

An Exploratory Look into Labour Market Regulation

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Abstract

This paper welcomes the fact that the discussion about the labour market and small business has broadened in scope. It considers some of the suggestions made by Cheadle (2006) in his recent concept paper. These include dismissals, unfair labour practices, appointments and promotions and collective bargaining. It also suggests that other changes to our labour laws are necessary, including the need for a doctrine of equal pay for equivalent work, the regulation of labour broker arrangements and other atypical employees, and the manner in which terms and conditions of employment can be amended. Besides legislative amendments it argues against the demise of the Labour Court and for greater administrative and judicial efficiency in that court.

Acknowledgement

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1. Introduction

Cheadle's concept paper (Cheadle, 2006) is not only thought provoking, but his submissions also get to the heart of the debate. Therefore, although this paper is not intended as a direct response to his paper, I refer frequently to his submissions.¹ I also set out a number of other issues that I believe should be considered.

Clearly what started out as a discussion about the labour market and small business has broadened in scope. This is correct because the problems facing small business cannot be solved without affecting the labour market as a whole. There is often a roll-on effect; for example, exemptions for small business from bargaining council agreements might dramatically affect the representivity of bargaining councils, and therefore threaten sectoral collective bargaining. We should, I believe, be cautious about agreeing to changes that may alter the fundamentals of our labour market regulations, which are, I believe, sound, when tinkering with certain areas, as we may affect the balance that has been painstakingly negotiated by the social partners.

We should also recognise that many of the problems facing small business and their employees are the same problems that employers and workers at medium and large enterprises face. In addition, there are also specific kinds of workers that are vulnerable and deserving of greater protection. It is, therefore, not possible to deal with small business in isolation of the broader regulation of the labour market.

At the same time, it would be foolhardy to think that changes to the labour laws alone will solve all the problems. The reason for this is that many of the problems do not lie with the nature of the laws, but rather with the way in which they are implemented or not implemented. A comprehensive programme beyond legislative reform is necessary. These areas include: the competence and training of labour law practitioners and managers generally; the administration of our dispute resolution institutions; and, the training of arbitrators and judges.

However, one point raised by Cheadle in relation to devising labour market legislation warrants repetition, and that is that when formulating legislation we tend to approach the problem as if we are dealing with the typical employer and the typical employee. In so doing, we forget that the legislation must embrace many types of employers and workers

¹ All references to Cheadle, except where so stated, are to his 2006 concept paper.

and different kinds of work, levels of employees and relationships. We need to approach the problem bearing in mind the diversity of employers and employees.

2. Summary

2.1 Dismissals for Misconduct and Incapacity

The problem is not the law, but how it is applied. The Code of Practice must be revised. It should explicitly deal with the procedures required of small businesses. The process and speed with which Codes are adopted and amended at NEDLAC needs to be addressed.

2.2 Dismissals for Operational Requirements

I discuss the nature of the employers and workers interests and analyse the balance struck in the legislation. I trace the difficulty that the courts have had in determining a test for the substantive fairness of a dismissal for operational requirements and to what extent the courts are willing to second-guess the employer's operational decision. I discuss the new s 189A and the problems with that section.

Sections 189 and 189A should be reworked so that all employees have the choice whether to strike about the operational decision or refer a dispute about the substantive fairness of the dismissals to court for adjudication. However, if it were referred to court, then a lesser test for substantive fairness should apply, as is presently encapsulated in s 189A(19) of the LRA. This would be in the interests of small business.

The Code of Practice on Dismissals for Operational Requirements, which is not useful, should be redrafted. It should include a section on the applicable procedure required of small business employers.

2.3 Probation and Newly Hired Employees

I trace the history of this issue during the negotiations that led to the 2002 LRA amendments.

There are questions about whether a qualifying period without protections against unfair dismissal will be constitutional.

I discuss workers' fears about this period, which includes the proliferation of short-term contracts, especially for non-skilled jobs.

In the light of the international trends on this issue, and assuming that a deal can be worked out, I suggest that it should include appropriate regulations that discourage the kinds of problems referred to above, adequately protect newly hired employees from discrimination, victimisation and at least guarantee some degree of substantive fairness (for example, the dismissal must at least be justifiable on rational grounds).

2.4 Recruitment and Hiring

I align myself with Cheadle's comments about selection decisions, except my comments about probation. I endorse his views about the need for a remedy requiring an employer to hire an applicant for employment who was refused employment because of her trade union affiliation or activities.

2.5 Unfair Labour Practices

Based on the CCMA statistics, I raise a question about whether the residual unfair labour practice is a major cause of rigidity in the labour market.

I question whether it is appropriate to leave the regulation of all labour practices contained in s 186(2) of the LRA to collective bargaining.

If a labour practice were to be regulated, then, in the interests of certainty, it would be better for the law to be specific rather than broad. For example, it is better to regulate suspension more fully, than simply provide that the employer may not act unfairly in relation to suspensions.

Promotions

Employers and trade unions should be encouraged to regulate their own promotion policies and procedures. However, in the absence of an agreement, employees should not be left without a remedy to challenge unfair conduct by the employer. This is because promotions are emotional and difficult issues in many organisations and promotion, albeit a species of appointment, concerns an employee's career path.

Demotion

I agree with Cheadle's recommendations, but raise two concerns: The first relates to the effective processing of demotion disputes in the CCMA. The second relates to the situation where consent to a demotion may be inferred from a disciplinary code or procedure that has the status of a collective agreement i.e. where the consent is obtained before the verdict and sanction of the disciplinary hearing is provided.

Benefits

I have concerns about the scrapping of this unfair labour practice without an adequate statutory alternative. Collective bargaining will not always be a satisfactory mechanism to resolve disputes about benefits. The example used to illustrate this point is the employer's inconsistent and unfair provision of benefits to employees where there is no agreement requiring fairness and no discrimination on a listed or analogous ground.

Discipline Short of Dismissal

If this unfair labour practice were deleted, one of the advantages to employees would be that employers could not argue at the subsequent dismissal hearing that the employee acquiesced to a previous disciplinary sanction that was short of dismissal because she never referred an unfair labour practice dispute.

However, if it were deleted there are three potential problems: The first is that, without this provision or a collective agreement, there is no statutory obligation on the employer to accord employees a fair procedure (i.e. the right to be heard) before imposing a disciplinary sanction short of dismissal.

The second relates to a situation where an employee is not promoted because she has a warning on her file. If both unfair labour practices relating to promotion and discipline were deleted, the employee may be without a remedy to resolve her grievance.

The third concern relates to the fact that disciplinary warnings often mean that an employee does not get a bonus or a notch increase. It is not clear if an employee would be without a remedy to challenge this in certain circumstances.

Suspension

I agree with Cheadle's comments and emphasise the widespread abuse of suspension, particularly in the public service.

Transfers

In the absence of collective agreements regulating this matter a statute should regulate the employer's conduct relating to transfers.

2.6 Equal Pay for Equivalent Work

It is necessary to introduce a doctrine of equal pay for equivalent work to cover situations where there is inconsistent and arbitrary remuneration or provision of benefits to workers and there is no unfair discrimination based upon one of the listed or analogous grounds. Collective bargaining is not always the appropriate mechanism for resolving these disputes.

2.7 Challenges Facing Dispute Resolution Institutions

A comprehensive analysis of the problems associated with dispute resolution at bargaining councils is necessary.

There are numerous problems associated with the Labour Court. Many are administrative. The Superior Courts Bill will not necessarily resolve all of them. The rules of the Labour Court must be looked at urgently. The Superior Courts Bill should maintain the Labour Court as a specialist court, even if it is a division of the High Court, and it must have national jurisdiction. The Bill must allow officials of trade unions and employers' organisation the right to representation. The issue of judges being qualified to adjudicate complex labour disputes after attending a short course at the judge's college is cause for concern.

A thorough investigation into the functioning and efficacy of the CCMA is required. We need to encourage well-organised sectors, such as retail, to establish councils, and not rely upon the CCMA for all their dispute resolution functions. The CCMA should also accredit private dispute resolution agencies.

2.8 Labour Brokers

I discuss the effect of labour broking arrangements upon workers, particularly when it comes to dismissal. I recommend that the client, and not the broker, be made the employer of the worker, if the worker has been placed with the client for more than three months. Alternatively, I recommend that the client's liability be extended, particularly when it comes to dismissal. Lastly, I recommend that labour brokers be required to register with the Department of Labour and that they be regulated through that process.

2.9 Other Atypical Workers

In order to deal with the problems of casualisation I recommend that:

- ⊙ Minimum amounts of pay and rates of pay are set for temporary workers through the extension of sectoral collective agreements or the issuing of sectoral determinations. Sectoral determinations may be necessary even where there is a sectoral bargaining council because of the limited capacity of bargaining councils to deal with matters of this nature. Casuals are very difficult to organise.
- ⊙ Temporary employees earning below a specified threshold should have their temporary (i.e. fixed-term) contracts transformed into permanent contracts (contracts of indefinite duration), if the temporary contract is renewed three times or after one year.
- ⊙ Employers should only be allowed to use temporary workers in specified situations such as a temporary increase in the amount of work.

2.10 Application of Labour Legislation to Workers

I recommend that dependent contractors, like owner-drivers, be afforded the protections of labour related statutes in terms of s 83 of the BCEA, alternatively that the definition of employee be amended to include dependent contractors.

I argue that in the interests of flexibility senior executives, including senior government officials, should be excluded from the ambit of labour legislation. I believe that they are adequately covered by the common law of contract.

2.11 Collective Bargaining

I agree with Cheadle's recommendations to the effect that:

- ⊙ Given the fragmentary nature of bargaining councils the Department of Labour should promptly facilitate a process for the establishment and consolidation of bargaining councils.
- ⊙ NEDLAC should urgently demarcate the sectors.
- ⊙ Bargaining councils should be empowered through subsidies and other means to fulfil their functions beyond setting terms and conditions of employment. These include setting sectoral policies, providing industrial support services, etc.

I explain some of labour's reasons for not agreeing to the Minister having the power to vary basic terms and conditions of employment downwards and suggest that, if there are specific proposals for downward variation with regard to a sector, those be tabled for discussion.

I discuss the nature of sectoral agreements and the setting of actuals as opposed to minima.

Extension of Collective Agreements

Cheadle proposes that the Minister be given the power to refuse to extend a bargaining council collective agreement if it conflicts with the country's labour market policy. He proposes two protections against abuse: the negotiation of the labour market policy

at NEDLAC and the constitutional right of review. I discuss the inadequacy of these protections.

Collective Bargaining and Small Business

There is no need to provide for further exemptions for small businesses from collective agreements that are extended by the Minister. This is so because at present the bargaining council system covers small businesses fairly, the exemption system is working efficiently and a blanket exemption would seriously undermine an already fragile bargaining council system. However, mechanisms for ensuring greater participation and representation of small businesses in bargaining councils are proposed.

2.12 Amending Terms of Conditions of Employment

In order to protect the sanctity of collective bargaining and in light of the *Fry's Metals* case, an amendment to s 187(1)(c) of the LRA is essential. An amendment is proposed.

3. The Context

The problem with concept papers is that it is easy to drift off into academic discussion about neat and clean legal solutions to labour market regulation. It is therefore important to constantly bear in mind both the constitutional and socio-economic contexts.

3.1 The Constitutional Context

Cheadle (2006) has effectively dealt with the constitutional context in his draft paper. It is, however, perhaps worth remembering that only a law of general application can limit the rights contained in our Bill of Rights, and it can do so only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the factors listed in s 36(1) of the Constitution. Naturally, there are always debates about how these rights should be balanced. How are the interests of so-called progress and improving the efficiencies of the employer's business balanced with the interests of employees for job security and decent employment?

The constitution is not entirely silent on the question of this balance. At its core it recognises the right to human dignity. This means that we are enjoined to protect and promote the interests of the vulnerable, powerless and disadvantaged, whose dignity in this country is under relentless attack from the adverse socio-economic conditions that they endure.

3.2 The Socio-Economic Context

The socio-economic context is equally important. I do not intend to delve into it in any depth because that would be beyond the scope of this paper; however, it is important to highlight a number of issues.

There is no need to debate exactly what the unemployment figure is, except to note that for a country of our nature and size it is tremendous. Particularly for the unskilled or semi-skilled worker and her family and other dependents, many of whom are unemployed, dismissal for whatever reason is a ghastly sentence. In addition, the limited welfare support for the unemployed is little consolation. Job security for the unskilled and semi-skilled in South Africa, with its extreme levels of poverty, is often a matter of survival.

It is, therefore, no wonder why workers who fear the terror of the unemployment queue mandate their organisations to vigorously resist changes to dismissal law that would make it easier for them to be dismissed. It is also understandable why workers and their organisations greet calls for more flexibility to the law of dismissal with such grave suspicion, especially when they are motivated by such crude sound bites as “if we could dismiss you more easily, we would hire more people”. (Of course, the importance of job security is not as acute for all grades or types of employees. In the light of the skills shortages in certain areas of our economy the effect of a dismissal may not be economically devastating for some employees.)

Economic growth has been steadily increasing, but remains below the annual target of 6 per cent. It is questionable to what extent that growth has translated into an increase in the number of jobs, particularly full-time, decent and sustainable jobs.

The quality and nature of the jobs that are and have been created is cause for concern. Casualisation is more and more prevalent. This means that increasingly jobs are temporary in nature. Frequently, these jobs are for a few hours on some days. These workers work for wages well below the poverty line; they have no access to medical aid and retirement fund schemes; they are difficult to organise and it is difficult to monitor and enforce decent conditions of employment. Other employees are structurally defined out of the protections of labour market regulation and become so-called independent contractors. They are thus without the legal protections created by statutes such as the Labour Relations Act 66 of 1995 (LRA) and Basic Conditions of Employment Act 75 of 1997 (BCEA).

Besides the high unemployment rate and lack of job creation it is evident that our country has large disparities between the incomes of the rich and the poor, and that such inequalities are growing and are above the international average. As wages are primarily determined through collective bargaining it is imperative that any change to the regulation of collective bargaining has the effect of strengthening that process rather than weakening it.

The levels and extent of poverty are not only unacceptable from a moral point of view, but for those more concerned about advancing their bottom lines, poverty represents a real risk to economic stability and growth in this country. The need for social justice is not only morally necessary, but in the long-term interests of all South Africans, including the wealthy.

At the same time, we cannot forget that as a country we need to be competitive on the international stage. Our country must continue to attract foreign investment. It is necessary to project to the world that a potential investor's money will be securely and profitably well looked after in this country, which is done by, amongst many other things, explaining that the regulation of our labour market reflects the correct balance between the needs for economic progress and social justice.

When it comes to the international stage, we are constantly reminded of the competitiveness of countries such as China. We must consider these issues carefully. These matters require a comprehensive comparison and analysis of all issues relating to international and local governance. It is not apparent that the undermining of labour standards will be economically beneficial to all South Africans, particularly the poor. Moreover, we cannot simply compare the wages of workers in South Africa and China, and then deduce that workers in our country are earning too much. Comparisons must be made precisely and should include the social wage provided by the State, which in this country is low. Once that is done, we must ask ourselves the moral question of whether we want any of our people to be subjected to the appalling working conditions that Chinese workers experience. Do we, for example, agree that a clothing worker with numerous dependents should earn less than R300 per week or that she should have only a few weeks' maternity leave? I very much doubt that anyone with a moral conscience can answer in the affirmative.

It is also important to note that many East Asian countries do not simply undermine labour standards, but instead they ensure substantial career mobility and excellent job security in their formal companies, and invest heavily in skills.

In light of the above, there is a clear need for greater social justice in this country. Unfortunately, the need for greater social justice is not uppermost in many people's minds when they call for changes to the laws regulating the labour market. Usually these calls are made to ensure that employers can more easily reap greater economic reward. Coupled to this is often the professed assumption that greater economic reward for employers will inevitably result in more social justice. Workers and trade unions are justifiably sceptical of the assumptions inherent in this line of reasoning and suspicious that arguments of this nature are merely a ruse for tilting the balance in favour of employers at the expense of workers.

We should recognise that the discourse about labour market legislation in the public media is crude, frequently picking up one-liners that reflect the views of those whose

interest is not social justice and greater human dignity. The chant for greater labour market flexibility is loud and repetitive; it drowns out the demands for job security. The public discourse does not adequately understand the need for and complexity of the balance between economic growth and social justice.

Moreover, many of the pronouncements about the inflexibility of our labour market are based upon surveys of the perceptions of human resource practitioners or lawyers such as estimates of how much time it takes them to resolve the disputes (Bisseker, 2005). These are hardly scientific and the information gathered does not prove inflexibility. It might show managerial incompetence in many cases or incompetence on the part of adjudicators. In fact, I believe that many of the so-called ills of our labour market reflect the ignorance or lack of skill of many of our managers. It is always easier to blame the system than admit one's own faults. It is also easier for a manager to blame the system than have to admit her reluctance to confront an under-performing or recalcitrant employee.

Therefore, what we need to do is to evaluate our labour market legislation pragmatically by asking the question whether it reflects the correct and appropriate balance between the needs for economic growth and social justice. The question is not whether it is flexible or inflexible, but rather whether it creates the appropriate balance.

4. Dismissals for Misconduct and Incapacity

I align myself with Cheadle's comments about dismissals for misconduct and incapacity. I therefore make the following points by way of addition.

The problem here is not really the law, but how adjudicators, labour law practitioners, employers and employees apply it. It seems to me that the Code of Good Practice on Dismissals for Misconduct and Incapacity has proved to be an insufficient guide. It needs to more explicitly refer to the different requirements and expectations that are imposed upon employers according to their size. The Code should, I believe, deal explicitly with the procedures required of small employers.

The Code also needs to be regularly and frequently updated, and in this regard the process and speed with which the Code and its amendments are negotiated at NEDLAC needs to be addressed.

The Code must emphasise the need for a fair procedure, but discourage an overly technical approach where failure to comply with a minor requirement on the lengthy procedural checklist that many employers have, renders the dismissal procedurally unfair. If this were done, it would be a decisive intervention into the labour market, which should assist in transforming the overly formalistic and criminal like disciplinary hearing proceedings that take place at many employers.

The overemphasis on technical issues relating to procedural fairness that seems to pervade much of the arbitrators' thinking could also possibly be changed by explaining in the Code how compensation awards should be arrived at. Here it may be a good idea to make it explicit that compensation for substantive unfairness should be greater than compensation for procedural unfairness.

The amendment of the Code should make the labour market more efficient, thereby addressing the perception that the labour market is inflexible, especially for small employers, without affecting the rights of workers.

But such an intervention would not be sufficient. If the present culture of disciplinary hearings is to be changed, then substantial education and training of adjudicators, human resource personnel and trade unionists will be required. All the social partners need to develop and implement a comprehensive plan in this regard.

5. Dismissals for Operational Requirements

When it comes to a retrenchment or a redundancy (i.e. dismissal for operational requirements) the employer's interest is for numerical flexibility i.e. the capacity to change the levels of employment cheaply and quickly. The employee's interest is security of employment. How is the balance struck?

It is struck by allowing for dismissals where it is operationally required and by protecting the employee from arbitrary loss of employment. In terms of s 188(1) of the LRA, an employer may dismiss for operational requirements if there is a fair reason based upon that employer's operational requirements, and after the employer has followed a fair procedure. Sections 189 and 189A and the Code of Good Practice on Dismissals based on Operational Requirements set out the requirements and procedures that an employer should follow. In terms of s 203(3) of the LRA any person interpreting or applying the LRA must take into account the relevant Code of Good Practice. If they are adhered to, the employer may change its levels of employment and the employee should be protected against arbitrary loss of employment.

The decision to dismiss is made by the employer. It evaluates whether or not it has a fair reason for the dismissal and whether or not it has followed a fair procedure. The decision to dismiss need not be ratified by the Minister of Labour or some other external party, as is the case in other countries.

Moreover, strict adherence to all the requirements of s 189 is not altogether necessary, although the failure to adhere to one or more of its provisions may indicate unfairness. (*Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 LAC at 97B-E; *Sikhosana & others v Sasol Synthetic Fuels* (2000) 21 ILJ 649 (LC))

In general, the requirements are that there must be a fair reason based upon the employer's operational requirements, fair and objective selection criteria, disclosure of relevant information and meaningful consultation. The consultation, which is conducted with a view to reaching consensus, is about the need for the dismissals, alternatives and ways to ameliorate the adverse affects of the retrenchments.

The legal requirements and procedures are not in and of themselves complex. However, the process may become complex when the requirements are applied to a particular situation. For example, the employer's choice of fair and objective selection criteria may be difficult, especially if the employer wishes to manipulate them to solve some of its performance related problems and the employees suspect this hidden agenda.

It is important to note that the costs and difficulty of retrenching vary substantially from case to case. In my experience, where small and medium enterprises retrench one employee or a few employees, the retrenchments can be and often are quickly and inexpensively done. In my experience, some of these retrenchments take place in less than a month, with a few short consultative meetings and exchange of correspondence taking place. In other cases, especially larger retrenchments, the process can take much longer. This obviously means greater cost, but it is necessary because the parties should and must explore alternatives that may save jobs or minimise the adverse effects of those dismissals.

There are four problems relating to the law of dismissals for operational requirements. The first is: when is a matter properly the subject of consultation for operational requirements and when is it properly a matter for collective bargaining. This is discussed later. The second relates to the way in which the Labour Court and the Labour Appeal Court (LAC) have interpreted the meaning of 'a fair reason based on an operational requirement'. The third relates to the processes envisaged by s 189A. The fourth is the nature and content of the Code of Good Practice on Dismissals for Operational Requirements. I shall consider the second to fourth problems now.

5.1 What Constitutes a Fair Reason?

The Labour Court and the LAC have oscillated on this matter (Du Toit, 2005). I do not intend to traverse all the nuances and facts of the cases associated with each of the approaches, as it is not necessary for the purposes of the point that I wish to make. In general, the approaches vary from:

- (i) recognising the desire to increase profits as a legitimate operational requirement (*Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC); *FAWU v Simba (Pty) Ltd* [1997] 4 BLLR 408 (LC); *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & Others* (2003) 24 ILJ 133 (LAC));

- (ii) checking that the dismissal was operationally justifiable on rational grounds (*SACTWU & others v Discreto (A Division of Trump & Springbok Holdings)* (1998) 10 ILJ 1451 (LAC));
- (iii) checking that there is a commercial justification for the decision to retrench and whether or not that decision is reasonable and fair to the affected party (*BMD Knitting Mills (Pty) Ltd v SACTWU* (2001) 22 ILJ 2264 (LAC));
- (iv) requiring the employer to balance the alternatives such that there is only a fair reason to retrench if there is no other rational alternative which preserves some or all of the jobs (*Enterprise Foods (Pty) Ltd v Allen & others* (2004) 25 ILJ 1251 (LAC)); to
- (v) only allowing the employer to dismiss employees for operational requirements as a measure of last resort (*CWIU & others v Alograx (Pty) Ltd* (2003) 24 ILJ 1917 (LAC)).

What is apparent is that the test for substantive fairness has vacillated. The latest LAC case of *Alograx*, which espouses the 'last resort' test, probably means that things have come full circle i.e. close to the position adopted by the old LAC in the 1993 case of *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC). In that case the court held as follows:

"Fairness in this context goes further than bona fides and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the courts to state that termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operational reasons." (at 648D-F)

I predict that this will not necessarily be the end of the debate in the courts.

5.2 Section 189A

At the heart of the debate about the correct test for substantive fairness is the willingness of the court to second-guess the employer's business decision that leads to the retrenchments. In *Discreto* (at para 8) Froneman JA stated the following:

“The function of a court in scrutinizing the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do, in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process have been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.”

However, in *Algorax Zondo JP* qualified this and, as Du Toit (2005) notes in his article, this decision seemed to herald a more interventionist approach on the part of the court. Dealing with the argument that the court normally will not have the business knowledge or expertise that the employer as a businessperson may have to deal with the operational problems in the business, Zondo JA stated:

“This is true. However, it is not absolute and should not be taken too far. When either the Labour Court or this Court is seized with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question of whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it fair, and therefore, it is or should be fair. ... Furthermore, the court should not hesitate to deal with an issue which requires no special

expertise, skills or knowledge that it does not have but simply requires common sense or logic...”

“[Section 189 implies] that the employer has an obligation, if at all possible, to avoid dismissals of employees for operational requirements altogether or to ‘minimize the number of dismissals’, if possible, and to consider other alternatives of addressing its problems without dismissing the employees and to disclose in writing what those alternatives are that it considered and to give reasons ‘for rejecting each of those alternatives’. It seems to me that the reason for the lawmaker to require all of these things from the employer was to place an obligation on the employer only to resort to dismissing employees for operational requirements as a measure of last resort.” (At paras 69-70)

It was precisely these issues that were at the heart of the negotiations between the social partners that led to the promulgation of s 189A of the LRA. The unions were the primary drivers of this amendment. They perceived that their members were getting little joy from the courts, which were reluctant to intervene and save jobs by declaring the retrenchments unfair. They viewed the law as preventing them from striking about retrenchments because retrenchment disputes were disputes that a party had a right to refer to adjudication. Section 65(1)(c) of the LRA prevents a strike where the issue in dispute is one that a party has the right to refer to arbitration or the Labour Court. They perceived that they were caught between a rock and a hard place, unable to get joy from the courts and unable to use power to compel a different course of action to stem the tide of retrenchments. They, therefore, demanded the right to strike about retrenchments. And following the negotiations at the Millennium Labour Council (MLC) and NEDLAC, section 189A was born.

Section 189A is a compromise. In terms of s 189A(1) it only applies to larger employers (i.e. employers employing more than 50 employees) and the number of retrenchments in any given 12-month period must be above the prescribed threshold. It prescribes a procedure and time framework for negotiations. The time-period cannot be less than 60 days. Once the employer makes the decision to retrench, the union can challenge the procedural fairness of the dismissals or impending dismissals by way of a semi-urgent application. Furthermore, it can either strike about the substantive fairness of the

retrenchments or refer a dispute about the substantive fairness of the retrenchments to the Labour Court. If the union refers a dispute about the substantive fairness of the retrenchments to the Labour Court, the test for substantive fairness is limited to the test set out in the *Discreto* case. Section 189A(19) of the LRA, which I refer to as the *Discreto* test, states the following:

“In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employees was dismissed for a fair reason if —

- (a) the dismissal was to given effect to a requirement based on the employer’s operational, technological, structural or similar needs;*
- (b) the dismissal was operationally justifiable on rational grounds; there was proper consideration of alternatives; and selection criteria were fair and objective.”*

There are a number of problems with s 189A, which include the following. In contrast to the rest of the LRA, this section is cumbersome and complex, and in my experience unionists and employers find it difficult to understand. The LRA limits the test for substantive fairness for s 189A retrenchments only. This is in the interest of larger employers who engage in larger scale retrenchments. In other words, smaller employers may have the ‘last resort’ test applied to their retrenchments.

In addition, the threshold requirements for the application of s 189A throw up a number of anomalies, which are difficult to justify rationally. For example, if an employer employs 51 employees and 9 of them are retrenched, there is no right to strike and the test for adjudicating the substantive fairness of the retrenchments is not limited. However, if two months later the employer retrenches one more person, there is a right to strike and the test for the substantive fairness of that retrenchment is limited to the *Discreto* test. If the employer employed only 49 employees and 10 of them were retrenched, there would also be no right to strike and the test for substantive fairness would not be limited.

Employer’s interests were met to some extent in s 189A, as it prevented an overly interventionist approach by the courts, which is something employers fear, especially given the lengthy delays in adjudicating disputes at the Labour Court.

I believe that s 189A has pointed us in the direction of the answer. The resolution to the problem is grounded in the distinction between interest and rights disputes. The operational decision that gives rise to retrenchments is an interest matter. The parties should be able to negotiate and resort to a power play over the operational decision that gives rise to the retrenchments. This means that workers should be entitled to strike about the operational decision that gives rise to the retrenchments. For example, they should be able to strike in support of the demand that the employer save jobs and take less profits, that the employer not implement outsourcing, etc. Employers would have recourse to a lock-out or could act unilaterally. On the other hand, disputes about the fairness of the retrenchments themselves are rights disputes, which should be adjudicated by the courts.

At the same time, we have to recognise that a power play is not always possible or appropriate in many circumstances. A strike is often of little effect or value where the majority of employees are to be dismissed. Moreover, employees not only have a constitutional right to fair labour practices, but in terms of s 34 of the Constitution of the Republic of South Africa Act No. 108 of 1996 ("the Constitution") they also the right to have "*any right that can be resolved by application of the law decided in a fair public hearing... .*". Therefore, there must be choice about resolving the matter through collective bargaining or adjudication.

The trade off, which is presently reflected in s 189A, is that if workers do not exercise their right to strike over the operational decision that gives rise to the dismissals and refer a rights dispute to the Labour Court, then a non-interventionist approach akin to the *Discreto* test is appropriate. In other words, workers obtain the right to strike about the operational decision, but if they exercise their right to adjudicate the substantive fairness of the retrenchments, the test is limited to the *Discreto* test.

This should apply to all businesses. A non-interventionist approach to the adjudication of the substantive fairness of a retrenchment would be in the interests of smaller employers as well. Workers at smaller employers should also have the right to strike about the operational decision that gives rise to the retrenchments. Furthermore, if it applied to all businesses, the problems arising from the anomalies relating to the thresholds would be resolved.

5.3 The Code of Good Practice

The problem with the Code on Dismissals for Operational Requirements is that it says nothing more than what is stated in s 189. It is of little assistance to employers and trade unionists involved in retrenchment consultations. It is certainly of little assistance to the small employer who contemplates retrenching one or two employees.

A revised Code is called for that sets out more clearly what is required of an employer who contemplates retrenching. I also suggest that it includes a section dedicated to the small employer (as well as employers of domestic workers) that sets out a simple and abbreviated process for small employers and their employees.

6. Probation and Newly Hired Employees

This is indeed a troublesome issue. The history of the issue is as follows. Probation was originally not referred to in the new LRA, including the Code relating to dismissals for misconduct or incapacity. In 2000 the government proposed amendments to the LRA, amongst which there were two proposals.

The first was that an employee was fairly dismissed within her first six months of employment due to incompatibility or poor performance if the employer followed a fair procedure. In other words, the dismissal need not have been substantively fair. The proposal also limited procedural fairness to giving the employee an opportunity to make her representations.

The second was an amendment to the Code on dismissal for misconduct and incapacity. The amendment provided for a period of probation and specified, amongst other things, that if an employee was dismissed during her probationary period, then the reasons for dismissal may be less compelling than would be the case for dismissals effected after the successful completion of the probationary period.

The trade union movement expressed concern about the proposal, especially the first one. The compromise was to adopt the second proposal, but to include guidelines for employers with regard to the kind of procedures that should be followed in the case of poor performance. As Cheadle points out, the Code omitted to deal with incompatibility.

The first proposal was rather bizarre because it obliterated the employee's right to substantive fairness, but kept in tact her right to procedural fairness. The employer was required to go through the procedural motions only; it did not have to have a substantively fair reason for terminating the contract. Perhaps if the proposal had been the other way round – obliging the employer to have a substantively fair reason for the dismissal, albeit on a lesser scale than an ordinary dismissal after the six month period, but not requiring the employer to follow a fair procedure – the proposal might have been more palatable and another trade off might have been possible. Giving up the right to a fair procedure is not too problematic when the employee still has the right to refer a dispute to arbitration i.e. the employee will be afforded her right to be heard at the CCMA, bargaining council or Labour Court. In any event, a prudent employer would grant a hearing in order to check that it does have a substantively fair reason for the dismissal.

In the negotiations that led to the 2002 amendments, the trade unions' primary concern that employers may use probation unfairly by continually extending the probationary period was resolved by listing probation as one of the residual unfair labour practices. It was also introduced to deal with their other fear, which was that employers might impose a probationary period that was excessively long and disproportionate to the nature of the job. As far as I know very few disputes relating to probation as a basis for an unfair labour practice have been declared.

The issue of probation and newly hired employees has been raised again. The argument appears to be that the difficulties of dismissing employees are a barrier to employment because if it were easier to fire, more employees would be hired. The motivation for the proposal is apparently job creation. Of course, there is leap of faith in this argument: if employers could fire more easily, would more persons be hired or would there just be a greater turnover of staff? The argument also presupposes that it is difficult to fire for incompatibility or poor performance, which I take issue with. Perhaps this matter would not cause such concern if managers were better trained in how to deal with these matters.

Moreover, workers who desperately fear the unemployment queue with all its horrific ramifications will, without doubt, see the proposal as a mere attempt to diminish their rights and make them more vulnerable. If a proposal of this nature is to be implemented, it will have to be carefully motivated to deal with their legitimate fears and it will have to be articulated more scientifically than it has been to date. Most importantly, a proposal of this nature would also have to pass the constitutional test for a limitation of the right to fair labour practices, which may be difficult. The government would have to convince the Constitutional Court, amongst other things, that in terms of s 36(1)(e) of the Constitution there was not a less restrictive means of achieving their purpose .

Cheadle's proposal that the period of service should include all previous service with the employer prevents employers from trying to escape the application of labour laws by terminating just before the expiry of the six-month period and then re-employing. However, it does not prevent the possibility that an employer may fire before the end of the six-month period and then re-hire another new employee, which is possible for non-skilled jobs. In addition, an employer may be discouraged from employing a person that it has employed for six months before as opposed to a new employee. The reason for this is that with the latter, the employer is able to escape its normal obligations with regard to dismissal. I suspect that these will be some of the concerns of workers.

At the same time, we have to recognise that there is a trend internationally to remove some or all of the protections from dismissal in respect of newly hired employees. (As far as I know, that champion of social democracy, Margaret Thatcher, first introduced it.) If such a provision were introduced, then relaxations with regard to newly hired employees should include appropriate regulations that discourage the kinds of problems referred to above, adequately protect newly hired employees from discrimination, victimisation and at least guarantee some degree of substantive fairness (for example, the dismissal must at least be justifiable on rational grounds).

7. Recruitment and Hiring

I align myself with Cheadle's comments about selection decisions, save for my comments about promotions.

In particular, I think that it is necessary that the remedy of requiring an employer to hire an employee victimised for her trade union affiliation and activities should be available.

8. Unfair Labour Practices

The residual unfair labour practice is now defined in s 186 of the LRA. Cheadle proposes that the unfair labour practice be scrapped and that those aspects that are necessary to retain, such as the regulation of unfair suspension (and presumably occupational detriments in contravention of the Protected Disclosures Act No. 26 of 2000), be kept in another form. He also states that in relation to small business they should be scrapped, as they are incidents associated with larger employers.

Before dealing with the content of Cheadle's proposals I wish to make a few preliminary points.

I wonder to what extent the residual unfair labour practices, as presently contained in the LRA, are a major cause for rigidity in the labour market. The reason for this is that, according to Benjamin and Gruen (2005), unfair labour practice referrals only constitute 7 per cent of all the disputes at the CCMA.

I suspect that many employees, particularly middle and upper level employees, will be anxious about giving up their right to process disputes relating to the residual unfair labour practices. They will fear that they may be left without a remedy where they have a legitimate grievance. I, however, suspect that for the wily amongst the trade unionists, the issue will inevitably be what employees, who give up their right to process unfair labour practices, will get in return?

I believe that as many residual unfair labour practices involve disputes about individual employees, it may still be necessary to regulate the exercise of employer power in certain circumstances. I, therefore, do not think that it is always suitable and correct to

leave the regulation of certain labour practices to collective bargaining. The question is, which labour practices should be regulated in a statute and which ones should be left to the parties to regulate through collective agreement. Of course, when we answer this question we have to bear in mind that if there is no collective agreement, then the employer may act unilaterally, provided it does not materially change terms and conditions of employment. It is the very possibility that there may not be an agreement about the regulation of a labour practice that may require, from a policy point of view, a statute to regulate the fairness of the employer's conduct.

If a labour practice is to be regulated, then in the interests of legal certainty, I think it is a good idea for the law to be specific and not broad. In other words, it would be more useful to spell out what is outlawed or what an employer may or may not do when it comes to suspension, for example, than to simply say that the employer may not conduct itself unfairly with regard to the suspension of an employee. With the former the employer knows exactly what it may or may not do. The law regulating that labour practice could be articulated in a provision dedicated to the relevant topic, such as suspension, and it could be explained in a Code of Practice.

Bearing those general comments in mind, I consider some of the residual unfair labour practices and the question of transfer.

8.1 Promotion

Promotion disputes are more common in large institutions and the public service, in particular the education sector, parastatals, etc. Promotion disputes do not usually involve blue-collar workers. When it comes to small employers I suspect that promotion disputes are few and far between.

Appointments are generally not regulated. There are two exceptions. Firstly, for the purposes of unfair discrimination, an applicant for appointment is considered an employee. Secondly, employers whose turnover is above the prescribed minima specified in terms of the Employment Equity Act No. 55 of 1998 (EEA) are obliged to adopt affirmative action plans that may affect appointments. There is no further need to regulate appointments in a statute, except perhaps in the public sector; however, the question is whether promotions, as a species of appointment, should be regulated in any further way.

Cheadle makes three recommendations. The first is that the reference to promotion in the definition of the unfair labour practice be deleted. The second is that the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) be amended to exclude the State's employment decisions from judicial review under that Act. The second is that the Public Service Act (Proclamation 103 of 1994) be amended to provide for a judicial or administrative remedy for corrupt or inept appointments.

Let me begin with the last two suggestions. I think it is a good idea to exclude the State's employment decisions from judicial review under PAJA. One remedy should be provided for all employees and there is no need for overlapping jurisdiction between the LRA and PAJA when it comes to public service employees.

In the context of our increasing concern for corruption and service delivery, it is a good idea that the Public Service Act be amended to provide for a judicial or administrative remedy for corrupt or inept appointments. But why should it be limited to the public service? Why should it not apply to parastatals or private institutions that perform public functions and services such as banks?

It is a little more difficult to readily agree to Cheadle's first proposal about the deletion in the LRA of the unfair labour practice relating to promotions. The reasons for this are set out below.

Promotions usually involve questions relating to an employee's career path in an organisation, which is an emotive issue for many employees, particularly for middle and upper level employees. This is why employees want to ensure that the procedure and criteria for choosing the appropriate candidate are fair and rational.

In some sectors such as public education, promotions are regulated by collective agreements. Insofar as there is a collective agreement, the employee has a remedy to process a promotion dispute because the dispute will always be about the interpretation or application of the agreement.

But what if there is no agreement and no residual unfair labour practice relating to promotions? What if the employer only has a policy on promotions, but it does not constitute an agreement? How does the employee process her grievance about a promotion dispute, if there is no specific statutory provision dealing with this matter? In such a case the employee is without a remedy unless she can show unfair discrimination

or victimisation. It is usually very difficult to resolve individual disputes of this nature through negotiations and collective bargaining.

In addition, will it not be more difficult for trade unions to secure collective agreements regulating promotions, if the employer is not obliged statutorily to act fairly in relation to promotions? The possibility of different and varying awards if each promotion dispute were independently adjudicated in terms of the unfair labour practice definition, is surely part of the reason why an employer agrees to or prescribes a promotions policy and procedure.

Promotion issues are emotional and difficult issues in many organisations, particularly those with large bureaucracies, because they affect an employee's career advancement. I agree that employers and trade unions should be encouraged to agree upon their own promotion policies and procedures. However, this does not mean that employees should be left without a remedy for unfair conduct on the part of the employer, where there is no agreed policy and procedure.

8.2 Demotion

As Cheadle correctly points out a demotion occurs in three contexts: firstly, as a disciplinary measure; secondly, as an alternative to a dismissal for incapacity; and thirdly, as an alternative to retrenchment. In each case the employee must consent to the demotion. If the employee does not consent, then at common law the demotion is a repudiation of a contract, allowing an employee to sue for breach of contract or unfair dismissal.

Cheadle argues that the courts and the CCMA have held that demotion must be preceded by consultation and counselling, which is something less than consent and is incorrect. For him this illustrates the dangers of providing remedies when there are sufficient remedies to secure the protection from the unfair exercise of employer power.

I agree with Cheadle, yet I have two concerns. The unfair labour practice with regard to demotion should reflect the common law position articulated above. But when an ordinary employee is demoted she does not immediately perceive it as a dismissal. She merely wants to process her grievance to the relevant body such as the CCMA as a demotion dispute. She should be able to do this without having to consult a lawyer to obtain a legal analysis of the real nature of demotion. Therefore, if demotion is to be deleted, then in

some way the statute or Code must direct the employee who wants to challenge the demotion. It must also explain its true legal nature and guide commissioners with regard to the legal options for relief where there is an unfair demotion.

Secondly, many disciplinary codes provide for demotion as a possible disciplinary sanction. The fact that an employee or her trade union has agreed to the Code should not constitute the necessary consent for a demotion after a disciplinary enquiry finds an employee guilty of misconduct. If it were, then the demotion might not be considered a dismissal (because there was consent), but a disciplinary measure short of dismissal, and if that unfair labour practice were deleted, the employee would not be able to challenge the fairness of the finding and the demotion. That would be untenable. This could be cured with a suitable explanation to this effect in the Code.

8.3 Benefits

When it comes to the unfair labour practice with regard to benefits, it is evident that this provision has created substantial difficulty for the courts.² It is now evident that a dispute concerning an unfair labour practice relating to benefits cannot be declared in order to create a right to a benefit. See in this regard *HOSPERSA & another v Northern Cape Provincial Administration* (2002) 21 ILJ 1066 (LAC) and *Protekon (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and others* (2005) 26 ILJ 1105 (LC). This is something that should be left to collective bargaining.

Cheadle argues that the unfair labour practice with regard to benefits should be disregarded for two reasons: The first is that if benefits are granted in terms of an agreement, the employee has a legal remedy relating to the breach of that agreement. This is valid.

If there was no unfair labour practice with regard to the provision of benefits and the employer has a discretion to grant the benefit in terms of an agreement, then the employee may not be able to challenge the fairness of the employer's exercise of that discretion. The exception is if the employee could show that there is an explicit, implied or tacit term of the agreement that the power to exercise the discretion must be

² A useful article on the subject entitled "What is an employment 'benefit'?" by PAK Le Roux appears in *Contemporary Labour Law* Vol 15 No 1 August 2005

conducted fairly. All of this is correct because the agreement must have been a product of negotiations or collective bargaining.

Cheadle's second reason is that where the unfair labour practice remedy constitutes a mere 'judicial review' of the employer's exercise of power, then the mechanism for ensuring fairness should rather be collective bargaining and structured worker participation. Cheadle further motivates this by arguing that there is no reason why the employer's exercise of power with regard to benefits should be regulated, when its powers to hire, transfer and to direct how and when work is done, are not subject to regulation.

I agree with this in general, save for the following. Firstly, I am not sure what 'structured worker participation' means in this context. Secondly, while I agree that collective bargaining should be the remedy for creating a right to a benefit, collective bargaining may not always be a sufficient or satisfactory remedy for resolving grievances about a dispute relating to the provision of benefits.

Take this scenario relating to the unfair or inconsistent provision of benefits: Two employees are not granted a benefit where their contracts of employment provide that the employer has a discretion to grant it. The contract does not include an explicit, implied or tacit term to the effect that the discretion must be exercised reasonably or fairly. All other employees are granted the benefit. There is no direct and indirect discrimination on one of the listed (e.g. race, gender, etc) or analogous grounds; however, the employer's approach vis-à-vis the two employees is inconsistent, irrational and therefore unfair. Should the two employees' only remedy be to bargain, and failing negotiations, to go out on strike?

In many situations like this, employees would not have the capacity to organise and mobilise a strike about such a matter and they would be effectively without a remedy. Moreover, I think that as a matter of policy, we should limit strikes about this kind of irrational behaviour. I believe that irrational conduct about the provision of benefits where employees already have a right to the benefit or the employer has a discretion to provide the benefit should be regulated in the law. (See the discussion under section 8 about the need for a doctrine relating to equal pay for equivalent work, which is similar.)

Furthermore, the case of *Protekon* indicates that the employer's exercise of a discretion to grant or refuse a benefit in terms of a scheme conferring the benefit (i.e. where there is no contractual right to be enforced), may be subjected to the CCMA's scrutiny in terms of the

unfair labour practice jurisdiction. It does not seem appropriate to require the resolution of this kind of dispute through collective bargaining.

I therefore suggest that it may be useful to regulate the provision of benefits in a specific section of a statute such as the BCEA. It may be necessary to prescribe in the statute or Code of Practice the parameters of unfair conduct relating to the provision of benefits.

8.4 Discipline Short of Dismissal

Cheadle argues that there is no good reason to regulate the employer's power to discipline, once the power to dismiss as a disciplinary measure is regulated. He argues that if an employer relies on an earlier warning to justify a dismissal, the fairness of the previous warning can be raised at the dismissal hearing. It seems unnecessary to clog up the dispute resolution institutions with disputes of this nature, which are potentially numerous.

The deletion of this unfair labour practice is clearly in the interests of employers. I believe that its deletion may also be advantageous to employees because of the following. Many employees do not challenge warnings issued against them by referring unfair labour practice disputes to the CCMA or the relevant bargaining council. It is frequently argued at their dismissal dispute that they acquiesced to the warning because they did not refer such a dispute. This proposal would cure this problem.

However, I foresee three problems. The first is that without this provision there is no statutory obligation on employers to accord employees a fair procedure (i.e. the right to be heard) before imposing a disciplinary sanction short of dismissal. It might be argued that this should be left up to collective bargaining, but I think that would not be appropriate in all circumstances. If there was no collective agreement regarding disciplinary procedures at an employer, then the employer could impose disciplinary sanctions short of dismissal without according employees the right to be heard. This might not be a major problem if the sanction were only a warning, which would not affect the employee financially, but if it involved a suspension without pay it might be a completely different story.

The second problem relates to the situation where the employee has the possibility of being promoted, but will potentially not get the promotion because of her disciplinary record. If the employee cannot review the warning and she cannot challenge the failure to

promote, she may be left in a rather invidious position.

The third problem is that disciplinary warnings often mean that an employee does not get a bonus or a notch increase. How would an employee challenge this, if this unfair labour practice were deleted and there was no agreement regulating the fairness of the employer's exercise of its discretion not to award a bonus or notch increase?

8.5 Suspension

I agree with Cheadle's analysis and recommendations relating to this unfair labour practice. It is necessary to highlight that in my experience the employer's abuse of the power to suspend employees pending a disciplinary hearing, particularly in the public service, is widespread. The abuse is twofold: suspensions are arbitrarily made and are lengthy. It is not rare to find suspensions that endure for two years. The present remedy of referring a dispute to the CCMA or relevant bargaining council seems to be inadequate and proper regulation of this labour practice is necessary.

8.6 Transfers

I think that the employer's powers with regard to transfers should be subject to some kind of 'judicial review'. The employer should be obliged to act fairly where transfers are not regulated by collective agreement or another statute.

9. Equal Pay for Equivalent Work

Many employees raise the grievance of unequal pay for equivalent work. How should a dispute about such a matter be resolved? There are a number of options. The dispute can be resolved through collective bargaining. I deal with whether this should be the only appropriate remedy below. If the employee wishes to refer a rights dispute, she has two possible options. If the matter involves a promotion, the employee may refer an unfair labour practice dispute relating to promotion. If the matter involves unfair discrimination, she may refer a dispute in terms of the EEA. I think it was initially thought that disputes about equal pay for equivalent work would involve some aspect of discrimination and that employees, therefore, had an adequate remedy. But in the light of the provisions of the EEA this is not always the case.

Section 6 of the EEA prohibits discrimination only on the following terms:

“No person may unfairly discriminate, directly or indirectly, against any employee, in any employment policy or practice, on one or more grounds, including 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.”

The list of discriminatory grounds in s 6 is not a closed list, and other grounds that are analogous may be relied on. In order to succeed under s 6, a ground – either a listed ground or an analogous, unlisted ground – must be established.

The anti-discrimination provision that was contained in item 2(1)(a) of schedule 7 of the LRA prior to the coming into effect of the EEA made reference to discrimination on “*any arbitrary ground*”. There was a suggestion in the jurisprudence at the time that the reference to “*any arbitrary ground*” meant that “mere” arbitrary treatment would be sufficient to establish a discrimination claim. See in this regard *Kadiaka v ABI* (1999) 20 ILJ 373.

However, this item was repealed by the EEA and s 6 of the EEA no longer contains any reference to a mere “arbitrary ground” of discrimination. The Labour Court has held in both *NUMSA and others v Gabriels* [2002] (12) BLLR 1210 at para 19 and *Ntai and others v SA Breweries* [2001] (2) BLLR 186 para 17 that in order to establish a discrimination

claim based on this section it is not sufficient to allege that the employer acted arbitrarily. Instead, an alleged ground for discrimination must be specified and there must be a causal link between the ground and the discriminatory conduct.

In many instances there is no coherent listed ground of discrimination and all that can be said is that the remuneration of employees is determined irrationally and arbitrarily.

It may be possible to raise qualification and expertise as analogous grounds of discrimination, but it is probable that these grounds may not be found to be analogous because an analogous ground must be one that relates to a claimant's personality and identity that is intrinsic to, and has the potential to impair, human dignity (*Harksen v Lane* [1997] (11) BCLR 1489 (CC) at para 50. An example of a ground of discrimination that has been recognised by our courts is citizenship. See in this regard *Larbi-Odam v MEC for Education (North-West Province)* [1997] (12) BCLR 1655 (CC) at para 19.

Therefore, on the basis of the language of s 6 and the jurisprudence of the Labour Court arising out of this section, a claim for equal pay for equivalent work is often not possible. This means that if the dispute does not involve a promotion issue or the employee cannot establish a listed or analogous ground of discrimination, the employees must live with the irrational and arbitrary disparities in pay for equivalent work. The employee's only option then is to refer an interest dispute and hope that through the process of collective bargaining the matter can be resolved. Is this satisfactory? I do not think so because in many instances it is not possible or appropriate for employees to exercise power in such matters. It seems to me that that statutory expression should be given to the constitutional rights to equality and fair labour practices where the differentiation in remuneration or benefits is inconsistent and unfair, but does not necessarily involve a listed or analogous ground of discrimination.

In my experience disputes of this nature are common amongst blue-collar workers, and hence by providing for a legal remedy, strikes about such matters could be avoided.

Therefore, a doctrine of equal pay for equivalent work should be included in the EEA and its content developed in a Code of Good Practice. Naturally the doctrine and the potential sanctions that can be imposed upon an employer that has transgressed the doctrine would have to be carefully crafted.

10. Challenges Facing Dispute Resolution Institutions

A debate about labour market regulation cannot be limited to what the regulations say. Part of the problem is the way in which those regulations are implemented. That raises the issue about the manner in which our dispute resolution institutions function. If they are not functioning efficiently, then it may not help to change the regulations. Rather attention should be given to those institutions. This is, I believe, a large part of the problem.

I do not have a comprehensive understanding of the nature of dispute resolution at the bargaining councils, but my impression is that it varies from council to council. This is an area that needs attention because many disputes are not handled by the CCMA. For instance, the public service bargaining councils deal with the public service, which employs about 15per cent of all formal workers.

10.1 The Labour Court

One of the key developments of the new LRA was the establishment of a specialist labour court dealing with important and complex labour matters. There are numerous problems with this court. In my experience some of the problems are the following:

- (i) The court finds it difficult to attract sufficient permanent judges of calibre in the field of labour law. For judges the Labour Court has “come to be viewed as a career dead-end, particularly as appointments to the court are for a fixed term” (Benjamin, 2003:1870). Judges of the Labour Court receive inferior benefits as compared with High Court judges and they are seen as having a diminished status. Besides this, a competent lawyer who decides to go to the bench probably does not want to be “stuck” in the Labour Court dealing with retrenchment cases, reviews and strike interdicts. A permanent judge of the Labour Court has little ability to circulate

to the High Court and have exposure to other kinds of cases and law.³

- (ii) There has been an over-reliance on acting judges, some of whom have very little experience in labour law. This has undermined the specialist nature of the Labour Court.
- (iii) The judges on the LAC change frequently so that important precedent setting cases are often overturned, making it difficult to know with certainty what the law is. Some of the judges of the LAC have insufficient experience in labour matters.
- (iv) The administration of the court is problematic – there is often over-intervention in the processing of cases, instead of leaving it up to the parties to determine through the application of rules, as is the case in the High Court. For instance, requirements are made that the parties must file their heads of argument before they may set their application down. It is also common for the court to require heads of argument in simple unopposed matters, which increases legal costs unnecessarily. Such requirements do not find expression in the court's rules. In fact, the procedural practices of the court often diverge significantly from the rules of the court.
- (v) The Court's Rules Board has not met for many years to evaluate and update its rules in accordance with best practice. Some of the rules need urgent attention. This would include the rules regulating reviews of arbitration awards.
- (vi) There are serious delays in the setting down of matters. It is common, for example, for a simple review application to take up to two years.

³ As Benjamin points out in the article quoted above, a proposal to allow Labour Court judges to move to the High Court on completion of their term of office, was contained in the draft Labour Relations Bill published for comment in July 2000. This proposal would have enhanced the attractiveness of the Labour Court as an entry point into life on the bench. However, it was withdrawn from subsequent versions of the bill, at the request of the Ministry of Justice.

(vii) Judgments are often delayed. For example, the LAC judgment in the matter of *NEHAWU and others v University of Pretoria* [2006] 5 BLLR 437 (LAC), which involved the retrenchment of over 600 workers, took about 18 months to produce. The effect of a delay is more frequently to the detriment of the applicants, who are mostly workers. It is easier for the judge to excuse the delay if the applicant is unsuccessful because then she can argue that the applicant is in no worse a position than if the order had been given within a reasonable period of time.

Because of the problems referred to above, there has been a growing and powerful lobby for the integration of the Labour Court into the High Court. The Superior Court's Bill is now before Parliament. Will this resolve all the problems? I doubt it.

It may address some of the structural problems relating to the appointment of permanent judges. But it will not necessarily address the administrative problems that cause serious delays in the resolution of cases. This must be addressed comprehensively by ensuring the Registrar's office is run efficiently and by re-drafting and regularly updating the rules of court.

The Superior Court's Bill also has a number of problems. First of all it does not establish a specialist court for labour, which I believe is a serious blunder. Does this mean that the reasons that were advanced for a specialist court in 1995 no longer exist? There is an argument that to a much greater extent labour law has become a question of the application of statutory rules and that it is no longer the 'cutting edge' discipline that broke new ground during the 1980s and 1990s (Benjamin, 2003). I question this. Moreover, when it comes to dismissals, an adjudicator in a labour matter must still evaluate fairness, take into account human relations and understand and cherish the function and purpose of collective bargaining and the right to strike. This requires specialist expertise and experience.

Allied to this is the notion that judges can attend a short course in labour law at their training college and then be qualified to adjudicate a labour dispute. Bearing in mind that it is generally only the more complex disputes that will proceed to the High Court, this is a somewhat alarming provision. What a labour law judge needs is experience in labour law, not simply an academic understanding of the provisions of the labour statutes.

The other problem is that the High Court does not have national jurisdiction. This means that if there is a national strike or lock-out or a retrenchment of employees from a single employer in different jurisdictions of the country, the applicant will have to bring separate applications in the respective High Courts having jurisdiction. This is not only a waste of time, but will unnecessarily increase legal costs.

The last issue relates to the capacity of officials of trade unions and employers' organisations to represent their members in the High Court. It does not seem that a specific provision has been made for this.

10.2 The CCMA

It is difficult to assess the CCMA. The statistics contained in the paper by Benjamin and Gruen (2005) do not seem to reveal the entire picture. I am also mindful that my experience of the CCMA is limited to Gauteng and is usually in respect of reviews, where I frequently see the 'worst' of the CCMA arbitrations. Speak to any practicing labour lawyer and they will often regale you with horror stories about the CCMA, many of its arbitration awards and of frequent delays, postponements and the like. But does this tell the entire picture or are lawyers just exposed to the bad cases, which are by virtue of the number of disputes relatively few. I am also told that the administrative capacity and efficiency of the CCMA is markedly different in other regions. My inclination, therefore, is to err on the side of caution and not accept the proliferation and nature of these stories as reflective of the true nature of the CCMA.

The frequent accusation that the CCMA is biased towards employees is, I believe, incorrect. I have seen a number of awards that go against employees that are shocking to say the least. The problem is not bias, but rather incompetence and inexperience. Training of CCMA commissioners, including the so-called senior commissioners, is a top priority and would do more for the efficiency of the labour market than many amendments to the LRA.

It is important therefore that a thorough investigation is conducted into the functioning and efficacy of the CCMA, which should include a review of the quality of the arbitration awards. I do not believe that the inefficiency and functioning of such an institution should be allowed to justify the erosion of workers' substantive and procedural rights that are derived from the constitution.

Moreover, as Cheadle (1999) noted in his address to the 12th Annual Labour Law Conference:

“If the employer wishes to avail itself of the state machinery that costs nothing directly, it must be then prepared to expend the transaction time associated with the state justice system, just as it does if it seeks to recover debts in the magistrate’s court. For larger employers a lower transaction and legal cost regime is relatively easy to devise either contractually or through collective bargaining.”

I agree with these views. At the same time we should try to encourage other bodies to take on dispute resolution functions where this is appropriate and possible so that those that must use the CCMA, which are usually the unorganised and/or lower-level employees, obtain an efficient service. This means that well-organised sectors, such as retail, should have their own bargaining or statutory councils and they should not rely upon the CCMA for all their dispute resolution functions. The failure to establish councils in many sectors is a major problem that must be addressed by government and the other social partners.

It also means that the CCMA should accredit private agencies with respect to dispute resolution services in terms of s 127 of the LRA, which to date it has not done. If private agencies were accredited, I suspect that more employers with unorganised employees and many middle and upper-level employees, would use their services instead of burdening the CCMA.

Lastly, constant attention to the rules of the CCMA would also be useful, as I believe that the rules of procedure can assist in breaking a number of logjams.

11. Labour Brokers

There has been a rapid growth in the past decade in the number and use of labour brokers. This has caused a number of serious problems for workers. Some of the suggestions contained in this paper are drawn from Theron (2005).

Section 198 of the LRA uses the term 'temporary employment service' (TES). It defines it as:

“any person who, for reward, procures or provides to a client other persons—
(a) who render services to, or perform work for, the client; and
(b) who are remunerated by the temporary employment service.”

One of the strange things about the term is the use of the word 'temporary' because it is not inconceivable that the provision of services could be indefinite. However, most frequently services are provided on a temporary basis.

Section 198(2) of the LRA makes it clear that the labour broker (or TES) is the employer of the workers and not the client.⁴ However, in terms of s 198(4) the client is jointly responsible with the labour broker if there is a contravention of:

- (i) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
- (ii) a binding arbitration award that regulates terms and conditions of employment;
- (iii) the BCEA; or
- (iv) a sectoral determination.

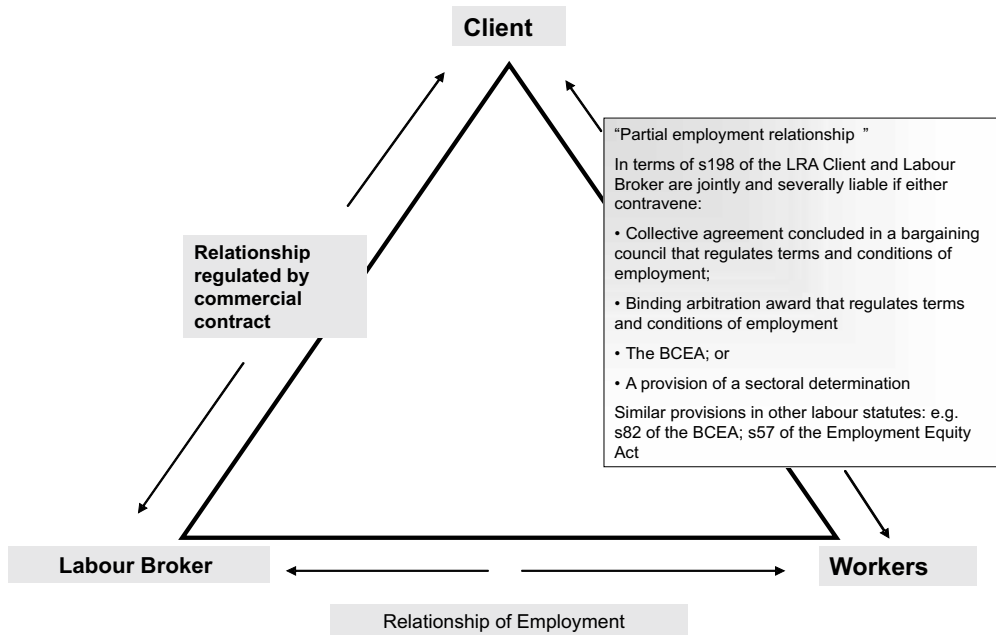
⁴ In his article, Theron traces the origin of the legal notion in the new LRA that the labour broker, and not the client, is the employer of the workers, to the 1983 amendment to the definition of employee in the old LRA. In that amendment the broker was deemed to be the employer of workers that it placed with a client.

Other labour statutes follow this trend. In s 82(3) of the BCEA, the TES and the client are jointly and severally liable if the TES, in respect of any employee who provides services to that client, does not comply with the BCEA or a sectoral determination.

In s 57(2) of the EEA, if a TES commits an act of unfair discrimination on the express or implied instructions of a client, then both the client and the labour broker are jointly liable. The LRA does not contain a similar provision with regard to dismissals. For the purposes of affirmative action plans s 57 (1) of the EEA deems the employee to be an employee of the client, if the employee's employment is of an indefinite duration or for a period of three months or longer.

The definition of employee in the Occupational Health and Safety Act No. 85 of 1993 (OHSA) excludes a labour broker. In contrast the provisions of the Mine Health and Safety Act No. 29 of 1996 apply to labour brokers. In my view there is a clear and problematic oversight in the OHSA.

In essence, therefore, if there is a labour broker or TES, then there is a triangular relationship (as depicted in the diagram). The relationship between the labour broker and the workers is one of employment. The relationship between the labour broker and the client is regulated by commercial contract. The relationship between the client and the workers is governed by statute in terms of which the client is jointly and severally liable with the labour broker in respect of certain contraventions of labour related agreements, awards, statutes or sectoral determinations. Therefore, the client acquires the status of employer in certain circumstances.



Employers seem to enter into labour broking arrangements for a number of reasons. The first is that they can extract lower wages and reduce the employee’s terms and conditions of employment. The typical example is that workers are presented with the employer’s business proposal to use a labour broker in terms of which the workers are offered alternative employment with the labour broker on reduced terms and conditions of employment. If they do not accept, they are retrenched.

The second reason is that the client escapes many of the obligations associated with being an employer, these obligations now being transferred to the labour broker. This includes the obligations associated with the right not to be unfairly dismissed. In practice, the labour broker seems more capable of escaping these obligations. For example, the labour broker can argue that the worker’s dismissal was for operational requirements because the client did not want that worker anymore, when clearly the ‘real’ reason for the dismissal may relate to the client’s view that the employee is performing poorly or has misconducted herself. An example of a clause in an agreement between labour broker and an employee states the following:

“In the event of [the labour broker’s] clients, for any reason whatsoever, refusing to allow the employee on their premises, [the labour broker] will be entitled to terminate this agreement”

In essence, therefore, the client continues to perform many of the functions of an employer such as directing how and when work will be done, interviewing prospective employees, etc. In fact, if one surveys many of the agreements between labour broker and employee, on the one hand, and labour broker and client, on the other, the labour broker is in truth not the employer, but merely an 'intermediary' and the client enjoys most of the rights associated with an employer. As Theron remarks "*[t]he client thus determines the parameters of the relationship, and is dominant in the relationship*" (Theron, 2005: 619).

The effect of labour broking arrangements upon workers is problematic. It usually means a decrease in wages and a reduction in terms and conditions of employment and benefits. It usually involves transforming the contracts of employment from indefinite to temporary or fixed term contracts. No longer is the employee working for a reputable company, but suddenly for some labour broker, many of whom are 'fly by nights', some of whom operate from the boot of a car. The union's capacity to organise and bargain collectively is diminished. The worker's capacity to challenge an unfair dismissal is also detrimentally affected, especially when it comes to re-instatement awards. Sometimes even finding the registered office of the labour broker is difficult. There are numerous other problems. It is safe to conclude that labour brokers have given birth to an underclass of employed workers.

It is evident that s 198 of the LRA and the similar provisions in the other labour related statutes have not sufficiently protected workers placed by labour brokers and that reform is essential and urgent.

I believe that it would be appropriate to recognise the true reality and change the notion in s 198 to state that the broker is the intermediary for placing employees in the service of the client and it is the client, not the labour broker, who is the employer. It may then still be necessary to regulate the role of the intermediary, but that would be a far simpler task.

Of course, the difficulty with this is the effect that it will have on the genuine TES that sends, for example, a domestic worker to do some ironing for an afternoon, or, that sends a temporary secretary to a business for three days to help out with urgent work. It seems unfair to make the client the employer in those circumstances. This TES and client is in a very different position to the company that permanently 'outsources' its employees to a labour broker and enters into fixed term contracts with the labour broker for say one to three years.

In order to resolve this problem I suggest that the law introduce a cut-off of say three months in any 12-month period. In other words, if the client procures an employee from a labour broker for more than three months in any 12-month period, then the client will be regarded as the employer. In order to prevent successive fixed-term contracts of just below three months, the stipulation of a 12-month period is necessary. This kind of cut-off period is already present in s 57(1) of the EEA, which deals with affirmative action plans.

The alternative is to make the client at least jointly and severally liable for the dismissal of workers and any unfair labour practices. Another, albeit weaker alternative, would be to provide that if the TES dismisses unfairly or commits an unfair labour practice on the express or implied instructions of the client, then the client and broker are jointly and severally liable. This is similar to the provision in s 57(2) of the EEA. The difficulty with a provision of this nature is the difficulty of proving the express or implied instruction.

Another alternative is to regulate the conduct of the client and the kind of contractual relationship that may be entered into between the client and the broker, making it impermissible, for example, for the client to act in ways that would cause unfair labour practices or an unfair dismissal. In that sense, the client's liability would be extended. This might put pay to the client acting unfairly and then hiding behind the broker, with the broker justifying the dismissal on its so-called operational requirements. This is a weaker alternative, as it does not deal with workers' diminished collective bargaining and organisational capacity, which results from the use of a labour broker.

It also seems to me that if labour brokers are to stay, they should be required to register with the Department of Labour, as was the case with the old LRA, and abide by a Code of Conduct. Through this process the brokers could be required to provide a registered address, which would make declaring disputes against them easier. Moreover, labour brokers should be regulated so that the unscrupulous ones can be deregistered. It may not be the solution to all problems, but it would at least provide the Department with the potential to root out some of the bad apples. I believe that the ILO Convention 181 recommends registration and already there is some kind of registration of employment service providers in s 24 of the Skills Development Act (SDA), albeit that this is for a different purpose.

12. Other Atypical Workers

A key issue for the future relates to atypical workers, who are vulnerable workers. This issue deals with the quality of an employee's job and a person's long-term job security. This issue has been on the agenda for some time, but it seems that South Africa has been slow to develop regulations on this issue.

Atypical workers include:

- (i) Casual workers. They are employees who have separate fixed term contracts, normally for a day at a time such that they are offered employment on an intermittent basis. They are often referred to as stand-by workers.
- (ii) Temporary employees. They are employed for a specific and usually short period of time. Their contracts of employment are fixed term contracts
- (iii) Part-time employees. They are employees who are employed on a continuous basis although not on a full time basis.

There are combinations of these types of employees such as casual part-time employment, etc. These kinds of contracts usually do not have benefits attached to them such as retirement funds, medical aid funds and the like. Most importantly, they are frequently devoid of any kind of long-term job security. Casuals and temporary employees are used widely by large enterprises, especially in the retail sector.

There are also 'dependent contractors', but I will deal with them in the next section.

I believe that on the legislative front we need to explore the following:

Casual or temporary employees in certain sectors should be guaranteed a minimum amount of pay. In other words, if temporary employees are called in for some Saturdays in a month and they are not sure which Saturdays and how many they will be called in for, then some arrangement must be made such that they are guaranteed at least some pay per month irrespective of the number of Saturdays they are called in for. This allows employees to be guaranteed some kind of income and to gain some kind of security. A minimum rate of pay should also be prescribed.

The best way to do this would be to allow such minima to be set by appropriate sectoral bargaining councils or through sectoral determinations. But, given the weak state of our bargaining council system and the limited capacity of trade unions to bargain on behalf of these workers, the Minister should be empowered to make sectoral determinations even if a bargaining council in that sector has not agreed to the minima for these workers.

As regards fixed-term contracts (i.e. temporary workers) there should be some provision, as I believe there is in the Dutch legislation and other jurisdictions, that if an employer enters into a number of consecutive temporary employment contracts, say three or more, or the employee has been in temporary employment for a fixed period of time, which could vary depending on the level of the employee and the sector, then the temporary contract converts itself into permanent arrangements. In the definition of dismissal, there is a presumption that if a person was given a reasonable expectation of continued temporary employment and that expectation is not fulfilled, then it may amount to a dismissal. This is not sufficient.

Moreover, it would be useful to specify exactly what an employer may use temporary or fixed term employees for. For example, it may be for a temporary increase in work. This would prevent the continual use of temporary employees for normal work; in such a case the employee should have a contract of indefinite duration.

In order to deal with the problems of inflexibility that may be caused, I suggest that this apply only to blue-collar workers, where the problems of casualisation are prevalent. This could be done by making the provisions subject to an earnings' threshold that is commensurate to the threshold determined in terms of s 6(3) of the BCEA, which is at present R115 572 per annum (See Government Gazette 25012, 14 March 2003).

13. The Application of Labour Legislation to Workers

When we speak of the employee, not only do we refer to all levels of employees from the CEO to the labourer, but we also refer to skilled and unskilled workers and workers in different sectors, categories and types of work. The 'one size fits all' approach to labour legislation does not lend itself to an easily adaptable labour market, because a relaxation in terms and conditions of employment for one employee may be appropriate in one context, but in another context it may threaten the security of employment and basic fairness of the employee's conditions of employment.

With the changing nature and structure of workplaces, global competition, changes in the nature of ownership of enterprises and the way in which work is arranged, it may well be that the 'one size fits all' approach to labour law is inappropriate for the future.

If we acknowledge this, then we need to consider the protections provided to different kinds of employees and ask ourselves whether they are sufficient. In this process we need to be guided by the principle that the vulnerable, powerless and disadvantaged need to be protected. This means that we need to extend protections to workers who do not have these protections and who are insufficiently protected by the present dispensation: dependent workers, who for one reason or another are classified as independent contractors, workers working for labour brokers, casuals, temporary employees, etc.

But it may also mean that certain employees need to surrender some of their protections such as senior management, other white-collar employees and newly hired employees. The question is to what extent should they surrender their protections. I have already addressed the issue of newly hired employees, casuals and temporary employees. I also consider the latter in the section dealing with collective bargaining.

13.1 Dependent Contractors

A good example of a dependent contractor, which is prevalent in the transport sector, is the owner-driver. What usually happens is that the company retrenches its drivers and then it enters into a commercial contract with each of the drivers. It makes them buy their trucks. It arranges a loan for the driver from a bank and stands as surety. The owner-driver then transports the company's goods at a standard rate. Usually all the work is provided by the one business.

Employers claim that the main reason for this type of scheme is that it promotes productivity. The owner-driver, who is no longer an employee but an independent contractor, does not take as much leave, the driver works many hours of overtime, etc without being limited by the BCEA. The owner-driver determines her own hours of work. The implications for the health and safety of the owner-driver and for safety on our roads are ominous.

Dependent contractors are widely used in many sectors, including domestic, textile, motor, engineering and transport. In most instances they are called 'independent contractors' and are therefore not subject to the protections afforded employees under labour-related statutes.

The term 'independent' is misleading. The contractors are utterly dependent on the business with which they contract. They must accept the terms and conditions upon which that work is provided to them because they are unable to use collective bargaining as a means of redressing the power imbalance between them and the business with which they contract. They are 'dependent contractors'.

S 200A of the LRA and s 83A of the BCEA sets out a test for when a worker is an independent contractor or an employee. It presumes that a worker is an employee if one or more factors indicating an employment relationship are present. These factors were drawn from the common law. The presumption is rebuttable and only applies to workers earning below the threshold prescribed in s 6(3) of the BCEA.

These sections have assisted in curtailing the crude attempts by some employers allied to the Confederation of Employers' Organisation (COFESA) to reclassify their employees as independent contractors. But these sections have not solved the problem of the 'dependent contractor', who is technically not an employee as contemplated by the labour statutes.

In terms of s 55(4)(k) of the BCEA the Minister may specify in a sectoral determination that minimum conditions of employment for persons other than employees. For example, the Sectoral Determination for the Domestic Sector applies to all persons employed in domestic work, whether they are employees or independent contractors.

The use of the word 'employment' in this subsection is a misnomer because strictly speaking dependent contractors are not 'employed'. It should probably be replaced with the word 'work', which connotes a broader concept. However, despite this wording, this

section probably does cover 'dependent contractors'.

The other problem with this section is that the Minister cannot specify minimum *terms* of employment, only *conditions* of employment. In this regard it is apposite to contrast s 55(4)(a) of the BCEA, which refers to both terms and conditions of employment, and s 55(4)(k), which refers only to conditions of work. This presumably prevents the Minister from setting minimum rates of remuneration for persons other than employees, which is a term as opposed to a condition of work. This is problematic. The section should, therefore, be broadened to include the concept of '*terms of work*'.

By virtue of s 83 of the BCEA the Minister has the power to deem any category of persons to be employees for purposes of the whole or part of the BCEA, any other employment law or any sectoral determination. The Minister also has the power to deem any category of persons to be contributors for the purposes of the whole or part of the Unemployment Insurance Act No. 63 of 2001. A similar provision is found in s 1(2) of the OHSA.

This is a valuable section. However, as far as I know, to date the Minister has not deemed any category of persons, such as the dependent contractor, an employee for the purpose of the BCEA or any other employment law. This is a grave omission. I believe that it is critical that dependent contractors be brought within the protections of the labour-related statutes. In many respects there is no difference between an employee and a dependent contractor.

Other countries have gone a different route. In Sweden the concept of dependent contractor is included in the definition of employee:

"For the purposes of this Act a person shall be regarded as an employee even if no normal engagement exists, provided that he performs work for another person and thereby occupies in relation to that person a position of dependence essentially similar to that occupied by an employee in relation to his employer."

In Canada the definition of employee has also been expanded to include the concept of 'dependent contractor'. In interpreting the definition, the Canadian Labour Relations Boards dealt with individuals who were in similar circumstances as the owner-driver. The Boards have found the owner-drivers to be dependent contractors and therefore part of the expanded definition of employee. In the case of *Fownes Constuction Co. Ltd* [1974] 1

Can. L.R.B.R. 453 (B.C.) at pp 461-2 the British Columbia Labour Relations Board found that:

- (i) the actual performance of their work or services fits into the same rotation as the employee-driver, in that they drive the same route and are subject to the same supervision and control;
- (ii) owner-drivers are paid the same standard rate as employees although the driver's rate is considerably higher because he rents his truck and his services;
- (iii) there is little room for entrepreneurial judgment or initiative that might result in extra profits or losses.

The Ontario Board in the case of *Nelson Crushed Stone* [1997] O.L.R.B Rep. Feb. 104 held that the purpose of this amendment was to address the mischief created by persons who may *"manifest the trappings of independent entrepreneurs but who in an intrinsic sense are clearly in such a subservient economic position vis-à-vis the beneficiary of his services that he ought to be extended the protection intended by the collective bargaining process"*.

The Board has also held that the word 'dependent' must be interpreted in a manner consistent with the economic reality of the relationship with the beneficiary of the service.

In the case of *Algoquin Tavern and CLC, Loc. 1689 (Re)* [1981] 3 Can. L.R.B.R. 337 (Ont.) the Ontario Labour Relations Board has listed 11 indicators that it considers when determining dependency. These are:

- (i) "the right to use substitutes in method of work performance;
- (ii) ownership of tools and supply of materials;
- (iii) evidence of entrepreneurial activity;
- (iv) the selling of one's own services on the market generally;

- (v) economic mobility or independence – the freedom to refuse a job;
- (vi) evidence of variation in fees charged;
- (vii) organisational integration;
- (viii) degree of specialisation, skill, expertise and creativity;
- (ix) control in the manner of performance of work;
- (x) magnitude of the contract and manner of payment; and
- (xi) the rendering of services under the same conditions as employees.”

Numerous other Canadian cases have considered the concept of ‘dependence’. I do not intend to review all the cases except to note that there have been different opinions from the Labour Boards about whether the owner-driver who employs others are dependent contractors. See in this regard *Bronwin Harvey Ltd* 80 C.L.L.C. 16,016 (Nfld. L.R.B.), *Canada Crushed Stone* [1977] O.L.R.B. Rep. Dec.806 and *Dominion Diaries Ltd* [1978] O.L.R.B. Rep. Dec. 1085

The German approach is to provide dependent contractors some, but not all, of the protections afforded to employees. Obviously, this would go some way to protecting owner-drivers where they are deemed to be dependent contractors, although it would depend on the nature and extent of the protections provided to them.

I believe that the Minister should use his powers in terms of s 83 of the BCEA to deem dependent contractors employees for the purposes of employment legislation. The above cases would be a useful guide in the formulation of the notice. If it is inappropriate to use s 83 for the purpose of extending labour statutes to dependent contractors, then I believe that we should pursue the Canadian and Swedish approach by including the concept of dependent contractor within the definition of employee.

13.2 Levels of Employees

Senior executives, who include senior government officials, need very little protection from the labour laws. They are usually well protected by the common law of contract, their contracts containing clauses such as notice periods of between three and twelve months. Their bargaining power is not comparable to the unskilled and semi-skilled blue-collar worker. In my experience the kinds of packages they are paid out when their services are terminated are handsome to say the least. Moreover, their employment security is less threatened, as they are able to find alternative employment a lot easier.

A bad CEO can cause havoc within an organisation, and accordingly, termination needs to be swift. Moreover, if a CEO or senior executive has lost the confidence of her Board or other mandating structure, then there is no reason for her to remain. But the labour law with its requirement for a fair dismissal often forestalls this unnecessarily. I believe that senior executives should be excluded from the ambit of labour legislation. It would make the labour market more flexible where it really requires flexibility.

The one difficulty will be how senior executive is defined. I believe a remuneration threshold is perhaps necessary as well as some objective factor indicating that the position is a senior position. It is important to note that in other countries, such as Canada, labour legislation does not apply to the upper levels of employees.

This raises the question of where the cut-off should be. We need to consider the question bearing in mind that it is necessary to protect the vulnerable and powerless.

14. Collective Bargaining

This is a complex issue. In 2000 the Department of Labour proposed amendments to the LRA dealing with collective bargaining, which evoked substantive opposition from labour. I shall not deal with these issues specifically, but merely concentrate on the proposals made by Cheadle.

As Cheadle states, at the outset the LRA's policy choice was twofold: The first was to strengthen and expand the coverage of sector level bargaining and to give bargaining councils the role of regulating bargaining at the level of the workplace. The second was to provide for a system of voluntarism. This represented a massive compromise for labour, which had campaigned for a system of compulsory centralised collective bargaining. As far as I know the business constituency, although united in its rejection of labour's demand, was divided, with some employers preferring a voluntary system of collective bargaining at workplace level.

14.1 Sector Level Bargaining

Cheadle identifies three problems with which I agree. The first problem relates to the fragmentary nature of bargaining councils, with most workplaces not covered by sectoral bargaining. This picture is confirmed by the report of Godfrey, Maree and Theron (2006). Cheadle criticises the Department of Labour post 1996, for having failed to convene meetings of employer organisations and trade unions operating in the same sector to commence and facilitate a process for the establishment and consolidation of councils.

The second problem relates to the lack of a broad demarcation of sectors, which should have been done by the social partners at NEDLAC.

The third problem is that most bargaining councils have not performed their envisaged functions beyond setting terms and conditions of employment. Many have not set sectoral policies and little has been done in respect of industrial support services and the extension of the bargaining council's services and functions to the informal sector and home workers. In this regard Cheadle, identifies that there is a failure to provide subsidies to councils in order that they may give effect to their many roles. The Department needs to develop programmes to assist councils to implement their new functions.

These problems demonstrate how changing legislation does not necessarily resolve the problem. We need an activist Department and social partners that drive the implementation of these matters.

Cheadle also criticises the labour movement for not agreeing to the possibility of the Minister of Labour promulgating sectoral determinations, whose terms and conditions are less favourable than those contained in the BCEA. But labour's position was, however, understandable. They did not want the floor of rights contained in the BCEA to be capable of being undermined and were not willing to hand over a broad power to the Minister on this. They feared that in future years another Minister might simply use this power to undermine workers' legitimate rights. Perhaps it would be better to discuss the sectors where less favourable terms and conditions are appropriate, rather than negotiate a broad and general power to the Minister. If they are appropriate, then specific exceptions could be written into the legislation. This might not be the tidiest way legally of dealing with the issue, but it would remove the debate from the abstract, where fears are difficult to deal with, to the concrete, where workers can readily see what they are in for.

Cheadle criticises sectoral agreements for setting actual wages and not minima. He believes that the sectors should set framework agreements and that actuals be determined at the level of the workplace. His criticism is based upon a survey of bargaining council agreements. I am not aware that the determination of actuals is as commonplace as he alleges. In their study Godfrey, Maree and Theron conclude that *"[t]he main agreements of councils also differ. Some are long and extremely complex, full of intricacies built up over years of negotiations, while others are relatively straightforward. The same applies to staffing and benefit funds, which vary considerably from council to council"*.

Moreover, in some sectors the negotiations of actuals is probably appropriate. In the motor (as opposed to auto) sector, actuals have been negotiated as a percentage. In other words, the parties agreed to a percentage increase on whatever the employees in that sector were earning. This was because the minima were so low and many workers were in fact earning way above that. Negotiations about minima therefore only affected a few workers. Negotiations at plant level in that sector are also very difficult because of the large number of workplaces – just think about the number of petrol stations.

14.2 Extension of Collective Agreements

Cheadle argues that the Minister should have a greater discretion on whether or not to extend collective agreements even if the parties are representative or sufficiently representative. In broad terms he envisages a situation where the Minister can refuse an extension if the agreement is not aligned with the government's labour market policy. He believes that there are two ways in which the parties to the agreement would be protected from the Minister abusing his power. The first is that the labour market policy would have to be negotiated at NEDLAC, and the second is the constitutional right to fair administrative action.

The Minister of Labour made a proposal of this nature in the run up to the 2002 LRA amendments. The unions fiercely opposed it. Another proposal of this nature will be controversial.

The question is on what grounds may a representative sector's wishes be undermined, and if it is, do they have adequate protections. My primary legal concern is really with the adequacy of the protections. Labour market policies negotiated at NEDLAC will no doubt be broad and general in nature. This, in turn, will mean that the reasons for not extending an agreement may also be broad and general in nature. Courts in review proceedings are reluctant to interfere with the policy decisions of the executive unless there is patent unfairness, illegality or irrationality. In many cases the courts are likely to say that it all comes down to a difference in the interpretation of, and emphasis given to, the policy, and that accordingly it is unable to interfere with the decision. In other words, reviews of this nature protect the parties from extreme or irrational abuse. They do not prevent the Minister from effectively entering into the bargaining process under the guise of administrative processes. Moreover, in reality a review process of this nature is time consuming and could effectively delay the wage increases of workers for many months.

I believe that a proposal of this nature can only be introduced if there are adequate and sufficient protections from Ministerial interference in the bargaining process. I do not believe that participation in the process of drafting the government's labour market policy and the general right to review administrative decisions are adequate.

14.3 Sector Level Bargaining and Atypical Workers

Cheadle correctly argues that the only form of collective bargaining that will give atypical workers, including dependent workers, a voice is sector level bargaining. But he argues that it is important for the bargaining councils to conclude agreements that are appropriate for this form of employment, and accordingly the Minister should have the discretion not to extend them if they fall outside of an agreed policy frame. He suggests that if there are no collective agreements for these workers, then the Minister should be empowered to make sectoral determinations covering atypical workers.

The idea of giving these workers a collective voice through sectoral collective bargaining and protecting them through sectoral determinations is appealing. The question of a broad ministerial discretion to refuse to extend a collective agreement setting minimum conditions of employment for atypical workers will throw up serious concerns for the trade union movement. I also believe that in many situations it may be necessary to proceed by way of sectoral determinations because atypical workers are generally difficult to organise, and consequently collective bargaining may not produce the required results.

14.4 Collective Bargaining and Small Business

What would the effect be of some kind of blanket exemption for small business from bargaining council collective agreements that are extended by the Minister, as was suggested by the President in his opening address to Parliament at the beginning of 2005? The question is difficult to answer precisely in the absence of a clear understanding of the nature of the intended blanket exemption; however, in general, the fear that it would seriously undermine sectoral collective bargaining must be legitimate and reasonable.

The first question that needs to be answered is why this is necessary. If it is motivated by the desire for increased job creation, then it will have to be cogently shown that quality jobs will be created by this move. It may merely mean less favourable conditions of employment for a vast number of workers, whose bargaining power is already limited due to the fact that it is well-known that it is difficult to organise workers in small businesses.

The second issue that needs consideration is the effect that it will have upon the bargaining council system as a whole. Fewer and fewer small businesses will see the need to become parties to the council because they know that they will be exempt

anyway. This would be disastrous for an already fragile bargaining council system.

Moreover, in many cases sectoral collective bargaining is in the interests of small business, as it removes this time consuming function from the workplace level where the employer would be forced to deal with the issue directly.

It may, therefore, be better to explore more thoroughly the issue of small business representation on the councils. Section 30(1)(b) of the LRA requires a bargaining council constitution to provide for the representation of small and medium enterprises on the council. The LRA, therefore, already gives small and medium businesses the opportunity to influence the nature of collective agreements.

The notion that big business drives sectoral collective bargaining is not true. The picture that emerges from the study by Godfrey, Maree and Theron (2006) is very different from that. They state that *“the data shows that in the vast majority of cases the party employers on councils are on average larger than the non-party employers (in employment terms)”*. They also state that it *“... is somewhat surprising ... that overall party employers are not particularly big (the average size is 27 employees) and they do not outweigh non-party firms by very much (the later employ on average 11 employees).”* Noting that there are of exceptions in some of the big national councils, they conclude that the *“... data shows ... that the bargaining council system predominantly covers fairly small firms”*.

Notwithstanding this, it is evident that greater work could be done by employers' organisations to organise small businesses and make their voice heard in the bargaining process. The same could be said of trade unions and the organisation of employees from small businesses. We cannot legislate this. But perhaps what we can look at is the way in which the employer side of the table at bargaining councils is organised and try and make sure that small business is better represented.

Godfrey, Maree and Theron (2006) point out that on some of the councils “the employers had nominated one or two employer representatives to specifically represent small business interests on the council” where there were no employers' organisations that specifically represented small business. They also state that “the councils indicated that the small business representatives did actually try to represent small business interests and in most cases the representation was seen as effective.” Despite this, it seems unsatisfactory that an employer representative, who is not in some way directly accountable to small business, is simply allocated to represent the interests of small business. The exigencies of the particular situation may require it. However,

the Department or Registrar of Labour Relations should be empowered to evaluate the manner in which small business representation is given effect to in the council's constitution as well as require better quality representation from small business where this is possible.

The other issue is the issue of exemptions as they presently exist. Section 32(3)(e) of the LRA allows the Minister of Labour to refuse to extend a collective agreement concluded in the bargaining council to a non-party if the agreement does not provide for an independent body to hear and decide appeals against a councils' decision to refuse an exemption or withdraw it. Section 32(3)(f) allows the minister to refuse to extend such a collective agreement to a non-party where it does not contain the criteria that the exemption body must apply. The criteria for exemptions must be fair and promote the primary objects of the LRA.

The picture painted by Godfrey, Maree and Theron (2006) about exemptions and small business seems to be that in general the system is working. The number of exemption applications during 2000 to 2004 increased and the success rate was above 70per cent. They also found that the total number of appeals was low. Furthermore, in some councils there were dedicated exemption procedures for small businesses and even blanket exemption procedures for small businesses that were registered with the council. They quote the "*Furniture (Northern Region) bargaining council, which provides for the phasing in of new firms that have 10 or less employees to full compliance over a period of about three years.*"

In the light of the above, it is unclear why the law needs to provide for further exemptions for small business from collective agreements that are extended by the Minister of Labour.

Nevertheless, insofar as there are exemptions for small business from collective agreements that are extended by the Minister, a question that will be difficult to deal with will be how a small business is defined. Should it be by number of employees or by turnover?

15. Amending Terms and Conditions of Employment

The facts in the case of *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC); *National Union of Metalworkers of SA & Others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) raise an important issue about collective bargaining. In that case the employer wanted to change its shift patterns i.e. amend its employees' terms and conditions of employment with regard to hours of work. It negotiated with the union, but could not obtain an agreement. It then threatened the retrenchment of the workers who would not agree to the employer's demand and invited the union to consult about the matter. In effect, the employer transformed a normal collective bargaining issue into a consultative issue relating to dismissals for operational requirements. The union challenged the threat of dismissals in the Labour Court as constituting an infringement of s 187(1)(c) of the LRA, which provides that a dismissal is automatically unfair if the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between employer and employee. The Labour Court upheld the interdict application, but the LAC overturned it on appeal. The Supreme Court of Appeal dismissed the union's application for leave to appeal and endorsed the LAC's approach, and the Constitutional Court dismissed the union's application for leave to appeal without providing any reasons.

The LAC interpreted s 187(1)(c) as if it outlawed 'lock-out dismissals', as they were known under the old LRA. A lock-out dismissal is a dismissal of a worker with an undertaking to re-employ, if the worker later accepts the employer's demand. The LAC held that the company's threatened dismissals were intended to be final dismissals and were not intended to be conditional dismissals i.e. if the employee accepted the employer's demand after the due date for acceptance of the new terms and conditions of employment, she would not be re-instated.

The courts' judgments do not adequately deal with the fundamental issue; namely, the manner in which collective bargaining is undermined by the employer's decision to threaten dismissals for operational requirements. If Fry's Metals could do it in order to amend terms and conditions of employment with regard to hours of work, which is traditionally an issue for collective bargaining, then it is possible that another employer could threaten dismissals if the workers do not accede to the employer's wage demands.

All the employer need do is classify its demand as an operational requirement and the employer can transform the collective bargaining process into a consultation about possible retrenchments. Given the broad manner in which our courts have interpreted the notion of an operational requirement, including the desire for increased profits, it would not be difficult to argue that most demands could easily constitute an operational requirement. Put differently, the employer is now able to introduce a threat of dismissal into the negotiations about collective bargaining issues. This undermines collective bargaining and the right to strike.

Collective bargaining has always been the preferred mechanism for resolving disputes about wages and other terms and conditions of employment. It is imperative therefore that the sanctity of collective bargaining be protected, and accordingly amendments to the LRA are necessary.

I therefore suggest that s 187(1)(c) of the LRA be amended to read:

*“A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—
...*

***[to compel the employee]** the employee’s refusal to accept a demand in respect of any matter of mutual interest between employer and employee;
...”⁵*

5 Bold in square brackets represents a deletion; underlying represents an addition

16. Conclusion

As I stated right at the beginning there is no quick fix for small business. We need to have a balanced approach that caters for the interests of all stakeholders.

We need to approach the law bearing in mind the different kinds of employers and redraft the Codes and law with this in mind. Similarly, we need to recognise that there are different kinds of workers, some deserving of greater protection and others, such as senior executives, deserving of less protection. We need to ensure that the vulnerable, powerless and disadvantaged are afforded greater protection. We must improve the capacity of all stakeholders to voice their interests in the structures and processes of collective bargaining. But at the same time, we all need to be realistic and recognise that this may require trade offs.

I believe that it is necessary to broaden the scope and content of legal protection for workers of labour brokers, dependent workers, casuals and other temporary employees. Other key issues that require legislative amendment are ones that bolster the sanctity of collective bargaining when it comes to issues such as amending terms and conditions of work and clarify the law regarding dismissals for operational requirements.

As regards the residual unfair labour practice, dismissals for misconduct and incapacity, dismissals for operational requirements, newly hired or probationary employees, there may be ways to streamline the regulation of these issues such that the labour market becomes more efficient and workers' rights are not too unfavourably affected. However, in regard hereto, there may also need to be trade offs.

But legislative reform will not solve all the problems. The management of our dispute resolution institutions and the implementation of policy to build and streamline sectoral collective bargaining require urgent attention. Without this, the debate about legislative reform may be rendered academic.

17. References

- Bisseker, C. (2005) "Tied up in Technicalities" *Financial Mail* 18 February 2005
- Benjamin, P and Gruen, C. (2005) "The Regulatory Efficiency of the CCMA : A Staistical Analysis. Unpublished
- Benjamin, P. (2003) A Termination for Operational Requirements? Some thoughts on the end of the Labour Court (2003) 24 *ILJ* 1869
- Cheadle, H. (1999) "*Regulated Flexibility: The Impact of South African Labour Law and Labour Market Policy in the Global Context*". 12th Annual Labour Law Conference: 1999 Butterworths
- Cheadle, H. (2006) "Regulated Flexibility and Small Business". Unpublished.
- Du Toit, D. (2005) *Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond* (2005) *Industrial Law Journal* Vol . 26 pp 595, 598-602
- Godfrey, S., Maree, J. & Theron, J. (2006) *Research Report: Conditions of Employment and Small Business: Coverage, Compliance and Exemptions*; University of Cape Town; 23 September
- Theron, J. (2005) "Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship". Jan 26 *ILJ* 618 at 625.

Statutes:

Basic Conditions of Employment Act No. 75 of 1997 (BCEA)

Constitution of the Republic of South Africa Act No. 108 of 1996 ("the Constitution")

Employment Equity Act No. 55 of 1998 (EEA)

Labour Relations Act No. 66 of 1995 (LRA)

Mine Health and Safety Act No. 29 of 1996

Occupational Health and Safety Act No. 85 of 1993 (OHSA)

Promotion of Administrative Justice Act No 3 of 2000 (PAJA)

Protected Disclosures Act No. 26 o 2000

Public Service Act (Proclamation 103 of 1994)

Unemployment Insurance Act No. 63 of 2001

Cases:

Algoquin Tavern and CLC, Loc. 1689 (Re) [1981] 3 Can. L.R.B.R. 337 (Ont.)

BMD Knitting Mills (Pty) Ltd v SACTWU (2001) 22 ILJ 2264 (LAC)

Bronwin Harvey Ltd 80 C.L.L.C. 16,016 (Nfld. L.R.B.)

Canada Crushed Stone [1977] O.L.R.B. Rep. Dec.806

CWIU & others v Alograx (Pty) Ltd (2003) 24 ILJ 1917 (LAC)

Dominion Diaries Ltd [1978] O.L.R.B. Rep. Dec. 1085

Enterprise Foods (Pty) Ltd v Allen & others (2004) 25 ILJ 1251 (LAC)

FAWU v Simba (Pty) Ltd [1997] 4 BLLR 408 (LC)

Fownes Constuction Co. Ltd [1974] 1 Can. L.R.B.R. 453 (B.C.) at pp 461-2

Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others (2003) 24 ILJ 133 (LAC); *National Union of Metalworkers of SA & Others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA)

Harksen v Lane 1997 (11) BCLR 1489 (CC) at para 50

Hendry v Adcock Ingram (1998) 19 ILJ 85 (LC)

HOSPERSA & another v Northern Cape Provincial Administration (2002) 21 ILJ 1066 (LAC)

Johnson & Johnson (Pty) Ltd v CWIU (1999) 20 ILJ 89 LAC at 97B-E;

Larbi-Odam v MEC for Education (North-West Province) 1997 (12) BCLR 1655 (CC) at para 19

Kadiaka v ABI (1999) 20 ILJ 373

National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd (1993) 14 ILJ 642 (LAC) at 648D-F.

NEHAWU and others v University of Pretoria [2006] 5 BLLR 437 (LAC)

Nelson Crushed Stone [1997] O.L.R.B Rep. Feb. 104

Ntai and others v SA Breweries 2001 (2) BLLR 186 para 17

NUMSA and others v Gabriels 2002 (12) BLLR 1210 at para 19

Protekon (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and others (2005) 26 ILJ 1105 (LC)

SACTWU & others v Discreto (A Division of Trump & Springbok Holdings) (1998) 10 ILJ 1451 (LAC)

Sikhosana & others v Sasol Synthetic Fuels (2000) 21 ILJ 649 (LC)