[430] while paragraph (a) was moved to the 1998-EEA.[431]

The current regulation on unfair labour practices has done away with the general definition of an unfair labour practice.[432] Instead specific rules and rights have replaced it.[433] The provisions of unfair labour practices are contained in section 186(2) of the 1995-LRA:[434]

> "'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving-
>
> (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
>
> (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
>
> (c) a failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement; and

[429] Fouche 2005:ULP-5.
[430] Du Plessis & Fouche 2006: 301.
[431] Grogan 2010: 92.
[432] Du Plessis & Fouche 2006: 301. The new concept refers to specific practices and does not include labour practices in general as under the 1956-LRA.
[433] Grogan 2010: 6. If any infringement of these rights occurs it may be referred either to the CCMA, accredited bargaining councils or the Labour Court.
[434] The current, and sixth, definition of an unfair labour practice.

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act."

With the restoration of the regulation of unfair labour practices to legislation itself, the name "unfair labour practice" (instead of "residual unfair labour practices") was restored as well. This was probably due to the inspiration of the United States unfair labour practice jurisprudence.[435] Landman describes the decision to retain the name as "ill advised".[436] There is an immense and undoubted agreement with Landman in this regard.[437]

These specific unfair labour practices can be committed by an employer only.[438] Although the opinion was raised that the specific language of section 186(2) creates the impression of an exhaustive list of unfair labour practices,[439] Grogan states that the unfair labour practices listed in section 186(2) are not exhaustive. The Labour Court stated that there may be a remainder of unfair conduct which may be covered by section 23(1) of the Constitution.[440] Unfair transfers and bad faith bargaining, for example, have been recognised as unfair labour practices under the 1956-LRA.[441] Grogan also states that when an employee complains of an unfair labour practice not listed in section 186(2), relief can be sought from a High Court in terms of a contractual right or the Constitutional Court in terms of the general right to fair labour practices.[442] The other "unfair labour practices"[443] are still regulated in separate provisions and/or legislation. It is also of importance to be reminded that the abovementioned regulation of unfair labour practices in terms of the 1995-LRA must be distinguished from the

435 Reichman and Mureinik 1980:1.
436 Landman 2004:807.
437 Please refer to Chapter 7 of the current study for a full discussion on this.
438 Du Plessis & Fouche 2006:301.
439 Fouche 2003:ULP-7.
440 *Govender v Dennis Port (Pty) Ltd* 2005 26 ILJ 2239 CCMA.
441 See *Simela v MEC for Education, Province of the Eastern Cape* 2001 9 BLLR 1085 LC.
442 Grogan 2008:51.
443 E.g. unfair discrimination, unfair dismissals etcetera.

regulation of "[un]fair labour practices in terms of the Constitution".[444] The regulation in terms of the 1995-LRA is a mere "extension of the constitutional right to fair labour practices".[445]

There is, however, one shortcoming: the term fairness was never really specifically addressed and also do not feature as one of the objectives of the 1995-LRA.[446] Unless the concept of fairness in fair labour practices is not addressed in the 1995-LRA and other legislation, this will in effect still leave room for juridification as it is the function of the Labour Courts to interpret fairness in respect of specific disputes.[447] It is for this reason and also because of decisions of the Labour Courts in recent case law that there is a respectful disagreement with Du Toit and Potgieter when they state that we are set in "a labour dispensation governed by black-letter rights within a constitutional framework that would maximise legal certainty and delimit the scope for judicial notions of equity".[448] Du Toit and Potgieter further aims to strengthen said argument by mentioning that the discretion left to the courts, is firstly limited to matters of mutual interest between employer and employee only and, secondly, limited by a statutory system designed to balance the contending views of fairness.[449] Again it is stated that recent case law has proved that this discretion sometimes has far-reaching implications leaving much room for uncertainty.[450] The fact of the matter is that "the criterion for deciding labour disputes was [is] no longer the court's interpretation of fairness but the letter and spirit of the LRA, the Bill of Rights and international law".[451]

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444 Van Jaarsveld ea 2001a:13-5.
445 Jordaan 2009:194. A more detailed discussion on this will follow in par 15 hereunder.
446 Du Toit & Potgieter 2007:4B15 and Van Jaarsveld ea 2001b:par 689.
447 See *Fedlife Assurance Ltd v Wolfaardt*:par 4 (32) Froneman AJA (in the dissenting view): "In my view the Constitution has a material impact on that particular conceptual distinction between the proper domain of contract and that of statute, namely that the former has little to do with fairness, whilst only the latter has…".
448 Du Toit & Potgieter 2007:par 4B15.
449 Du Toit & Potgieter 2007:par 4B15.
450 See *Discovery Health Ltd v CCMA & others* 2008 29 ILJ 1480 LC where an illegal immigrant was protected based on this principle of fairness.
451 Du Toit and Potgieter 2007:par 4B1.

10. The Constitution

The Constitution was certified and came into force on 4 February 1997.[452] The Constitution was originally entitled the "Constitution of the Republic of South Africa Act 108 of 1996", but has since 2005 been simply referred to as the "Constitution of the Republic of South Africa, 1996".[453] The Constitution is the supreme law of South Africa. This supremacy has a dualistic impact on labour law. Firstly, all (labour) legislation must be interpreted in accordance with the Constitution in order to uphold the values of the Constitution. Secondly, provision is made in the bill of rights for general constitutional rights[454] but also for specific labour and employment rights[455] thereby preventing the legislature "from unreasonably encroaching on the individual rights entrenched in Chapter 2" of the Constitution.[456]

The principle of fairness is addressed in section 23(1) of the Constitution where everyone is afforded the right to fair labour practices. After the enactment of the interim Constitution, the SA Law Commission was tasked with an investigation into group – and human rights in order to provide assistance with the drafting of the final Constitution. In this report the Commission pleaded for the inclusion of the right to fair labour practices.[457] According to Du Toit and Potgieter, section 23(1) is important for three reasons:[458]

a) **It serves as a guide to the interpretation of labour legislation.** In terms of section 39(2)[459] all legislation must be interpreted to "promote the spirit, purport and objects of the Bill of Rights". Grogan gives meaning to section 39(2) by

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452 Brassey 1998:A1:53.
453 Humby 2009:17. The citation was amended by the Citation of Constitutional Laws Act 5/2005.
454 E.g. the right to dignity, the right not to be subjected to forced labour, the right to privacy, the right to freedom of expression, the right to associate and peacefully demonstrate etc. Grogan in *Employment Rights* on p 4 describes these rights as "rights of employees *qua* employees".
455 E.g. the right to fair labour practices as contained in section 23(1).
456 Grogan 2010: 3.
457 Project 58 *SA Law Commission* 1994:par 5.50.
458 Du Toit & Potgieter 2007: par 4B16. (Only with reference to the text printed in bold. The rest of the text serves as commentary thereon.)
459 *The Constitution*: section 39(2).

explaining that the Constitution should serve as basis when interpreting other legislation.[460]

b) **It serves as a basis for actions not supported by legislation.** It was held in *SA National Defence Union v Minister of Defense & others*[461] that where legislation was enacted to give effect to a constitutional right, that legislation must form the basis for an action to claim protection in terms of that right. In these circumstances a constitutional right can only be relied on directly if it is simultaneously alleged to be inadequate to protect that right. And it is because of this reason that section 23(1) is seldom raised as a basis for an action regarding fairness. Many a time there is already sufficient protection in terms of another statute enacted to give effect to section 23(1).

c) **It serves as a basis for disputes involving people excluded from the protection of the LRA.** Again Grogan sheds more light on the matter:[462] In the event where a person is suffering from an alleged unfair labour practice and that person is covered by the Labour Relations Act or the Employment Equity Act, the person must utilize the remedies under said legislation (unless the constitutionality of the legislation is also questioned). Where someone does not enjoy the protection of mentioned legislation, the High Court can be approached with a constitutional or common-law action.

Other constitutional rights (except for section 23(1)) that may have an impact on the fairness of the employment situation are as follows:

- **The regulation of labour relations**[463] Employees have the right to form and join a trade union, to participate in the activities and programmes of a trade union and to strike.[464] Employers have a corresponding right to form and join an employers'

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460 Grogan 2010: 5. "Where legislation is ambiguous or unclear, a construction must be chosen or given which upholds the Bill of Rights, rather than undermines it.

461 *SA National Defence Union v Minister of Defense & others* (2007) 28 ILJ 1909 (CC): 51.

462 Grogan 2010: 4.

463 Constitution:section 23(2)-(6)

464 Du Toit and Potgieter 2007:par 4B2 emphasize the fact that, in contrast with the Interim Constitution, it is not only a right to join a union but also to participate in its activities and programmes. The Interim Constitution also confined the right to strike to the purposes of collective bargaining but this right is now unqualified.

organisation and to participate in the activities and programmes of an employers' organisation. Trade unions and every employers' organisations have the right to determine its own administration, programmes and activities, to organise and to form and join a federation.[465] Every trade union, employers' organisation and employer has the right to engage in collective bargaining.[466] National legislation may recognise union security arrangements contained in collective agreements. (There is no explicit mention of a constitutional right of employers to have recourse to a lock-out and also not of the right to picket.)[467]

- **Freedom of economic activity**[468] Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law. In contrast with section 26 of the Interim Constitution, this right was narrowed down to only provide protection to citizens and natural persons.[469]
- **The right to property**[470] No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Rights of employers associated with property ownership remain constitutionally entrenched.
- **Protection against abuse and exploitation**[471] No one may be subjected to slavery, servitude or forced labour. Children must be protected from exploitative labour practices and may not be required or permitted to perform work or provide services that are inappropriate for a person of that child's age or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.[472]

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[465] Trade unions acquired the right to deduct agency wages for the first time in 1966. See GN 1623 *Government Gazette* 1966:22(1567).

[466] Du Toit and Potgieter 2007:par 4B2 indicate that, in contrast with the Interim Constitution, this right is not only granted to employers and employees only but also to trade unions and employers' organisations.

[467] Du Toit and Potgieter 2007:par 4B2.

[468] Constitution:section 22.

[469] Du Toit and Potgieter 2007:par 4B3.

[470] Constitution:section 25.

[471] Constitution:section 13 and 28(1)(e) and (f).

[472] Du Toit and Potgieter 2007:par 4B5. This is similar to the provisions contained in the Interim Constitution, although more detailed.

- **The right to equality**[473] This right was contained in section 8 of the Interim Constitution and was extended in the Constitution to include grounds of pregnancy, marital status and birth as possible grounds of discrimination. The right to equality is currently also regulated (and extended) in the 1998-EEA. A welcome addition to the Constitution, however, was the fact that discrimination was also prohibited on a horizontal level, thus making it very applicable in an employer-employee context.[474] Affirmative action is regulated in order to give effect to substantive equality. The right to equality does not only refer to a right to be treated equally but denotes the right to equal treatment with other individuals in similar circumstances.[475]
- **The right to dignity**[476] Everyone has inherent dignity and the right to have their dignity respected and protected. This constitutional right is in support of the prohibition of unfair discrimination. Interestingly enough, Du Toit and Potgieter indicate that this constitutional right not only re-affirms the common law duty of an employee to behave in a dignified manner towards the employer but now also requires employers to treat employees with an appropriate degree of respect.[477]
- **The right to freedom of association**[478] Everyone has the right to freedom of association. Although both employers and employees enjoy this freedom, this freedom is not identical for these two parties. This is because of the fact that employers do not need as extensive protection in this regard and, due to the substantive equality principle in our law, employees are likely to be in a better position in this regard.[479]
- **The right to privacy**[480] Everyone has the right to privacy, which includes the right not to have their person or home searched, their property searched, their possessions seized or the privacy of their communications infringed.

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473 Constitution:section 9.
474 Du Toit and Potgieter 2007:par 4B7.
475 Oliver 2006:27.
476 Constitution:section 10.
477 Du Toit and Potgieter 2007:par 4B7.
478 Constitution:section 18.
479 Du Toit and Potgieter 2007:par 4B7.
480 Constitution:section 14.

- **The right to freedom of expression**[481] Everyone has the right to freedom of expression, which includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity and academic freedom and freedom of scientific research.
- **The right to access of information**[482] Everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights. This right applies to employees and applicants for employment in both the private and public sectors.[483]
- **The right to assemble, demonstrate, picket and petition**[484] Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. The 1995-LRA regulates the right to picket in great detail.[485]
- **The right to fair administrative action**[486] Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.[487] This right is especially applicable in the case of dismissal, promotion and change in working conditions of public servants as well as to decisions by the Registrar of Labour Relations.
- **The right to life**[488] Everyone's right to life should not only be protected against other individuals or the state but also against a general system of law. Reasonable safety in the workplace is but one example of the impact of this right on the employer-employee relationship.[489]
- **The right to freedom of religion, belief and opinion**[490] Employees may not be adversely treated on the basis of their religion, belief and opinions if these does not have a negative impact on their employment.

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481 Constitution:section 16.
482 Constitution:section 32.
483 Du Toit and Potgieter 2007:par 4B7. This constitutional right is regulated more extensively by the Promotion of Access to Information Act 2/2000.
484 Constitution:section 17.
485 1995-LRA:section 69.
486 Constitution:section 33.
487 This right is regulated in much more detail in the Promotion of Administrative Justice Act 3/2000.
488 Constitution:section 11.
489 Olivier 2006:30.
490 Constitution:section 15.

11. Basic Conditions of Employment Act 75 of 1997

The right to fair labour practices includes the right to fair working conditions. As discussed earlier, the common law contract of employment was initially regarded as an ordinary commercial contract. Consequently the employer and the employee enjoyed almost limitless contractual freedom which could give rise to possible exploitation of the employee. The initial endless contractual freedom is limited by the 1997-BCEA. The 1997-BCEA's provisions "constitute terms of any contract of employment, except to the extent that any other law or the contract provides for more favourable conditions".[491]

Du Plessis and Fouche introduce the 1997-BCEA as "…of considerable importance for the day-to-day administration of personnel matters since it sets minimum standards for the protection of employees in the absence of other protective measures, such as collective agreements or sectoral determinations".[492]

This Act was adopted by Parliament on 26 November 1997 and came into operation on 1 December 1998. The provisions of the 1997-BCEA will override the contract of employment only if the provisions are more favourable than the latter.[493] The 1997-BCEA also overrides the common law.[494]

The purpose of the Act is contained in section 2 of the Act:

> "The purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are –
>
> (a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution –
>
> (i) by establishing and enforcing basic conditions of employment; and

[491] Grogan 2010:74.
[492] Du Plessis and Fouche 2006:35.
[493] Du Plessis and Fouche 2006:5.
[494] Du Plessis and Fouche 2006:5. On p 35 the learned authors explain this principle: Seeing that the common law viewed the contract of employment as an ordinary commercial contract, parties (employer and employee) were at liberty to agree to almost anything…due to the contractual freedom they enjoyed. It was therefore possible that parties could agree to unfair conditions of employment. The 1997-BCEA, however, overrides the common law and all contracts of employment must comply with the minimum standards and conditions of employment as prescribed by the 1997-BCEA.

(ii) by regulating the variation of basic conditions of employment;…"

Van Jaarsveld *et al* make the following statement: "The concept 'fair labour practices' is extremely subjective, which leaves the government with a wide discretion as to what basic conditions it would legislate for and what not".[495] The 1997-BCEA lays down conditions of employment regarded by the legislature as fundamental and fair.[496] Conditions of employment regulated by the Act include, but are not limited to, aspects of working hours, overtime, leave, work on Sundays and public holidays, termination of employment and maintaining of records by employer.[497]

12. Employment Equity Act 55 of 1998

12.1 Introduction

Already in 1981 the Wiehahn Commission acknowledged anti-discrimination and equality as two main themes underlying fair labour practices.[498] The Commission also pointed out that a general social policy of non-discrimination and equality in the workplace should form part of a vaulting policy reflecting the general day-to-day life of the community.[499] As part of their right to fair labour practices, employees therefore had a right not to be unfairly discriminated against and designated employees may have had the right to be favoured by affirmative action. Discrimination in the workplace was addressed to a very little extent when it was contained in a schedule to the 1995-LRA as part of a "residual unfair labour practice, but with the enactment of the 1998-EEA,

[495] Van Jaarsveld ea 2001a:11-3.
[496] Smit 2009:312.
[497] Grogan 2010:6.
[498] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981:par 4.127.5. Also see par 8.2.1 above. Grogan 2010: 92 also mentions that unfair discrimination may result in an unfair labour practice even though the 1998-EEA does not formally designate unfair discrimination as an unfair labour practice.
[499] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981:par 4.127.6.

much dedication was put into the regulation of discrimination and employment equity in the workplace.[500]

Before the 1998-EEA was promulgated the Industrial Court developed employment equity on a case-by-case basis.[501] It is against this background, as well as section 9[502] of the Constitution, that the 1998-EEA was developed. Section 9 addresses equality before the law, affirmative action to address the inequities of the past and the prohibition of unfair discrimination. The 1998-EEA therefore elaborates more extensively on section 9 and circumscribes the scope for unequal treatment.[503] Although section 9 served as the backdrop in drafting the 1998-EEA, there are three fundamental differences between section 9 and the 1998-EEA:[504]

a) The Constitution's definition of discrimination does not satisfactorily address the ambiguity between differentiation and discrimination. The 1998-EEA incorporated the more exact definition of discrimination contained in the ILO Convention 111/1958.
b) The 1998-EEA does not create any scope for fair discrimination as section 9(5) of the Constitution does. It only allows for discrimination based on inherent requirements of a job and discrimination based on affirmative action.
c) Section 6 of the 1998-EEA provides that "no person" may unfairly discriminate against an employee. Although section 9(4) of the Constitution will also provide protection to an employer in this regard, Du Toit and Potgieter submit that the Promotion of Equality and Prevention of Unfair Discrimination Act[505] together with the 1998-EEA will provide enough coverage in this regard.

500 Landman 2004:807.
501 Du Plessis and Fouche 2006:77. This development by the IC was derived from the 1956-LRA's unfair labour practice jurisprudence.
502 The so-called equality clause.
503 Du Toit and Potgieter 2007:par 4B29. Unfair discrimination is defined in laws of general application (e.g. the Constitution) whereas the 1998-EEA regulates it in respect of the conduct of employers.
504 Du Toit and Potgieter 2007:par 4B29.
505 Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000.

12.2 ILO-standards

The ILO adopted the Discrimination (Employment and Occupation) Convention in 1958.[506] South Africa ratified this convention in March 1997. This Convention imposed a duty on South Africa to declare and follow a national policy aimed at promoting equal opportunities and equal treatment in respect of employment and occupation in order to eliminate any discrimination.[507] In terms of this Convention South Africa also had to outlaw discrimination based on race, colour, sex, religion, political beliefs, ethnic or social origin in training, access to employment and working conditions.

12.3 Content of the 1998-EEA

> "The purpose of this Act is to achieve equity in the workplace by –
>
> (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
>
> (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce."[508]

In the attainment of abovementioned objectives, it is required by the Act that all employers must eliminate unfair discrimination from the workplace. Designated employers must also comply with affirmative action. Furthermore, designated employers must "…take measures to progressively reduce disproportionate income differentials and must report to the Department of Labour on their implementation and progress of

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506 The Discrimination (Employment and Occupation) Convention 111 of 1958.

507 Equality is not defined in any of the ILO's Conventions. The Wiehahn Commission in *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing.* Deel 5. RP27/1981:par 4.127.9 described equality as to be borrowed from the word equity that arises from the Latin term "acquus". The Romans described it with words such as fairness, respect for the fundamental and the kind of conduct that behoves a person's honour and conscience. It was against this background that national standards of fair labour practices had to be developed.

508 1998-EEA:section 2.

employment equity".[509] Chapter 2 of the Act aims to eliminate unfair discrimination from workplaces and chapter 3 promotes affirmative action. Chapter 2 came into operation on 9 August 1999 and the remaining part of the Act took effect on 1 December 1999.[510]

Unfair discrimination is not only prohibited in chapter 2 but remedies are also provided for employees who fall victim to unfair discrimination.[511] Discrimination can be direct or indirect. Discrimination *per se* is not unfair but discrimination on one of the prohibited grounds[512] is unfair.

Chapter 3 provides that designated employers are obliged to apply affirmative action in their workplaces. Affirmative action is a measure in terms of which previously disadvantaged groups may be given preference with appointments and promotions, if all the requirements for the position are being complied with. Requirements include that affirmative action must be applied in terms of an employment equity plan and employee to be favoured must belong to one of the designated groups.

At first glance it may seem as if the EEA contains two contradictory principles: on the one hand chapter 2 prohibits unfair discrimination and on the other hand chapter 3 prescribes designated employers to adopt and enforce affirmative action measures. Grogan submits that the key to this is contained in section 5[513] which obliges all employers to "take steps to promote equal opportunity in any policy or practice".[514] It is submitted that affirmative action, although it may involve some form of discrimination, does not result in unfair discrimination if applied correctly and in accordance with the Act. It is, as a matter of fact, a means to achieve substantive equality.[515]

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509 Du Plessis & Fouche 2006:79.
510 Du Plessis & Fouche 2006:77.
511 Grogan 2009:8.
512 1998-EEA:section 6(1). The prohibited grounds include: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.
513 1998-EEA:section 5.
514 Grogan 2010:8.
515 Du Toit and Potgieter 2007:par 4B29. Substantive equality stands in contrast to mere formal equality. People's different needs and circumstances are taken into account to ensure true equality. Substantive equality ensures the equal enjoyment of all rights (in contrast to formal equality that

13. Skills Development Act 97 of 1998

Skills development dualistically relates to fair labour practices:

- The Wiehahn Commission indicated that the right to fair labour practices may include the right to training and development of the employee.[516]
- The 1998-EEA aims, *inter alia*, to eliminate employment barriers and to create equal employment opportunities by appointing suitable people from the designated groups. It is common knowledge that the designated groups are regarded as specifically vulnerable groups that suffered from unfair discrimination in the past. One of the forms of discrimination suffered from was a lack of access to education and skills. In order to address this form of past unfair discrimination on the one hand, and to attain the aim of promoting suitably qualified people from the designated groups, the 1998-SDA plays a role in ensuring fair labour practices.[517]

The greater part of the 1998-SDA took effect on 2 February 1999 and the remaining part came into operation on 10 September 1999. The 1998-SDA was amended in 2008.[518]

The Act provides for the development of employees' skills. Sector Education and Training Authorities (SETAs) are established for sectors (which are defined in terms of similarity of materials used, processes and technology, products, or services rendered and the organisational structures of trade unions and employers' organisations).[519] A SETA's membership consists of representatives or organised labour, organised employers, relevant government departments and sometimes any interested professional body or bargaining council with jurisdiction in that sector. The SETA must

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merely prohibits unfair discrimination) and requires of employers to take preventative steps to promote equal opportunities. In terms of substantive equality there can't be identical treatment of different circumstances but is differential treatment (affirmative action) sometimes imperative.

516 *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981: par 4.127.5.

517 Grogan 2010: 296.

518 Skills Development Amendment Act 37/2008.

519 Grogan 2009: 9.

then establish learnerships for its sector, must approve workplace skills plans, must allocate grants and must monitor education and training in that sector.[520]

14. The Unemployment Insurance Act 63 of 2001

In terms of the right to fair labour practices employees who have lost their employment through circumstances beyond their control also enjoy protection against the harmful effects of such a loss.

The Act makes provision for an employee who has lost his employment through termination of the contract by the employer, pregnancy, adoption of a child, and illness to claim a certain percentage of his salary until he finds new employment.

15. The Constitution and labour-related legislation[521]

The other critical point that needs mention is the question whether there is any correlation between section 23(1) of the 1996-Constitution (guaranteeing a right to fair labour practices), section 186(2) of the 1995-LRA (providing protection against specific unfair labour practices) and other labour legislation (promoting fair labour practices)?

The Constitution is the supreme law of the country. All law, including labour law, must comply with the Constitution and the rights contained in the Bill of Rights.[522] The Bill of

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520 Grogan 2009: 9.

521 Also refer to chap 4 par 5.1 of this study in this regard.

522 The Constitution:section 241 initially stated that a provision of the 1995-LRA "…remains valid, despite the provisions of the Constitution, until the provision is amended or repealed". Lagrange and Mosime 1996:72-76 warn that this only imply that parties will, for the most part, be confined to the remedies contained in the 1995-LRA. A fundamental right contained in the Constitution which the 1995-LRA appears to limit, cannot be given its full force by arguing that the 1995-LRA unreasonably limits that right. Lagrange and Mosime 1996:73-74 explain this insulation to have been inserted in order to limit

Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. Private employers and – employees are therefore also bound by the Bill of Rights in terms of the horizontal application of the Constitution.[523] In the event where the Constitution finds application to a dispute between an employer and employee, the common law must be applied and developed to the extent that law or legislation does not give effect to that constitutional right. When applying the Constitution, interpreting legislation or developing the common law, the courts must promote the spirit, purport and objects of the Bill of Rights.

15.1 Section 23(1) of the Constitution and section 186(2) of the 1995-LRA

McGregor *et al* provides the following useful comparison between section 23(1) and section 186(2):[524]

Constitution – section 23(1)	**1995-LRA – section 186(2)**
• Wide right. • Protects everyone (also workers who are not employees in terms of the 1995-LRA. • An infringement of the right will be determined with regard to surrounding circumstances.	• Right is limited to the list of actions included in the definition of an unfair labour practice. • Protects employees only against specific actions by employers. • An employee cannot commit an unfair labour practice towards an employer; only an employer can commit an unfair labour practice towards an employee.

the employer's right and recourse to a lock-out. BUT it was held in *In re Certification of the Constitution of the Republic of SA, 1996* 1996 4 SA 744 CC that those clauses which shielded the 1995-LRA from judicial review were not be in compliance with the constitutional principles.

523 The Constitution:section 8(2). The Constitution will apply to disputes between private employers and employees if the constitutional right is deemed to apply to the situation facing the employer or employee.

524 McGregor 2012:77.

Van Jaarsveld and Van Eck indicated that although the 1995-LRA has as one of its primary objects to give effect to the fundamental rights of the Constitution, no provision of the 1995-LRA provides such exhaustive protection as the protection guaranteed in section 23(1) of the 1996-Constitution.[525] The 1995-LRA does not acknowledge a general right to fair labour practices but only provides limited protection to employees against certain unfair labour practices.[526]

In support of this the following cases can be mentioned: In *NEWU v CCMA & others*[527] the court held that the 1995-LRA was not intended to regulate the concept of fair labour practices comprehensively. Du Toit *et al* therefore come to the conclusion that it seems as if the broad constitutional right cannot be utilized to extend the limits of the statutory definition. More or less the same interpretation was followed in *Schoeman & another v Samsung Electronics SA (Pty) Ltd*[528] where it was found that the clause pertaining to unfair labour practices contains "…a *numerous clausus* of types of disputes". In contrast thereto the CCMA found in *Govender v Dennis Port (Pty) Ltd*[529] that section 186(2) did not contain a closed list and that it should and could be developed.

It is, however, interesting to note that above authors also stated that the 1991-definition of unfair labour practices should be utilised to give meaning to the constitutional right to fair labour practices, seen in the light that, on the one hand, the 1991-definition was the definition known at the time of its enactment and, on the other hand, fair labour practices are the opposite of unfair labour practices.[530] Also, in *NEHAWU v University of Cape Town* it was stated that in determining the meaning of section 23(1), guidance should be sought from the "equity based jurisprudence generated by the unfair labour practices provisions of the 1956 LRA as well as the codification of unfair labour practice

525 Van Jaarsveld and Van Eck 2006:137. Also see Van Jaarsveld ea 2001a:13-5.
526 *1995-LRA*: section 186(2). See Van Jaarsveld ea 2001a:13-5 in this regard.
527 *National Entitled Workers Union v CCMA & others* (2003) 24 ILJ 2335 (LC).
528 *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 ILJ 1098 (LC).
529 *Govender v Dennis Port (Pty) Ltd*.
530 Van Jaarsveld and Van Eck 1996:317. (After ten years and many developments this was again confirmed by said authors in Van Jaarsveld and Van Eck 2006:137.) Also see Van Jaarsveld ea 2001a:13-7.

in the LRA".[531] To this, the following may be added: the 1991-definition contained in the 1956-LRA, judicial jurisprudence, international conventions, recommendations and other instruments.[532] Du Toit *et al*, however, state that the said issue in question "has yet to be addressed by the Constitutional Court".[533]

Without pre-empting a conclusion, which, is after all the main focus of this study and which still needs to be examined, it seems as if it can be deduced that although there is an important distinction between the constitutional right to fair labour practices and the protection against unfair labour practices in terms of the 1995-LRA, the concept provided for in the 1995-LRA provides insight into the meaning and contributes to the protection envisaged in the Constitution. Differently put in very lay terms: the unfair labour practices addressed in the 1995-LRA is not the same as the protection provided for in the Constitution. The Constitution intended a much more comprehensive type of general protection. But the concept in the LRA is but one attempt by the legislature to give meaning to the constitutional right to fair labour practices.[534]

15.2 Section 23(1) of the Constitution and other labour legislation

Similarly to the position outlined above, the 1997-BCEA and the 1998-EEA aim, *inter alia*, to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution. But yet again it merely serves as an attempt to contribute to the protection envisaged by the Constitution. The same can be said for all the other legislation mentioned from paragraph 12 and onwards. "There appears to be no reason

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531 *National Education Health & Allied Workers Union v University of Cape Town & Others* 2003 24 ILJ 95 CC: 111A.

532 Van Jaarsveld ea 2001a:13-7.

533 Du Toit *et al* 2006 : 484.

534 Brassey 1998:C3: 6-7 is also in agreement with this pre-empted conclusion. Also refer to Van Niekerk (ed) ea 2012:181-182. Where a labour practice is addressed by the 1995-LRA, direct reliance on the Constitution should be avoided. If the 1995-LRA proves to be insufficient in this regard, amendment of the act is suggested rather than direct reliance on the Constitution. It is only in the absence of regulation that the Constitution can be directly relied upon.

why the right to fair labour practices should not include rights regulated in labour legislation other than the LRA, such as health-and-safety rights at work".[535]

Due to the fact that the concept of (un)fair labour practices is not defined in the Constitution and this concept is derived from both labour – and constitutional law, the interpretation thereof will be conducted by both specialist tribunals (CCMA, Labour Court, Labour Appeal Court, High Court and Supreme Court of Appeal) and the Constitutional Court.[536] It was held that "the primary development of this law will, in all probability, take place in the Labour Court in the light of labour legislation"[537] but that the Constitutional Court will retain a vital oversight role in so far as "that legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers entrenched in section 23 are honoured".[538] When an employee alleges an unfair labour practice and where the practice concerns both labour legislation and the Constitution, it seems as if the employee will have a choice as to which statute to proceed with.[539]

16. Unfair labour practices and contractual rights

The relationship between a general right to fair labour practices and contractual rights in terms of the contract of employment deserves mention. There are currently two views in this regard:

- In *HOSPERSA & another v Northern Cape Provincial Administration*[540] it was held that protection against an alleged unfair labour practice can only be granted if it can be proven that there was a contractual entitlement to the benefit. (In

535 Govindjee and Van der Walt 2012:6.
536 *NEHAWU v University of Cape Town*.
537 *In re Certification of the Constitution of the Republic of SA, 1996*.
538 *In re Certification of the Constitution of the Republic of SA, 1996*.
539 Grogan 2008: 51.
540 *HOSPERSA & another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC).

Eskom v Marshall & others[541] the Labour Court noted that it was bound by *HOSPERSA*. However, without exploring the notion, it pointed out that where an employee can prove a legitimate expectation to the benefit, the foiling of that expectation may result in an unfair labour practice.)

- In *Department of Justice v CCMA & others*[542] one judge, in a minority judgment, questioned the *HOSPERSA*-decision based on the fact that protection against unfair labour practices can not only be afforded when a contractual remedy is already provided. Put differently: no contractual right to a benefit need to be proven in order to be accorded protection against unfair labour practices.

Grogan supports the second view and states: "The unfair labour practice was introduced precisely to cover situations in which employers use the contractual powers *unfairly*…The value of the unfair practice jurisdiction is precisely that it confers on arbitrators a discretion to go beyond the contract in the realms of fairness. To limit that discretion by narrowing the scope of an arbitrator's powers to identify and correct only unfair labour practices which involve breaches of contracts, collective agreements or specific statutes is to ignore the purpose of the statutory definition, which is to give expression to the general right to fair practices conferred by the Constitution".[543]

Above argument is also strengthened by the suggestion that in view of the fact that the contract of employment as the only basis for the employment relationship is fainting, the entitlement to the constitutional right should not rest upon the content of the contract of employment. Furthermore it is also provided that a breach of contract will not necessarily constitute an unfair labour practice; similarly an unfair labour practice will not necessarily result in a breach of contract – a legitimate expectation (contractual entitlement is therefore not present) to benefits unfairly denied by an employer may very well result in an unfair labour practice.[544]

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541 *Eskom v Marshall & others* (2002) 23 ILJ 2251 (LC).
542 *Department of Justice v CCMA & others* (2004) 25 ILJ 248 (LAC).
543 Grogan 2008: 50; Grogan 2010:102-103.
544 Grogan 2010:102-103.

17. Conclusion

A brief outline of the history of (individual) labour law as of after 1977 has been provided and the different highlights that impacted on the right to fair labour practices were discussed. History is indeed repeating itself over and over again.

History in general, the history of labour law and especially the history pertaining to fair labour practices have indeed impacted on the current regulation of the right to fair labour practices. Many of the challenges that are currently being faced in labour law, especially with regards to the right to fair labour practices, stem from the past and the manner in which labour was approached in the past:

- **Disregarding the human element present in the employment relationship** Slavery was the dominant mode of service in the Roman Empire and the Netherlands. It was also brought to South Africa and continued to exist locally until 1833. The manner in which certain groups of employees were treated until the late 1980's can be described as an almost moderate version of slavery.
- **Common law and common law contract of employment** Both the common law and the common law contract of employment have, for a long time, served as the only basis for establishing an employment relationship. The common law continuously forms an important part of the establishment and regulation of the relationship between employer and employee. Circumstances may even prove that protection or regulation in terms of common law is sometimes more beneficial than constitutional or legislative protection. But, despite the continued importance of it, it has been proven that it is not the only factor that will lead to the establishment of an employment relationship. Regards will rather be haven to all the circumstances surrounding the relationship between a person rendering services and the person paying for the services in order to establish the true nature of the relationship. In the end, protection for either of these parties is not solely dependent on a contract of employment anymore, but rather on the fact

whether an employment relationship was proven or not. In terms of the Constitution, courts may therefore develop common law in terms of section 23(1) in order to provide protection if protection is lacking in legislation. The main reason for this new approach is rooted in the fact that the contract of employment, being an ordinary commercial contract in its core, may not always serve the principle of fairness to its fullest. And it is then when the other approach will prove to be the preferential approach for ensuring fairness in the employment relationship.

- **Yardstick or criterion for the validity and fairness of labour-regulation** For quite a long time labour regulation in general as well as labour legislation in particular were based on the ideologies of the ruling political party (parliamentary sovereignty. The measuring yardstick was gradually replaced when the Industrial Court was established in 1979 to, *inter alia*, rule and regulate on unfair labour practices. When the Constitution took effect in 1996, the system of parliamentary sovereignty was replaced with constitutional supremacy. The Constitution is a reflection and a guarantor of ultimate fairness. The ultimate change that was brought about was therefore the following: Defining fairness was not dependent on a political party's view anymore but on constitutional values representing democratic values, social justice, fundamental human rights and the achievement of equality. This caused a fundamental improvement on the right to fair labour practices for everyone.
- **Confusion created by name-change** With the enactment of the 1995-LRA, the previous 1991-definition of an unfair labour practice found way into the legislation in the following manner: Protection against unfair dismissals was separated from other unfair conduct known as "residual unfair labour practices" contained in Item 2 of Schedule 7 in the 1995-LRA. Also there was no general protection against unfair labour practices. In 1992 the discrimination aspect of "residual unfair labour practices" was moved to the 1998-EEA and the remainder of Item 2 was moved to chapter 8 of the 1995-

LRA. Following American jurisprudence,[545] the move to chapter 8 was also coupled with a change in terminology: “Residual unfair labour practices” was changed to “unfair labour practices”. Due to the fact that the general protection against unfair labour practices was not contained in that section anymore, the general protection got lost in a sense. If the original term of “residual unfair labour practices” was kept intact, much of the confusion generated by the term “unfair labour practices” would have been avoided. The general protection against unfair conduct should also have been retained. But the most important conclusion from this past mistake is this: The regulation of residual unfair labour practices under something termed as unfair labour practices created the confusion that the residual unfair labour practices were the only unfair labour practices as envisaged in section 23(1).

- **Limiting legislative protection** Before the enactment of the Constitution, protection in an employment context was literally limited to legislation providing protection. Many employers and workers suffered from this limitation when certain technicalities excluded them from protection: e.g. not being regarded as an employee or the certain practice complained of not being contained in legislation. Legislation should be interpreted according to the Constitution and common law should be developed in terms of the Constitution. Based on this premise everyone can currently enjoy the right to fair labour practices based on section 23(1), even if excluded by legislation or common law and even in the absence of regulation by legislation or common law.
- **Defining fairness** Although previous regulation of unfair labour practices contained protection against unfair labour practices in general, and, consequently also contained an indication of defining such unfairness, the current regulation of fairness of labour practices does not contain any definition of the fairness-concept. It has been held that it is impossible of

[545] This was clearly a mistake. The name of a concept was followed although, according to Devenish 1999: 314, the South African concept of unfair labour practices is distinct and the content thereof was not derived from the labour regimes of the United States, Canada and Japan.

precise definition although it is strongly suggested that the current definition of fairness should rest heavily on the 1991-definition.

Taking note of realities of the past which influenced the current situation and addressing *lacunae* and problems stemming from the past can have a considerable positive influence on the current regulation of the constitutional right to fair labour practices. But as in all other spheres of life, one general *caveat* must be borne in mind: Change does not rest upon the shoulders of one man alone – the past mistakes cannot be addressed by the Constitution only. It will result, *inter alia*, in juridification and legal uncertainty. Legislation should be addressed accordingly in order to give effect to the constitutional right to fair labour practices and in the process of revision, the reason for the revision should always be borne in mind.

CHAPTER 4

THE SCOPE OF SECTION 23(1) WITH REFERENCE TO THE WORD "EVERYONE"

Everybody can be great... because anybody can serve.[546]

1. Purpose of this chapter

Section 23(1) may be perceived as being open ended and broad. From the reading of it, it seems as if it is not limited by many restrictions. This may lead to critique and legal uncertainty. In order to determine the possible scope of section 23(1) it is therefore necessary to analyse this right with a view of identifying the boundaries and limitations attached to it. In this chapter it is therefore attempted to analyse and determine the scope of the word everyone.

2. Introduction

Section 23[547] reads as follows:

"(1) Everyone has the right to fair labour practices.

(2) Every worker has the right –

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right –

(a) to form and join and employers' organisation; and

[546] Martin Luther King.
[547] The Constitution.

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right –

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

Any study of section 23(1) must be conducted in accordance with the recognition of the importance of these rights to ensure the promotion of a fair working environment.[548] Also, international law must always be considered when interpreting section 23.[549]

In order to determine the ambit/scope of the right to fair labour practices, regard must, first of all, be had to the meaning of the word everyone. A first argument for interpreting everyone in a broad manner will be that a constitutional right will only be restricted to a specific category of person if there is a good reason to circumscribe the right.[550] The different categories of recipients that may enjoy protection of a constitutional right are natural persons, citizens, children, juristic persons, workers and employers. Even in an

[548] Cheadle ea 2005:18-2.

[549] *SANDU* I. See, however Cooper 2004:53-10: In order to establish the meaning of and scope of section 23(1) of the Constitution it is of little help to refer to foreign jurisdictions as "…it is rare to find a constitution that includes the broad and vague right to fair labour practices". This argument is also strengthened by indicating that ILO Conventions and Recommendations do not make provision for a right to fair labour practices. The same follows in respect of the European Social Charter of 1961 which guarantees, *inter alia*, the right to just conditions of work. The term just may include the notion of fairness, and conditions refer to the product of practices. It is therefore suggested that South African labour law, and more specifically the 1956-LRA, the 1995-LRA and the BCEA should be considered when determining the meaning of the right to fair labour practices

[550] Devenish 1999:20.

early stage of this discussion there seems to be no good reason why section 23(1) will not include all of those categories.[551]

Different opinions exist as to whether the word everyone has broadened the scope of protection to also protect relationships other than the traditional employer-employee relationship. Up until now the Constitutional Court did not have a meaningful opportunity to define the scope of everyone. In *NEHAWU v University of Cape Town & Others* it was stated that it is the function of the legislature, at first instance, and then the Labour Appeal Court and the Labour Court to give content and meaning to section 23(1).[552] Unfortunately the enquiry into the scope of section 23(1) was limited to reference of employees versus employers and natural persons versus juristic persons. Accordingly it was held that everyone refers to every person, including natural and juristic persons, and also that it does not only refer to employees because it was not stated that it refers to employees only.[553] Ngcobo J further held that the focus of section 23(1) is "…the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both.…Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices".[554] Van Jaarsveld *et al* supports this argument by stating that because the constitutional right to fair labour practices guarantees everyone this right, any victim of an unfair labour practice would be entitled to relief in terms of the Constitution and common law.[555]

It was proposed that the right to fair labour practices is an individual right as opposed to a collective right. It has been argued that it is only applicable to individual employment

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551 In Mubangizi 2004:123 it is pointed out that everyone is limited to labour practices and that the scope of everyone is therefore limited to only workers and employers. There is a respectful disagreement with this. Labour practices do not only involve workers and employers.

552 *NEHAWU v University of Cape Town*:par 34. In par 35 it was stated that the Constitutional Court has a "supervisory role to ensure that legislation giving effect to constitutional rights is properly interpreted and applied".

553 *NEHAWU v University of Cape Town*:par 39. Also see *Maseko v Entitlement Experts* 1997 3 BLLR 317 CCMA. Although the CCMA found that it had no jurisdiction to arbitrate the dispute, the dispute dealt with an unfair labour practice committed by an employee against an employer. The CCMA did not mention that this was impossible.

554 *NEHAWU v University of Cape Town*:par 40.

555 Van Jaarsveld ea 2001b:par 689.

relationships as collective relationships, and the fairness pertaining thereto, has been adequately dealt with in the LRA and the remainder of section 23 of the Constitution.[556] Brassey, however, is of the opinion that it was in fact not the intention of the drafters of the Constitution to ascribe a meaning to a term already known to us.[557] He continues to support his argument that, although collective issues are dealt with in the remainder of section 23, section 23(1) does not specifically exclude collective issues as an issue which may be collective in nature can also fall beyond the purview of collective bargaining.[558]

It has also been suggested that the word everyone should be interpreted according to section 9 of the Constitution. Section 9, the equality clause, guarantees that everyone is equal before the law and enjoys equal protection of the law. In the light of the equal protection guaranteed by section 9, everyone should be accorded the broadest interpretation possible.[559]

Supporting the broad interpretation of the word everyone, the following argument may also be raised: Labour law and labour legislation cover, regulate and protect people who qualify as beneficiaries in terms of the legislation. The qualification is mostly embedded in the word employee. Seeing that employees employed in formal employment relationships already enjoy some form of protection, it is only fair to conclude that the Constitution intended to cover other atypical workers as well (within certain limits of course).[560]

[556] Du Toit *et al* 2006:67; Brassey 1998:C3:6.
[557] Brassey 1998:C3:6.
[558] Brassey 1998:C3:6.
[559] Olivier 2006:94.
[560] McGregor 2012:15.

3. Natural persons and juristic persons

Everyone does not only refer to natural persons. “Many universally accepted fundamental rights will be fully recognised only if afforded to juristic persons as well as natural persons”.[561]

3.1 Natural persons

All human beings are natural persons. Although they all have legal capacity, their status and contractual capacity may differ. Qualities (e.g. age and sex) and circumstances (marriage, insolvency) of a natural person is determinative of such a person’s status. The contractual capacity of a person will usually serve as a yardstick in order to be involved in an employment relationship. Contractual capacity can be categorised into “no contractual capacity”, “limited contractual capacity” and “full contractual capacity”.

The only possible factors pertaining to contractual capacity that will limit the natural person’s capacity to be involved in an employment relationship are age,[562] mental incapacity,[563] and insolvency.[564] It is however foreseen that although these factors may bare an influence on the validity of a contract of employment, the workers involved will still enjoy the protection afforded by section 23(1).

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561 *In re Certification of the Constitution of the Republic of SA, 1996*:n 35 at par 57.

562 Refer to par 7 of this chapter for a detailed discussion on this.

563 Although a mentally incapacitated person has no contractual capacity, it is suggested that in the event where such a person is involved in an employment relationship, either at his own accord or with assistance by a curator, such a person will still enjoy the right to fair labour practices.

564 An example of insolvency influencing an employment relationship is that advocates are not allowed to practice as such while being declared insolvent.

3.2 Juristic persons

It is becoming more common to experience people performing services under the guise of a separate legal entity.[565] Due to the fact that it is indeed the person rendering the services, although the conclusion of the contract is done between a legal entity and the employer, this phenomenon has been termed as self-employed persons.[566]

The argument was raised that only natural persons can be entitled to the protection of constitutional rights because an extension of the rights to juristic person would diminish the rights of natural persons – but this argument was rejected.[567] Initially courts have also held that only natural persons can be employed as employees. The main reason for this approach was the fact that natural persons formed close corporations and then performed their services through these corporations in order to enjoy tax benefits. Courts therefore felt that these workers could not enjoy the benefits of both employees and tax-efficient entities. In *Denel v Gerber*,[568] however, it was held that although services were rendered through entities and although these tax-efficient tactics had to be sorted out with the Receiver of Revenue prior to awarding money, it is indeed possible that where one person owns a legal entity and that entity renders services to another entity, that person may also be regarded as an employee of the latter entity. The reality of the relationship between a juristic person and an employer is what should be the deciding factor.

Chapter 2 of the Constitution in general applies to juristic persons.[569] "The entitlement to constitutional rights depends upon the nature of the rights and the nature of the juristic person".[570] It was held that the nature of the constitutional right to fair labour practices

565 Although it is foreseen that the amendment of the Companies Act, which has halted the registration of any more Close Corporations, will cause a decrease in this phenomenon.
566 Van Niekerk 2012:76.
567 *In re Certification of the Constitution of the Republic of SA, 1996*:par 58.
568 *Denel (Pty) Ltd v Gerber* 2005 25 ILJ 1256 LAC.
569 Woolman ea (Vol 2) 2009:31-36.
570 *NEHAWU v University of Cape Town*:par 37. The court made reference to sectionion 8(4) of the Constitution which states that: "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person." Whether a juristic

also includes employers who are juristic persons.[571] Devenish states that exclusion of a juristic person will occur only in the following circumstances:[572]

- Due to the nature of certain rights, those rights will not vest in a juristic person e.g. the rights to human dignity, life and freedom and security of person.
- Juristic persons are also excluded from rights which are peculiar to individuals e.g. freedom of religion and opinion.
- A third category of rights excluding juristic persons are the rights that are so semantically formulated as specifically to preclude juristic persons from being the bearers of such rights e.g. *inter alia* the rights of conscience, religion and residence.

But an important point in this regard is also made: Even if a juristic person is excluded from a certain right, the juristic person is not also precluded from raising such a right as a defence.[573]

4. Employers and employees

From the onset the most obvious inclusion in the word everyone is an employee. But everyone does not apply only to employees but also to employers[574], employers' organisations and employees' unions.[575]

person may benefit from a right in the Constitution is not an issue of application but an issue of interpretation. Also see Rautenbach 2003:170.

571 *NEHAWU v University of Cape Town*:par 37. Also refer to Cheadle ea 2005:18-8 and Cooper 2004:53-5 where Cooper bases this on section 8(4) of the Constitution.

572 Devenish 1999:22-23.

573 *R v Big M Drug Mart Ltd* 18 DLR (4th) 321; [1985] 1 SCR 295.

574 Basson 1994:42.

575 Cheadle ea 2005:18-3; Grogan 2010:4; Joubert and Scott 1995:par 403 fn 3 as well as Van Jaarsveld ea 2001b:par 687 also confirm that both employers and employees are entitled to the right to fair labour practices. Also refer to *NEHAWU v University of Cape Town*.

4.1 Employers

4.1.1 Defining an employer

The 1956-LRA defined an employer as follows:[576]

> "'employer' means any person whatsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him or who permits any person whatsoever in any manner to assist him in the carrying on or conducting of his business; and 'employ' and 'employment' have corresponding meanings".

None of the current labour statutes define an employer. Du Toit *et al* provide the following definition: "…any person who receives services from an employee or is assisted in the conduct of its business by an employee."[577] To this the "remuneration in exchange for services" can also be added. Such a definition would then relate to the definition of an employee.[578] But this would imply that an employee needs to be identified before an employer can be identified. Conversely, if there is no employee there can't be any employer.[579]

It is sometimes not that simple to identify an employer, especially where empty legal shells are used to conduct business. Du Toit quotes Hepple to suggest that "the company or other person or persons who [have] control over the undertaking in which the worker is employed" should be regarded as the employer.[580] It is interesting how this view corresponds with the principle of "lifting the corporate veil" in company law.

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576 1956-LRA:section 1(1)(xii)
577 Du Toit ea 2006:80.
578 McGregor 2012:24-25. Grogan 2010:27 also supports such a definition.
579 Grogan 2010:27.
580 Du Toit ea 2006:80. This view was followed in a number of cases: *Camdons Realty (Pty) Ltd v Hart* 1993 14 ILJ 1008 LAC; *Paper Printing Wood & Allied Workers Union v Lane NO as trustee of Cape Pellet cc (in liquidation) & another* 1993 14 ILJ 1366 IC and *Gaymans v Ben Ngomeni* 2000 9 BLLR 1042 LC.

The position pertaining to a temporary employment services (TES) is somewhat more complicated. When a TES is involved a unique tri-partite relationship arises. Where the 1995-LRA is concerned the TES is deemed to be the employer[581] unless the employee is an independent contractor.[582] Although the TES is deemed to be the employer of the person hired to a client for reward, the relationship between the client and such a person is an important indication of the nature of the relationship between the person and the TES:[583]

> "That the person whose services are hired by a temporary employment service renders service to the temporary employment service is a fiction. *In casu*, the relationship between the client and the applicant was one of employment. It was conceivable that an arrangement between a person who is hired out by a labour broker could give rise to an employment relationship between both the labour broker and the client. This is why the Act stipulates that the employment relationship in such cases is deemed to be between the person and the labour broker. However, the nature of the relationship between such person and the labour broker's client may be an important factor in determining whether that person is an independent contractor *vis-à-vis* the labour broker. It was clear that the applicant placed his personal services at the disposal of the client. He was paid a monthly salary, he worked under the supervision and control of the client, and he was not required to produce a certain specified result for the client. The respondent exercised disciplinary powers over the applicant, and set standards for his work performance. This meant that the applicant was under the supervision and control of the respondent to a degree that one would expect in an employment relationship. Furthermore, the respondent had in the initial contract indemnified itself against the actions of the applicant. It was accordingly clear that the contract was not merely to facilitate payment of money to the applicant, as the respondent claimed. Although there were indications in the contract that the relationship was that of an independent contractor, the factors

581 1995-LRA:section 198(2).
582 1995-LRA:section 198(3). Also see Du Toit ea 2006:81.
583 *Mandla v LAD Brokers (Pty) Ltd* 2000 9 BLLR 1047 LC.

indicating the contrary were stronger. Parties cannot disguise the true nature of the contract merely by giving it another label."[584]

If the employee is not an employee of the client, the labour broker must adhere to the requirements of fairness with the dismissal of the employee.[585]

Many amendments to the regulation of TES has been proposed in the Labour Relations Amendment Bill in order to provide more protection to the employee.[586]

In the event where the employee is employed by a subsidiary in groups of companies it may be possible that all the subsidiaries and holding companies be employers.[587] It is also possible to have more than one employer.[588] The state[589] may also be the employer i.e. governmental institutions.

4.1.2 Protection afforded to the employer

In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others*[590] Smalberger JA held the following: "Fairness comprehends that regard must be had not only to the position and interests of the workers, but also those to the employer, in order to make a balanced and equitable assessment".[591] When legislation is interpreted as

[584] *Mandla v LAD Brokers (Pty) Ltd*.
[585] *Labuschagne v WP Construction* 1997 9 BLLR 1251 CCMA.
[586] The Labour Relations Amendment Bill (hereinafter referred to as the 2012-Labour Relations Amendment Bill) contained in GN 281 *Government Gazette* 2012:35212:sections 43-44.
[587] *Board of Executors Ltd v McCafferty* 1997 18 ILJ 949 LAC.
[588] Again see *Camdons Realty v Hart*. Also see *Boumat Ltd v Vaughan* 1992 13 ILJ 934 LAC; *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit* 1999 7 BLLR 713 LC and also *Footware Trading CC v Mdlalose* 2005 26 ILJ 443 LAC.
[589] The state refers to provincial and national spheres of government. Devenish 1998:19 states the difficulty in ascribing a precise meaning to the state. It is usually "…an independent political society occupying a defined territory, the members of which are united for the purpose of resisting external force and the preservation of internal order". The operation of a state, however, also encompasses levying of taxes, administering justice, regulating commerce and providing social services. It is therefore difficult to reconcile into a single public law theory of the state. Reference will have to be made to the circumstances of each case to establish the identity and scope of the state. Reference can also be made to the Constitution:section 239.
[590] *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others* 1996 4 SA 577 A.
[591] *National Union of Metalworkers of SA v Vetsak Co-operative*:589C-D.

being fair to both employer and employee there is an absence of bias in favour of either.[592] Du Toit and Potgieter also state that there is no good reason to afford protection only to employees.[593]

In *NEWU v CCMA* a trade union official of NEWU was elected deputy president of the union and was appointed in the position for 2 years. After 2 months the employee resigned without giving the required notice. NEWU referred the matter to the CCMA on the basis that the employee committed an unfair labour practice towards the employer by resigning without proper notice. The Labour Court confirmed the CCMA's decision to hold that an employer cannot be guilty of an unfair labour practice in terms of section 186(2) of the 1995-LRA. The court, however, acknowledged the employer's right to fair labour practices and held the following:

> "An employee may, in limited circumstances, commit conduct vis-à-vis an employer that may be lawful but unfair. An employer has the right to expect that in certain circumstances an employee will not merely comply with his or her rights in regard to the employer but will also act fairly.[594] This conduct may, in my view, qualify as an unfair labour practice, i.e. a practice that is contrary to that contemplated by s 23 of the Constitution."[595]

The court also held that the fact that the 1995-LRA does not make provision for an unfair labour practice by an employee, does not render the 1995-LRA unconstitutional, but merely means that the 1995-LRA does not give full effect to section 23(1) of the Constitution.[596] Despite the *lacuna* in the 1995-LRA, it therefore seems that a lawful

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592 *National Union of Metalworkers of SA v Vetsak Co-operative*:593G-H.

593 Du Toit and Potgieter 2007:par 4B16.

594 This right was also previously acknowledged in *Council for Scientific & Industrial Research v Fijen* 1996 17 ILJ 18 A: "…in every contract of employment there is an implied term that the employer will not, without reasonable and probable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties".

595 *NEWU v CCMA*:2339-2340. From this Schooling 2003:47 came to the conclusion that an employer may approach a court of competent jurisdiction and rely directly on section 23 for relief even if the labour practice which is allegedly unfair is not regulated by a conventional statute such as the 1995-LRA.

596 The Labour Appeal Court in *NEWU v CCMA & others* 2007 28 ILJ 1223 LAC confirmed the labour court's decision.

resignation by an employee that in the circumstances is also unfair, may constitute an unfair labour practice.[597]

It is recommended that a definition of employer be provided in legislation.

4.2 Employees

4.2.1 Definition

A traditional definition of an employee may read as follows: a person rendering services to another, in terms of a contract of employment, while being remunerated for the services so rendered. The 1995-LRA defines an employee as follows:

> "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration[598]; and
>
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer".[599]

Paragraph (a) of this definition refers to people rendering services in terms of the common law contract of service (*locatio conductio operarum*)[600] and includes employees in the private – and public sectors and also includes domestic workers and

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597 Schooling 2003:46. "Thus, for example, the contract of employment gives rise to rights and duties that can be construed as fair labour practices, and similarly a breach of the contract of employment which is unfair to an employer, may give rise to an unfair labour practice".

598 Refer to *ER24 Holdings v Smith NO & others* 2007 28 ILJ 2497 SCA pertaining to remuneration as an essential element of a contract of employment. It was held that when a person is permitted to work in order to gain vocational training, that permission to benefit did not amount to remuneration.

599 1995-LRA:section 213. The definitions in the 1997-BCEA and the 1998-EEA are nearly identical. A much more comprehensive definition is provided by the Fourth Schedule to the Income Tax Act 58/1962:par 1. Although Croome and Braun 2002:24 regret the fact that these definitions are not in line with each other, there is doubt as to whether any reference can be made to the definition in the Income Tax Act in a labour law context.

600 *SA Broadcasting Corporation v McKenzie* 1999 20 ILJ 585 LAC:588 par 7.

farm workers. People rendering services under a contract for work (*locatio conductio operis*) and people performing unpaid work are excluded from the definition.

Paragraph (b) has been broadened to include people who are in a *de facto* employment relationship despite the absence of a formal contract of employment.[601] Any person assisting in the carrying on or conducting of a business will also be regarded as an employee. The following requirements regarding this assistance should however be met to comply with paragraph (b) of the definition: [602]

- It must be the person assisting in the carrying on or conducting of a business and not the performing of work/services which have the effect of providing such assistance.[603]
- This assistance must also be repeated with some form of regularity.
- Assistance should also not be at the will and in the sole discretion of the one assisting.
- The obligation to assist must arise *ex contractu* or *ex lege*.

It is also important to give consideration to section 3 of the 1995-LRA when interpreting the definition of an employee.[604] In terms of this section it is required that, in the application of the 1995-LRA, its provisions must be interpreted to give effect to its primary objects, in compliance with the Constitution and in compliance with the public international law obligations of South Africa.

Sections 200A of the 1995-LRA and 83A of the 1997-BCEA create a rebuttable presumption in favour of an employee. If one or more of certain factors are present, then it is presumed that the person is an employee (unless of course the employer can

601 Du Toit ea 2006:73.
602 *Borcherds v CW Pearce & F Sheward t/a Lubrite Distributors* 1991 12 ILJ 383 IC:388.
603 This distinction was also drawn in *Oak Industries (SA)(Pty)Ltd v John NO and another* 1987 2 All SA 302 N.
604 Muswaka 2011:536.

rebut the presumption on a balance of probabilities).[605] Section 200A(1)[606] provides as follows:

> "Until the contrary is proved, a person who works for, or render services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
>
> a) the manner in which the person works is subject to the control or direction of another person;
> b) the person's hours of work are subject to the control or direction of another person;
> c) in the case of a person who works for an organisation, the person forms part of that organisation;
> d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
> e) the person is economically dependent on the other person for whom he or she works or renders services;[607]
> f) the person is provided with tools of trade or work equipment by the other person; or
> g) the person only works for or renders services to one person."

Section 200A(4) required of NEDLAC to prepare and issue a code of good practice to be considered in determining whether someone is an employee or not. Such a code was indeed issued in 2006[608] and the Code requires of any person applying the 1995-

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605 The factors contained in section 200A(1) was utilized as a guide by the court in many cases such as *Van Zyl & others and WCPA (Department of Transport & Public Works* 2004 25 ILJ 2066 CCMA as well as *Starke/Financial Expert Marketing CC* 2005 2 BALR 244 CCMA. Very much emphasis was also placed on the true nature of the employment relationship in *Rodgers and Assist-U-Drive* 2006 27 ILJ 847 CCMA to determine the true nature of the relationship between the parties.

606 1995-LRA:section 200A. Note that persons earning in excess of the amount determined by the Minister in terms of section 6(3) of the 1997-BCEA are excluded from this presumption. But it is important to understand that they are only excluded from the presumption – the criteria still applies. Also note that, according to Du Toit ea 2006:79 the court will still use the criteria of the past (e.g. the dominant impression test) to determine the nature of the relationship. The mentioned criteria are only an aid in determining the existence of an employment contract.

607 Bosch and Christie 2007:808 fn 21 point out that "dependence is an indicator of vulnerability to exploitation and thus needs to be covered by labour legislation".

608 GN 1774 *Government Gazette* 2006:29445.

LRA to take the Code into account when determining whether a particular person is an employee or not.[609] Items 29 and 31 are of importance:

> "The courts must have regard to the realities of [the] relationship, irrespective of how the parties have chosen to describe their relationship in the contract. Adjudicators should look beyond the form of the contract to ascertain whether there is an attempt to disguise the true nature of the employment relationship[610]…It is necessary to look beyond the legal structuring to ascertain the reality of the employment relationship".

A person who has concluded a contract of employment but who has not yet commenced working will also be regarded an employee.[611] Du Toit supports the correctness of this interpretation.[612] The reason for his argument is that vulnerability wanting of protection is already present at conclusion of a contract of employment.[613]

Also included in the definition are managerial employees and directors working for a company or close corporation.[614]

The contrary may, however, also be true. Parties may agree upon duties and obligations to one another but these duties and obligations do not necessarily create a contract of employment. An employment relationship should not be forced upon parties who did not intend creating such a relationship.[615] An example of this surfaced in this

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609 Code of Good Practice: Who is an Employee:Item 3.

610 Very much emphasis was also placed on the true nature of the employment relationship in *Rodgers and Assist-U-Drive*.

611 *Wyeth SA (Pty) Ltd v Manqele & others* 2005 26 ILJ 749 LAC. (Hereinafter referred to as *Wyeth v Manqele* (LAC).)

612 Du Toit ea 2006: 74.

613 Refer to par 7 hereunder for a detailed discussion on the protection afforded to job applicants.

614 Working for a CC/Company presupposes that this person will receive/be entitled to receive remuneration or a salary other than directors' fees. *Oak Industries (SA)(Pty)Ltd v John NO and another* and also *PG Group (Pty) Ltd v Commissioner Mbambo NO & others* 2004 25 ILJ 2366 LC. This was also later confirmed by Du Toit ea 2006:75.

615 *Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation Mediation and Arbitration & others* 2001 22 ILJ 2274 LC. Also refer to *Dankie and Highveld Steel & Vanadium* 2005 26 ILJ 1553 BCA where it was held that a person performing tasks in terms of a sponsorship agreement (which entailed that the person would be sponsored for training, that the person sponsoring the training would have the option to offer employment after completing the training but also that the person being sponsored would be required to perform certain tasks while

case: When a church merely provides the opportunity to someone to put his calling (which comes from God) into action, it did not necessarily create an employment relationship between the church and the priest. Although this view has been held in a few cases, some authors disagree with this and believe that the absence of an intention to conclude a common law contract of employment should not undermine the status of the person as an employee.[616]

A new definition of a contract of employment has been proposed which reads as follows:[617]

> "'contract of employment' means a common law contract of employment, or any other agreement or arrangement under which a person agrees to work for an employer but excluding a contract of work as an independent contractor".

A new definition of employee has also been proposed:

> "'employee means any person employed by or working for an employer, who receives or is entitled to receive any remuneration, reward or benefit and works under the direction or supervision of an employer".[618]

The proposed definition, however, could have created confusion as the current reference to the exclusion of independent contractors was left out.

These proposed definitions would have catered for the inclusion of atypical workers in the definition of an employee. The proposals were, however, not contained in the latest Labour Relations Amendment Bill.[619]

International guidance can be found in Recommendation 197 of the ILO.[620] This Recommendation provides guidance *in re* the establishment of the existence of an

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being so sponsored) was also not regarded as an employee. This decision was also followed in *Salvation Army (South African Territory) v Minister of Labour* 2005 26 ILJ 126 LC.

616 Le Roux and Jordaan 2009:E1-12.

617 The Labour Relations Amendment Bill (hereinafter referred to as the 2010-Labour Relations Amendment Bill) contained in GN 1112 *Government Gazette* 2010:33873.

618 2010-Labour Relations Amendment Bill (contained in GN1112/2010).

619 2012-Labour Relations Amendment Bill (contained in GN 281/2012).

620 Recommendation 197 of 2006 (Employment Relations).

employment relationship and also sheds some light on disguised employment. The most important guidelines can be summarized as follows:[621]

- Clear definitions in legislation and practice as to which workers would enjoy protection and who not.[622]
- In the event of disguised employment reference should be made to the performance of work rather than the agreement between the parties.[623]
- Provision for a statutory presumption of an employment relationship in the event of indicating factors to that effect.[624]
- Definitions should be provided for an employment relationship rather than a contract of employment.[625]
- Ensuring protection to uncertain and vulnerable workers.[626]

It, however, remains difficult to determine the exact meaning of the concept of employee. It is also important to be reminded that the status of an employee is not decisive of the nature of the employment relationship. Section 23 further contributes to the difficulty of the situation by the use of the word worker. Another noteworthy observation has also been made in *Kylie v CCMA*[627] namely that recognition of employee-status for the purpose of section 23(1) of the Constitution will not necessarily entitle such an employee protection against dismissal for example.[628]

4.2.2 "Worker" and/or employment relationship

The ILO's Draft Convention and its Draft Recommendation on Contract Labour ensure protection for workers falling outside the scope of the standard employment relationship

621 Van Niekerk 2012:61 (as adapted).
622 Recommendation 197/2006:art 1.
623 Recommendation 197/2006:art 9.
624 Recommendation 197/2006:art 11(b).
625 Bosch and Christie 2007:808.
626 Recommendation 197/2006:art 5.
627 *Kylie v CCMA & others* 2008 29 ILJ 1918 LC. (Hereinafter referred to as *Kylie* (LC).)
628 *Kylie* (LC):par 90.

and outside the Private Employment Agencies Convention.[629] The Draft Convention defines contract labour as "work performed for a natural or legal person (referred to as a user-enterprise) by a person (referred to as a contract worker) where the work is performed by the worker personally under actual conditions of dependency on or subordination to the user-enterprise and these conditions are similar to those that characterise an employment relationship under national law and practice…".[630] It applies to both direct contractual relationships (between contract worker and user-enterprise) and to situations where the worker is provided by a sub-contractor/intermediary.

Cheadle suggests that the constitutional interpretation of worker should extend the traditional view of an employee performing services under a contract of employment. Worker may include a person rendering services under a contract of work as long as the services are dependant in nature and not forming part of the person's own business or profession.[631] The 1995-LRA is capable of a wide enough interpretation which does not necessarily limit constitutional rights[632] and it is therefore suggested that the same should apply when defining an employee.[633] It was also held that legislation intended to give effect to constitutional rights should be generously interpreted.[634]

Cheadle is also of the opinion that the legal form of the contract should not be determinative of an entitlement to the rights. This is due to the fact that the Constitutional Assembly uses the concept of worker as opposed to the concept of employee in the subsections following section 23(1).[635] The personal and dependent

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629 ILO Private Employment Agencies Convention No. 181 of 1997.

630 Convention 181/1997:section 1.

631 Cheadle ea 2005:18-7. This is supported in *State Information Technology Agency (Pty) Ltd v CCMA & others* 2008 29 ILJ 2234 LAC (and hereinafter referred to as *SITA*). Unless legislation like the 1995-LRA and the 1997-BCEA is not amended to include these workers, recourse will be afforded in terms of section 23(1) of the Constitution.

632 *NUMSA & others v Bader Bop*. This principle was also confirmed in *Lumka & Another and Premier: Eastern Cape Province* 2008 29 ILJ 783 CCMA.

633 Bosch and Christie 2007:806.

634 *Kiva v Minister of Correctional Services & another* 2007 28 ILJ 597 E.

635 Cheadle ea 2005:18-4. This may imply that it is not only people rendering services under the common law *locatio conductio operarum* who enjoy protection but any person rendering services in terms of any agreement to that effect. Also see Du Toit and Potgieter 2007:par 4B16 in which it is stated that

nature of a worker's services is the basis for entitlement to protection.[636] This view is also supported by the ILO's Recommendation 197/2006 that suggests that the performance of the work and the remuneration of the worker, despite any contractual or other arrangement that may indicate the contrary, should be conclusive in determining whether such a person is an employee or not. Another argument which can be raised in support of this is the fact that the presumption in section 200A indicates that it is not assumed "…that only a common law contract of employment serves to establish an employment relationship".[637]

In *SANDU* I it was held that the relationship between a soldier and the Defence Force is similar to an employment relationship.[638] Based on this judgment, Cheadle suggests that there may be a relationship deserving of protection under section 23(1) independent of the type of contract in terms of which the services are rendered and even in the absence of a contract of employment. One of the most important reasons for this conclusion is to be found in the number of modern-time forms of employment deserving of protection against exploitation of labour.[639] These modern-time forms of employment involve atypical workers who are vulnerable to exploitation and unfairness due to the absence of trade union organisation, collective bargaining protection and the benefits of social security in many instances.[640]

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section 23(1) was designed to also afford protection to all the people normally excluded from the definition of an employee.

636 Bosch and Christie 2007:806.

637 Le Roux and Jordaan 2009:E1-12.

638 This is based on the court's decision that the term worker was used in the context of employers and employment.(Reference can be made to Van Rensburg 2003:31-42 for a useful report on the influence of trade unions in the military force on fair labour practices since this decision was handed down.)

639 Cheadle ea 2005:18-4. Mention is also made of examples of modern-time forms of labour: "...part-time employment, temporary employment, employment of casuals, employment through employment agencies, labour-only contracts, casual employees, home workers, owner-drivers, labour-tenants, and so on." It seems therefore as if these service-rendering persons will also be entitled to fair labour practices.

640 McGregor 2012:7. It is also indicated that the majority of these atypical workers usually are women.

In determining whether someone is entitled to fair labour practices, the definition of an employment relationship should therefore be given preference over the reliance on the existence of an employment contract.[641]

In *Rumbles v Kwa Bat Marketing (Pty) Ltd*[642] the court stated the following:

> "…what is required [in determining whether a worker is an "employee"] is a conspectus of all the relevant facts including any relevant contractual terms, and a determination whether these holistically viewed establish a relationship of employment as contemplated by the statutory definition…".[643]

In *White v Pan Palladium*[644] this view was also confirmed:

> "…the existence of an employment relationship is therefore not dependent solely upon the conclusion of a contract recognized at common law as valid and enforceable. Someone who works for another, assists that other in his business and receives remuneration may, under the statutory definition, qualify as an employee even if the parties *inter se* have not yet agreed on all the relevant terms of the agreement by which they wish to regulate their contractual relationship. This proposition finds support, albeit of an indirect nature, in the decision of the Appellate Division in *National Automobile & Allied Workers Union (now known as National Union of Metalworkers of SA) v Borg-Warner SA (Pty) Ltd* 1994 3 SA 15 A."[645]

A similar view was also held in *NUCCAWU v Transnet Ltd t/a Portnet*.[646] The workers were part of a pool of 2000 workers who were selected on a day-to-day basis to deliver services. The selection did not involve any preference in the pool and services could be required on any given day. The "fact that the respondent [stated] that when there is a

641 Bosch and Christie 2007:808; Mubangizi 2004:123.
642 *Rumbles v Kwa Bat Marketing (Pty) Ltd* 2003 24 ILJ 1587 LC.
643 *Rumbles v Kwa Bat Marketing*:1592.
644 *White v Pan Palladium SA (Pty) Ltd* 2006 27 ILJ 2721 LC.
645 *White v Pan Palladium SA*:391.
646 *NUCCAWU v Transnet Ltd t/a Portnet* 2000 21 ILJ 2288 LC.

need to employ from the pool it created"[647] satisfied the court that the workers were employees within the definition contained in the 1995-LRA.

Also refer to *Wyeth v Manqele* (LAC) where the LAC supported a more expansive, purposive interpretation of the definition of an employee and to *Denel v Gerber* where it was stated that "…substance rather than form must determine the relationship…"[648] when determining whether a worker is an employee.

Abovementioned examples prove that the statutory definition of an employee should be interpreted as extending beyond to confines of common law employees engaged in terms of a contract of service.[649] The most important criterion for entitlement to protection is that the work relationship, in terms of which services are rendered, must be similar to an employment relationship.[650] It is therefore not every work relationship that is protected but only work relationships that are similar to an employment relationship. And for a work relationship to be similar to an employment relationship, the services must be personal and must be dependent in nature.[651] In support of this, refer to *Kylie* (LC) where the following was stated:

> "It follows then that the rights in s 23 [of the Constitution] do not apply to persons who genuinely own and work in their own business – such as independent contractors, partners and the self-employed. It does not apply to judges or to

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647 *NUCCAWU v Transnet*:2292.

648 *Denel v Gerber*:1296. This approach was termed the reality approach by the court. All relevant factors are taken into account as well as public interest. The substance of the relationship rather than the appearance thereof will be determinative.

649 Le Roux and Jordaan 2009:E1-10 – E1-11.

650 Cheadle ea 2005:18-4 – 18-5. Note the distinction drawn between work relationship and employment relationship. According to Cheadle this work relationship includes services rendered by an agent for his principal, services rendered by partners as part of partnership duties, services rendered by an independent contractor in terms of the *locatio conductio operis* as well as services rendered by an employee in terms of the *locatio conductio operarum*. It also includes persons running their own businesses. But not all work relationships is guaranteed protection under section 23 – only those akin to an employment relationship. Also see Woolman (Vol 4) 2009: 53-4 where Cooper supports this view.

651 Cheadle ea 2005:18-5.

cabinet ministers for that matter. Not everyone who works is a worker for purposes of s 23."[652]

Cheadle suggested the following approach in order to determine whether a work relationship is indeed akin to an employment relationship:[653]

- "Does the person provide a personal service?
- Does the person provide the service under a contract of employment? If the person does, that person is a worker for purposes of section 23.
- If a person providing a personal service is not subject to a contract of service, does that person provide the services as part of his or her business? If he or she does not perform the services as part of his or her business, that person performs work "akin to employment" and, accordingly, should fall within the protective ambit of section 23."

The criteria of an employment relationship were also identified in *SITA*:[654]

- "An employer's right to supervision and control.
- Whether the employee forms an integral part of the organisation with the employer.
- The extent to which the employee was economically dependent upon the employer."

If personal services and dependence of employee upon employer are regarded as factors indicative of an employment relationship, certain problems may also surface:

- **Personal services** The element of personal services on its own will broaden the ambit of section 23(1) too extensively.[655]
- **Dependence** Relying solely on the element of dependence, on the other hand, will have an unduly limiting effect.[656] Another question that can be asked is

[652] *Kylie* (LC):para 54. Magistrates and members of statutory boards are also excluded. Refer to Grogan 2010:40.
[653] Cheadle ea 2005:18-6.
[654] *SITA*:par 14.
[655] Le Roux 2009:52.
[656] Le Roux 2009:52.

whether the extent/degree of dependence will be relative, and if so, how this will be measured. To complicate matters even more, *de facto* dependence may appear to be absent from the relationship although the dependence may still be presented as a legal consequence of the contract of employment.[657] It must also be borne in mind that individuals who may be vulnerable in the present legislative landscape are not necessarily economically dependent on their employers, although the services rendered by them mirror traditional employment, and that by solely relying on dependence, these individuals would be excluded from the right to fair labour practices.[658]

Le Roux suggests a solution in determining whether someone will be regarded as part of everyone:[659] Section 200A[660] provides of a list of factors and creates a rebuttable presumption that someone is an employee if one or more of the factors are present. If "personal services" is then taken as an element of an employment relationship and it is possible to combine it with any one or more of the factors listed in section 200A, most, if not all individuals deserving of a right to fair labour practices, will qualify as forming part of everyone as contained in section 23(1).[661]

The fact that sections 23(2)-23(4) refines the beneficiaries to workers, employers, trade unions and employer organisations, limits the focus to the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both.[662] Everyone does not include those outside the employment relationship.[663]

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657 Cheadle ea 2005:18-6.

658 Le Roux 2009:52. Examples of such workers are volunteer workers at a police station or an ambulance service.

659 Le Roux 2009:52-53.

660 1995-LRA:section 200A. Refer to par 3.2.1 abovementioned for a discussion on this particular section.

661 The solution proposed should only have reference to a determination of the beneficiaries of the right to fair labour practices. Protection provided by other labour legislation should in each case be determined with reference to the purpose of the protective legislation.

662 Le Roux 2009:50 as well as *NEHAWU v University of Cape Town*:para 40.

663 *Discovery Health v CCMA*:para 40.

One caveat, however, deserves mention: Employers may also engage in practices after an employee's retirement.[664] Although practices by employers relating to job applicants[665] are somehow regulated by section 23(1), the position pertaining to retired employees is not that certain. Le Roux[666] suggests, basing the suggestion on the minority judgment of Sachs J in *SANDU* I, that these retired employees will possibly also enjoy protection under section 23(1) because everyone may indeed mean everyone.

4.2.3 Employees *in utero*

The protection afforded in the event of pre-employment termination[667] is somewhat more complex. An employment contract legally comes into being when agreement between the employer and employee is reached on the *essentialiae*[668] of a contract of employment. In the event where the date of commencement of duties is ahead of the day the contract is signed, the operation of the contract is suspended until such date arrives.[669] But the fact remains that a contract of employment will then be in existence and a failure by the employer to take the employee into service will result in a breach of contract. It is therefore exactly this contemplated scenario which requires protection of an employee.

In *Whitehead v Woolworths*[670] the Labour Court ruled that no "pre-employment termination protection" could be afforded to Whitehead. Whitehead approached the

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664 Le Roux 2009:50. As an example of this, Le Roux made reference to *Erasmus & others v Senwes Ltd & others* 2006 3 SA 529 T where the employer intended to exercise a contractual discretion in such a way as to reduce substantially the subsidy it paid in respect of a medical aid scheme for retired employees.

665 Refer to par 7 hereunder for a detailed discussion on this.

666 Le Roux 2009:51.

667 Pre-employment termination refers to a situation where a contract of employment is concluded but also repudiated before the employee start working.

668 The essential elements of an employment contract are usually the services to be rendered and remuneration. Other essential elements, e.g. the authority of the employer, have also been proposed. Smit 2009:313 is in agreement with authority of the employer as an additional essential element.

669 Grogan 2003:1.

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

court in terms of the 1995-LRA and based her claim, *inter alia*, on an unfair dismissal. The reason why the court denied protection was because Whitehead was not recognised as an employee in terms of the 1995-LRA, and therefore could not be dismissed:

> "In terms of the definition a person is only an employee when such person actually works for another person. The person must therefore have rendered a service to another which services are not that of an independent contractor. In addition to working for another, the employee must also receive or be entitled to receive remuneration. The remuneration referred to must correspondingly mean remuneration for work done or tendered to be done. In circumstances where an offer of employment is made to another and the offer is accepted a contract of employment may come into existence but the parties to the contract do not enjoy the protection of the Act until such time as the offeree actually commences her performance or at least tenders performance in terms of the contract."[671]

A similar view was adopted in *Jack v Director-General Department of Environmental Affairs*[672] pertaining to the definition of an employee[673] although Pillay J remarked on the absurdity of this finding: It would mean that an applicant for employment will be in a much better position than a person who already concluded a contract of employment but who did not commence with employment yet.[674] Grogan therefore proposes an extension of the statutory definition of an employee and also that these employees *in utero* may take recourse in terms of section 23(1).[675]

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671 *Whitehead v Woolworths*:2137.

672 *Jack v Director-General Department of Environmental Affairs* 2003 1 BLLR 28 LC.

673 In this case, although, the court did recognize *Jack* as an employee in terms of the 1997-BCEA. This was because of the fact that *Jack* claimed breach of contract in terms of the 1997-BCEA, in which case the court is not really concerned with the fact whether a claimant is an employee or not but rather with the fact whether a contract of employment is in existence. If *Jack* claimed dismissal under the 1995-LRA, the same conclusion would've been reached regarding his status as an employee. And it is therefore submitted that, pertaining to the definition of an employee at least, *Jack* did not develop the law in this regard.

674 Grogan 2003:4 elaborates on this absurdity. Not only will job applicants find themselves in a better position but the 1995-LRA (section 186(1)(a)) defines a dismissal *inter alia* as the termination of a contract of employment by an employer with or without notice. It is only an employee who can be dismissed. In the *Whitehead*- and *Jack*-case it was however found that the applicants were not employees…although the contracts of employment were acknowledged.

675 Grogan 2003:4.

A welcomed development occurred in *Wyeth SA (Pty) Ltd v Manqele & others*[676] where the Labour Court held that *Woolworths* was decided incorrectly. This was due to the fact that the conclusion that the word work only refers to work that is actually performed was not justified by the wording of the definition and also did not support the legislature's attempts to protect job security. The court was also satisfied that a flexible interpretation of the definition of employee was supported by section 23(1) of the Constitution. It was therefore held that the statutory definition of employee extended to employees *in utero*.[677]

5. Independent – and dependent contractors

Currie and De Waal propose that even independent – and dependant contractors may also be included as workers.[678] Du Toit and Potgieter support this by stating that the reasons why an independent contractor was excluded from the definition of the 1956-LRA and the 1995-LRA, are not applicable for purposes of section 23(1).[679] There is however a respectful disagreement with this due to the fact that Cheadle's view[680] is favoured.

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676 *Wyeth SA (Pty) Ltd v Manqele & others* 2003 7 BLLR 734 LC. (Hereinafter referred to as *Wyeth v Manqele* (LC).)

677 This ruling was confirmed in *Wyeth v Manqele* (LAC) two years later. The Labour Appeal Court also emphasized that the parties agreed on the rendering of services in return for remuneration and that it was that mutual intention which constituted the reality of the relationship between the parties, and brought the contract of employment into existence. (And for purposes of this study, the most important fact is certainly that the decision of the court was based on the constitutional right to fair labour practices.)

678 Currie and De Waal 2005:499.

679 Du Toit and Potgieter 2007:par 4B16. The LRA was designed to regulate relations between employer and employee whereas the Bill of Rights was designed to afford protection to the vulnerability experienced in the employment relationship.

680 Refer to par 4.2.2 of this study. The relationship should be akin to an employment relationship prior to affording protection under the ambit of section 23(1). Personal delivery of services and dependency are key factors that should be present for a relationship to be regarded as a relationship akin to an employment relationship.

Although it is therefore submitted that an independent/dependent[681] contractor will not be entitled to protection in terms of section 23(1), it is necessary to include a very brief discussion on the distinction between a worker performing services in a relationship akin to an employment relationship and an independent/dependent contractor. Workers and contractors are many a time confused due to the very fine line between an employee and an independent/dependant contractor and it is submitted that only workers are entitled to protection in terms of section 23(1). Unfortunately there is not a perfect set of criteria to distinguish between these two concepts. What is important is that notwithstanding what the relationship is called, as long as the relationship is similar to that of an employment relationship, protection may need to be afforded to the vulnerable person.[682]

5.1 Distinction between employees and independent contractors

The distinction between an employee and an independent contractor is both important and necessary in light of the fact that the employee enjoys statutory protection in terms of labour legislation while the independent contractor does not (although this distinction is not necessarily applicable to section 23(1)[683]).

An employee are usually characterised as someone who works for a single employer, who must , in terms of a job description, place his personal services at the disposal of the person he works for during working hours, is entitled to remuneration at regular intervals and is subject to the authority of the person he works for.[684] An employee places his productive at the disposal of an employer.[685]

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681 Currie and De Waal 2005:500 defines a dependent contractor as "…those workers who were called independent but were in fact economically dependent on one employer because they devoted all their working hours to, and usually worked only for, that employer."
682 Currie and De Waal 2005:500 fn 4; Van Jaarsveld and Van Eck 2006:39-40.
683 See statement of Du Toit and Potgieter above under par 3.2.3.
684 Du Toit ea 2006:75; McGregor 2012:15.
685 *Liberty Life Association of Africa Ltd v Niselow* 1996 7 BLLR 825 LAC.

Du Toit describes an independent contractor as a person who "usually performs a specific service or produce a specific result for a fee, does not work for a single employer and is not expected to be at the latter's beck and call".[686] An independent contractor will usually not be obliged to perform the required services personally or under the control and supervision of the employer – independent contractors are their own masters and are not bound by the employer's orders but by their own contracts.[687] An independent contractor commits himself to only the end result of his productive capacity.[688] A definition for an independent contractor has also been proposed in the 2010-Labour Relations Amendment Bill:

> "'independent contractor' means a person who works for or supplies services to a client or customer as part of the person's business undertaking or professional practice".

The proposal was, however, not contained in the 2012-Labour Relations Amendment Bill.

When determining the nature of the relationship, it is important to note that it is primarily, and not only, determined by the terms of the parties' agreement.[689] This was confirmed in *SA Broadcasting Corporation v McKenzie* where the court held that the legal relationship between the parties "must be gathered primarily from a construction of the contract which they concluded" and from "the realities of the relationship between them, not simply from the way they have chosen to describe it".[690]

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686 Du Toit ea 2006:75; McGregor 2012:15.

687 *Borcherds v CW Pearce & F Sheward t/a Lubrite Distributors*. This was also confirmed in *Gordon v St John's Ambulance Foundation* 1997 3 BLLR 313 CCMA.

688 *Liberty Life Association of Africa Ltd v Niselow*. This was confirmed in *Opperman v Research Surveys (Pty) Ltd* 1997 6 BLLR 807 CCMA. The court held that "an employee was distinguished from an independent contractor on the basis that an employee placed his or her services (productive capacity) at the disposal of the employer, whereas the independent contractor typically performed specified work for a specified period and supplied the product of labour, rather than the labour itself. The test involved looking beyond the contract to determine the true relationship between the parties".

689 *Liberty Life Association of Africa Ltd v Niselow* 1996 17 ILJ 673 LAC.

690 *SA Broadcasting Corporation v McKenzie*:591 par 10. The court, however, indicates that the parties' own perception of their relationship and the manner in which the contract is carried out in practice may assist in determining the relationship between them.

In cases where the distinction between employees and independent contractors are not that evident, various tests are applied to determine the status of the person:[691]

a) **Control test** The employer has control over the employee in the sense that he/she dictates what to do and how to do it.[692] "Immediate and recurring" control is necessary.[693] This test was, however, not always appropriate in matters dealing with an employee in terms of a statute because the control test often undermined the purpose of the legislation.[694] The degree of control required also posed to be a problem as different types of employees are already subjected to different degrees of control and freedom, e.g. a line worker and a manager.[695] Another problematic aspect pertaining to this test is that control is a consequence of a contract of employment rather than an indication of the existence thereof.[696]

b) **Organisation/Proprietary/Integration test** The employee must work as "'part and parcel of the organisation' and the work performed must not be 'only accessory' to the business".[697] Due to the fact that the majority of employers are juristic persons and corporate entities it may happen that some people only perform a minor role in that entity. According to this test they may not be regarded as employees, which are then in fact, not a true reflection of the relationship between the person and the entity.[698] This test was rejected in *Smit v Workmen's Compensation Commissioner*.

c) **Dominant impression test** This test implies that the nature of the relationship as a whole is examined and then a dominant impression is formed as to whether the

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691 *Tshabalala v Moroka Swallows Football Club Ltd* 1991 12 ILJ 389 IC provides an excellent example of the court's utilization of these tests.

692 Du Toit ea 2006:75.

693 Du Toit ea 2006:75 fn 96. A contract with some form of supervision will therefore not necessarily qualify as an employment contract. This principle was originally laid down in *Smit v Workmen's Compensation Commissioner*. In *Smit* it was held that supervision and control was indeed one of the most important *indicia* that a particular contract was a contract of service. The greater the degree of supervision and control to be exercised by the employer over the employee, the stronger the probability will be that it is a contract of service. Similarly, the greater the degree of independence from such supervision and control the stronger the probability will be that it is a contract of work.

694 Le Roux and Jordaan 2009:E1-6. Also refer to *R v AMCA Services Ltd and another* 1959 4 SA 207:13.

695 Grogan 2010:16.

696 Le Roux and Jordaan 2009:E1-6.

697 Du Toit ea 2006:76.

698 Grogan 2010:17.

worker in question is an employee or a contractor.[699] No single factor decisively indicates an employment contract.[700] The courts examine the totality of the relationship to determine which factors indicate an employment relationship and which an independent contract and then determine which side is indeed heavier.[701] Although the dominant impression test is held to be the most suitable way of determining whether a contract is one of service or one of work[702] and although it forms the basis of the Code of Good Practice to who is an employee, it is the opinion of many authors that it poses the same problem as the other tests – namely describing consequences of a contract of employment rather than the causal indications thereof.[703]

The Code of Good Practice: Who is an Employee contains guidelines when applying these tests.

In *SA Broadcasting Corporation v McKenzie*[704] certain characteristics of an employment contract in contrast to a contract for work was outlined:

a) With an employment contract the essential element of it is the personal rendering of services. With a contract for work it is the "production of a specified result".
b) With an employment contract the employee must render services personally. With a contract for work it may be performed through others.
c) With an employment contract the employer may require the employee's services at any time (obviously within statutory limitations). With a contract for work the time for performance is usually specified.

699 Du Toit ea 2006:76. Also refer to *Dempsey v Home & Property* 1995 3 BLLR 10 LAC where this is confirmed.
700 Le Roux and Jordaan 2009:E1-8. Different weights have been attached to various factors in different cases, e.g. in *Borcherds v CW Pearce & J Sheward t/a Lubrite Distributors* the purpose of the relationship was the most important factor; in *Board of Executors Ltd v McCafferty* it was the power to dismiss a worker which tipped the scale and in *FPS Ltd v Trident Construction (Pty) Ltd* 1989 3 SA 537 A it was the fiduciary duty of the employee which determined the status of the worker.
701 Grogan 2010:17.
702 *Medical Association of SA & others v Minister of Health & another* 1997 5 BLLR 562 LC.
703 Le Roux and Jordaan 2009:E1-8.
704 *SA Broadcasting Corporation v McKenzie*:590-591 par 9. Also refer to Du Toit ea 2006:76.

d) With an employment contract the services must be performed under the supervision/authority of the employer. With a contract for work the services is performed subject to the agreed terms in the contract.
e) With an employment contract it is terminated upon the death of the employee. With a contract for work this is not necessarily the case.
f) With an employment contract it terminates on expiration of the period of service contracted for. With a contract for work it terminates on completion of the agreed work.

5.2 Exclusion of contractors from the ambit of section 23(1)

It is submitted that independent/dependent contractors are not included under the protection afforded by section 23(1).[705] Contractors are not performing services under the auspices of a relationship akin to an employment relationship. Although their services are performed under a work relationship which is much broader than an employment relationship, section 23(1) does not cover people performing work under a work relationship but only services performed under a relationship akin to an employment relationship. And after everything has been said on independent/dependent contractors, the heading of section 23 in the Constitution specifically refers to labour relations.

6. Citizens and aliens

International employment is not a foreign phenomenon anymore. South African citizens may work outside the borders of our country and foreigners may perform services within South Africa. These workers may work for themselves, may be employed by someone else or may even perform the services in terms of another related contract like an

[705] See earlier arguments provided by Cheadle as discussed under par 4.2.2 of this study.

independent contract. If working for an employer, the employer may be a national of the country where the services are performed or may only have business interests in that country. The employment contract can be concluded within/outside South Africa. This raises the questions of how to determine which country's legal system will regulate an employment relationship with foreign aspects and also whether section 23 will find application in any given scenario.

Abovementioned question can briefly be answered by declaring that private international law must be applied.[706] Also, if the litigants' countries have all ratified international Conventions of the ILO, regard must definitely be having to those Conventions. In establishing the applicable law, a court will usually follow a four-stage process:[707]

a) **Jurisdiction**[708] Jurisdiction is established if there is a ground of jurisdiction/cause of action between the matter and the area where the court has jurisdiction[709] and if the defendant is domiciled/resident within the court's jurisdiction.[710]
b) **Classification** The dispute must be classified and be placed in the correct legal category.[711]
c) **Establishing the *lex causae* of the contract** Private international law will be applied to establish the law that will regulate the matter. Usually courts will apply the legal system chosen by the parties to the contract. In the absence of this choice, regard will be haven to connecting factors between the dispute and the applicable legal systems.[712]

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706 Calitz 2007:3-4. It may thus happen that a foreign court will apply South African law or that a South African court will apply foreign law.
707 Calitz 2007:4-8 describes this process.
708 The Labour Court, unlike the High Court, is a creature of statute and may not apply foreign law. The Labour Court can only assume jurisdiction if it falls within the territorial jurisdiction in the RSA and if a matter was specifically assigned to the Labour Court in terms of the 1995-LRA.
709 E.g. the contract was concluded/performed/breached within that area.
710 If a defendant is not domiciled/resident in a court's jurisdiction but nevertheless submits to the jurisdiction of the court, the second requirement for establishing jurisdiction will be met.
711 E.g. the validity of a marriage, a delictual claim for damages or an employment contract.
712 E.g. the place of conclusion of the contract and the place where contract was performed.

d) **Ascertainment of the content of the *lex causae*** If the *lex causae* is a foreign legal system, expert evidence will be heard to establish the content of such foreign system. Rules *contra boni mores* of a court will not be applied.

In *Trythall v Sandoz*[713] the employer was a Swiss company operating in South Africa. The court held that the SA legal system should regulate the contract mainly because of the fact that the contract was performed in South Africa.

Kleynhans v Parmalat[714] followed another route than *Trythall.* Kleynhans was a South African employee delivering services in Mozambique for 3 years on a fixed-term contract. Although the court also held that South African law should apply the reasons for this decision were as follows: When the parties agreed to the same terms and conditions as previously, that was an indication that South African law was tacitly chosen by the parties; The applicant's constitutional right of access to the court would be protected by South African law; The *lex loci solutionis* (law of the place where the contract was performed) was not the determining connecting factor but only one of the connecting factors; South African law subscribed to international labour and human rights standards whereas Mozambique's law did not; The applicant's constitutional rights would be protected by applying South African law.

The view that was held in *Kleynhans* also prevailed in *Parry v Astral Operations*.[715] Not only did the court do so because it also regarded the *lex loci solutionis* as one of the connecting factors, but mainly because of the fact that labour rights are protected in the Constitution.[716]

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713 *Trythall v Sandoz* 1994 15 ILJ 666.
714 *Kleynhans v Parmalat* 2002 9 BLLR 879 LC.
715 *Parry v Astral Operations* 2005 10 BLLR 989 LC.
716 *Parry v Astral Operations*:1000. "In South Africa, an added consideration is the elevation of labour rights to a constitutional right. In my opinion, the constitutionalisation of labour rights strengthens the public policy and protective components of labour law…".

Similarly in *Moslemany v Lever Brothers*[717] the deciding factor for the court assuming jurisdiction was also to be found in the extended protection offered to employees by South African law compared to other jurisdictions.

6.1 Inclusion/exclusion of aliens

Where the text of the Constitution refers to everyone it can be assumed that reference is made both to citizen and alien alike.[718] Woolman states that "…the text gives us no reason to assume that resident aliens – who have legally entered the country and who remain in good legal standing – will receive anything less than the levels of constitutional protection required for person-hood. That does not mean that every right extended to persons will afford equal levels of protection to all classes of alien. That illegal or undocumented aliens may receive diminished levels of procedural or substantive protection in specific situations…".[719]

See however the remark by the Court in *Lawyers for Human Rights & Another v Minister of Home Affairs & Another*:[720] "…concerned with a delicate issue that has implications for the circumstances in and the extent to which we restrict the liberty of human beings whom may be said to be illegal foreigners. The determination of this question could adversely affect not only the freedom of people concerned but also their dignity as human beings. The very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity".

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717 *Moslemany v Lever Brothers* 2006 27 ILJ 2656 LC.

718 Woolman ea (Vol 2) 2009:31-35. This conclusion is made because there are instances (e.g. the Property clause in the Constitution) where specific reference is made to citizens.

719 Chaskalson ea 1996:10-6. This was also confirmed in Woolman ea (Vol 2) 2009:31-35. Although this may be true in general, we have seen cases where illegal aliens were still afforded all levels of protection, e.g. *Discovery Health v CCMA*.

720 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 4 SA 125 CC:par 20.

6.2 Influence of the Constitution on foreigners

Calitz quotes Forsyth to indicate that the Constitution has not yet had a fundamental impact on private international law due to the fact that the existing law is more or less compliant with the standards of the Constitution.[721] The current rules of private international law already provide the basis for the development of constitutionalism and the new constitutional order therefore does not dominate but benefits private international law.[722]

Reference can also be made to *Discovery v CCMA*.[723] The court held that although the absence of a valid work permit may render the status of a foreigner as illegal, nothing precludes that foreigner to conclude a valid contract of employment and to enjoy protection of the 1995-LRA. This was due to the fact that the operation of section 23(1) of the Constitution required an employment relationship and not an employment contract to determine whether someone is an employee or not. The court also reasoned that any interpretation which invalidated the contract of employment concluded in violation of the Immigration Act would be an interpretation that unjustifiably limits the right to fair labour practices.[724] The *Discovery*-decision invited many positive remarks from both jurists and laymen.[725]

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721 Calitz 2007:8.
722 Calitz 2007:8.
723 Refer to par 8.2.4 hereunder for a detailed discussion of this case.
724 Sangoni:2010:3. This was a welcomed change since e.g. *Dube v Classique Panelbeaters* 1997 7 BLLR 868 IC.
725 Mabuza 2008. http://www.businessday.co.za/Articles/TarkArticle.aspx?ID=3189404 (28 May 2008). The media reported on *Discovery* in the following manner: "South African employers have the same duty of care to illegal foreign employees as they do to South African citizens, according to a precedent-setting Labour Court judgment, which ruled that illegal immigrants have the same labour rights as other workers". It was also reported that Bishop Paul Verryn of the Methodist Church made the following remark: "It will send a signal to opportunists who abuse foreigners". Wessel Badenhorst, an attorney at Leppan Beech Attorneys, was quoted in the article as follows: The judgment is in line with the Constitution, which states that everyone has a right to fair labour practices. This judgment protects every employee, especially where work permits expire. It is a ground-breaking judgment, especially for those employers who employ foreign nationals who require work permits".

Section 23(1) mentions the word everyone. As the word citizen is not used, it is therefore reasonable to draw the conclusion that both citizens and aliens are protected by the right to fair labour practices.[726]

7. Children

Rights that do not benefit children are the exception.[727] The Constitution provides as follows:

> "…(1) Every child has the right –
>
> …
>
> (e) to be protected from exploitative labour practices;
>
> (f) not to be required or permitted to perform work or provide services that –
>
> (i) are inappropriate for a person of that child's age; or
>
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development…"[728]

The Constitution defines children as persons under the age of 18 years.[729] The 1997-BCEA further provides that children, who have reached the age of 15 or the minimum school-leaving age, are permitted to be employed.[730] Regulations are also in place to regulate limited employment of children younger than 15 years.[731]

It is submitted that as children who are permitted to be employed will also be entitled to claim protection under section 23(1) of the Constitution.

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[726] This conclusion is based on the argument of Woolman in Chaskalson ea 1996:10-5. Note however that the argument of Woolman was based on the use of the word persons instead of citizens.

[727] Woolman ea 2009 (Vol 2):31-38.

[728] The Constitution:section 28(1)(e) and (f).

[729] The Constitution:section 28(3).

[730] 1997-BCEA:section 43. Also refer to the SA Schools Act 84/1996:section 3(1). The minimum school-leaving age is the last day of the year in which the child reaches the age of 15 or the year in which the child completes grade 9, whichever occurs first.

[731] Examples of this are sectoral determinations regulating employment of children younger than 15 years in cultural activities.

8. Job applicants

It is first of all important to establish when someone is a job applicant and exactly when the status of the job applicant changes to an employee. This question was answered in *Wyeth v Manqele* (LAC). A person responding to an advertisement is a job applicant, and remains so, even after lodging an application. Three important requirements must be met to be regarded as a job applicant:[732]

(a) The application must contain an offer to conclude a contract of employment and not an independent contract.
(b) The offer must be made to an employer and must not merely be an enquiry at an employment agency.
(c) The contract of employment must not yet have been concluded.

The moment a concrete offer (containing the *essentialiae* of a contract of employment) is put on the table by the employer and that offer is accepted by the job applicant on the terms offered by the employer, the job applicant becomes an employee.

It is also important to distinguish between a job applicant and an employee who has already concluded a contract of employment but has not yet commenced with duties.[733]

8.1 Protection afforded other than constitutional protection

People applying for a position are not experiencing the same needs *in re* employment protection than employees. The Industrial Court never had any jurisdiction over prospective employees and could not make any determination in this regard.[734] But it was acknowledged that job applicants needed limited protection, especially during the application-process. The 1998-EEA[735] provides protection to job applicants against

[732] Grogan 2010:26.
[733] Refer to par 3.2.1 above.
[734] Brassey 1998:C3:28. Also refer to Dupper ea 2004:9. Applicants for work enjoyed no protection under the 1956-LRA.
[735] 1998-EEA:section 9.

possible discrimination. The 1995-LRA[736] provides protection to job applicants against victimisation. It is therefore not in doubt that the Labour Court has jurisdiction to determine disputes of victimisation and discrimination of job applicants.

8.2 Constitutional protection

But what about the Constitutional Court? No such limitation on jurisdiction was imposed on the Constitutional Court.[737] Cooper suggests that, although job applicants have recourse against discrimination in terms of the 1998-EEA, they nevertheless also may have a claim to fair labour practices in terms of section 23(1) of the Constitution.[738] Grogan supports this view and also makes reference to protection against victimisation by the 1995-LRA which can be supported by the Constitution.[739] Cheadle, however, is in disagreement and states that section 23 was intended to operate within the framework of the employment relationship.[740]

The Labour Court, however, is endowed with equivalent power to the Constitutional Court and due to the fact that the remedies provided for by the 1995-LRA should first be exhausted, such a case will in all likelihood not be referred to the Constitutional Court.[741]

736 1995-LRA:section 5(3).
737 Brassey 1998:C3:28. The court can therefore make a ruling on the constitutionality of a refusal to hire a job applicant.
738 Woolman ea (Vol 2) 2009:53-5. This is due to the broad reading of this section.
739 Grogan 2003:1.
740 Brassey 1998:C3:29 fn 1.
741 Brassey 1998:C3:29.

9. Illegal work

9.1 Introduction

A working agreement or contract of employment may be tainted by illegality of some sort or another. South African law provides that an illegal contract is void. Public policy, based on common law,[742] also requires the courts not to sanction or encourage illegal activity.[743] Unlawful conduct is also punishable under criminal law. One of the purposes of the 1995-LRA, however, remains that the LRA should give effect to section 23 of the Constitution. It is suggested that the unenforceability of a contract of employment in a civil court does not deprive a party from constitutional protection at work.[744] Employment law has therefore been extended to vulnerable individuals who are deserving of protection and a denial of such protection would be "prejudicial to vulnerable claimants".[745] It seems safe to state that the Constitutional Court has held on many occasions[746] that everyone refers to all and until the constitutional right to fair labour practices is limited to certain beneficiaries, all individuals/entities who are in employment-like relationships should be protected.[747] Bosch and Christie rightly hold the following view:

> "…a claim before the CCMA is not a criminal matter and…the task of the CCMA is to apply labour legislation and not act as custodian of public morality or be proxy for the police…This is not condoning or encouraging the [illegal] contract

[742] Common law rules which gave rise to this principle is e.g. *ex turpi causa non oritur actio* (No action can flow from a disreputable cause) and *in pari delicto potior conditio defenditis* (It curtails recovery "when the dishonour exists on the side of the giver or on both sides").
[743] Muswaka 2011:539.
[744] Bosch and Christie 2007:807.
[745] Bosch and Christie 2007:807.
[746] *Khosa & others v Minister of Social Development & others; Mahlaule & another v Minister of Social Development & others* 2004 6 BCLR 569 CC. *Lawyers for Human Rights v Minister of Home Affairs*. *Dawood, Shalabi & Thomas v Minister of Home Affairs & others* 2000 1 SA 997 C.
[747] Bosch and Christie 2007:805. The criteria for protection is not rooted in a valid contract of employment but rather in the fact whether the person is a worker.

but recognizing unequal power relations and applying the principle of proportionality of the applicant and respondent in relation to the illegality".[748]

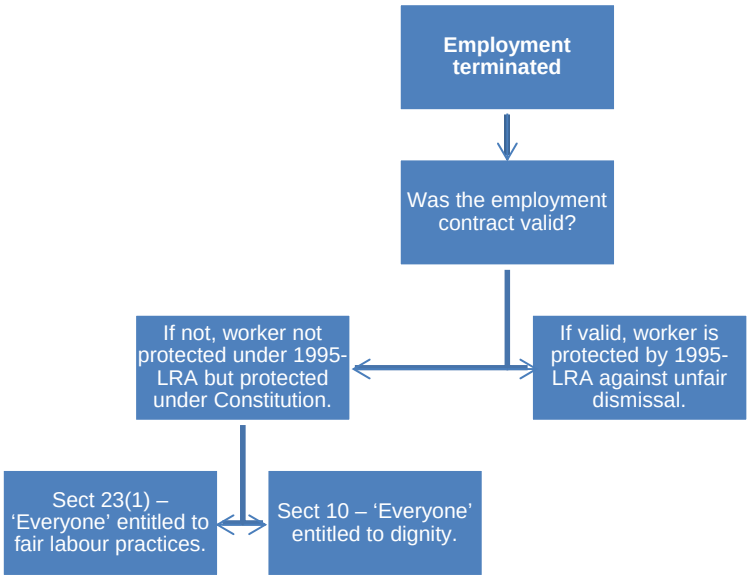
The submission is that the court should rather consider the seriousness of the illegality and the possible harm that will be caused to a claimant in the event where illegality clouds a claim for protection in the employment sphere.[749] A distinction should therefore be drawn between an illegal contract and an invalid contract: a contract concluded for an unlawful purpose or in terms of which a party has to perform a criminal act, will not be enforced by the courts. An invalid contract may be void *ab initio* or voidable at the instance of either party. If the contract is only voidable it will still afford protection. Also, if a contract is not prohibited but merely penalized for not complying with formalities and/or requirements, parties also remain bound by it.[750]

Muswaka suggests the following test to be utilised in determining whether someone qualifies as an employee where illegality taints the situation:[751]

a) The first stage involves an enquiry into the employment contract and the employment relationship between the parties.
b) The second stage involves a wide interpretation of the term employee.

McGregor *et al* provides the following useful summary of the protection in terms of the Constitution and in terms of the 1995-LRA for illegal workers:[752]

[748] Bosch and Christie 2007:811.
[749] Bosch and Christie 2007:812.
[750] Grogan 2010:42.
[751] Muswaka 2011:538.
[752] McGregor 2012:22.



9.2 Case law

9.2.1 *Chipenete*[753]

Chipenete was a Mozambician and worked and resided in South Africa without authorization. He was dismissed by his employer and when he presented himself for reinstatement the employer notified the police upon which he was arrested for being an illegal alien in South Africa. The court noted the illegality in status of Chipenete but considered it a collateral issue to the employment situation.

9.2.2 *Kylie*

The applicant, Kylie, worked for a massage parlour as a masseuse/sex worker. She was dismissed because of alleged substance abuse and disruptive behaviour.

- **CCMA**[754] She referred a claim for unfair dismissal to the CCMA. The CCMA found that the services delivered by Kylie were of an illegal nature due to the

[753] *Chipenete v Carmen Electrical CC & another* 1998 19 ILJ 1107 LAC.

infringement of the Sexual Offences Act.[755] The illegality of the services therefore rendered the employment contract unenforceable and no claim could be recognised under the 1995-LRA.[756] Another reason advanced by the CCMA for failing to provide protection to Kylie was the fact that it would've lead to absurdities.[757] The commissioner, furthermore, reasoned that no remedy was in any event available to a complainant of illegal work.[758] It was held that the constitutional right to fair labour practices does not confer protection in respect of work that is illegal.

- **Labour Court**[759] "Kylie applied to review abovementioned ruling of the CCMA. The court held that the question was not whether the definition of an employee was wide enough to include those without a valid contract of employment but whether as a matter of public policy courts (and tribunals) should encourage illegal conduct in the context of statutory and constitutional rights. The court found there could be little doubt that the relationship between the applicant and the third respondent was one of employment. It was not the lack of a valid contract that was at stake but the reason for its invalidity and the effect that that had on a tribunal or court called on to enforce a right under the LRA. The court found it to be a fundamental principle in SA law that courts ought not to sanction or encourage illegal activity. In the present case the question raised was not the enforcement of a contractual right but of a statutory right not to be unfairly

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754 '*Kylie' v Van Zyl t/a Brigettes* 2007 28 ILJ 470 CCMA.

755 Sexual Offences Act 23/1957:section 20(1A). Also refer to the Criminal Law (Sexual Offences and Related Matters) Amendment 32/2007 which also criminalizes the conduct of the client.

756 *Kylie v Van Zyl*:10-11. "Given the status of the common law on the enforceability of illegal contracts be they employment contracts or otherwise (it is trite that the employment contract forms the basis of the employment relationship between the parties) and the fact that the applicant was employed to perform illegal work and did, should the CCMA resolve such disputes it would then place itself in a position where it would be making policy decisions for the legislature." Also refer to Naidoo and Mudaly 2007:27.

757 *Kylie v Van Zyl*:11. "…the fact that sex workers are not specifically excluded of s 2 [of the LRA] does not mean that as argued that they are included. If that were so it could be argued that any person who is paid by another to undertake an activity which is criminalized would be able to access the LRA as well as other statutes enacted for the protection of workers and thus the majority of cases referred would be in favour of the applicant." This has however been argued to be wrong. Refer to Chap 6 of this study for a detailed explanation of said argument.

758 *Kylie v Van Zyl*:11. "Further, the commissioner would not be able to implement the remedy of first choice being reinstatement or re-employment".

759 *Kylie* (LC).

dismissed. The court found the principle that the courts should not sanction or encourage illegal activities to be as applicable to statutory rights as to private law rights. The court concluded that the legislature intended that the Sexual Offences Act should not only penalize the prohibited activity but intended that the courts would not recognize any rights or claims arising from that activity. Subject to the Constitution, the court found that the application of this approach to the enforceability of statutory claims rendered a sex worker's claim to the statutory right to fair dismissal unenforceable. The court then considered the scope of the labour rights granted in terms of section 23 of the Constitution, and the purposes of constitutionalizing such rights. The main object of the constitutional right and of the legislation giving effect to that right was to structure employment in a manner that counteracted the inequalities of bargaining power inherent in the employment relationship. Further, the central purpose of unfair dismissal legislation was to provide work security, and reinstatement or re-employment was the primary remedy. Reinstating a person in illegal employment would not only sanction the illegal activity but might constitute an order on an employer to commit a crime. The court further considered whether withholding labour rights from sex workers would undermine or frustrate the core purposes of the constitutional right. There was no question that sex workers were a vulnerable group and subject to exploitation, but so were those illegally employed as foreign workers and child workers. The difference was that in the latter cases the prohibition was aimed at who did the job rather than the job itself. To protect sex workers from exploitation would mean sanctioning and encouraging activities that the legislature had constitutionally decided should be prohibited. The court accordingly concluded that the scope of the protection guaranteed by section 23(1) of the Constitution did not include those engaged in prohibited work, and did not extend to sex workers and brothel keepers. The court also held that the Sexual Offences Act justifiably limited the scope of section 23 by excluding sex workers and brothel keepers as rights holders."[760] It was again held that the

[760] *Kylie* (LC):Headnote. (Due to the fact that this decision is not important for present purposes, the headnote as provided was reproduced *verbatim* to summarize this case.)

CCMA did not have jurisdiction to hear the matter. The court was at pains to emphasize that its finding did not decide that a sex worker was not an employee for the purposes of the 1995-LRA, nor that a sex worker was not entitled to the protections under the 1997-BCEA, occupational health legislation, workers' compensation or unemployment insurance. It also did not decide whether the definition of employee in the LRA applied to those in an employment relationship without a valid contract.[761] Although there is disagreement with this decision, there is also agreement with Mischke when emphasizing that the court focussed on the services rendered and not the person in denying relief.[762] This is in contrast with situations where illegal foreigners and children are employed because in those situations the focus is on the person and not the services rendered.

- **Labour Appeal Court**[763] The Labour Appeal Court held that Kylie was an employee for the purposes of the 1995-LRA and that the CCMA had jurisdiction to determine the dispute between the parties. The court established that the real question did not revolve around the validity of Kylie's contract of employment but rather if Kylie is entitled to protection in terms of section 23(1). The court held accordingly that a sex worker has the right to be treated with dignity by her client and that section 23 of the Constitution afforded a similar right to the sex worker to be treated with dignity by her employer. The court pointed out that section 23(1) was designed to ensure that the dignity of all workers should be respected and that the workplace should be predicated on principles of social justice, fairness and respect for all. Instead of putting emphasis on the common law principle that courts should not sanction or encourage illegal activity, like the labour court did, the court pointed out that this common law principle was already embodied in the Constitution. It also found that the common law was more flexible than the 1995-LRA and could therefore be developed in favour of a party involved in an illegal contractual arrangement in order to enjoy constitutional protection without sanctioning the illegal activity.

761 Mischke 2008:6.
762 Mischke 2008:8.
763 *Kylie v CCMA & others* 2010 31 ILJ 1600 LAC.

9.2.3 *SITA*

An employee, who worked for a front company of the SANDF, was retrenched and given a severance package. The package as well as other laws and regulations provided that this employee was not to be employed again by the Defence Force. On a later stage this employee's services were needed again and he provided his services again to the Defence Force but via the conduit of a close corporation.[764] Upon termination of the second service-agreement, the employee questioned the validity of his dismissal.

Despite the fact as to who the true employer was and also despite the alleged illegality of the second agreement, the court held that the employee was indeed an employee based on the fact that the relationship that existed during the second agreement reflected an employment relationship. Davis JA remarked as follows: "…the absence of clean hands did not prevent the court from concluding that an employment relationship existed."[765]

9.2.4 *Discovery Health v CCMA*

Lanzetta was an Argentinian immigrant employed by Discovery Health. Upon the discovery of the fact that Lanzetta's residence permit had expired, he was dismissed. He referred a dismissal dispute to the CCMA. Discovery argued that Lanzetta was not a legal employee. The CCMA found that Lanzetta was not an employee. The matter was referred to the Labour Court for review. The court held that the contract of employment between Discovery and Lanzetta was not invalid despite the absence of a valid permit. This was due to the fact that the Immigration Act[766] criminalized only the conduct of an employer who employs a foreign national without a valid permit and not the foreigner.

[764] In terms of the severance package agreement and other laws and rules referred to earlier, although the services were not illegal services, brought an illegal element to the status of the person performing the service.
[765] *SITA*:paras 17 and 18.
[766] Immigration Act 13/2002:section 38.

The Immigration Act aimed to deter employers from intentionally hiring workers not authorised to work and not to allow employers who, through criminal conduct in employing unauthorised workers, to escape their obligations in terms of their agreement with the unauthorised worker.[767] The Act also did not proscribe a contract of employment in the absence of a valid work permit. The court also found that even in the event where the contract had been invalid because of the provisions of the Immigration Act, a foreigner was nonetheless an employee because the definition in the 1995-LRA was not dependent on a valid and enforceable contract – this was based on the fact that section 23(1) which guarantees everyone a right to fair labour practices is not dependent on a contract of employment.

10. Temporary employees

A definition of a temporary employee may read as follows: A Person employed for a finite period or a brief duration of time with the understanding that the duration of the contract will depend on the need for services of the employee, whilst the employee will nurture no expectation of continued employment.[768] A distinction must be made between a temporary employee (time is the determining factor) and an employee employed in terms of a fixed-term contract (completion of a specific project).

Temporary employees will also enjoy protection under section 23(1).

[767] McGregor 2012:23.
[768] Grogan 2010:34.

11. Casual employees

A definition of a casual employee may read as follows: A person employed on a daily or an *ad hoc* basis and who renders services to a particular employer for less than 3 days[769] a week. It is important to distinguish between casual employees and regular casual employees: the casual employees employed on a regular basis and at regular intervals might rather be categorised as permanent part-time workers than casual employees.[770]

Casual employees will enjoy the protection afforded by section 23(1) although there are also examples of them enjoying protection under the 1995-LRA.[771]

12. Acting employees

Acting employees will naturally also be included under the scope of section 23(1). It is also true that these employees enjoy both contractual protection (if there was an agreement to the effect that an acting allowance will be paid to employee) and legislative protection (an unfair labour practice may be committed if employer created a legitimate expectation of appointment or promotion to the acting position).[772]

13. Probationary employees

An employee may be appointed subject to a probationary period in order to assess the skills, ability, compatibility and suitability of such an employee. Courts have relied

[769] The Basic Conditions of Employment Act 3/1983 made reference to this number of days associated with a casual employee.
[770] Grogan 2010:35.
[771] *NUCCAWU v Transnet Ltd t/a Portnet*.
[772] Grogan 2010:36.

heavily upon the managerial prerogative during such evaluation and assessment.[773] But even in the light of the managerial prerogative, managers (employers) should take care to ensure fair treatment of employees during the probationary period with specific reference to the time of the probationary period, prior agreement to probation, regular evaluation and feedback during probation and possible extension of the period in order to accommodate the employee's needs.

14. Managerial employees

A managerial employee is entitled to be treated fairly in terms of labour legislation and common law as long as it can be proved that these employees are employees indeed.[774] Care must just be taken to keep in mind that due to elevated nature of a managerial employee's position, different standards compared to other employees may apply in cases of e.g. work performance.[775]

15. Conclusion

It is submitted that our law has moved beyond the realms of contract to broad constitutionality in determining who is an employee. A claim to be recognised as an employee in terms of the 1995-LRA is not contractual in nature but rather a claim to enforce constitutional rights.[776] Although a contract of employment (or being regarded as an employee) is required to claim labour rights in terms of the 1995-LRA and other

[773] *Nondzaba v Nannucci Cleaners* NHK 13/2/1061 (IC), unreported.
[774] Grogan 2010:39. Also refer to *Oak Industries (SA)(Pty)Ltd v John NO and another*; *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd* 1987 8 ILJ 356 IC.
[775] Grogan 2010:39-40.
[776] Bosch and Christie 2007:811.

labour laws, section 23(1) of the Constitution provides broader protection than labour laws where a person is in a work relationship akin to an employment relationship.[777]

It therefore seems safe to say that everyone is determined with reference to being involved in an employment relationship. The following persons will therefore in general enjoy protection in terms of this right: natural persons, juristic persons, employers, workers (including employees employed in a contract of employment and employees *in utero*), citizens, aliens, children, job applicants, illegal workers (to a certain extent), temporary workers, casual workers, acting workers, probationary workers and managerial employees.

It is also suggested that the protection afforded by section 23(1) is not limited to an individual relationship but extends to collective relationships as well.

[777] McGregor 2012:23.

CHAPTER 5

DEFINING "FAIRNESS"

"*Being fair is a central interest among today's employers concerned about providing equal employment opportunities, fair labour practices and paying a fair day's pay for a fair day's work. The differing perspectives, interests and goals of managers and employees, however, make it difficult to determine what employees regard as fair treatment. The multidimensionality of fairness is evident when one considers how people disagree when asked what is fair. The differences depend on whether the focus is on outcomes, procedures or motives of labour practices…Research has shown that employees are more inclined to accept unfavourable outcomes if they are treated in a fair and respectful manner*".[778]

1. Purpose of this chapter

This chapter continues with the purposes stated in chapter 3 of this study. Section 23(1) may be perceived as being open ended and broad. From the reading of it, it seems as if it is not limited by many restrictions. This may lead to critique and legal uncertainty. In order to determine the possible scope of section 23(1) it is therefore necessary to analyse this right with a view of identifying the boundaries and limitations attached to it.

The main aim and purpose of section 23(1) is to curb unfairness. It is therefore extremely necessary to provide meaning to this all-encompassing concept – fairness in an attempt to determine the exact scope of section 23(1).

[778] Coetzee and Vermeulen 2003:17.

2. Introduction

The 1997-BCEA, the 1998-EEA and the 1995-LRA, rather than section 23(1) of the Constitution, serve as the guarantors of fairness of labour practices. There are, however, employees who are not covered by mentioned legislation. For those employees, section 23(1) will be crucial in enforcing fairness of labour practices.

3. Defining fairness

3.1 Wiehahn Commission's recommendations

The Wiehahn Commission stated that in light of the fact that South Africa has entered into a new labour dispensation, it was foreseen that legislation cannot foresee or determine all parameters of fairness or unfairness. The initial meaning was much more neutral and the concept of fairness was equated with clear or unblemished.[779] It seemed, however, as if this concept has acquired a quasi-judicial connotation when applied in the context of relationships between people: today it is equated with equitable, unbiased, reasonable, impartial, balanced, just, honest, free from irregularities and according to the rules.[780]

In a labour context it should have had relation to practices in accordance with doctrines of justice. The community's perception of what was fair and just would therefore have been a key-indicator as to whether it was a fair labour practice or not.

[779] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981:par 4.127.3.
[780] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing*. Deel 5. RP 27/1981:par 4.127.3

3.2 Industrial Court

At first the Industrial Court stated that fairness was something more than lawfulness.[781] Lawful conduct was therefore not *per se* fair conduct. The common law and common law contract of employment endorse lawfulness – a mere prescription with legal requirements. But fairness is much wider and takes all surrounding circumstances into account.[782] Fairness is also not the same as morality. Fairness also requires much more than good intentions e.g. taking account of the immediate consequences of one's doing and the careful consideration of the possible consequences of one's doing upon others.[783] Fairness is also not exactly the same concept as equity – equity relates to the consequences of decisions whilst fairness has a bearing to the manner in which decisions must be taken.

The Industrial Court was endowed with the responsibility of ascribing meaning to the fairness-concept in determining unfair labour practices. The courts were therefore compelled to rule on unfair labour practices in order to prevent further political unrest and to establish a forum for proper regulation of the employment relationship.[784] This led to judgements on the fairness (or not) of labour practices and also resulted in the establishment of the concept of unfair labour practices.[785] Cooper states that the jurisdiction of the Industrial Court resulted in "rights-based rules" in terms of which fairness was seen as the balancing of rights between employers and employees in order to obtain labour peace.[786] In the course of the court's existence, different *modus operandae* were utilised to determine fairness:

a) **Defining fairness according to interpretation of statutes** In an attempt to provide meaning to the concept of fairness, the Industrial Court utilised the definition of unfair labour practices contained in the 1956-LRA. The first case following this method was *SADWU v The Master Diamond Cutters' Association*

781 Currie and De Waal 2005:503 and Landman 2004:808.
782 McGregor 2012:4. This is in conformity with the view of Aristotle that fairness entailed the equal treatment of equals and the unequal treatment of unequals.
783 Marais 1989: 9.
784 Currie & De Waal 2005: 501
785 As contained in section 186(2) of the Labour Relations Act 66 of 1995.
786 Woolman *et al* (Vol 4) 2009: 53-11 – 53-12.

of SA.[787] The definition[788] covered all forms of possible unfair labour practices, including unfair conduct pertaining to dismissals. The court also held as follows in *MAWU v BTR Sarmcol*:[789] "The present definition of unfair labour practice is extremely wide and virtually open ended. The interpretation of respondent that the latter part of s 1(1)(a)(ii) is not qualified by the word unfair in fact leads to an even wider application hereof. In other words almost all labour practices will of necessity fall within the definition if they in fact may prejudice or jeopardize employment opportunities. Although the present wording of the definition lends support to respondent's argument, it will lead to absurd results that it cannot be countenanced, and would make nonsense of the definition. In the view of the court the accent falls on the unfairness of conduct. This is borne out by the fact that is it is an unfair labour practice which is being defined and not a labour practice per se. Therefore unfair must read to qualify the rest of s 1(1)(a)(ii). It is obvious that this definition requires reformulation".[790] Following amendments, dismissals were regulated separately from other residual examples of unfair conduct. It resulted in amendments to the 1995-LRA regulating specific forms of unfair labour practices.[791] But did this definition provide insight into what fairness entails? Van Jaarsveld *et al* acknowledges the possibility of this by stating that fair labour practices may be regarded as the opposite of unfair labour practices.[792] Although there may be some truth in this statement and although it may assist in ascribing meaning to the concept of fairness, it is suggested that the concept of fairness comprise much more than merely being the opposite of unfairness.

b) **Defining fairness according to reasonableness** The first case on unfair labour practices to be heard by the Industrial Court was *Metal & Allied Workers' Union v*

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787 *SADWU v The Master Diamond Cutters' Association of SA* 1982 3 ILJ 87 IC.

788 Refer to Chapter 2 par 13. The Industrial Court was in existence from 1979 – 2000. It therefore made use of the first definition (1979), the second definition (1980), the third definition (1988) and the fourth definition (1991).

789 *MAWU v BTR Sarmcol* 1987 8 ILJ 815 IC.

790 *MAWU v BTR Sarmcol*:830I-831B.

791 1995-LRA:section 186(2).

792 Van Jaarsveld ea 2001b:par 687 fn 2.

A Mauchle.[793] Based upon this landmark-case the following suggestion regarding fairness was made: "Fairness is obviously a policy decision and like other policy decisions which require pronouncement by the courts, it can be expected that the court will rely on the prevailing values of fairness in the community and the test of the reasonable man. Both are fictions. It is not a sociological investigation, verifiable by empirical evidence, which the court has to conduct. It is really no more than the balance of the respective interests of the employer and the employee in a capitalist society."[794]

c) **Defining fairness according to commercial rationale** Commercial rationale was never cited as a direct reason for the court's determination of fairness. But is suggested that the Industrial Court applied it in an indirect manner to determine fairness especially in dismissal- cases of misconduct and operational requirements.[795]

3.3 Contemporary views

."…the nature of equity remains shrouded in mystery. The search for the meaning of justice which began in the corridors of the Academy of Athens is still an unfinished story. Much of the uncertainty which surrounds the meaning of equity is due to the fact that the law must balance the interest of the individual against the interest of society, and each set of interest is differently affected by moral codes".[796]

Justinian described this concept as "the set and constant purpose to give every man his due". Cicero viewed fairness dualistically: On the one hand it was based on the direct principles of truth, justice and the fair and good; on the other hand it entailed an exchange of a recompense which, in the case of a kindness is called thanks and in the

[793] *Metal & Allied Workers' Union & another v A Mauchle (Pty) Ltd t/a Precision Tools* 1980 3 ILJ 227 IC.
[794] Cheadle 1980:201-202.
[795] Marais 1989:30.
[796] Marais 1989:5 quoting Newman.

case of a wrong revenge. Fairness is one of the most difficult words to define. This may be so because of the fact that fairness is sometimes much more of an idea, an ideal.[797] Fairness basically represents the inherent conflict between "what is" and "what is supposed to be". It may be synonymous with words like, just, equitable, reasonable, fair-minded and righteous. Just is defined according to what is in accordance with what is right. Equitable refers to the capacity enabling one to do what is right upon another. It is therefore suggested that the true meaning of fairness is not confined to a specific word but to an all-embracing concept. This may be explained by an example containing the essence of Calvin's approach to fairness:[798] When a seller must determine the fairness of a selling price it is not necessarily fair to decide on a fair price affording benefits to both the seller and the purchaser. Fairness would rather entail striking a balance between the seller asking for a price that he would have been prepared to pay if he was the purchaser, and the seller looking after his own interests to make a fair profit. This is not the easiest balance to strike, is it? It is then when it is realised that "'fairness' is the term increasingly preferred to denote the set of principles traditionally designated by the more formal rubric 'natural justice'".[799] Based on these premises it is suggested that fairness is subordinate to reasonableness; but in order to be fair, a reasonable balance between parties' interests must be struck. These synonyms describing fairness are therefore all dependent on each other to attain the true meaning as is envisaged by the word itself.

There are 3 theories relating to the attempt to define fairness:[800]

- **Positive law-theory** Fairness is adhering to positive law.
- **Law of nature-theory** Fairness is based upon laws of nature.
- **Social interest-theory** Fairness is the promotion of social interest.

It is sometimes both sensible and unavoidable to define a certain concept with reference to the opposite of that concept. Unfairness was defined as follows:

797 Marais 1989:6.
798 Goudzwaard 2009:442.
799 Hersch 1993:1136.
800 Marais 1989:10.

> "…it is apparent that one has to establish the meaning of that word [unfairness] from subparas (i) to (iv) of the definition and also from para (b) thereof. …The *Shorter Oxford English Dictionary* at 2297 defines unfair *inter alia* as "not fair or equitable, unjust", "unfavourable". In the Afrikaans text the corresponding word is "*onregverdig*", which according to Kritzinger, Schoonees & Cronje *Groot Woordeboek* (11 ed 1972) at 425, may also be translated as 'unjust, inequitable'. The aforegoing can be said to support the meaning of 'unfair' to be 'inequitable'. …For the purposes of this analysis, one could probably accept that the word 'unfairly' in the context used in the definition, could mean, subject to the meaning further attributed thereto in the examination of the remainder of the definition, 'inequitable' or 'unjustified'."[801]

Du Toit *et al* define fairness as a practice that is "…not capricious, arbitrary or inconsistent".[802]

In *NEHAWU v University of Cape Town* Ngcobo J expressed himself as follows regarding fair labour practices and in particular, the fairness concept:

> "Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is confounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept. …The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the specialist tribunals including the Labour Appeal Court and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the 1995-LRA, a statute which was enacted to give effect to section 23(1). In giving content to this

801 *SADWU v The Master Diamond Cutters' Association of SA*:116F-H.
802 Du Toit ea 2006:481.

> concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956-LRA as well as the codification of unfair labour practices in the 1995-LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance. …That is not to say that this Court has no role in the determination of fair labour practices. Indeed, it has a crucial role in ensuring that the rights guaranteed in section 23(1) are honoured".[803]

Although abovementioned definitions does not truly shed any light on the meaning of fairness it is confirmed that such a determination of fairness and unfairness should be an exercise in statutory interpretation and not a matter of personal inclination.[804] The true intention of the legislature should therefore be sought. And as early as 1931 our current approach to this interpretation was already supported: A liberal instead of a restrictive construction of fairness should be preferred as fairness is a provision with a beneficial object.[805] Grogan suggests the following criteria that may be regarded as the hallmark of unfair conduct:[806]

- Favouritism on the basis of irrelevant criteria.
- Arbitrary treatment (treatment not according to established rules).
- Irrational treatment on the basis of unproven or untested views and suppositions.
- Penalisation or denial of advantages without adhering to the *audi alteram et partem*-rule.

The undisputed fact remains that the word fair is much, much more than an adjective as it introduces an equitable component into the area of law covered by the constitutional

803 *NEHAWU v University of Cape Town*:paras 33-35.
804 Brassey ea 1987:61.
805 *City Council of Cape Town v Union Government* 1931 CPD 366:369.
806 Grogan 2010:98.

right contained in section 23(1).[807] Also, the fairness or not of a labour practice can only be defined with reference to the specific circumstances surrounding the practice.

4. Requirements for fair conduct

4.1 Commercial rationale and legitimacy

Brassey produced a ground-breaking essay in 1987 on unfair labour practices with specific reference to the fairness-factor.[808] In exploring the concept of fairness he starts of his argument with determining the object of an employment relationship. He finds that the employment relationship is a mercantile relationship and that financial gain is the mainspring of this relationship.[809] The employer wants to make a profit and hires the employee in order to get the job done; the employee agrees to the hire because he wants to make a profit from the rendering of his services. Money (a commercial rationale) is the fundamental object for both parties. This object is permitted by the legislature who believes that the parties' interests will be served by the free enterprise system it manifests.[810] (This pursuit of gain is, however, controlled and regulated by the legislature through instruments like the Basic Conditions of Employment Act, the Labour Relations Act, health – and safety legislation.)

Brassey then continues his analysis of fairness by indicating that fairness is usually determined by reference to the object of a particular situation.[811] The following mundane

[807] Grogan 2010:97 (as adapted).
[808] Brassey ea 1987:17-176. His analysis of fairness has been described by Cheadle ea 2005:par 18.4.2 as "forms a better basis for developing a conception of fairness than the inarticulate formulations of the Industrial Court and the vague moral norm adopted by the Appellate Division [in 1996 in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others*]".
[809] Brassey ea 1987:65.
[810] Brassey ea 1987:65.
[811] Brassey ea 1987:65-66.

example is provided to illustrate his conclusion in a brilliant fashion:[812] "Since we were children we have used unfair to describe conduct in conflict with its apparent objective. Ask a child, for example, whether a race is fair if one of the runners gets a thirty metre start, and he will say "no". He assumes that the objective is to discover who can run the fastest. Then tell him the runner in question is younger than the others, chances are he will say the race is fair, or at any rate would be fair if the handicap were right. He is now assuming that the objective is to find out who can run the fastest taking the age difference into account. In each case, he decides the issue of fairness by reference to the objectives of the race". It can therefore be concluded that as long as an action is taken that is relevant to the object of the race, or, if irrelevant but being able to be justified with reference to the object, it will be regarded as a fair action; the moment any action irrelevant to the object of the race is taken, unfairness will most probably be determined.

But, although commercial rationale is therefore a necessary condition for any test of fairness in an unfair labour practice, it is not a sufficient condition. The rationale must, in addition, be legitimate.[813]

If abovementioned way of reasoning is utilised to determine the fairness of practices and is compared to the employment relationship, the following concise conclusion is suggested: Conduct by an employer or an employee should, first of all, bear a commercial rationale in order to be regarded as a fair labour practice. If there is no commercial rationale it will not be fair. But even if a commercial rationale is present, the conduct must also be legitimate (taking section 23(1) of the Constitution, legislation and the common law into regards).

[812] Brassey ea 1987:65-66.
[813] Brassey ea 1987:98.

4.2 Balancing the rights of the employer, the employee and the public

The unfairness-concept usually only comes into play in relationships where a party possesses power over another – the unfairness is then a result of an abuse of power.[814] What is important is the fact that fairness can only be attained if the rights of both workers and employers are considered[815] and balanced.[816] "Thus, any understanding of fairness must involve weighing up the respective interests of the parties, in addition to the interests of the public".[817]

In *National Education Health & Allied Workers Union v University of Cape Town & Others* it was held that workers' rights to job security as well as the interests of employers should be protected. The court also balanced the employer's commercial interests and the legitimate workplace interests of employees in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others*.[818]

The importance of this balance was also confirmed in *Sidumo v Rustenburg Platinum Mines Ltd*:[819]

> "The Constitution and the LRA seek to redress the power imbalance between employees and employers. The rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organisations. Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal. It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to a dispute. Dismissal disputes are often emotionally charged. It is therefore all the more important that a scrupulous even-handedness be maintained. The approach of the Supreme Court of Appeal tilts the balance against employees. It is a practical reality that in the first place it is

814 Grogan 2010:98.
815 Woolman ea (Vol 4) 2009:53-16.
816 Bosch 2006:32. *NEHAWU v University of Cape Town*:113.
817 Currie and De Waal 2005:504. Du Toit ea 2006:483 agree with this statement when they quoted the court in *Nehawu v University of Cape Town & others*: "…this right is 'incapable of precise definition'".
818 *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others*.
819 *Sidumo v Rustenburg Platinum Mines Ltd* 2007 28 ILJ 2405 CC.

> the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing discretions. Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace".[820]

Unfortunately the balance between these two groups' rights can be troublesome. In *Hoffmann v South African Airways*[821], although keeping the rights of the employer in mind, the court held the following: "*Our Constitution protects the weak, the marginalized, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secured that our own rights are protected.*"

Due to the fact that both the employer and the employee must act fairly towards one another, an indication of the requirements in the two different circumstances will therefore be made. Note, however, that the practices itself will be discussed in greater detail in chapter 5 of this study.

4.3 The interests of the employer

It seems suitable to start with the reason for introducing the concept of fairness in labour legislation from 1979: Employers' and employees' rights had to be balanced, but more

[820] *Sidumo v Rustenburg Platinum Mines Ltd*:par 74 – 75.
[821] *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC):par 34.

importantly, effect had to be given to the 1956-LRA's objective of labour peace.[822] It is submitted that since then, labour peace has been attained (at least up until the economic recession in 2009) and it seems as if the emphasis has shifted to the promotion of employees' interests and rights.

It is interesting to note that unfair labour practices can, in terms of the 1995-LRA, only be committed by employers. It therefore seems as if only employees' interests are protected. However, the court held that the 1995-LRA was not intended to "…regulate exhaustively the entire concept of a fair labour practice as contemplated in the Constitution".[823]

Employees owe a common law duty of good faith to the employer. An employee may not act in a manner which is calculated or likely to destroy, or seriously impair, the relationship of trust existing between the employer and the employee.[824]

4.4 The interests of the employee

Over the years the balance between the interests of employers and employees was neglected in so far as it was mostly the conduct of the employee vis-à-vis the employer that was regulated. Due to the employee's subordinate position towards the employer and the corresponding all-embracing duty of good faith, the employee was required to obey all lawful commands, not to be guilty of insubordination, to be respectful and courteous towards the employer and to serve the employer honestly and faithfully.[825] Despite this rather comprehensive regulation of the employee's obligation to respect the interests of the employer, little attention was given to the corresponding obligation of the employer. In chapter 3 of this study[826] the implied duty of trust and confidence of the employer, as was highlighted in *Council for Scientific & Industrial Research v Fijen*, was

[822] Du Toit *et al* 2006: 481.
[823] *National Entitled Workers Union v CCMA*:2340.
[824] Jordaan 1992:53.
[825] Bosch 2006:31.
[826] Par 3.1.2.

comprehensively discussed. It is therefore submitted that greater emphasis and recognition of this duty may facilitate the balance of interests of employer and employee, as envisaged in the right to fair labour practices, necessary to ensure fairness in an employment relationship.[827]

The description and explanation of the role of fairness in the workplace is known as organisational justice.[828] In order to ensure fairness in the workplace, the employer must ensure that fairness is attained in the three pillars constituting organisational justice:[829]

a) **Distributive justice** This pertains to the fairness in the decisions which the employer makes. It also refers to the perceived fairness of the outcome or allocations that an employee receives. Employers should keep equity, needs and equality of employees in mind to ensure fairness of decisions (distributive justice).
b) **Procedural justice** This pertains to the procedures adopted by the employer in making decisions. It ensures that not only a fair decision will be made but that the decision will also be fairly executed.[830] Procedural justice refers not only refers to the fairness of procedures in place but also to the extent to which individuals regard their employers as being fair and sincere.
c) **Interactional justice** This pertains to the interpersonal treatment employees receive. Not only should the interpersonal treatment of employees be fair but care should also be taken to be fair when formal decision-making procedures are explained.

McGregor *et al* highlight the fact that fairness by the employer is required throughout all of the employment stages. The following requirements for fair conduct by the employer during the different stages are provided by said authors:[831]

827 Bosch 2006:31.
828 Coetzee and Vermeulen 2003:19.
829 Coetzee and Vermeulen 2003:19-21. (The most important highlights of these authors' useful discussion are provided here.)
830 Hersch 1993:1133.
831 McGregror 2012:5.

- **Pre-employment stage** During this stage the employee is still only regarded as a job applicant and not yet as an employee. The employer is required to act fairly in its dealings with the job-applicant, especially not to discriminate unfairly towards job applicants.[832]
- **During-employment stage** The fairness required by employers towards employees during employment[833] more or less pertains to protection of employees against unfair labour practices, e.g. promotion, demotion, training, provision of benefits and suspension.[834] To this common law fairness (e.g. the duty to provide a safe working environment and working conditions) and other legislative fairness (e.g. non-discrimination) can also be added.
- **Termination-of-employment stage** A contract of employment may be terminated due to various circumstances like, *inter alia*, death of the employee, resignation of the employee, insolvency of the employer and mutual agreement between the employer and employee. When the employer, however, terminates the contract it must be a substantively – and procedurally fair termination (dismissal). The duty of fairness by the employer can even be extended to the period after dismissal, for example, in cases of re-employment.

Employers owe a corresponding common law duty of good faith to the employee as highlighted in par 4.3 above. An employer may not act in a manner which is calculated or likely to destroy, or seriously impair, the relationship of trust existing between the employer and the employee.[835]

832 1998-EEA:section 9.
833 McGregor 2012:30.
834 1995-LRA:section 186(2).
835 Jordaan 1992:53.

5. Determining fairness

Currie and De Waal suggests that the determination of the concept of fairness as envisaged in section 23(1) is only of limited use.[836] It is further suggested that one should consider the purpose of legislation when determining the fairness of a labour practice.[837]

5.1 Determining fairness in terms of the Constitution, legislation and the common law

South Africa's Constitution and Bill of Rights enjoy a special status in our legal order. This special status can be explained as follows: No right can be directly relied upon and be claimed in terms of the Constitution. The Constitution does not regulate conduct directly but only guarantees the constitutionality of rights.[838] This principle also pertains to section 23(1) – the unfairness of a labour practice cannot be directly challenged in terms of section 23(1) but must be challenged in terms of common law[839] or legislation giving effect to the constitutional right to fair labour practices.[840] Although the development of fair labour practice jurisprudence therefore lies with the legislature and specialist courts, the Constitution "has a supervisory role to ensure that the legislation giving effect to the right is properly interpreted and applied".[841] Of course the Constitution can be directly relied upon if no common law or legislation giving effect to the constitutional right is in existence.[842] It is however advised that it would be more beneficial to apply to the court for a development of the common law rather than directly

836 Currie and De Waal 2005:504.
837 Currie and De Waal 2005:504.
838 Davis 1994:452.
839 The Constitution:section 8 obliges courts to develop the common law in order to give effect to a constitutional right.
840 Olivier 2006:22. *NEHAWU v University of Cape Town*:para 34. "…must be given content by the legislature and thereafter left to gather meaning…from the from the decisions of the specialist tribunals…". Also refer to Devenish 2005:126.
841 Cheadle ea 2005:par 18.4.2 fn 55. This means that all legislation and common law must be interpreted to "promote the spirit, purport and objects of the Bill of Rights". (The Constitution:section 29(2)) Also refer to Govindjee and Van der Walt 2012:4.
842 Grogan 2010:4. Also see *Gcaba v Minister of Safety & Security and others* 2007 28 ILJ 1909 CC:par 51.

relying upon the constitutional right.[843] The reason for this is that once the common law is developed to establish a certain principle, it becomes an essential element of the concept of a fair labour practice.[844] It will only relive as a constitutional issue when the developed common law rule is improperly applied.

Many arguments for and against constitutionalisation of labour rights have been raised. On the positive side it "provides employees with a minimum floor of rights which no court of law or statute can diminish".[845] On the negative side there is the danger of juridification[846] of labour legislation and also the fact that the judiciary interferes with something that was reserved for the legislature.[847] The fact remains that all labour legislation and labour principles in general must be interpreted according to the Constitution. Du Toit and Potgieter also states that the Constitution has served as an important source in interpreting labour legislation.[848]

When the constitutionality of any action needs to be determined, an analysis of a fundamental right will very often take place. This analysis comprises three stages: application, interpretation and limitation.[849] If this analysis is applied to section 23(1) of the Constitution the analysis will be as follows:[850]

a) During the first stage the court will have to determine whether the Bill of Rights applies to the relationship in question.
b) In the second stage it must be determined if this right to fair labour practices has been infringed. Determine whether the provision *prima facie* infringes any of the basic rights laid down by the Bill of Rights. (Establish the ambit of the right in

843 Cheadle ea 2005:par 18.4.2.
844 Cheadle ea 2005:par 18.4.2.
845 Du Toit & Potgieter 2007: 4B12.
846 See fn 20 in Chapter 1.
847 Du Toit & Potgieter 2007: 4B12.
848 Du Toit & Potgieter 2007: 4B13. This was not always the situation. In Woolman *et al* (Vol 4) 2009:2-11 Woolman and Swanepoel describes the first attempt of judicial review by Chief Justice JG Kotze in *Brown v Leyds* in 1897. Kotze CJ was of the opinion that sovereignty vested in the people of the Republic and not in the *Volksraad*. He was of the opinion that the court therefore was obliged to strike down legislation incompatible with the *Grondwet*. ZAR President Paul Kruger described this view as an "invention of the devil" and Kotze was dismissed as Chief Justice.
849 Chaskalson *et al* 1996: 1-4.
850 Du Toit *et al* 2006: 70-71.

accordance with section 39 of the Constitution) An explicitly purposive approach must be followed with the interpretation of this legislation and with the Constitution.[851] The interpretation of these statutes should therefore be conducted in order to give effect, *inter alia*, to the right to fair labour practices. It was also held that the Constitutional Court had an important supervisory role to play in ensuring that legislation giving effect to the constitutional right was properly interpreted.[852]When interpreting this right to fair labour practices a court must promote the values of an open and democratic society based on freedom and equality.[853] The interpretation of the labour legislation is analogous to constitutional interpretation[854] insofar as the interpretation has an embodied future perspective.[855]

c) And in the third stage it must be determined whether a limitation of this right (to the extent of the infringement) is justifiable in an open and democratic society, in other words in accordance with section 36 of the Constitution. If the infringement does not pass the limitation-test it must be interpreted in compliance with the Constitution. Otherwise it will be declared invalid to the extent of its inconsistency.

When the state or an individual relies on a statute, that statute is subject to constitutional review.[856] When the state relies on common law, the common law is subject to constitutional review, but when an individual relies on common law the question whether the common law is subject to constitutional review is a bit more

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851 Du Toit *et al* 2006: 61-62. Du Toit also describes it as a "…more contextually-sensitive and value-coherent approach…". Also see Chaskalson *et al* 1996: 11-6A where Kentridge and Spitz support this approach. However Kentridge JA stressed the importance of the text itself and stated in *S v Zuma & others* 1995(2) SA 642 (CC) at para 17 the following: "I am well aware of the fallacy of supposing that general language must have a single objective meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which is to be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination".

852 Du Toit *et al* 2006: 483 quoting from *Nehawu v University of Cape Town & others*.

853 Chaskalson *et al* 1996: 11-7.

854 Du Toit *et al* 2006: 64-65.

855 As Du Toit *et al* puts it: "…drafted with an eye to the future".

856 Chaskalson *et al* 1996: 1-4.

complex. Woolman, however, endorsed the horizontal approach.[857] According to section 8(2) of the Constitution, the Bill of Rights may be applied horizontally between persons. Labour rights are therefore suited to horizontal application.[858]

5.2 Different situations in the process of determining fairness

The determination of the fairness of a labour practice can occur in one of four situations. It is therefore important to identify the type of situation in order to correctly apply the right to fair labour practices:[859]

a) **No legislative provision is in existence and the courts develop the common law** Due to the fact that no legislation regulating the fairness of the specific situation is in existence, the courts will have to develop the equity-based jurisprudence. The unfair labour practice must firstly be identified and the balance between the interests of the employer and employee must then be found. This balance can only be found by way of a value judgement of the courts whilst taking all the surrounding circumstances into account.[860]

b) **Legislation affording discretion to tribunals/courts to determine the fairness of a labour practice** Legislation usually identifies the different labour practices but the determination of fairness thereof is left to the discretion of specialist bodies. Examples of these practices are dismissals, employment discrimination, re-organisation of employment and discipline. The courts and tribunals must then give content to the practices in order to interpret and apply the legislation. In applying the discretion regard must be having to the legislation itself, previously decided case law and international instruments.

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857 Chaskalson *et al* 1996: 1-5. Also refer to Chapter 10 of this work where a detailed discussion is put forward to indicate that all law is subject to the scrutiny of the Constitution.

858 Woolman *et al* (Vol 4) 2009: 53-2. This view is also supported by articles 1 and 2 of the ILO's Convention on the Right to Organize and Collective Bargaining. These articles provide that protection is afforded regarding activities relating to private conduct and legislative enactments.

859 Cheadle ea 2005:par 18.4.2. provides a useful exposition of these four circumstances.

860 Refer to par 4 above for a more comprehensive discussion on the determination of fairness with reference to balancing the respective interests of the employer and the employee.

c) **Legislation is in existence and expresses the fairness of the provision itself** Legislation must be tested and analysed by the courts to determine whether fairness is given expression to.

d) **Legislation is in existence and allows for various mechanisms (including collective bargaining) to determine the fairness of a practice** This situation mainly addresses underlying disputes of interest. Such a dispute is usually regulated by legislation but they are also usually left without any arbitration-based remedy. Since the fairness of these disputes usually can't be determined by arbitration, two other mechanisms fulfil this role: collective bargaining and minimum standards legislation. The fairness of these disputes must be determined by the designed mechanisms itself; otherwise the Constitutional Court will become an appeal court on every claim of fairness. Also, the moment collective issues come into play; resort should be taken to sections 23(2) – 23(6) of the Constitution and not section 23(1).

6. Conclusion

Fairness is a concept that has drawn attention not only since the unfairness of labour practices in South Africa has been realised but since the beginning of time. In attempting to comprehend the meaning of this concept attention should therefore be divided to the unfairness complained of, the views of ancient philosophers, the recommendations of the Wiehahn Commission, the previous Industrial Court's perception and decisions on fairness, contemporary views and future predicaments (last mentioned form an important part of defining this concept due to the fact that much of the meaning of the concept of fairness is contained in its idealistic nature).

Determining the fairness of a labour practice should not be done according to a value judgment made by a court as this would lead to much uncertainty. In *Concorde Plastics*

(Pty) Ltd v National Union of Metal Workers of SA[861] it was held that in determining whether a particular practice constitutes an unfair labour practice the court passes a moral judgment. Therefore a statutory definition of an unfair labour practice must be interpreted and applied in accordance with the spirit, purport and objects of the fundamental rights guaranteed by the Constitution. It is not certain what type of value judgement will ensure fairness and it is also uncertain how it should be done. Furthermore, the content and standard of such a value judgment is uncertain. Brassey's determination of fairness ensures much more certainty: A labour practice will only be regarded as fair if it bears both an economic rationale and also proves to be legitimate.

It is suggested that fairness is determined by balancing the respective interests of parties in any given situation. Unfortunately the following is also true: "Fairness for everyone would be possible only if everyone's interests were the same".[862]

[861] *Concorde Plastics (Pty) Ltd v National Union of Metal Workers of SA* 1997 11 BCLR 1624 LC.
[862] Olivier 2006:325.

CHAPTER 6
DEFINING "LABOUR PRACTICES"

1. Purpose of this chapter

This chapter continues with the purposes stated in chapters 3 and 4 of this study. Section 23(1) may be perceived as being open ended and broad. From the reading of it, it seems as if it is not limited by many restrictions. This may lead to critique and legal uncertainty. In order to determine the possible scope of section 23(1) it is therefore necessary to analyse this right with a view of identifying the boundaries and limitations attached to it.

The main aim addressed by section 23(1) is to provide protection and a constitutional guarantee to the fairness of labour practices. Studying and exploring only the concept of fairness would not provide insight into the scope of this constitutional right. This constitutional right and guarantee, is after all, focussed on labour practices.

2. Introduction

Cheadle suggests that the determination of the scope of section 23 should not be focussed on the word everyone but should be made and limited by reference to the phrase labour practices.[863] The reason for this is to be found in the fact that the section only applies to the class of persons included in the concept of labour practices.[864]

[863] Cheadle (ed) ea 2005:18-3. This view was also supported by Mubangizi 2004:123.

[864] Cheadle (ed) ea 2005:18-3. Refer to chapter 2 of this study for a suggested definition on labour practices (although it was stated by Ngcobo J in *National Education Health & Allied Workers Union v University of Cape Town* that "…the concept of fair labour practice is incapable of precise definition."

Cheadle then proceeds to define labour practices as "…practices that arise from the relationship between workers, employers and their respective organisations".[865] When defining the concept of labour practices, Du Toit *et al* refers to labour as "…encompassing both mental and physical labour" and describes a 'practice' as "…including not only habitual action but also a single act or omission".[866] In individual employment relations labour practices concern the exercise of power by the employer against the employee; in the collective sphere it concerns a complicated dialectic of power between trade union, union members, employee, employer and employers' organisation.[867]

In *DENOSA obo Njeza and Cape Peninsula Organisation for the Aged*[868] it was found that an employer can also be guilty of committing an unfair labour practice falling outside the scope of the 1995-LRA.[869]

Although this concept will be studied in more detail later on in this chapter, it must be noted that on the one hand an attempt to establish the meaning of labour practices, as referred to in section 23(1), may have been limited to the statutory prohibition against unfair dismissal and the definition of unfair labour practices in section 186(2)[870] and, on the other hand, it may have been extended by the provision of section 39[871] that makes provision for the reference to international law when interpreting the Bill of Rights.

865 Cheadle (ed) ea 2005:18-3. Currie and De Waal 2005:504 support this when stating that a labour practice "…must relate to the mutual interests of the employer and employee parties…".
866 Du Toit ea 2006:481.
867 Mubangizi 2004:123 (quoting Cheadle *et al*).
868 *DENOSA obo Njeza and Cape Peninsula Organisation for the Aged* 2009 30 ILJ 949 CCMA.
869 1995-LRA:section 186(2).
870 1995-LRA: section 186(2) defines unfair labour practices.
871 The Constitution:section 39.

3. Equity jurisdiction of the Industrial Court and the Labour Court

3.1 Introduction

The 1956-LRA initially did not make provision for the concept of unfair labour practices. Circumstances like the political tension in the late 1970's, the aggressiveness of trade unions and the implementation of certain recommendations by the Wiehahn Commission after 1979[872], awakened the concept of unfair labour practices.

After amendments to the LRA in 1979, an unfair labour practice was, for the first time, defined as follows:
"…any labour practice which in the opinion of the industrial court is an unfair labour practice".[873]

Abovementioned definition was amended several times and the last definition in terms of the 1956-LRA was as follows:
""Unfair labour practice" means any act or omission, other than a strike or lock-out, which has or may have the effect that

(i) any employee or class of employees is or may be unfairly affected or that his/their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
(iii) labour unrest is or may be created or promoted thereby;
(iv) the labour relationship between employer and employee is or may be detrimentally affected thereby".[874]

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872 See *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing Deel 5* RP 27/1981: 4.127.17.
873 *Labour Relations Act* 28/1956: section 1 as amended by the *Industrial Conciliation Amendment Act* 94 of 1979:section 1(f).
874 1956-LRA:section 1(1) as amended by the Labour Relations Amendment Act 9/1991: section 1(a) (as contained in GN 741 *Government Gazette* 1991:310(13145). Van Niekerk (ed) ea 2012:39 refers to the 1982-definition. There is a respectful recommendation that the Industrial Relations Amendment

In terms of this jurisdiction of the Industrial Court, unfair labour practices were held to cover both individual and collective practices but were limited to the employer-employee relationship.

A practice was defined as to include both habitual action and a single act or omission.[875] Labour included both mental and physical labour.[876]

3.2 Specific acts of unfairness emanating from equity jurisdiction

The following are examples of labour practices that were ruled to be unfair in terms of the equity-based jurisprudence:[877]

- Unfair dismissals (due to a lack of substantive and procedural fairness)
- Dismissal of striking employees participating in a lawful strike[878]
- Failure to re-employ where there was an agreement to that effect
- Failure to renew a contract where there was a reasonable expectation of such renewal[879]
- Selective dismissal[880]
- Racial discrimination[881]
- Victimisation for trade union activities[882]

Supplementary to above the following practices were struck down for being conducive to labour unrest and undermining of the employment relationship:

Act 95/1982 only amended the definition very slightly. After that there was another amendment of the definition in 1988. The last definition, and also probably the definition that was referred to by the drafters of the Interim Constitution, was the 1991-definition. It is therefore submitted that the definition referred to should be the definition that was indeed contained in the 1991 Amendment Act (although it did not differ much from the 1982-definition).

875 *Trident Steel (Pty) Ltd v John NO* 1987 8 ILJ 27 (W).

876 *Bleazard v Argus Printing & Publishing Co Ltd* 1983 4 ILJ 60 (IC).

877 Woolman ea (Vol 4) 2009:53-12

878 *NUM v Marievale Consolidated Mines Ltd* 1986 7 ILJ 123 (IC).

879 *Mtshamba v Boland Houtnywerhede* 1986 7 ILJ 563 (IC).

880 *Fihla v Pest Control* 1984 5 ILJ 165 (IC).

881 *MWU v East Rand Gold & Uranium Co Ltd* 1990 11 ILJ 1070 (IC).

882 *Mbatha v Vleissentraal Co-operative Ltd* 1985 6 ILJ 333 (IC).

- Refusal to bargain[883]
- Bad faith bargaining[884]
- Failure to accord rights relevant to the bargaining process[885]
- Use of unfair bargaining tactics[886]
- Resorting to industrial action before reaching deadlock in negotiations[887]

3.3 Specific acts of unfairness emanating from the 1995-LRA

The 1995-LRA identifies the following unfair labour practices:[888]

- Unfair conduct relating to workers' security
- Unfair conduct relating to work opportunities
- Unfair disciplinary action

Surprisingly the 1995-LRA does not regulate unfair labour practices relating to a duty to bargain and a duty to bargain in good faith.[889]

According to Woolman the current scope of labour practices should at least include the following:[890]

- Unfair practices relating to work security and employment opportunities
- Unfair practices relating to minimum standards afforded by the BCEA
- Unfair practices relating to disputes of right

883 *FAWU v Spekenham Supreme* 1988 9 ILJ 628 (IC).
884 *MAWU v Natal Die Casting Co (Pty) Ltd* 1986 7 ILJ 520 (IC).
885 *NUM v Free State Consolidated Gold Mines (Operations) Ltd* 1988 9 ILJ 804 (IC).
886 *East Rand Gold & Uranium Co Ltd v NUM* 1989 10 ILJ 683 (LAC).
887 *NUM v Henry Gould (Pty) Ltd* 1988 9 ILJ 1149 (IC).
888 Woolman ea (Vol 4) 2009:53-13.
889 Woolman ea (Vol 4) 2009:53-13.
890 Woolman ea (Vol 4) 2009:53-13 – 53-14.

4. Suggested forms of labour practices pertaining to individual employment relations that may result in unfair labour practices in terms of section 23(1)

There are three different views regarding the scope of the concept of labour practices:

- **Narrow view** In terms of this view it is held that labour practices are limited to practices arising from the unfair labour practice jurisdiction of the 1995-LRA.
- **Extended view** Labour practices are not limited to the 1995-LRA only but to any practices that arise from the relationship between workers, employers and their respective organisations.
- **Broad view**[891] Labour practices are not limited to the 1995-LRA and practices that arise from the relationship between workers, employers and their respective organisations but to all practices related to and emanating from the employment relationship.

Due to the fact that the broad view on labour practices is supported by author of this study, a very brief outline of the possible practices in individual employment relations that, firstly, may be regarded as labour practices and, secondly, may result in unfairness, will be provided. The discussion will then be continued with reference to the collective sphere as well.

4.1 Practices termed as unfair labour practices in the 1995-LRA

The 1995-LRA gives effect to the constitutional right of fair labour practices by regulating certain unfair labour practices.[892] In terms of the 1995-LRA's unfair labour practices, such a practice can either be due to an act or an omission, can only be committed by an employer, is limited to certain labour practices and can only occur during the duration of the employment relationship.[893] The following practices are

[891] This view was developed by the author of this study and is consequently the view preferred.
[892] 1995-LRA:section 186(2).
[893] Van Jaarsveld ea 2001a:13-10.

regulated as possible unfair labour practices by an employer in the employment relationship:

4.1.1 Unfair conduct of an employer relating to promotion

The promotion of an employee usually refers to a raise in status, rank, position and/or salary. Promotion generally falls within the managerial prerogative and it is exceptional that an employee will be contractually entitled to a promotion or will be able to prove a legitimate expectation to a promotion.[894] When the employer exercises his/her managerial prerogative regarding a promotion, this decision must be substantively and procedurally fair.

Substantive fairness mainly entails the following:

- The employer's discretion must not be exercised capriciously.[895]
- An employer must be able to provide reasons for the decision.[896]
- An employee acting in a certain position does not have any automatic entitlement to appointment in or promotion to that position.[897]
- The employer must honour a legitimate expectation or promise of promotion.[898]
- The employer's decision must not be taken on wrong principles[899] and must be in compliance with the prescribed requirements of a post.[900]
- The employer must not show bias in the decision to promote or not to promote.[901]
- The employer must apply affirmative action measures in a fair manner when promoting employees.[902]
- The employer must act consistently.[903]

894 McGregor (ed) ea 2012:78.
895 McGregor (ed) ea 2012:78; Van Jaarsveld ea 2001a:13-11.
896 Van Jaarsveld ea 2001b:par 692; McGregor (ed) ea 2012:78.
897 *SAPS v Basson* 2006 ILJ 614 LC.
898 Van Jaarsveld ea 2001a:13-11.
899 McGregor (ed) ea 2012:78.
900 Van Jaarsveld ea 2001a:13-11.
901 McGregor (ed) ea 2012:79.
902 Van Jaarsveld ea 2001a:13-11.

Procedural fairness mainly entails the following:

- The employer may not apply unacceptable or unfair comparisons.[904]
- The employer must afford the employee the right to challenge to composition and/or competency of a selection panel.[905]
- The employer must follow agreed promotion procedures.[906]
- The employer must consider all candidates.[907]
- The employer may not refuse to provide candidates with promotion information.[908]
- The employer must consider the development of an employee.[909]

4.1.2 Unfair conduct of an employer relating to demotion

Demotion of an employee relates to a transfer of an employee to a lower level, a decrease in remuneration, a decrease in benefits or a loss in status.[910] A demotion must be substantively and procedurally fair in order not for it to be considered an unfair labour practice.

Substantive – and procedural fairness mainly entails the following:

- The transfer of an employee with a consequent lowering in status should be undertaken according to the transfer policy and only after consultation with the employee.[911]

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903 Van Jaarsveld ea 2001a:13-11.
904 *George v Liberty Life Association of South Africa Ltd* 1996 4 BLLR 494 IC.
905 Fouche 2003:ULP-9.
906 Van Jaarsveld ea 2001a:13-11.
907 The so-called "bottom line". Van Jaarsveld ea 2001a:13-11; Fouche 2003:ULP-8.
908 *PSASA obo Petzer v Department of Home Affairs* 1998 ILJ 412 CCMA.
909 Fouche 2003:ULP-9.
910 *Murray v Independent Newspapers* 2003 24 ILJ 420 CCMA.
911 McGregor (ed) ea 2012:79. Refer to *Member of the Executive Council, Department of Roads & Transport, Eastern Cape & another v Giyose* 2008 29 ILJ 272 E where it was held that, although being a matter under administrative law, an employee is entitled to the right to a pre-transfer hearing also based on the right to fair labour practices.

- The demotion of an employee in terms of restructuring or merging of organisations should be undertaken according to the transfer policy and only after consultation with the employee.[912]
- The demotion of an employee as a disciplinary measure (in order to avoid a dismissal) should be undertaken according to the disciplinary code of the employer and only after consultation with the employee.[913] Demotion as a disciplinary measure can only be taken where a dismissal is justified but, due to mitigating circumstances, the employer decides not to dismiss the employee.[914]

4.1.3 Unfair conduct of an employer relating to probation

Probation refers to the agreed-upon period after the appointment of the employee during which the employer evaluates the skills, capacity and other factors of the employee in order to determine whether the appointment of the employee should be confirmed or not. An employer must present substantive – and procedural fairness to an employee on probation.

Substantive fairness mainly entails the following:

- The period of probation should be a reasonable period with reference to the nature of the job and the time it will take to conduct a reasonable evaluation.[915] Training, guidance and advice should be given to the employee during this period.[916]
- The probation should be used for the right reason: evaluation of the employee.[917]

Procedural fairness mainly entails the following:

[912] McGregor (ed) ea 2012:79. (The substantive fairness is based on the operational requirements of the employer.)
[913] McGregor (ed) ea 2012:79. (The disciplinary code must make provision for such action to be taken.)
[914] *Arries v Afric Addressing (Pty) Ltd t/a Afric Mail Advertising* 1998 5 BALR 525 CCMA.
[915] McGregor (ed) ea 2012:80.
[916] Van Jaarsveld ea 2001a:13-15.
[917] McGregor (ed) ea 2012:80.

- The period of probation should be determined in advance.[918]
- If the employer decides to extend the probation period or not to confirm the appointment of the employee, an employee must be allowed an opportunity to make representations in this regard.[919]
- If the employer decides to extend the probation period or not to confirm the appointment of the employee, the employee must be afforded an opportunity to improve, must have been aware of unacceptable standard of work, must have been counselled and must have been treated sympathetically and with patience.[920]

4.1.4 Unfair conduct of an employer relating to training

An employer must act substantively – and procedurally fair as far as providing training to an employee. Training must be provided if:

- it was agreed on,[921]
- if it is necessary for the advancement of the employee and there is an established practice of training in the workplace, and
- if the employee can prove a legitimate expectation of training.[922]

Due to the fact that the 1998-SDA and 1998-EEA also contain provisions pertaining to the development of skills of the employee and the training of an employee and also because these provisions are so narrowly entwined with the duty to provide training, it is submitted that non-compliance of these provisions may also result in an unfair labour practice.[923]

[918] McGregor (ed) ea 2012:80.
[919] McGregor (ed) ea 2012:80.
[920] *SACTWU v Mediterranean wooden Mills (Pty) Ltd* 1995 3 BLLR 24 LAC. Also refer to Van Jaarsveld and Van Eck 2006:139.
[921] *VLC Properties v Olwyn* 1998 12 BLLR 1234 LAC. This is confirmed in *MITUSA v Transnet Ltd* 2002 11 BLLR 1023 LAC.
[922] McGregor (ed) ea 2012:81.
[923] Le Roux 2009:58 (quoting Cheadle).

4.1.5 Unfair conduct of an employer relating to the provision of benefits

The exact meaning of a benefit is very difficult to determine. A benefit refers to anything extra to what an employee is entitled to.[924] Variation of benefits should only be effected if there is a fair reason for such a variation and if the employee has been consulted.[925] Furthermore, an employee must be entitled to a benefit before an unfair labour practice can be committed; if there is a mere interest in or to a benefit, it must be resolved by way of industrial action.[926]

The Minister of Labour may determine whether a particular category of payment forms part of an employee's remuneration. The following categories of payment usually forms part of remuneration package of employee and will therefore not constitute a benefit for purposes of an unfair labour practice:

- Housing allowance.
- Car allowance.
- Employer's contribution towards medical -, pension – or provident fund.
- Funeral or death benefit schemes.
- Any cash or in kind payment other than payment to enable employee to work.

The following categories of payment usually do not form part of remuneration package and may therefore be the subject of an unfair labour practice:

- Relocation allowance.
- Gifts from employer.
- Share incentive schemes.
- Discretionary payments not related to employee's hours of work/performance.
- Entertainment allowance.
- Education or schooling allowance.

924 *Schoeman v Samsung Electronics*:1102J-1103A.
925 Van Jaarsveld ea 2001a:13-16.
926 McGregor (ed) ea 2012:81.

4.1.6 Unfair conduct of an employer relating to suspension or any other disciplinary action short of dismissal

Suspension is when an employee is prohibited temporarily from rendering his services to his employer whilst continuing to be an employee. An employer must be substantively – and procedurally fair when suspending an employee. There are 2 forms of suspension:[927]

- **Precautionary suspension** The employee is suspended pending the outcome of a disciplinary hearing. This suspension is implemented to allow the employer to investigate the matter but in the absence of the employee because there is reason to believe that the employee's presence will be detrimental to the investigation.[928] This suspension must be accompanied with payment of usual salary. The employer must have a reasonable belief that the employee is guilty of the allegations. The employee's presence must pose a threat to the business of the employer or the validity of the investigation. It is sometimes necessary to hold a hearing before suspending an employee pending the outcome of the main disciplinary hearing, although it not a usual requirement.[929]
- **Punitive suspension** This type of suspension can only be implemented as an alternative to a sanction of dismissal.[930] This type of suspension may take the form of an unpaid suspension.

The following forms of disciplinary action need mention:

- **Warnings** An unwarranted warning is an example of disciplinary action short of dismissal that will result in an unfair labour practice.[931]
- **Transfers** Transfer as a disciplinary measure must be preceded by an opportunity where the employee can state his case. Other transfers must be fairly effected whilst taking all relevant circumstances into account.[932]

927 *Koka v Director-General: Provincial Administration North West Government* 1997 7 BLLR 874 LC.
928 McGregor (ed) ea 2012:82.
929 Fouche 2003:ULP-16.
930 McGregor (ed) ea 2012:83.
931 *Zulu v Empangeni Transport Ltd* 1990 ILJ 123 IC.
932 Van Jaarsveld ea 2001a:13-21.

- **Reduction in salary and wages** Minor breaches of contract and damage to the employer's property caused by the employee would warrant a reduction or deduction of salary. Substantive – and procedural fairness should be adhered to.
- **Short-time** An employee may be instructed to work short-time as long as it complies with substantive – and procedural fairness.[933]

4.1.7 Unfair conduct of an employer relating to a refusal to reinstate or re-employ in terms of any agreement

In the event of an agreement of reinstatement or re-employment of an (former) employee, the employer must act substantively – and procedurally fair if the terms of the agreement require reinstatement or re-employment. The employer is, however, not compelled to reinstate or re-employ employees where the required skills needed are not available amongst the persons contemplated in such an agreement.[934]

4.1.8 Unfair conduct of an employer relating to an employee suffering an occupational detriment on account of a protected disclosure

The Protected Disclosures Act[935] aims to promote a culture of openness and accountability and regulates the disclosure by employees of information on suspected criminal and other improper conduct by employer. The PDA protects an employee against an occupational detriment when the employee makes a protected disclosure. Such a detriment will then be regarded as an unfair labour practice.

933 Van Jaarsveld ea 2001a:13-21.
934 *National Automobile and Allied Workers Union (now known as National Union of Metalworkers of South Africa) v Borg-Warner SA (Pty) Ltd* 1994 3 SA 15 A.
935 Protected Disclosure Act 26/2000 (and hereinafter referred to as the PDA).

An occupational detriment may be any of the following:[936]

- Any disciplinary action.
- Dismissal, suspension, demotion, harassment or intimidation.
- Involuntary transfers.
- Refusal of a transfer or a promotion.
- Subjection to a term of employment.
- Subjection to a term of retirement (altered/kept) to the employee's disadvantage.
- Refusal of a reference or providing an adverse reference.
- Denial of appointment to any position or office.
- Threats of any of the above.
- Any other adverse treatment pertaining to employment, employment opportunities and work security.

A disclosure will be regarded as a protected disclosure if it is made to any one of the following:

- To legal practitioner/legal advisor
- In good faith to an employer.
- In good faith to a member of Cabinet or to the Executive Council of a province.
- In good faith to the Public Protector or the Auditor-General.
- In good faith to any person/body by an employee who reasonably believes that the information is true.

The information disclosed must revolve around the following in order to be regarded as a protected disclosure:

- Committing of a criminal offence.
- Failure to comply with a legal obligation.
- Occurrence of miscarriage of justice.
- Endangerment of health/safety.
- Damage to the environment.

[936] McGregor (ed) ea 2012:84.

- Unfair discrimination.
- Concealing any of the above.

4.2 Unfair discrimination against job applicants, employees and former employees

Unfair discrimination was regulated as an unfair labour practice since 1988 when it was included in the definition of an unfair labour practice. It was then moved to Item 2 of Schedule 7 to the 1995-LRA. It was only in 1998 with the enactment of the 1998-EEA that unfair discrimination against employees was regulated in detail. The provisions contained in Item 2 of Schedule 7 to the 1995-LRA were moved to the 1998-EEA in 2002.

Unfair discrimination against anyone is prohibited by the Constitution on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and any other ground that may be proven to be unfair.[937]

Unfair discrimination against an employee[938] is prohibited by the 1998-EEA on the grounds of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.[939] Harassment of an employee on any one or more of these grounds is also regarded as unfair discrimination.[940] Discrimination as a possible form of unfair labour practice usually surfaces in hiring, training, promotion, pay and other conditions of employment.[941]

[937] The Constitution:sections 9(3) & (4).
[938] This includes a job applicant.
[939] The 1998-EEA:section 6(1).
[940] The 1998-EEA:section 6(3).
[941] Davis ea 1997:215.

4.3 Medical testing of employees

An employer must be substantively – and procedurally fair when subjecting an employee[942] to medical testing.

The 1998-EEA provides as follows:

> "(1) Medical testing of any employee is prohibited, unless –
>
> (a) legislation permits or requires the testing; or
>
> (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.
>
> (2) Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act".[943]

4.4 Psychological testing and other similar assessments

An employer must be substantively – and procedurally fair when subjecting an employee[944] to psychological testing and other similar assessments.

Such tests or assessments may only be conducted in the following circumstances:[945]

- The test must be scientifically proven to be valid and reliable.
- The test must be able to be applied fairly to all employees.
- The test may not be biased against any employee or group.

[942] This includes a job applicant.
[943] The 1998-EEA:section 7.
[944] This includes a job applicant.
[945] The 1998-EEA:section 8.

4.5 Statutory restrictions on employment

An example of a statutory restriction is an advocate who is statutorily prohibited to practise in someone else's service and for such a person's account. The prohibited conduct is punishable with removal from the roll of advocates. Such a restriction will, apart from constituting unequal treatment or an unwanted intrusion into freedom of trade, also be subject to constitutional scrutiny on the strength of section 23(1).[946] This acknowledgment of unfair labour practices beyond the confines of the employment relationship is however criticized by Davis *et al* because of the fact that the remainder of section 23 focusses on employment related aspects.[947]

4.6 Terms of employment

Although terms of employment are usually regulated by the 1997-BCEA, it is foreseeable that unfair terms of employment may be brought under the protective scope of section 23(1) as well. An example of this is the fact that certain workers e.g. senior managerial employees are permitted and required to work longer hours. This would very well constitute an infringement of the right to fair labour practices.[948]

Davis *et al* state the possibility of state employees attacking unfair conditions of employment in terms of section 23(1) as conditions of employment also form a labour practice.[949]

It is necessary to emphasize an important *caveat* in this regard: Terms of employment which are accorded to a worker in terms of legislation or an agreement will usually be referred to as a dispute of right. A mere interest in improved terms of employment will

[946] Brassey 1998:C3: 29.
[947] Davis ea 1997:214.
[948] Brassey 1998:C3: 33.
[949] Davis ea 1997:216.

be categorized as a dispute of interest and is as such not subject to the provisions of section 23(1).[950]

4.7 Dismissal

An employer must act substantively – and procedurally fair as far as the termination of an employee's employment is concerned. There are 3 reasons that will satisfy the substantive fairness of a dismissal: Misconduct, incapacity and operational requirements. Each of these categories (reasons) has its own set of procedural requirements: Misconduct – An opportunity for the accused employee to be heard; incapacity – informing employee of incapacity and affording employee an opportunity to improve; operational requirements – consultation with the employee in order to avoid or soften the consequences of the retrenchment.

Although dismissals are thoroughly regulated by the 1995-LRA, there have been a few incidents where workers were initially not granted relief based on the fact that they were not regarded as employees in terms of the 1995-LRA.[951] Based on their right to fair labour practices, however, they were brought under the protective ambit pertaining to dismissals of the 1995-LRA.

An employee whose employment has been terminated must refer such a dispute to the CCMA. If conciliation fails, the parties may proceed with arbitration. The arbitration award, however, is final and no appeals may be made against such an award. Although this may possibly also present an unfair labour practice, the real problem lies with the right to legal representation at the CCMA.[952] No legal representation is allowed during the process of conciliation. If the dismissal was based on misconduct or incapacity, no legal representation is allowed at the arbitration proceedings as well, unless parties

[950] Also refer to chapter 1 par 25 of the current study. Van Niekerk (ed) ea 2012:180-181 provide a useful discussion of this and prove that unfair labour practices only concern disputes of right.

[951] Refer to the *Kylie*-case, the *Discovery*-decision and the *SITA*-decision in this regard. These workers were all brought under the ambit of the 1995-LRA on the strength of their right to fair labour practices.

[952] Brassey 1998:C3: 37.

agree to it or the commissioner considers it necessary for the proper conduct of the case. If a party is therefore denied legal representation during arbitration proceedings, it may very well constitute an unfair labour practice in terms of section 23(1).

4.8 Pension rights and interests pertaining to unemployment insurance, workmen's compensation, claims against an employer's insolvent estate and claims of severance pay

Beneficiaries of pension schemes have usually ceased to be employees and pension funds are often controlled by independent organisations. Grogan therefore states that it may prove difficult to apply the right to fair labour practices to pension rights.[953]

Another view in this regard entails that an employer is obliged to protect an employee's right to pension benefits based on the contractual duty of good faith.[954] In terms of this duty an employer should not act in a manner which is calculated or likely to destroy, or seriously impair, the relationship of trust existing between them. When it lies within the discretion of the employer, fairness must be displayed in protecting the employee's right to pension benefits.[955]

It is, therefore, submitted that due to the broad meaning attached to everyone and due to the fact that the receipt of a pension-benefit stems from the employment relationship, it may be possible to enforce a right to fair labour practices in respect of pension rights.

It is further submitted that these same principles pertain to the interest in unemployment insurance or workmen's compensation.[956] A suggestion was even made that, on strength of the right to fair labour practices, an employee's claim against the insolvent estate of an employer will encourage the placement of employees in a separate

[953] Grogan 2009:89.
[954] Jordaan 1992:53.
[955] Jordaan 1992:54.
[956] Le Roux 2009:58 disagrees with this.

category of creditors.[957] Reference can also be made to *Mathews v Glaxosmithkline SA* where it was held that although the unfair differentiation in payment of severance benefits to employees of the same standing and service should fall under the 1995-LRA, the court was even prepared to provide relief in terms of section 23(1) should the action prove to be unsuccessful under the 1995-LRA.[958]

It is however important to note that the right to fair labour practices will only find application where an employee is indeed entitled to that right – section 23(1) was not enacted to be used by an employee, not entitled to benefit from a right, to persuade an unwilling employer to give him or her such a benefit.[959]

5. Suggested forms of labour practices pertaining to collective employment relations that may result in unfair labour practices in terms of section 23(1)

It is believed by some learned colleagues and authors that section 23(1) does not also provide protection to the labour practices mentioned in the remainder of section 23. Cooper, for instance, suggests that section 23(1) should be viewed distinct from the other labour rights contained in section 23(2) – (6).[960] Van Niekerk *et al* supports this view held by Cooper: The main reasons advanced are that collective labour disputes deal with disputes of interests and not disputes of right. Author of this study agrees with that fact but it is submitted that section 23(1) does not envisage the regulation of disputes of interest when regulating labour practices giving effect to a workplace characterized by fair labour practices. By extending section 23(1) to collective labour relations, the collective disputes as such are not intended to be regulated – it is rather a "pavement of the way to ensure fairness in the workplace in all regards". The second reason advanced is that section 23(1) is distinct from the remainder of section 23. Once

957 Van Eck ea 2004:902.
958 *Mathews v Glaxosmithkline SA (Pty) Ltd* 2006 27 ILJ 1876 LC.
959 *Moloka v Greater Johannesburg Metropolitan Council* 2005 26 ILJ 1978 LC.
960 Woolman ea (Vol 4) 2009:53-14 – 53-15.

again there is a respectful disagreement with this view as this author believes that section 23(1) served as an introductory right, stating the purpose even, of the whole notion of regulating fair labour practices in its entirety. Individual – and collective relationships are intertwining relationships and it is possible that individual rights present it in collective issues.

There are, however, also opinion that section 23 (1) does not preclude inclusion of the remainder of section 23. The court, in one instance at least, has hold that this right to fair labour practices can encompass trade union rights as well.[961] Davis *et al* hold that the 1991-defintion of an unfair labour practice, which was in effect when the interim Constitution was drafted, clearly included the regulation of collective labour relations as well.[962] It was furthermore acknowledged that collective labour relations do not only address collective issues but in fact relate to the dignity of workers who may not be treated as coerced employees[963] – which serves as a very good reason for forming part of the right to fair labour practices. It is also interesting to note that although both the 1956-LRA and the Interim Constitution did not provide express protection to trade unions and employers' organisations, this protection is now explicitly included in section 23 – there must be an obviously important reason for that.

5.1 Union organisation

The 1995-LRA entitles employees to form, join and participate in the activities of trade unions.[964] Organisational rights are also provided to unions.[965] These rights of workers are also guaranteed in section 23(2) of the Constitution. Similarly, employers are also entitled to form, join and participate in the activities of employers' organisations.[966] The

961 *SANDU 1*.
962 Davis ea 1997:214. The IC continued in the same fashion recognizing collective labour relations as a possible form of an unfair labour practice in its equity-based jurisprudence. This view is also supported by Van Jaarsveld and Van Eck 2006:137. They recommend that this definition still serves as guideline in order to give meaning to the concept of fair labour practices.
963 *NUMSA & others v Bader Bop*. Also refer to Rautenbach 2003:181-182.
964 1995-LRA:sections 4 and 5.
965 1995-LRA:sections 12-14 and 16; The Constitution:section 23(4).
966 The Constitution:section 23(3).

right of organisation forms an integral part of the vitally important collective bargaining process, required to ensure fairness and equality in labour matters.[967]

In the unlikely event where the 1995-LRA will not be applicable, recourse may be taken in terms of sections 23(2) and 23(3). And in the further unlikely event of this not finding application, it is suggested that section 23(1) will find application – the right of workers, employers and unions to organise remains a labour practice.

5.2 Closed shop agreements

Closed shop agreements seem to be open to constitutional challenge based on employees' right to freedom of association.[968]

Brassey submits that closed shop agreements can be constitutionally justified as long as it "…fulfils its proper objectives without operating in an unduly oppressive way".[969] It is also submitted by the author of this study that there is a fundamental difference between the right of freedom of association and the right of freedom of non-association. Based on this difference and due to the fact that the Constitution does not guarantee a right of freedom to non-association, it seems correct to state that closed shop agreements will not necessarily be regarded as an unfair labour practice. This view of author is also reflected in the argument of Du Toit and Potgieter.[970]

967 Devenish 1999:315.
968 Brassey 1998:C3: 42.
969 Brassey 1998:C3: 43.
970 Du Toit and Potgieter 2007:par 4B19. The regulation and limitations placed upon closed shop agreements in section 26 of the 1995-LRA contributes to the fact that such an agreement will most probably pass the constitutionality-test.

5.3 The right to bargain

The right to engage in collective bargaining is guaranteed in section 23(5). This right is granted to employers, employers' organisations and trade unions. Employees can't rely on this right individually as collective bargaining requires employees to act in concert.

This right to engage in collective bargaining involves three important elements:[971]

a) **The freedom to bargain collectively** This is a negative right directed against the state not to prohibit collective bargaining.
b) **The right to use economic power in collective bargaining** It entails the use of various forms of economic power against partners in the process of bargaining.
c) **The duty to bargain** It is a positive right and "carries with it a policy choice as to the form and level of collective bargaining and the regulatory regime that is necessary to govern and maintain it".[972]

The most obvious consequences of collective bargaining are collective agreements, closed shop agreements and agency shop agreements. These agreements may be applicable on non-parties and although there are regulatory provisions for these agreements, not much regulation exist pertaining to the content of these agreements.

5.4 The right to strike

The right of every worker to strike is embedded in the Constitution as well as the 1995-LRA.[973] This right can be limited by, *inter alia*, the 1995-LRA if the limitation is in

[971] Mubangizi 2004:125.
[972] It is suggested that there is no duty to bargain. The state is not compelled to bargain but can also not prevent collective bargaining. It would therefore rather be described as a freedom to bargain (although practice and power-play between the parties may effect an indirect duty to bargain). See Devenish 1999:316.
[973] The Constitution:section 23(2)(c); the 1995-LRA:section 64.

compliance with section 36.[974] Also note that it is a general right to strike that is afforded, not only in respect to collective bargaining.[975]

5.5 Picketing

Picketing is indirectly guaranteed in the Constitution[976] and is regulated in the 1995-LRA.[977] It is foreseeable that disputes pertaining to picketing may concern the constitutionality of the 1995-LRA in this regard: A picket can only be called by a registered union; also, the CCMA's power to lay down rules for the picket may very well also result in an infringement of the right to fair labour practices.[978]

5.6 Lock-out

No explicit constitutional right to lock-out has been granted to employers. It is argued that the right of the employer to bargain collectively also contains an implication to the right to perform a lock-out.[979]

6. Conclusion

The purpose of studying the concept of labour practices was to establish the true meaning of this concept in order to determine the exact scope of section 23(1). It was stated that a determination of the scope of this constitutional right is necessary in order to enhance legal certainty as to the correct application of section 23(1). The scope of

974 Van der Walt (ed) ea 2012:8.
975 Brassey 1998:C3: 51-52.
976 The Constitution:sections 15 and 16.
977 1995-LRA:section 69.
978 Brassey 1998:C3: 54.
979 Brassey 1998:C3: 55.

application can therefore either be limited or extended, depending on all the surrounding circumstances and other factors influencing the application of this constitutional right, but most importantly, depending on the values and norms laid down in the Constitution.

If the other factors, *i.e.* the concept of everyone and the meaning of fairness, influencing the application of section 23(1), the history of unfair labour practice regulation and the values of the Constitution are taken into consideration, it seems justified to conclude on the concept of labour practices in the following fashion: the Constitution envisaged to prevent and prohibit the repetition of a system that was representative of unfairness in the employment relationship. Both individual – and collective employment relations have bearing on the perceived fairness of the employment relationship. All practices concerned with the employment relationship (before, during and after such a relationship) should therefore be subject to the scrutiny of the constitutional right to fair labour practices.

CHAPTER 7
CONCLUSION AND RECOMMENDATIONS

In order to determine the exact meaning and scope of the constitutional right to fair labour practices, not only the right itself should be analysed but also the historical development that led to the origin of the right.

From the analysis of the historical development of fair labour practices, the following conclusions were made:

- History in general, the history of labour law and especially the history pertaining to fair labour practices have indeed impacted on the current regulation of the right to fair labour practices. Many of the challenges that are currently being faced in labour law, especially with regards to the right to fair labour practices, stem from the past, the manner in which labour was approached in the past and the neglect to appreciate the consequences of the past on the current regulation of this concept.
- The human element of the labour relationship was initially disregarded by the notion of slavery. Fairness towards the person providing labour was not only initially ignored but was neglected for a very long time. This ignorance and neglect did not only influence legislation and the regulation of services while being in existence but continued to influence it for a long time after the abolishment thereof – in the mindsets of people, in the manner in which employers treated (some) employees and in (un)written policies. The manner in which certain groups of employees were treated until the late 1980's can be described as an almost moderate version of this concept of slavery.
- Both the common law and the common law contract of employment have, for a long time, served as the only basis for establishing and regulating an employment relationship. The common law continuously forms an important part of the establishment and regulation of the relationship between employer and employee. Circumstances may even prove that protection or regulation in terms of common law is sometimes more beneficial than constitutional or legislative

protection. But, despite the continued importance of it, it must be developed to such an extent that due regard must be given to all the circumstances surrounding the relationship between a person rendering services and the person paying for the services in order to establish the true nature of the relationship and in order to ensure the fairness of the practices of this employment relationship. The main reason for this new approach, in terms of which the existence of an employment relationship is established with reference to circumstances surrounding the work relationship rather than the existence of a contract of employment, is rooted in the fact that the contract of employment, being an ordinary commercial contract in its core, may not always serve the principle of fairness to its fullest. And it is then when the new approach will prove to be the preferential approach for ensuring fairness in the employment relationship.

- The 1995-LRA does not guarantee, define and regulate a general right to fair labour practices as the 1956-LRA did.
- By amending "residual unfair labour practices" in the 1995-LRA to "unfair labour practices", much confusion was unnecessarily created.

From the analysis of the word "everyone", the following submission is made: our law has moved beyond the realms of contract to broad constitutionality in determining who is an employee. Although a contract of employment (or being regarded as an employee) is required to claim labour rights in terms of the 1995-LRA and other labour laws, section 23(1) of the Constitution provides broader protection than labour laws where a person is in a work relationship akin to an employment relationship. It seems safe to conclude that "everyone" is determined with reference to being involved in an employment relationship. The following persons will therefore in general enjoy protection in terms of this right: natural persons, juristic persons, employers, workers (including employees employed in a contract of employment and employees *in utero*), citizens, aliens, children, job applicants, illegal workers (to a certain extent), temporary workers, casual workers, acting workers, probationary workers and managerial employees. It is however suggested that a definition of an employer must be included and the definition of an employee be amended with reference to the employment

relationship in the 1995-LRA. It is also suggested that the protection afforded by section 23(1) is not limited to an individual relationship but extends to collective relationships as well.

Fairness is a concept that has drawn attention not only since the unfairness of labour practices in South Africa has been realised but since the beginning of time. It has been proved that a definition and provision of a meaning of the concept of fairness cannot be postponed anymore. Although previous regulation of unfair labour practices contained protection against unfair labour practices in general, and, consequently also contained an indication of defining such unfairness, the current regulation of fairness of labour practices does not contain any definition of the fairness-concept. It has been held that it is impossible of precise definition. In attempting to comprehend the meaning of this concept attention should therefore be divided to the unfairness complained of, the views of ancient philosophers, the recommendations of the Wiehahn Commission, the previous Industrial Court's perception and decisions on fairness, contemporary views and future predicaments (last mentioned form an important part of defining this concept due to the fact that much of the meaning of the concept of fairness is contained in its idealistic nature). It is strongly suggested that the current definition of fairness should rest heavily on the 1991-definition. Much wisdom is also contained in the factors of commercial rationale and legitimacy as indicating fairness. Determining the fairness of a labour practice should not be done according to a value judgment made by a court as this would lead to much uncertainty. In *Concorde Plastics (Pty) Ltd v National Union of Metal Workers of SA* it was held that in determining whether a particular practice constitutes an unfair labour practice the court passes a moral judgment. Therefore a statutory definition of an unfair labour practice must be interpreted and applied in accordance with the spirit, purport and objects of the fundamental rights guaranteed by the Constitution. It is not certain what type of value judgement will ensure fairness and it is also uncertain how it should be done. Furthermore, the content and standard of such a value judgment is uncertain. Brassey's determination of fairness ensures much more certainty: A labour practice will only be regarded as fair if it bears both an economic rationale and also proves to be legitimate.

The concept of labour practices serves as an important factor determining the scope of the protection afforded by section 23(1). If the other factors, *i.e.* the concept of everyone and the meaning of fairness, influencing the application of section 23(1), the history of unfair labour practice regulation and the values of the Constitution are taken into consideration, it seems justified to conclude on the concept of labour practices in the following fashion: the Constitution envisaged to prevent and prohibit the repetition of a system that was representative of unfairness in the employment relationship. Both individual – and collective employment relations have bearing on the perceived fairness of the employment relationship. All practices concerned with the employment relationship (before, during and after such a relationship) should therefore be subject to the scrutiny of the constitutional right to fair labour practices.

The following recommendations are therefore made:

- It is of the utmost importance to always acknowledge the human element of labour in ensuring the fairness of labour practices.
- Despite the continued importance of the common law and the common law contract of employment, it must be developed to such an extent that due regard must be given to all the circumstances surrounding the relationship between a person rendering services and the person paying for the services in order to establish the true nature of the relationship and in order to ensure the fairness of the practices of this employment relationship, rather than a mere reference to only the existence of such a contract. Fair labour practices should be adhered to in every work relationship akin to an employment relationship.
- It is, however, not only the common law that should be adapted in order to ensure fair labour practices for everyone involved in an employment relationship, but legislation should also be amended accordingly. It is recommended that the 1995-LRA be amended to guarantee, define and regulate a general right to fair labour practices as the 1956-LRA did. Not only will this conform to the Constitution and give a more meaningful effect to the Constitution but will the

necessity of direct reliance upon the Constitution, and consequential room for juridification to that effect, be reduced.

- It is also recommended that the wording in the 1995-LRA of "unfair labour practices" be amended to revert back to the wording of "residual unfair labour practices". With the enactment of the 1995-LRA, the previous 1991-definition of an unfair labour practice found way into the legislation in the following manner: Protection against unfair dismissals was separated from other unfair conduct known as "residual unfair labour practices" contained in Item 2 of Schedule 7 in the 1995-LRA. Also was there no general protection against unfair labour practices. In 1992 the discrimination aspect of "residual unfair labour practices" was moved to the 1998-EEA and the remainder of Item 2 was moved to chapter 8 of the 1995-LRA. Following American jurisprudence,[980] the move to chapter 8 was also coupled with a change in terminology: "Residual unfair labour practices" was changed to "unfair labour practices". Due to the fact that the general protection against unfair labour practices was not contained in that section anymore, the general protection got lost in a sense. If the original term of "residual unfair labour practices" was kept intact, much of the confusion generated by the term "unfair labour practices" would have been avoided. The general protection against unfair conduct should also have been retained. But the most important conclusion from this past mistake is this: The regulation of residual unfair labour practices under something termed as unfair labour practices created the confusion that the residual unfair labour practices were the only unfair labour practices as envisaged in section 23(1).
- A definition of an employer must be included and the definition of an employee be amended with reference to the employment relationship in the 1995-LRA.
- An attempt should be made to provide guidelines for establishing fairness of labour practices. It is strongly suggested that such a definition of fairness should rest heavily on the 1991-definition. Much wisdom is also contained in the factors of commercial rationale and legitimacy as indicating fairness. It is therefore

[980] This was clearly a mistake. The name of a concept was followed although, according to Devenish 1999: 314, the South African concept of unfair labour practices is distinct and the content thereof was not derived from the labour regimes of the United States, Canada and Japan.

suggested that fairness is determined by balancing the respective interests of parties in any given situation. Unfortunately the following is also true: “Fairness for everyone would be possible only if everyone’s interests were the same”.

Based on the critical analysis conducted in this study the final conclusion may be formulated as follows: Everyone participating in an employment relationship is entitled to fair labour practices.

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Summary

Section 23 of the Constitution is an embodiment of fundamental labour rights. Section 23(1) reads as follows:

"(1) Everyone has the right to fair labour practices."

The fair labour practice concept is a rather recent development in South African labour law and is it therefore still required to attempt to provide meaning to this concept. It further becomes essential to provide meaning to the concept if it is acknowledged that when this concept was introduced in 1979, the unfairness of the concept was regulated by labour legislation and the Industrial Court's equity jurisprudence; currently, not only the unfairness of this concept is legislatively regulated but is the fairness of this concept embedded as a constitutional guarantee in the Constitution of South Africa. It has therefore become necessary to determine the exact scope of this constitutional right in order to determine the relation between the legislative concept and the constitutional right and to investigate whether there is any room for an extended view of this right and to which limitations (if any) it should be subjected to.

Prior to analysing the constitutional right to fair labour practices, a comprehensive investigation was led into the historical position preceding the introduction of this right. It was found that the history of fair labour practices played an immensely important role in the analysis of this constitutional right. The events, motivations and circumstances which consequently led to the introduction of this right, without any doubt, provided a useful guideline as to the interpretation of the right. The disregard for the human element present in the employment relationship, not only while slavery was in existence but also in the continued policies and mindsets of policy-makers thereafter, could be described as the first element contributing to the unfairness of labour practices. It was also found that, although the common law still being relevant, the common law contract of employment should no longer serve as the yardstick for establishing the existence of an employment relationship (for purposes of provision of protection and ensuring fair labour practices). Regards must rather be having to all the circumstances surrounding

the relationship between a person rendering services and the person paying for the services in order to establish the true nature of the relationship. In the end, protection for either of these parties is not solely dependent on a contract of employment anymore, but rather on the fact whether an employment relationship was proven or not. Before the enactment of the Constitution, protection in an employment context was literally limited to legislation providing protection. It is suggested that legislation should be interpreted according to the Constitution and common law should be developed in terms of the Constitution. Based on this premise everyone can currently enjoy the right to fair labour practices based on section 23(1), even if excluded by legislation or common law and even in the absence of regulation by legislation or common law.

When analysing the word everyone, it is submitted that our law has moved beyond the realms of contract to broad constitutionality in determining who is an employee. A claim to be recognised as an employee in terms of the 1995-LRA is not contractual in nature but rather a claim to enforce constitutional rights. Although a contract of employment (or being regarded as an employee) is required to claim labour rights in terms of the 1995-LRA and other labour laws, section 23(1) of the Constitution provides broader protection than labour laws where a person is in a work relationship akin to an employment relationship. Everyone should be determined with reference to "being involved in an employment relationship". The following persons will therefore in general enjoy protection in terms of this right: natural persons, juristic persons, employers, workers (including employees employed in a contract of employment and employees *in utero*), independent – and dependent contractors, citizens, aliens, children, job applicants, illegal workers (to a certain extent), temporary workers, casual workers, acting workers, probationary workers and managerial employees. It is also suggested that the protection afforded by section 23(1) is not limited to an individual relationship but extends to collective relationships as well.

Fairness is a concept that has drawn attention not only since the unfairness of labour practices in South Africa has been realised but since the beginning of time. In attempting to comprehend the meaning of this concept attention should therefore be

divided to the unfairness complained of, the views of ancient philosophers, the recommendations of the Wiehahn Commission, the previous Industrial Court's perception and decisions on fairness, contemporary views and future predicaments (last mentioned form an important part of defining this concept due to the fact that much of the meaning of the concept of fairness is contained in its idealistic nature). Determining the fairness of a labour practice should not be done according to a value judgment made by a court as this would lead to much uncertainty. Therefore a statutory definition of an unfair labour practice must be interpreted and applied in accordance with the spirit, purport and objects of the fundamental rights guaranteed by the Constitution. It is not certain what type of value judgement will ensure fairness and it is also uncertain how it should be done. Furthermore, the content and standard of such a value judgment is uncertain. Brassey's determination of fairness ensures much more certainty: A labour practice will only be regarded as fair if it bears both an economic rationale and also proves to be legitimate. It is suggested that fairness is determined by balancing the respective interests of parties in any given situation.

If the other factors, *i.e.* the concept of everyone and the meaning of fairness, influencing the application of section 23(1), the history of unfair labour practice regulation and the values of the Constitution are taken into consideration, it seems justified to conclude on the concept of labour practices in the following fashion: the Constitution envisaged to prevent and prohibit the repetition of a system that was representative of unfairness in the employment relationship. Both individual – and collective employment relations have bearing on the perceived fairness of the employment relationship. All practices concerned with the employment relationship (before, during and after such a relationship) should therefore be subject to the scrutiny of the constitutional right to fair labour practices.

Opsomming

Artikel 23 van die Grondwet is ‘n vergestalting van fundamentele arbeidsregte. Artikel 23(1) lees as volg:

“(1) Elkeen is geregtig op billike arbeidspraktyke.”

Die billike arbeidspraktyk beginsel is ‘n relatief nuwe ontwikkeling in die Suid-Afrikaanse arbeidsreg en word dit daarom deurgaans en steeds vereis om te poog om betekenis aan hierdie beginsel te verleen. Dit is verder belangrik om betekenis aan die beginsel te verleen indien erkenning verleen word aan die feit dat toe die beginsel in 1979 bekendgestel is, die onbillikheid van die beginsel slegs deur arbeidswetgewing en die Nywerheidshof bepaal is; huidiglik word die billikheid nie net aan die hand van wetgewing bepaal nie maar word hierdie beginsel as ‘n grondwetlike waarborg in die Grondwet van Suid-Afrika vervat. Dit het daarom nodig geword om die presiese omvang van die grondwetlike reg te bepaal en om ondersoek in te stel na die vraag of daar enige ruimte is vir ‘n uitgebreide siening jeens die beginsel en aan watter beperkinge (indien enige) dit onderwerp moet word.

Alvorens die grondwetlike reg tot billike arbeidspraktyke geanaliseer is, is ‘n uitgebreide ondersoek na die historiese posisie wat hierdie reg voorafgegaan het, geloods. Daar is bevind dat die geskiedenis van billike arbeidspraktyke ‘n uiters belangrike rol in die analise van hierdie grondwetlike reg vertolk. Die gebeure, motiverings en omstandighede wat eindelik tot die bekendstelling van hierdie reg aanleiding gegee het, het sonder enige twyfel, ‘n baie bruikbare riglyn tot die interpretasie van die reg voorsien. Die miskenning van die menslike element teenwoordig in die werksverhouding – nie alleenlik tydens slawerny nie maar ook ingewortel in die voortgesette beleidsoorwegings en gedagtes van opstellers van beleide daarna, kan beskryf word as die eerste element wat tot die onbillikheid van arbeidspraktyke bygedra het. Daar is ook gevind dat, alhoewel die gemenereg steeds relevant blyk te wees, die gemeenregtelike dienskontrak nie langer as die maatstaf vir bepaling van die bestaan van ‘n diensverhouding (vir doeleindes van voorsiening van beskerming en waarborg van

billike arbeidspraktyke) geag moet word nie. Dit is meer wenslik dat alle omringende omstandighede betreffende die verhouding tussen ‘n person wat dienste lewer en ‘n person wat vir die dienste betaal, in ag geneem moet word ten einde die ware aard van die verhouding te bepaal. Na alles moet dit in gedagte gehou word dat beskerming vir enige van hierdie partye nie alleenlik van ‘n dienskontrak afhanklik is nie maar eerder van die feit of ‘n werksverhouding nagespoor kon word of nie. Voor die instelling van die Grondwet was beskerming in werksverband letterlik beperk tot wetgewing wat sodanige beskerming verleen het. Daar word aan die hand gedoen dat wetgewing ooreenkomstig die Grondwet geïnterpreteer moet word en dat die gemenereg in die lig van die Grondwet ontwikkel moet word. Gebaseer op hierdie beginsel word almal dan in staat gestel om die reg tot billike arbeidspraktyke, soos vervat in art 23(1), te geniet. Dit sal geld selfs indien iemand deur wetgewing of die gemenereg uitgesluit word en selfs ook in die afwesigheid van enige wetgewing en gemenereg.

Met die analisering van die woord elkeen word dit aan die hand gedoen dat ons reg verby die grense van kontraktereg beweeg het en eerder op breë grondwetlikheid steun ten einde te bepaal wie ‘n werknemer is. ‘n Eis om as werknemer erken te word ingevolge die 1995-WAV is nie kontraktueel van aard nie maar eerder ‘n aansoek om grondwetlike regte af te dwing. Alhoewel ‘n dienskontrak (of om as werknemer beskou te word) vereis word om op arbeidsregte ingevolge die 1995-WAV en ander arbeidswetgewing aanspraak te maak, maak art 23(1) van die Grondwet vir breër beskerming as ander arbeidswetgewing voorsiening waar ‘n person in ‘n werksverhouding is wat grens aan ‘n diensverhouding. Elkeen moet bepaal word met verwysing na betrokke in ‘n diensverhouding. Die volgende persone sal in die algemeen op beskerming ingevolge hierdie reg kan aanspraak maak: natuurlike persone, regspersone, werkgewers, werkers (insluitend werknemers ingevolge ‘n dienskontrak en werknemer *in utero*), onafhanklike – en afhanklike kontrakteurs, burgers, nie-burgers, kinders, aansoekers vir werk, onwettige werkers (in ‘n sekere mate), proeftydperk-werknemers en bestuurswerknemers. Dit word ook aan die hand gedoen dat art 23(1) nie beperk is tot die individuele verhouding nie maar uitgebrei word om die kollektiewe verhouding ook in te sluit.

Billikheid is ‘n begrip waaraan aandag geskenk is nie slegs sedert die focus op die onbillikheid van arbeidspraktyke in Suid-Afrika nie maar van die begin van tyd af. Wanneer gepoog word om die betekenis van die begrip te verstaan moet ag daarom geslaan word op die onbillikheid wat aangevoer word, die menings van antieke filosowe, die aanbevelings van die Wiehahn Kommissie, die vorige Nywerheidshof se persepsie en uitsprake rakende billikheid, huidige opinies oor billikheid en toekomstige voorspellings (laasgenoemde vorm ‘n belangrike deel van die definisie van hierdie begrip omdat baie van die betekenis van billikheid in die idealistiese aard daarvan opgesluit is). Wanneer die billikheid van ‘n arbeidspraktyk bepaal word moet dit nie ooreenkomstig ‘n waarde-oordeel van die hof geskied nie aangesien dit tot onnodige onsekerheid so lei. Daarom moet ‘n definisie van onbillike arbeidspraktyke in wetgewing vervat word en moet dan geïnterpreteer en toegepas word ooreenkomstig die doel van grondwetlike regte soos dit deur die Grondwet gewaarborg word. Dit is onseker watter tipe waarde-oordeel billikheid sal waarborg en dit is ook onseker hoe sodanige waarde-oordeel sou moes geskied. Verder is die inhoud en standaard van so ‘n waarde-oordeel ook onseker. Brassey se bepaling van billikheid verseker heelwat meer sekerheid: ‘n arbeidspraktyk sal slegs as billik geag word indien dit beide ‘n ekonomise rasionaal en legitimiteit inhou. Dit word aan die hand gedoen dat billikheid bepaal moet word deur die onderskeie belange van die partye in enige gegewe situasie te balanseer.

Indien die ander faktore, dit is die begrip elkeen en die betekenis van billikheid, wat die toepassing van art 23(1) beïnvloed, die geskiedenis van die regulering van onbillike arbeidspraktyke en die waardes soos in die Grondwet vervat in ag geneem word, blyk dit geregverdig te wees om af te sluit oor die begrip onbillike arbeidspraktyke in die volgende trant: die Grondwet het beoog om ‘n herhaling van ‘n sisteem te voorkom wat gespreek het van onbillikheid in die arbeidsverhouding. Beide individuele – en kollektiewe arbeidsregtelike verhoudings speel ‘n rol in die billikheid van die diensverhouding. Alle praktyke ter sprake in die diensverhouding (voor, tydens en na afloop daarvan) moet daarom onderworpe gestel word aan die grondwetlike reg tot billike arbeidspraktyke.

Keywords

Unfair
Labour
Practices
Constitutional
Wiehahn Commission
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Section 23(1)
1977
Worker
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