

**CRITICAL ANALYSIS OF THE NEBULOUS CONCEPT OF  
IMCOMPATIBILITY WITHIN SOUTH AFRICAN DISMISSAL LAW**

by

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## ABSTRACT

### CRITICAL ANALYSIS OF THE NEBULOUS CONCEPT OF INCOMPATIBILITY WITHIN SOUTH AFRICAN DISMISSAL LAW

While there is unanimous acceptance of the view that incompatibility of an employee is a legitimate ground for dismissal, there is a fair amount of dispute as to the correct classification of this concept. This controversy stems from the fact that section 188 of the Labour Relations Act (LRA) espouses only three fair reasons for a dismissal. Evidently incompatibility is not one of them, as the three grounds are specified as conduct, capacity and operational requirements. The focus of this research report therefore seeks to establish whether incompatibility dismissals can be suitably accommodated under the current dismissal structure, or whether it is more preferable to define it as a separate ground of dismissal, for which a separate procedure is required.

This study is important in finding the rightful place of incompatibility in South African dismissal law, which is becoming increasingly significant due to the wording of the LRA, which enforces the dismissal requirements of substantive and procedural fairness. Understanding where employee incompatibility is positioned within dismissal law is essential in order for the concept to be used as an effective form of dismissal.

A descriptive; analytical and comparative approach has been adopted in this research. There has been a comprehensive depiction of labour relations and other statutes. Key decisions made by labour courts and tribunals regarding employee incompatibility have been investigated. The statutory prescripts, as well as the reasoning of the courts and tribunals have been carefully evaluated, resulting in the principle of incompatibility and its management within the law being methodically examined. In order to provide an international perspective, this study includes a comparison with the United Kingdom and New Zealand. This assessment serves to establish the manner in which these countries have accommodated incompatibility within their dismissal structures.

The findings of this research report provide evidence that a strong element of fault is present in a considerable number of incompatibility cases. Employers have constantly been required to show that the employee is the party substantially responsible for the disharmony caused. Notwithstanding the prevalence of the element of fault, there are cases where conduct that lends itself to allegations of incompatibility, though attributable to the employee, does not translate into conduct accompanied by fault. An apt example of this is the eccentric employee. However, due to the high incidence of culpability in such cases, it can no longer generally be accepted that incompatibility is most often a species of incapacity. Two categories of incompatibility therefore emerge, one which is akin to misconduct and the other which is akin to incapacity.

Notwithstanding the association of incompatibility to both misconduct and incapacity, it has been found that incompatibility may not be proficiently accommodated within the substantive and procedural confines of either a misconduct or incapacity dismissal. This is due to the distinct characteristic of incompatibility, which is primarily the disharmonious workplace relations that is caused by the actions of an employee.

The main conclusion drawn from this study is that while incompatibility is found to be closely linked to misconduct and on occasion to incapacity, it will not appositely correlate with any of the existing grounds of dismissal. Irrespective of whether the incompatibility is blameworthy or not, a separate ground and specific procedure that encompasses incompatibility dismissals in its entirety, is proposed.

## TABLE OF CONTENTS

	<b>PAGE NO</b>
<b>CHAPTER 1: INTRODUCTION</b>	
1.1 Significance of study.....	1
1.2 Research questions.....	2
1.3 Research methodology.....	2
<b>CHAPTER 2: ILO AND SUPRANATIONAL STANDARDS</b>	
2.1 Introduction.....	4
2.2 Relevant recommendations and conventions	
2.2.1 Recommendation 119.....	5
2.2.2 Convention 158.....	6
2.2.3 Recommendation 166.....	7
2.3 Influence of ILO standards on SA labour law	
2.3.1 The position prior to 1994.....	7
2.3.2 The position post 1994.....	8
2.4 Conclusion.....	9
<b>CHAPTER 3: HISTORICAL DEVELOPMENT IN SOUTH AFRICA</b>	
3.1 Introduction.....	11
3.2 Unfair dismissal law under the LRA of 1956.....	12
3.3 Effect of unfair dismissal law on incompatibility.....	13
3.4 Definition of incompatibility.....	14
3.5 Varying interpretations of incompatibility.....	14
3.6 Key decisions of the Industrial Court	
3.6.1 Introduction.....	15
3.6.2 Requirement of substantive and procedural fairness.....	16
3.6.3 Incompatibility in relation to operational reasons.....	18
3.6.4 Analysis of the case law.....	20
3.7 Conclusion.....	21
<b>CHAPTER 4: CONSTITUTIONAL INFLUENCE</b>	
4.1 Introduction.....	23
4.2 Constitutional provisions impacting on labour law	
4.2.1 Section 23(1).....	24
4.2.2 Section 39.....	25
4.3 Effect of the constitutional provisions on unfair dismissal law.....	26
4.4 Conclusion.....	27
<b>CHAPTER 5: LABOUR RELATIONS ACT OF 1995</b>	
5.1 Introduction.....	29
5.2 Unfair dismissal law under the LRA of 1995	
5.2.1 Section 188.....	30
5.2.2 Code of Good Practice: Dismissal.....	31
5.3 Effect of unfair dismissal law on incompatibility.....	31
5.4 Importance of correctly categorising incompatibility dismissals.....	33
5.5 Incompatibility cases	
5.5.1 Incompatibility in relation to misconduct.....	35
5.5.2 Incompatibility in relation to incapacity.....	41
5.5.3 Incompatibility in relation to operational requirements.....	46
5.5.4 Analysis of the cases.....	49
5.6 Conclusion.....	51

**CHAPTER 6: INTERNATIONAL COMPARISON**

6.1	Introduction.....	53
6.2	The United Kingdom (UK)	
	6.2.1 General Overview of UK dismissal law.....	54
	6.2.2 Incompatibility as a ground of dismissal.....	55
	6.2.3 Relevant case law.....	56
	6.2.4 Analysis of the case law.....	58
6.3	New Zealand (NZ)	
	6.3.1 General Overview of NZ dismissal law.....	59
	6.3.2 Incompatibility as a ground of dismissal.....	61
	6.3.3 Relevant case law.....	61
	6.3.4 Analysis of the case law.....	63
6.4	Conclusion.....	63

**CHAPTER 7: CONCLUSION**

7.1	Introduction.....	65
7.2	Research question answered.....	65
7.3	Recommendations.....	66

## CHAPTER 1 INTRODUCTION

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	Page
1.1 Significance of study.....	1
1.2 Research questions.....	2
1.3 Research Methodology.....	2

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### 1.1 SIGNIFICANCE OF STUDY

Incompatibility as a form of dismissal has been discussed by many authors, and has been the subject of many unfair dismissal disputes. There is unanimous acceptance of the view that incompatibility of an employee is a legitimate ground for dismissal. However, there appears to be a lot of undecidedness, as to how this concept is to be dealt with. This stems from the fact that section 188 of the Labour Relations Act (LRA)<sup>1</sup> espouses only three fair reasons for a dismissal. These are dismissals for conduct, capacity or operational requirements. Incompatibility is not recognised as a separate ground of dismissal, hence there have been differing views, as to which of the existing grounds for dismissal adequately accommodates incompatibility.

The answer to the above question may appear to be nothing more than semantics, but it has become increasingly important because there are different pre-dismissal procedures ascribed to the varying grounds of dismissal. The LRA<sup>2</sup> requires that a dismissal be both substantively and procedurally fair. In order for incompatibility dismissals to survive the scrutiny of the courts and labour tribunals it is vital that it is dealt with under the correct category of dismissal, which will inform the procedure to be followed. Understanding where incompatibility stands or falls will go a long way to assisting employers in utilising it as an effective form of dismissal.

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<sup>1</sup> The Labour Relations Act 66 of 1995.

<sup>2</sup> Section 188 of the Labour Relations Act 66 of 1995.

## 1.2 RESEARCH QUESTIONS

This research report seeks to analyse the manner in which the concept of incompatibility dismissals have been dealt with under the old labour dispensation,<sup>3</sup> as well as how it is currently being dealt with. This analysis will aid the development of a workable solution to the problems and uncertainties that exist. One of the main aspects to be determined is whether incompatibility can be suitably accommodated under the current dismissal structure,<sup>4</sup> or whether it is more preferable to define it as a separate ground of dismissal under the LRA,<sup>5</sup> for which a separate procedure is required.

In view of the foregoing, this study aims to address the following research question: Whether the nebulous concept of incompatibility constitutes a separate ground of dismissal to those espoused in the LRA, for which a separate and specific procedure is required to be formulated?

In answering the above research question the following areas will be explored:

- 1) Under which of the three substantive grounds for dismissal does incompatibility belong, if any?
- 2) Is it more apt for incompatibility dismissals to be included in the LRA as a separate ground of dismissal?
- 3) What procedure is recommended to deal with such dismissals?

## 1.3 RESEARCH METHODOLOGY

The approach to this study is descriptive, analytical and comparative. The descriptive approach will be used to illustrate the fundamental instruments that underpin this concept, which have in turn given rise to its past and present place in dismissal law. As a starting point the provisions of the applicable ILO

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<sup>3</sup> The Labour Relations Act 28 of 1956.

<sup>4</sup> Section 188(1)(a) of the Labour Relations Act 66 of 1995.

<sup>5</sup> The Labour Relations Act 66 of 1995.

Convention<sup>6</sup> will be examined. There will then be an evaluation of the manner in which incompatibility was addressed under the Industrial Court, by having regard to the decisions taken in significant cases arising during that aeon. The focus will then move to the influence of the LRA<sup>7</sup> on incompatibility. The impact of the LRA will be judged by the statutory provisions on dismissal and the decisions taken by the Labour Court and labour tribunals.

The analytical approach will be utilised to appraise the methods employed by legislation to deal with this concept, and the resultant actions of the court. The above evaluation process will result in the principle of incompatibility and its management within the law being methodically examined.

The comparative approach will be used to examine to what extent the principle of incompatibility is recognised in countries other than South Africa. Two countries have been identified for this comparison, which is the United Kingdom and New Zealand. The United Kingdom has been chosen due to the similarities in its dismissal law structure with that of South Africa. New Zealand has been chosen, as from the research done, it appears to be one of the countries that recognises incompatibility dismissals. From the comparison with these two countries an assessment will be made on whether any best practices can be imported to assist in providing a solution to the questions posed.

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<sup>6</sup> C158 Termination of Employment Convention of 1982.

<sup>7</sup> The Labour Relations Act 66 of 1995.



## CHAPTER 2

### ILO AND SUPRANATIONAL STANDARDS

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	Page
2.1 Introduction.....	4
2.2 Relevant recommendations and conventions	
2.2.1 Recommendation 119.....	5
2.2.2 Convention 158.....	6
2.2.3 Recommendation 166.....	7
2.3 Influence of ILO Standards on SA Labour Law	
2.3.1 Position prior to 1994.....	7
2.3.2 Position post 1994.....	8
2.4 Conclusion.....	9

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#### 2.1 INTRODUCTION

The International Labour Organisation (ILO), which is responsible for compiling and overseeing international labour standards, was established in 1919 by the Treaty of Versailles. South Africa was a signatory to the said treaty and hence became a founder member of the ILO. However, South Africa withdrew its membership in 1964, subsequent to a resolution adopted by the ILO calling for the withdrawal of South Africa, on account of the government's apartheid policy. South Africa rejoined as a member of the ILO on 26 May 1994.<sup>8</sup>

The ILO has a tripartite structure unique in the United Nations, in which employers' and workers' representatives (the social partners of the economy) have an equal voice with those of governments in shaping its policies and programmes.<sup>9</sup> The ILO, like ancient Gaul, comprises three parts. The International Labour Conference is the supreme policy making body, the

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<sup>8</sup> Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2008) 20.

<sup>9</sup> See information booklet, accessible on the ILO website at [www.ilo.org](http://www.ilo.org), which was downloaded on 30 April 2011.

Governing Body is the executive of the ILO and the International Labour Office is the ILO's secretariat.<sup>10</sup>

The main aims of the ILO are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work related issues.<sup>11</sup> The organisation achieves these objectives through the development of international labour standards, which are legal instruments that set out basic principles on rights at work. These international labour standards take the form of Conventions and Recommendations. Conventions are legally binding international treaties that may be ratified by member states. Upon ratification it creates an obligation on the member state to implement the terms of the Convention into national law. A Recommendation conversely is a non binding guideline, and often serves to supplement a Convention.

It is important for South Africa in developing its national legislation to align such laws to the standards set by the ILO, as such standards serves as a yardstick for the evaluation of domestic labour legislation. Furthermore, these labour standards represent an important source of customary international law, and are explicitly recognised by the Constitution.

## **2.2 RELEVANT RECOMMENDATIONS AND CONVENTIONS**

### **2.2.1 RECOMMENDATION 119**

The ILO in achieving its objectives, one being the promotion of rights at work, developed international labour standards governing termination of employment at the initiative of the employer. The first labour standard governing this aspect was Recommendation 119 of 1963.<sup>12</sup> The Recommendation recognized that the individual worker required protection against arbitrary and unwarranted termination of his or her employment and against the economic and social

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<sup>10</sup> Van Niekerk "The International Labour Organisation (ILO) and South African Labour Law" (1996) *CLL* 5(12) 113.

<sup>11</sup> Van Niekerk, Christianson, McGregor, Smit and Van Eck 19.

<sup>12</sup> ILO Recommendation 119 of 1963.

hardships resulting from loss of employment.<sup>13</sup> The Recommendation did not merely require a fair reason for dismissal, but went further to stipulate the grounds which were considered to be fair. Article 2, stipulates that the termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker, or based on the operational requirements of the undertaking, establishment or service.

## 2.2.2 CONVENTION 158

Following the aforementioned Recommendation, Convention 158 of 1982<sup>14</sup> was adopted. Christianson mentions that this Convention was the foundation for the Industrial Court's (IC's) jurisprudence on unfair labour practices in general and unfair dismissal in particular.<sup>15</sup> The Convention in keeping with Recommendation 119 set out in article 4, three reasons for a fair dismissal. These are:

- termination connected with the capacity of the worker;
- termination connected with the conduct of the worker; and
- termination based on the operational requirements of the undertaking, establishment or service.

From the grounds set out above, it is clear that incompatibility is not specifically mentioned.

The Convention goes further, and as per articles 5 & 6, sets out the grounds which are considered to be invalid for termination. These include *inter alia*, union membership or participation in union activities, discrimination, and absence from work due to maternity leave or due to illness. Notwithstanding the fact that incompatibility is not listed as a fair ground for dismissal, it is also not specifically prohibited.

Article 7 of the Convention sets out the broad procedural requirements for dismissals. It stipulates that the employment of a worker shall not be terminated

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<sup>13</sup> Cassim "Unfair Dismissal" (1984) 5 *ILJ* 278.

<sup>14</sup> ILO Convention 158 of 1982.

<sup>15</sup> Christianson "Incapacity and disability: A retrospective and prospective overview of the past 25 years" (2004) 25 *ILJ* 881.

for reasons related to the worker's conduct or performance before he or she is provided an opportunity to defend himself against the allegations made. The central issue is that the employee is entitled to some form of hearing or some form of consultation before dismissal. Convention 158 does however, provide that there may be exceptional circumstances in which an employer cannot reasonably be expected to comply with the requirement of a hearing.

### **2.2.3 RECOMMENDATION 166**

Further to this, Recommendation 166<sup>16</sup> was adopted, which serves to supplement Convention 158. In the main the Recommendation espouses the principle of progressive discipline. It expands on the procedure for termination of unsatisfactory performance and provides for the right to be represented when defending oneself.

## **2.3 INFLUENCE OF ILO STANDARDS ON SA LABOUR LAW**

### **2.3.1 THE POSITION PRIOR TO 1994**

Prior to 1994, international labour standards played only an indirect role in the development of South African dismissal law.<sup>17</sup> Despite the meandering application of ILO standards on South African law due to the fact that South Africa was not a member of the ILO, it was still influential when the IC developed its unfair labour practice jurisprudence during the 1980's. The ILO's international labour standards on Termination of Employment at the Initiative of the Employer set the foundation for the IC's jurisprudence on unfair dismissal. The Court referred to ILO standards in considering unfair dismissal disputes.<sup>18</sup>

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<sup>16</sup> ILO Recommendation 166 of 1982.

<sup>17</sup> Van Niekerk, Christianson, McGregor, Smit and Van Eck 19.

<sup>18</sup> Van Niekerk (1996) 112 "In the 1980's, ILO conventions became an important touchstone for members of the Industrial Court as they attempted to give meaning to the amorphous definition of unfair labour practice. Some members of the Court went so far as to suggest that the Court was bound by ILO conventions as a matter of public international law".

In *MAWU v Stobar Reinforcing (Pty) Ltd*<sup>19</sup> the Court found the dismissal of a group of employees for allegedly participating in a go slow to be unfair, and their reinstatement was ordered. In coming to its decision the Court took cognisance of ILO Recommendation 119. In *Van Zyl v O'Okiep Copper Co Ltd*<sup>20</sup> the Court found the employees dismissal to be unfair due to the employer's failure to conduct an enquiry. The Court held that an employee should be given an opportunity to state his case before dismissal. In coming to this conclusion the Court referred to paragraph 11(5) of Recommendation 119.<sup>21</sup>

The fairness requirements for dismissal cases that emerged from court decisions were that dismissals were required to be substantively and procedurally fair. This was in harmony with the requirements for termination of employment set by the ILO.

### 2.3.2 THE POSITION POST 1994

As a result of South Africa rejoining the ILO in 1994, international law is accorded a specific status within the South African Constitution.<sup>22</sup> The Constitution<sup>23</sup> recognises the importance of international law and requires that international law be considered as points of reference for the interpretation of labour and other legislation.

In the address to the international labour conference made by the Minister of Labour in 1994, he expressed commitment to the principles of the ILO.<sup>24</sup> The ILO in turn undertook to provide the necessary support and assistance to the tripartite constituents in South Africa, and to assist the country in the adoption of labour legislation and other measures, which are compatible with international

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<sup>19</sup> *Metal and Allied Workers Union & Others v Stobar Reinforcing (Pty) Ltd & Another* (1983) 4 ILJ 84 (IC).

<sup>20</sup> *Van Zyl v O'Okiep Copper Co Ltd* (1983) 4 ILJ 125 (IC).

<sup>21</sup> Paragraph 11.5 provides: "Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given an opportunity to state his case promptly, with the assistance where appropriate of a person representing him".

<sup>22</sup> The Constitution of the Republic of South Africa, 1996.

<sup>23</sup> Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

<sup>24</sup> See Mboweni "Address to the International Labour Conference" (1994) 15 ILJ 737 where he mentioned that the ILO principles of tripartism, social partnership and social justice are our compass. He indicated that South Africa's reconstruction and development programme is premised on respect for human and worker rights.

labour standards. It is clear from the Labour Relations Act of 1995<sup>25</sup> that this was achieved, as if one has regard to the wording of section 188 on unfair dismissals and the code of good practice on dismissals, it is evident that ILO principles have been adopted.<sup>26</sup> It is important to note that despite South Africa's commitment to the endorsement of and application of international labour standards, Convention 158 has not been ratified by South Africa.<sup>27</sup>

## 2.4 CONCLUSION

The ILO standards on Termination of Employment at the Initiative of the Employer in the main enforce the requirement of substantive and procedural fairness in dismissals. Although South Africa was not a member of the ILO between 1964 and 1994, the ILO principles relating to termination of employment were relied on by the courts in deciding unfair dismissal disputes.

Notwithstanding the fact that the ILO standards did not go further and expound on the precise nature of the three categories of dismissal espoused in the Convention,<sup>28</sup> it has had a profound effect on South African Labour Law. The IC drew heavily on the Convention during the 1980s when it developed protection against unfair dismissal under the unfair labour practice definition.<sup>29</sup> This is evident from the case law cited.<sup>30</sup>

Due to the lack of precision in regard to the composition of the three recognised grounds of dismissal as set out in the ILO standards, it is uncertain whether dismissal for incompatibility was considered and, if so, where within the three recognised grounds of dismissal it was envisaged to fall. However, what is evident is that if incompatibility could find a place within one of the three recognised categories of dismissal, then such a dismissal would be regarded as being substantively fair. If such a dismissal located itself within the category of

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<sup>25</sup> The Labour Relations Act 66 of 1995.

<sup>26</sup> This is discussed in chapter 5 below.

<sup>27</sup> See [www.ilo.org](http://www.ilo.org), which provides a list of the ILO conventions and the countries that ratified them.

<sup>28</sup> ILO Convention 158 of 1982.

<sup>29</sup> Van Niekerk, Christianson, McGregor, Smit and Van Eck 205.

<sup>30</sup> *Metal and Allied Workers Union & Others v Stobar Reinforcing (Pty) Ltd & Another and Van Zyl v O'Okiep Copper Co Ltd.*

conduct or capacity then some form of hearing would be required prior to dismissal, unless exceptional circumstances prevented such an opportunity from being afforded to the employee.

## CHAPTER 3

### HISTORICAL DEVELOPMENT IN SOUTH AFRICA

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	Page
3.1 Introduction.....	11
3.2 Unfair dismissal law under the LRA of 1956.....	12
3.3 Effect on unfair dismissal law on incompatibility.....	13
3.4 Definition of incompatibility.....	14
3.5 Varying interpretations of incompatibility.....	14
3.6 Key decisions of the Industrial Court	
3.6.1 Introduction.....	15
3.6.2 Requirement of substantive and procedural fairness	16
3.6.3 Incompatibility in relation to operational reasons.....	18
3.6.4 Analysis of the case law.....	20
3.7 Conclusion.....	21

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### 3.1 INTRODUCTION

The law has always recognized that employers have a right to rid themselves of unsatisfactory workers. Under the common law it was virtually unfettered.<sup>31</sup> The problem with the law was that it afforded little protection to employees and was open to abuse.<sup>32</sup> This warranted the development of unfair dismissal law, which would primarily provide employees with a form of protection against arbitrary termination of their employment.

The aspect of fairness in dismissals was to some extent addressed in the Labour Relations Act of 1956 (LRA of 1956),<sup>33</sup> through the unfair labour practice concept. Though there was no specific mention made of unfair dismissals in the

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<sup>31</sup> Grogan and Myburgh "Cracking the Code - The Code of Good Practice: Dismissal" (1997) *ELJ* 118.

<sup>32</sup> Brassey, Cameron, Cheadle and Olivier *The New Labour Law* (1987) 5 "The common law, in short, offers little protection against arbitrariness. It allows the party with the greater bargaining power to extract any bargain he wants, however oppressive, perverse or absurd it may be, provided it is not illegal or immoral".

<sup>33</sup> The Labour Relations Act 28 of 1956.



LRA, the broad definition of the unfair labour practice concept resulted in the Industrial Court (IC) interpreting it to include unfair dismissals. Despite the above, there was no clear indication given of what the recognised grounds of dismissal were. However, it is apparent from the decisions of the IC that incompatibility was recognised as a ground of dismissal.

### 3.2 UNFAIR DISMISSAL LAW UNDER THE LRA OF 1956

In 1979, the newly created IC was given the power to determine disputes concerning alleged unfair labour practices.<sup>34</sup> This was as a result of the introduction of the concept of the unfair labour practice into the LRA of 1956, following the work of the Wiehahn Commission. Initially, unfair labour practice was defined as “any practice which in the opinion of the IC constitutes an unfair labour practice.” This definition was very broad and conferred a wide discretion on the IC.

Providentially, this unfair labour practice definition was amended by Parliament in 1982.<sup>35</sup> The main focus was on the unfairness of the act or omission and the effect that this unfairness had on an employee or class of employees. Unfair conduct in this sense was thought to be conduct that was arbitrary and inconsistent.<sup>36</sup> However, the amended definition was still viewed as being too broad. It was defined as open texture in the extreme, its content being said to depend very largely upon the manner of its interpretation.<sup>37</sup> It was considered to give the IC virtual carte blanche to develop the concept of the unfair labour practice as it deemed appropriate, and as a result of the vagueness of the definition, it was said to have provided employees with obvious opportunities to allege that their dismissals constituted unfair labour practices.<sup>38</sup> In *SADWU v the Master Diamond Cutters Association of South Africa*<sup>39</sup> the Court found that the dismissal of diamond cutters amounted to an unfair labour practice. Similarly in

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<sup>34</sup> Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* (1994) 18.

<sup>35</sup> Amended by the Labour Relations Amendment Act of 1982.

<sup>36</sup> Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2008) 166.

<sup>37</sup> Mureinik “Unfair Labour Practices: Update” (1980) 1 *ILJ* 113.

<sup>38</sup> Le Roux and Van Niekerk 20.

<sup>39</sup> *SADWU v The Master Diamond Cutter’s Association of South Africa* (1982) 3 *ILJ* 87 (IC).

*Esterhuisen v Porter Sigma, Paardeneiland*<sup>40</sup> the IC accepted that a dismissal could constitute an unfair labour practice.

Within a relatively short period of time the concept of unfair dismissal was accepted and applied by the IC.<sup>41</sup> The IC went further in the case of *Van Zyl v O'Okiep Copper Co Ltd*<sup>42</sup> and acknowledged that a dismissal must be both substantively and procedurally fair. From the decisions of the IC it was accepted that unfair dismissals fell within the ambit of the unfair labour practice concept. As indicated by Christianson,<sup>43</sup> it was this amended definition that allowed the IC to develop its jurisprudence and to place fairness high on the agenda in any termination of employment.

The effect of the LRA of 1956 on dismissals is aptly captured by Cassim in the following extract:

Dismissal law, as evolved by the Industrial Court, complements legislation (from which it derives jurisdiction) and supplants the common law. A fundamental assumption underlying these new principles is that an employee has a legally protected right to his job. This property right is advanced through the consensus model created by the Labour Relations Act and, in conjunction with that model, is protected by the industrial Court (dismissals covered by ULP).<sup>44</sup>

### 3.3 EFFECT OF UNFAIR DISMISSAL LAW ON INCOMPATIBILITY

Despite the fact that the unfair labour practice definition was interpreted by the IC to encompass unfair dismissal disputes, neither the legislation nor the IC espoused the grounds that constituted fair reasons for a dismissal. As such, incompatibility was not specifically recognised as a ground for dismissal.

However, dismissal cases for incompatibility were considered by the IC,<sup>45</sup> and it was in these earlier decisions that dismissals for incompatibility were given

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<sup>40</sup> *Esterhuisen v Porter Sigma, Paardeneiland* (unreported case).

<sup>41</sup> Le Roux and Van Niekerk 23.

<sup>42</sup> *Van Zyl v O'Okiep Copper Co Ltd* (1983) 4 ILJ 125 (IC).

<sup>43</sup> Christianson "Incapacity and disability: A retrospective and prospective overview of the past 25 years" (2004) 25 ILJ 880.

<sup>44</sup> Cassim "Unfair Dismissal" (1984) 5 ILJ 275 at 292.

<sup>45</sup> See, for example *Erasmus v BB Bread Limited* (1987) 8 ILJ 537 (IC); *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC).

recognition. The judgments of the IC therefore formed the basis for the jurisprudence on this subject.

### 3.4 DEFINITION OF INCOMPATIBILITY

It is considered imperative in understanding the jurisprudence of this concept, to firstly understand what incompatibility is. The definition of incompatibility appears to be rather wide, and encompasses various traits ranging from poor interpersonal skills, a bad attitude, unsuitable personality or disposition, character differences to severe eccentricity. Le Roux and Van Niekerk mention that incompatibility conveys a notion of an inability to work in harmony either within the corporate culture of the business or with fellow employees.<sup>46</sup> Rossouw and Conradie state that incompatibility occurs in situations where an employee does not fit in with his or her work environment and relates poorly to his or her colleagues or clients, and, as a result, creates an unhappy or hostile working environment.<sup>47</sup>

A key feature that arises from the above descriptions is that in order for an employee to be considered compatible, he or she should be able to display collegiality. As correctly pointed out by Van Jaarsveld<sup>48</sup> anyone who is not self-employed must work with others, and the ability to do so is therefore an essential component of the employees overall fitness for the job.

### 3.5 VARYING INTERPRETATIONS OF INCOMPATIBILITY

While accepted as a valid ground for dismissal in certain circumstances under the LRA of 1956, it was not one of the three fundamental reasons for a fair dismissal recognised by the ILO, and opinions were divided on where it belonged.<sup>49</sup>

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<sup>46</sup> Le Roux and Van Niekerk 285.

<sup>47</sup> Rossouw and Conradie *A Practical Guide to Unfair Dismissal Law in South Africa* (1999) 38.

<sup>48</sup> Van Jaarsveld "An employee's contractual obligation to promote harmonious relationships in the workplace" (2007) *SA Merc LJ* 204.

<sup>49</sup> Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Rossouw *Labour Relations Law A Comprehensive Guide* (2006) 420.

It was as a result of this uncertainty that the concept of incompatibility has been the subject of many discussions. The earlier writings on the subject did not provide an authoritative stance on this issue, as there were differing viewpoints. Rycroft and Jordaan<sup>50</sup> classified incompatibility as falling within the broad category of dismissal for unsatisfactory work performance. Van Jaarsveld and Van Eck<sup>51</sup> appear to have concurred with this view in that they stated that cases of incompatibility differ from misconduct in that the employee is not wilfully responsible for his lack of the expected competence. The procedure supported by them points to a dismissal for poor performance. Le Roux and Van Niekerk<sup>52</sup> on the other hand took a different stance, and classified incompatibility as a form of dismissal for operational purposes.

### 3.6 KEY DECISIONS OF THE INDUSTRIAL COURT

#### 3.6.1 INTRODUCTION

Incompatibility dismissals was first considered in the case of *Stevenson v Sterns Jewellers*,<sup>53</sup> wherein the Court found the dismissal to be fair on the basis that there had been serious friction between the applicant who was appointed as Managing Director and the Managers of the company. The Court distinguished such a dismissal from a dismissal on grounds of misconduct. In terms of procedure, although no formal enquiry was held, the applicant was confronted with the allegations, to which he replied.

Following on *Stevenson*<sup>54</sup> was *Larcombe v Natal Nylon Industries*,<sup>55</sup> wherein the alleged incompatibility arose from a tiff with another member of the management team. This led the managing director to the conclusion that one of them would have to go.<sup>56</sup> The dismissal was found to be unfair, as the company failed to establish any basis for their allegation. Furthermore, the company's failure to

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<sup>50</sup> Rycroft and Jordaan *A Guide to South African Labour Law* (1992) 211.

<sup>51</sup> Van Jaarsveld and Van Eck *Principles of Labour Law* (2002) 206.

<sup>52</sup> Le Roux and Van Niekerk 285.

<sup>53</sup> *Stevenson v Sterns Jewellers Proprietary Limited* (1986) 7 ILJ 318 (IC).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Larcombe v Natal Nylon Industries Proprietary Limited* (1986) 7 ILJ 326 (IC).

<sup>56</sup> *Grogan Workplace Law* (2009) 262.

hold a proper enquiry and to give Larcombe an opportunity to reply was regarded as being an unfair labour practice.

A leading case in which the principles of incompatibility dismissals were developed was the 1987 case of *Erasmus v BB Bread*.<sup>57</sup> The nature of the incompatibility was the use of offensive words, the display of a difficult attitude, the abuse of his management powers, and being responsible for ongoing personality clashes with a subordinate. This case laid the basis for employers to act against employees whose conduct is incompatible with work harmony. The IC found the dismissal to be fair and held that:

An employer is entitled to insist on reasonably harmonious interpersonal relationships on the factory floor. Where disharmony results from the actions or presence of a particular employee, the employer is entitled to address the problem. It may be necessary for an employer to remove an employee from the scene. Of course, the employer must act fairly in dealing with the employee.<sup>58</sup>

The foundation laid by *Erasmus*<sup>59</sup> was supported in *Sibiya v Iscor Ltd*<sup>60</sup> where it was said that an employer has a clear interest in maintaining morale within the workplace and ensuring that there is a friendly atmosphere. The right to harmonious working relationships was clearly established and continued to be advocated.<sup>61</sup>

### 3.6.2 REQUIREMENT OF SUBSTANTIVE AND PROCEDURAL FAIRNESS

Despite the fact that the above cases endorsed incompatibility as a valid ground for dismissal, these cases did not provide a clear understanding into which of the three legitimate grounds, as set out by the ILO,<sup>62</sup> dismissal for incompatibility fell. The courts further failed to provide clarity on the appropriate procedures that employers should follow. In *Stevenson*<sup>63</sup> it was distinguished from misconduct,

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<sup>57</sup> *Erasmus v BB Bread Limited*.

<sup>58</sup> *Idem* 538.

<sup>59</sup> *Erasmus v BB Bread Limited*.

<sup>60</sup> *Sibiya v Iscor Ltd* (1992) 1 LCD 255 (IC).

<sup>61</sup> Butterworths *Beaumonts Express* Volume 1 (1991-1994) 87 "A disruptive personality is not in the interest of sound labour relations or productivity or good relations between those who have to give instructions and those who have to obey those instructions".

<sup>62</sup> Section 4 of ILO Convention 158 of 1982.

<sup>63</sup> *Stevenson v Sterns Jewellers Proprietary Limited*.

and while counsel for the respondent argued that the case does not concern misconduct, it was not classified into any specific category, except for it being said that managing directors are dismissed for a variety of reasons, and in this case the applicant simply did not fit in.<sup>64</sup>

In *Larcombe*,<sup>65</sup> it was held that the holding of an enquiry is necessary where the charge against the employee is one of incompatibility. The emphasis was on the alleged unacceptable conduct of the employee, which is suggestive of a dismissal falling within conduct.

Though *Erasmus*<sup>66</sup> enforced the employer's right to insist on good working relationships, just like the *Stevenson*<sup>67</sup> case it did not specifically clarify into which ground of dismissal incompatibility fell. However, the IC agreed that the case did not concern misconduct and if one has regard to the IC's reasoning, it becomes apparent that they considered it to be a dismissal for incapacity.<sup>68</sup>

The above cases clearly enforced the principle of substantive and procedural fairness. However, it was still unclear into which of the recognised grounds for dismissal incompatibility fell, from which the applicable procedure could be established.

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<sup>64</sup> Mr Trengove on behalf of respondent adopted a fundamentally different approach. He submitted that the case does not concern gross misconduct. The applicant simply did not 'fit in' and the Court should not substitute its judgment for the managerial decision. It was also not for the Court to say that respondent should have occupied a style foreign to its own. The fact was that applicant caused problems, rightly or wrongly.

<sup>65</sup> *Larcombe v Natal Nylon Industries Proprietary Limited*.

<sup>66</sup> *Erasmus v BB Bread Limited*.

<sup>67</sup> *Stevenson v Sterns Jewellers Proprietary Limited*.

<sup>68</sup> In *Erasmus v BB Bread Limited* the Court interestingly noted that the disciplinary code specifically states that disciplinary action against persons whose job performance is not satisfactory is only appropriate where the individual is in fact capable but unwilling to perform satisfactorily. The IC found that this was not the case here, as the respondent had a high regard for the loyalty and integrity of the applicant, and that no allegation whatsoever had been made that the applicant is unwilling to perform his services. This suggests that the applicant was incapable rather than unwilling to display the required disposition and management style, which most similarly resembles a dismissal for incapacity.

### 3.6.3 INCOMPATIBILITY IN RELATION TO OPERATIONAL REASONS

The IC's judgment in the 1992 case of *Wright v St Mary's Hospital*,<sup>69</sup> added a further dimension to incompatibility dismissals. The case involved the dismissal of an employee on allegations of the undermining of authority, incitement and losing his temper. The dismissal for incompatibility was classified as a dismissal based on operational reasons. The case set out the procedure to be followed, which required that the employee be advised of the following:

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

The IC held that every step short of dismissal should first be investigated in order to seek to effect an improvement in the relationship.

The requirements set out in the case were interpreted by Rossouw and Conradie<sup>70</sup> to be as follows:

- the incompatibility in question must be either entirely or substantially the employee's fault;
- the employee should be given an opportunity to remedy the incompatibility; and
- the incompatibility should have resulted in the irretrievable breakdown of the employment relationship.

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<sup>69</sup> *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC).

<sup>70</sup> Rossouw and Conradie 38.

While the procedure set out in *Wright*<sup>71</sup> is considered useful in dealing with incompatibility dismissals, it is believed that it cannot be sustained under the category of operational requirements. Firstly, if one considers article 7 of Convention 158,<sup>72</sup> the requirement of giving an employee an opportunity to defend him or herself extends only to dismissals for conduct or capacity. The procedure set out in *Wright*<sup>73</sup> is compatible with the procedure set out in article 7,<sup>74</sup> but it would be contradictory to classify it as a dismissal for operational reasons. Secondly, in terms of the 1995 Labour Relations Act (LRA of 1995)<sup>75</sup> a specific section has been introduced to deal with dismissals for operational requirements. Section 189 encompasses a wide ranging consultation process, which is not akin to the processes set out in *Wright*.<sup>76</sup>

Although subsequent cases followed the guidelines set out in *Wright*,<sup>77</sup> if one has regard to the facts of these cases it gives credence to the above contention that incompatibility dismissals does not properly fit within the grounds of operational requirements. In *Lubke v Protective Packaging*,<sup>78</sup> a new managing director was appointed and he made sweeping reforms. However, the changes caused annoyance amongst subordinate employees and the manager was accused of lacking interpersonal skills. The IC held that the dismissal lacked substantive grounds, stating that senior personnel should learn to adapt to changes and new work patterns introduced by a new MD, no matter how irksome. The IC accepted the approach taken in *Wright*,<sup>79</sup> as it was held that before reaching a decision on alleged incompatibility, the employer must make practical and genuine efforts to effect an improvement in interpersonal relations when dealing with a manager whose work is otherwise perfectly satisfactory. It was held that a disciplinary enquiry is necessary where the charge against the employee is one of incompatibility, but in this case the applicant was dismissed without the benefit of an enquiry. The requirement of a disciplinary enquiry is inconsistent with its classification as a dismissal for operational requirements.

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<sup>71</sup> *Wright v St Mary's Hospital*.

<sup>72</sup> ILO Convention 158 of 1982.

<sup>73</sup> *Wright v St Mary's Hospital*.

<sup>74</sup> ILO Convention 158 of 1982.

<sup>75</sup> The Labour Relations Act 66 of 1995.

<sup>76</sup> *Wright v St Mary's Hospital*.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Lubke v Protective Packaging Proprietary Limited* (1994) 15 ILJ 422 (IC).

<sup>79</sup> *Wright v St Mary's Hospital*.



In *Hapwood v Spanjaard*,<sup>80</sup> the principles of *Wright*<sup>81</sup> were again applied, as the IC held that an employer was obliged to seek to assist an employee who was causing disharmony before acting against him. Dismissal was only justified after remedial action had been attempted, provided it could be shown that the employee had substantially contributed to the disharmony and that it was irremediable. In that event, dismissal for incompatibility was to be regarded as a dismissal for operational reasons. However, the Court held that a fair inquiry was still necessary, and hence the respondent was wrong in its belief that a disciplinary meeting was not required.

### 3.6.4 ANALYSIS OF THE CASE LAW

The one clear principle that has come out of the IC is the fact that employers have the right to insist on harmonious working relationships and that employee's who cause disharmony can be dismissed.<sup>82</sup>

Case after case has enshrined the core requirements of substantive and procedural fairness, but has been unable to provide certainty on the question of the correct ground for dismissal into which incompatibility best fits. It is evident from the case law that there were distinctions in the manner in which incompatibility cases were treated. In *Stevenson*<sup>83</sup> and *Erasmus*<sup>84</sup> it was distinguished from misconduct, while in *Larcombe*<sup>85</sup> the fine line between incompatibility and misconduct became evident. There were also differing views on the procedural requirements for such a dismissal. The former two cases held that a disciplinary enquiry was not necessary, while the latter case highlighted the requirement of a disciplinary enquiry.

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<sup>80</sup> *Hapwood v Spanjaard Limited* (1996) 2 BLLR 187 (IC).

<sup>81</sup> *Wright v St Mary's Hospital*.

<sup>82</sup> *Erasmus v BB Bread Limited*.

<sup>83</sup> *Stevenson v Sterns Jewellers Proprietary Limited*.

<sup>84</sup> *Erasmus v BB Bread Limited*.

<sup>85</sup> *Larcombe v Natal Nylon Industries Proprietary Limited*.

The *Wright*<sup>86</sup> case appears to have provided greater clarity on the issue, as there was a clear procedure outlined for incompatibility cases. Furthermore, the concept of incompatibility was precisely categorised, as a dismissal based on operational requirements.

While the procedure espoused in *Wright*<sup>87</sup> is considered useful, the classification of incompatibility dismissals as a dismissal based on operational requirements is unconvincing. It is acknowledged that during the time when this case was considered, there was no statute defining the concept of operational requirements. However, the courts were guided by the ILO convention,<sup>88</sup> and considering the wording of this convention, as well as the definition of operational requirements, as contained in the LRA of 1995, it is unlikely that the IC has correctly classified incompatibility dismissals.

If one considers the nature of the cases under review, it is clear that in most of these cases the element of fault on the part of the employee was present. The element of fault influences a conclusion that incompatibility more suitably falls within the confines of a dismissal relating to conduct, rather than one based on operational requirements.

### 3.7 CONCLUSION

The decisions of the IC had a critical role to play in the development of dismissals for incompatibility. The IC recognised incompatibility as a valid ground for dismissal and enforced the need for such dismissals to be both substantively and procedurally fair. It attempted to provide certainty to the ambiguity surrounding the classification of incompatibility into a fair ground of dismissal. Unfortunately its decision to place incompatibility dismissals within the ambit of dismissals for operational requirements is viewed with great scepticism, having considered Convention 158<sup>89</sup> and the LRA of 1995.

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<sup>86</sup> *Wright v St Mary's Hospital*.

<sup>87</sup> *Ibid.*

<sup>88</sup> ILO Convention 158 of 1982.

<sup>89</sup> *Ibid.*

The question, as to the correct classification of incompatibility dismissals remains unanswered. Perhaps the answer to the question is that there is no need to force incompatibility into one of the existing grounds. Maybe it is best dealt with as a ground on its own, for which a separate procedure, similar to that set out in *Wright*<sup>90</sup> is required. These questions will be explored in the subsequent chapters.

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<sup>90</sup> *Wright v St Mary's Hospital*.

## CHAPTER 4

### THE CONSTITUTIONAL INFLUENCE

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	Page
4.1 Introduction.....	23
4.2 Constitutional provisions impacting on labour law	
4.2.1 Section 23(1).....	24
4.2.2 Section 39.....	25
4.3 Effect of constitutional provisions on unfair dismissal law....	26
4.4 Conclusion.....	27

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#### 4.1 INTRODUCTION

The end of apartheid and the advent of democracy in South Africa brought about the introduction of the Interim Constitution,<sup>91</sup> which came into force on 27 April 1994 and has been described as revolutionary.<sup>92</sup> In 1996 the country's new Constitution,<sup>93</sup> which has had a profound impact on all branches of law, was effected.

The Constitution embodies an entrenched and justiciable Bill of Rights (BOR's), which is a set of instructions to the state that it must use its power in ways which do not violate fundamental rights and which promote these rights.<sup>94</sup> Fair and equitable labour relations was one of the fundamental rights recognised in section 27 of the Interim Constitution, which provided *inter alia* for the right to fair labour practices.

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<sup>91</sup> The Interim Constitution of 1993.

<sup>92</sup> Currie and De Waal *The Bill of Rights Handbook* (2005) 2.

<sup>93</sup> The Constitution of the Republic of South Africa, 1996.

<sup>94</sup> Currie and De Waal *The New Constitutional and Administrative Law* (2002) 318.

This fundamental right was to have a considerable influence on labour law,<sup>95</sup> and as indicated by Basson, the introduction of this constitutional provision was bound to bring about a change in the operation of the Industrial Court.

The context within which the Industrial Court will operate in future when exercising its unfair labour practice jurisdiction, has changed completely and radically with the introduction of the Bill of Rights contained in chapter 3 of the Constitution. This conclusion is based upon a careful examination of the terminology used in section 35 of the Constitution (the so-called interpretation clause). This clause provides for a framework of values against which the Courts should interpret the fundamental human rights, whenever called upon to do so.<sup>96</sup>

Rights relating to labour relations was carried through to the present Constitution. Article 23 of the Constitution entrenches several fundamental rights concerning labour relations. These rights protect various interests and conduct within the framework of labour relations.<sup>97</sup> They include rights to freedom of association; the right to strike; the right to engage in collective bargaining; and importantly the right to fair labour practices. The right to fair labour practices is regarded as one of the sources of law that regulate the termination of the employment relationship in South Africa.

## 4.2 CONSTITUTIONAL PROVISIONS IMPACTING ON LABOUR LAW

### 4.2.1 SECTION 23(1)

The right to fair labour practices is a fundamental right contained in the BOR's. Section 23(1) of the Constitution stipulates that "everyone has the right to fair labour practices."

In the premise, courts were called upon to promote the values which underlie an open and democratic society based on freedom and equality, and to have due regard to the spirit, purport and objects of the Constitution when interpreting the unfair labour practice definition.<sup>98</sup>

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<sup>95</sup> Devenish *The South African Constitution* (2005) 125 "It is submitted that section 23 of the Constitution is likely for some time to influence in a considerable measure the labour jurisprudence of the courts."

<sup>96</sup> Basson "Labour Law and the Constitution" (1994) 57 *THRHR* 498 at 506.

<sup>97</sup> Rautenbach and Malherbe *Constitutional Law* (2009) 382.

<sup>98</sup> *Ibid.*

The right to fair labour practices is not defined in the Constitution, and the Constitutional Court in *NEHAWU v University of Cape Town*<sup>99</sup> expressed the view that the concept is incapable of precise definition. However, the Court enforced the fact that it includes protection against unfair dismissal. The Court indicated that the purpose of the right is to ensure that the relationship between a worker and an employer is fair to both. The right not to be dismissed unfairly is essential to the right to fair labour practices.

The same sentiment was expressed in an earlier decision where the following was held:

It seems to me almost uncontested that one of the most important manifestations of the right to fair labour practices that developed in labour relations in this country was the right not to be unfairly dismissed.<sup>100</sup>

Similarly, Landman J held that this concept is not defined in the Constitution but embraces the right to job security.<sup>101</sup>

#### **4.2.2 SECTION 39**

Section 39 of the Constitution addresses the interpretation of the BOR's and requires the courts when interpreting the BOR's to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It further requires the court to promote the spirit, purport and objects of the BOR's when interpreting any legislation, and when developing the common law or customary law.

Subsequent to the introduction of the Interim Constitution, specific labour legislation<sup>102</sup> was enacted. The stated primary purpose of the Labour Relations Act<sup>103</sup> (LRA) is to give effect to and to regulate the fundamental rights conferred by section 27 of the Interim Constitution. As such, one of the areas regulated by

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<sup>99</sup> *NEHAWU v UCT & others* (2003) 24 ILJ 95 (CC).

<sup>100</sup> *Fedlife Assurance Ltd v Wolfaardt* (2001) 21 ILJ 2407 (SCA) at 2420.

<sup>101</sup> *Netherburn Engineering CC t/a Netherburn Ceramics v Mda'u & others* (2003) 24 ILJ (LC).

<sup>102</sup> The Labour Relations Act 66 of 1995.

<sup>103</sup> *Ibid.*

the LRA is the right to fair labour practices, which encompasses the right not to be unfairly dismissed. Therefore any person or court interpreting the LRA must give effect to the Act's primary objects and ensure that its provisions are in compliance with the Constitution.<sup>104</sup>

#### 4.3 EFFECT OF THE CONSTITUTIONAL PROVISIONS ON UNFAIR DISMISSAL LAW

The elevation of the right to fair labour practices to the status of a fundamental right in the Constitution has afforded significantly stronger protection to job security and rights associated with employment. The Constitution has had an influential and profound effect on the evolution of Labour Law and can be used to:

- test the validity of legislation that seeks to give effect to fundamental rights;
- interpret legislation enacted to give effect to fundamental rights; and
- develop the common law.<sup>105</sup>

The practical effect of this constitutional provision on labour law can be gleaned from a number of labour cases. In *NUM v Bader Bop*<sup>106</sup> the Court confirmed that it's the ultimate Court of appeal from the Labour Appeal Court on any Constitutional matter. A Constitutional matter includes the interpretation of the constitutionality of labour legislation.<sup>107</sup>

In *NEHAWU*<sup>108</sup> the Constitutional Court was satisfied that since the LRA had been enacted to give content to a constitutional right, the proper interpretation of the statute was a constitutional matter and therefore the Court had jurisdiction to hear the appeal.

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<sup>104</sup> Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2008) 35.

<sup>105</sup> *Idem* 34.

<sup>106</sup> *National Union of Metalworkers of South Africa & others v Bader Bop (Pty) Ltd & another* 2003 (3) SA 513 (CC).

<sup>107</sup> Christianson "2003 Annual Survey of SA Law" 716.

<sup>108</sup> *NEHAWU v UCT & others*.

The above developments are evidence of the fact that there can be grave consequences for employers if dismissal disputes are not treated fairly. As indicated in *Association of Professional Teachers & another v Minister of Education & others*,<sup>109</sup> it was not intended that labour laws be immune from constitutional scrutiny. A number of labour cases have already been considered by the Constitutional Court, which illustrates that the court will not be hesitant to intervene in any labour matter, including a dismissal for incompatibility, if such a need arises.

#### 4.4 CONCLUSION

The purpose of labour law is to bring about fairness in employment. It is seen as the countervailing force against the inequality of bargaining power, which is inherent in the employment relationship. As indicated in *Kahn-Freunds Labour and the Law*,<sup>110</sup> law is a technique for the regulation of social power and labour law is chiefly concerned with this elementary phenomenon.

Constitutionalising the right to fair labour practices is seen as a major advancement in South Africa's labour relations, as the Labour Appeal Court is no longer the ultimate arbiter of labour disputes. Such disputes are potentially subject to the scrutiny of the Constitutional Court. As the definition of fair labour practices have been interpreted to include the right not to be unfairly dismissed, constitutional protection extends to the arena of dismissal law, of which incompatibility is a part. As contended by Cheadle this can have far reaching consequences on dismissal law.

The Court has claimed jurisdiction over the interpretation and application of the Constitutional right to fair labour practices in so far as the right has been given effect to in the LRA. Because the determination of fairness is always a matter of interpretation and application of the Constitutional right, the Constitutional Court may have opened its portals to every labour practice, including dismissal, in which the fairness of the practice or dismissal is in dispute.<sup>111</sup>

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<sup>109</sup> *Association of Professional Teachers & another v Minister of Education & others* (1995) 9 BLLR 29 (IC).

<sup>110</sup> Davies and Freedland *Kahn-Freunds Labour and the Law* (1983)14.

<sup>111</sup> Cheadle "Labour Law and the Constitution" (2003) CLL 91 taken from 2003 Annual Survey of SA labour Law 718.



It is clear that dismissals for incompatibility are not resistant to the scrutiny of the courts, including the highest court of the country. In order to ensure that cases of incompatibility dismissals survive the scrutiny of the courts it becomes imperative that the uncertainties surrounding this form of dismissal are resolved. In order for employers to deal with such dismissals in a fair manner, the starting point is for them to be aware of the correct category of dismissal under which incompatibility falls, which should then inform the procedure to be followed. An answer to this research question will equip employers with the information needed to address incompatibility in a fair manner, which should prevent challenges to such a dismissal. But even in the event that it is the subject of constitutional assessment, it should be able to withstand such scrutiny if there is clear guidance on the uncertainties that exist.

## CHAPTER 5

### THE LABOUR RELATIONS ACT OF 1995

	Page
5.1 Introduction.....	29
5.2 Unfair dismissal law under the LRA of 1995	
5.2.1 Section 188.....	30
5.2.2 Code of Good Practice: Dismissal.....	31
5.3 Effect of unfair dismissal law on incompatibility.....	31
5.4 Importance of correctly categorising incompatibility dismissals	33
5.5 Incompatibility cases	
5.5.1 Incompatibility in relation to misconduct.....	35
5.5.2 Incompatibility in relation to incapacity.....	41
5.5.3 Incompatibility in relation to operational reasons.....	46
5.5.4 Analysis of the cases.....	49
5.6 Conclusion.....	51

#### 5.1 INTRODUCTION

Employers frequently wish to get rid of undesirable employees because they are seen as trouble-makers, eccentrics, disruptive, disagreeable, pushy, non-compliant, independent or merely refuse to suck up to the boss.<sup>112</sup> These are but a few concepts used to describe the incompatible employee who has become a recognisable part of dismissal law.

Labour legislation prior to the enactment of the Labour Relations Act (LRA)<sup>113</sup> was devoid of statutory guidance on this issue. While case law has shown that it was accepted as a valid ground for dismissal under the previous LRA,<sup>114</sup> it is not one of the three fundamental grounds for a fair dismissal recognised by the

<sup>112</sup> Isrealstam "Incompatibility is not a reason within itself; an employee should be given the chance to resolve the problem" (2006) *The Star Newspaper* 1.

<sup>113</sup> The Labour Relations Act 66 of 1995.

<sup>114</sup> *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC), *Erasmus v BB Bread Limited* (1987) 8 ILJ 537 (IC).

ILO,<sup>115</sup> and opinions have been divided on where, within the permissible grounds for dismissal, incompatibility belonged.<sup>116</sup> With the advent of the LRA,<sup>117</sup> the question to be answered is whether it provides legislative certainty to this ongoing workplace problem.

There is no doubt that the inception of the LRA has brought about fundamental revisions to the employment relationship in South Africa. Of great importance is the fact that it gives effect to constitutionally entrenched rights, such as the right to fair labour practices. One of the basic principles enshrined in the LRA is that every employee has the right not to be unfairly dismissed. The grounds for a fair dismissal as stated in the LRA have its origins in the ILO Convention concerning Termination of Employment at the Initiative of the Employer,<sup>118</sup> which enforces the substantive and procedural fairness requirements for a dismissal.

Notwithstanding the remarkable impact that the LRA has had on dismissal law, the question to be answered is whether it has made any inroads into the thorny issue of incompatibility.

## 5.2 UNFAIR DISMISSAL LAW UNDER THE LRA OF 1995

### 5.2.1 SECTION 188

In terms of section 185 of the LRA every employee has the right not to be unfairly dismissed. The LRA has rendered dismissals for certain reasons impermissible in any circumstances,<sup>119</sup> and confined permissible reasons for dismissal to three.<sup>120</sup> These grounds are set out in section 188, which reads:

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<sup>115</sup> ILO Convention 158 of 1982.

<sup>116</sup> Du Toit *Labour Relations Law: A Comprehensive Guide* (2006) 420.

<sup>117</sup> The Labour Relations Act 66 of 1995.

<sup>118</sup> ILO Convention 158 of 1982.

<sup>119</sup> Section 187 of the Labour Relations Act 66 of 1995 "A dismissal is automatically unfair if the reason for the dismissal is that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action, that complies with the provisions of Chapter IV, or to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee; etc".

<sup>120</sup> Grogan *Workplace Law* (2009) 165.

A dismissal that is not automatically unfair is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity; or based on the employer's operational requirements.<sup>121</sup>

In addition to a fair reason for a dismissal, section 188 also requires that a fair procedure be followed. The relevance of the Code of Good Practice: Dismissal (the Code) is emphasised in the section,<sup>122</sup> as it is required that any person considering whether or not the reason for dismissal is a fair reason, or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant Code issued in terms of the Act.<sup>123</sup>

### **5.2.2 CODE OF GOOD PRACTICE: DISMISSAL**

The LRA places great importance on the procedure that is required to be followed in respect of dismissals. This is evident from the Code, which sets out the relevant pre-dismissal procedures for misconduct and incapacity cases.<sup>124</sup> Though the pre-dismissal requirements for dismissals based on operational requirements are not contained in the Code, it is contained in the LRA itself.<sup>125</sup> Each of the three recognised grounds of dismissal comes with its own set of procedures and underlying each of these procedures is the principle that employees must be given an opportunity to be heard prior to a decision being taken. Considering the importance placed on procedural fairness, uncertainty about the category within which incompatibility falls could lead to the dismissal being regarded as unfair.

### **5.3 EFFECT OF UNFAIR DISMISSAL LAW ON INCOMPATIBILITY**

Incompatibility has not been identified as a separate ground for dismissal under the LRA. Notwithstanding this, incompatibility is present in the workplace and has and continues to be the subject of unfair dismissal disputes. It has been said that employers are forced to pigeon-hole all dismissals into one of three categories: dismissals for misconduct, incapacity or operational requirements,

<sup>121</sup> Section 188(1)(a) of the Labour Relations Act 66 of 1995.

<sup>122</sup> Schedule 8: Code of Good Practice Dismissal.

<sup>123</sup> Section 188(2) of the Labour Relations Act 66 of 1995.

<sup>124</sup> Schedule 8: Code of Good Practice Dismissal, paragraphs 4 & 9.

<sup>125</sup> Section 189 and 189A of the Labour Relations Act 66 of 1995.

as the Act recognises three-and only three grounds on which a dismissal may be legitimate.<sup>126</sup> It is held that if the reason for the dismissal cannot be brought under one of these headings, it will be arbitrary and unjustifiable.<sup>127</sup> This creates doubt as to whether it can be regarded as a valid ground for dismissal.<sup>128</sup> According to Grogan and Myburgh<sup>129</sup> this means that it is no longer permissible to dismiss an employee for incompatibility or eccentric behaviour *per se* without bringing such forms of behaviour within one of the recognised grounds of dismissal.

Grogan and Myburgh<sup>130</sup> are of the view that incompatibility is probably nothing other than a form of incapacity, and can thus be dealt with on that basis. Grogan has extended his support of the above view by holding that unsatisfactory work performance is measurable not only in terms of low or poor productivity; it can sometimes take more subtle forms, such as incompatibility.<sup>131</sup> However, he has acknowledged the fine line that exists between incompatibility and misconduct. The determining factor appears to be whether or not the employee is to blame.

Dismissal for incompatibility is probably more properly classified as a form of dismissal for incapacity, if the employees concerned are not to be blame for the conduct that renders them incompatible with their colleagues. On the other hand, if the employees concerned are to blame for their behaviour, termination of their employment can be viewed as a dismissal for misconduct.<sup>132</sup>

The definition of operational requirements as contained in the LRA can be seen as assistive in finding the rightful place for incompatibility within dismissal law, as the definition detracts from the notion that incompatibility constitutes a dismissal for operational requirements. I agree with the view taken that the definition is probably too narrow to embrace this form of dismissal.<sup>133</sup>

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<sup>126</sup> Grogan & Myburgh "Cracking the Code - The Code of Good Practice: Dismissal" (1997) *ELJ* 119.

<sup>127</sup> Grogan (2009) 166.

<sup>128</sup> Du Toit 420.

<sup>129</sup> Grogan & Myburgh (1997) 2.

<sup>130</sup> *Ibid.*

<sup>131</sup> Grogan (2009) 262.

<sup>132</sup> Grogan *Dismissal* (2010) 452.

<sup>133</sup> Grogan *Dismissal, Discrimination & Unfair Labour Practice* (2007) 511.

## 5.4 IMPORTANCE OF CORRECTLY CATEGORISING INCOMPATIBILITY DISMISSALS

The courts have considered a number of cases relating to incompatibility dismissals,<sup>134</sup> which is evidence of the fact that it is accepted as a valid reason for dismissal, despite it not being specifically catered for in the LRA. The courts have tried to accommodate incompatibility dismissals into one of the recognised categories, and there have been differing views as to the correct categorisation.

The category into which incompatibility falls may seem to be nothing more than semantics. However, considering the way the LRA is now structured, different pre-dismissal procedures must be followed by the employer. The categorization of incompatibility dismissals will dictate the procedure that should be followed, which is of the utmost importance, as courts have set aside dismissals as being unfair where incorrect procedures were followed. In *Hedley v Papergraphics*<sup>135</sup> the Court found that the employer's intentional avoidance to utilise the procedures for a poor performance dismissal was sufficient to constitute substantive unfairness.

The importance of correctly classifying the reason for dismissal is suitably captured in *Zililo v Maletswai Municipality*.<sup>136</sup> In this case the charges were a mixture or overlap between misconduct and poor performance. Because of the blurring of the categories of dismissal by the employer the Court held that the reason for the dismissal was unfair. The Court required a rigid approach, requiring the arbitrator to conduct an analysis of the various offences that the employee was accused of having committed, and then deciding whether they had been correctly classified. The failure by the employer to use the correct category, condoned by the arbitrator, made the award reviewable.

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<sup>134</sup> *Jardine v Tongaat Hulett Sugar Limited* (2002) 4 BALR 426 (CCMA), *Jabari v Telkom SA (Pty) Ltd* (2006) JOL 17475 (LC), etc.

<sup>135</sup> *Hedley v Papergraphics Ltd* (2001) 22 ILJ (LC).

<sup>136</sup> *Zililo Maletswai Municipality & Others* (2009) JOL 23238 (LC).

Though case after case<sup>137</sup> has confirmed the old principle that the employer is entitled to require harmonious working relationships in the organization, employers are still having difficulty in handling such cases. In *Nathan v Reclamation Group*<sup>138</sup> a director was dismissed for poor performance while the real reason for the dismissal was incompatibility. Similar situations arose in *Cutts v Izinga*,<sup>139</sup> and *Gordon v St John's Ambulance Foundation*.<sup>140</sup>

In other instances, employers are resorting to dismiss on the basis of incompatibility without any justification. In the recent case of *SAFA v Ramabulana NO & Another*,<sup>141</sup> the employee was dismissed after being arrested in full view of crowds in a soccer stadium. At the arbitration SAFA indicated that the termination was based on incapacity, specifically in the form of compatibility related issues, but this was rejected by the commissioner.

The above cases support the sentiments expressed by Grogan<sup>142</sup> that employers cannot use allegations of incompatibility to mask aversion to employees for unacceptable reasons.

Due to the absence of statutory guidance on incompatibility dismissals, one has to look to the court and arbitrators to resolve the uncertainty. However, if one has regard to court decisions it is evident that they have not been of much assistance in providing a decisive answer, which reflects the hybrid nature of incompatibility dismissals and the difficulties surrounding it.

Considering all of the above, the ability of the current dismissal structure to cater for cases of incompatibility becomes somewhat questionable. The above debate confirms the sentiments expressed by Rycroft that these separate categories

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<sup>137</sup> *Erasmus v BB Bread Limited, Wright v St Mary's Hospital*.

<sup>138</sup> *Nathan v Reclamation Group* (2002) 23 ILJ 588.

<sup>139</sup> *Cutts v Izinga Access Proprietary Limited* (2005) JOL 12617 (LC), Mr Cutts was retrenched, but the Court found that the real reason for the employee's dismissal was incompatibility.

<sup>140</sup> *Gordon v St John's Ambulance Foundation* (1997) 3 BLLR 313 (CCMA), Gordon's dismissal was said to be for poor performance, while the commissioner found that there was a personality clash of gigantic proportions.

<sup>141</sup> *SAFA v Ramabulana NO & Another* (2011) 3 BLLR 291 (LC).

<sup>142</sup> Grogan (2009) 262.

seem at first glance to be easy to apply but in practice are often highly ambiguous.<sup>143</sup>

Perhaps the answer lies in the approach adopted by *SABC v CCMA & Others*,<sup>144</sup> where the following was held:

The notional line between the various circumstances that could give rise to a fair dismissal is not always easy to draw. Often the same conduct may give rise to more than one appropriate categorisation. Employers may often, not unreasonably, err in their attempts to categorise the circumstances giving rise to a potential dismissal. The failure to correctly categorise should not however detract from the appropriate inquiry in each case, namely, to assess first, whether there was a substantively fair reason for dismissal and second, whether an appropriate and fair procedure was followed by the employer.<sup>145</sup>

However, considering the decision taken in *Zillio*<sup>146</sup> it does not appear that courts are willing to adopt such a flexible approach. This therefore emphasises the importance of correctly classifying incompatibility dismissals and ensuring that the appropriate pre-dismissal procedures are followed. If such cases are not soundly dealt with, employers will be unsuccessful in defending these dismissals, which will adversely affect them, as an order of reinstatement strengthens the hand of an undesirable employee and makes further action extremely difficult.<sup>147</sup> In order for employers to ensure that incompatibility dismissals are both substantively and procedurally fair, the ambiguity surrounding this concept needs to be eliminated.

## 5.5 INCOMPATIBILITY CASES

### 5.5.1 INCOMPATIBILITY IN RELATION TO MISCONDUCT

Conduct is behaviour for which the employee concerned can be held accountable or blameworthy, and which the employee could have avoided.<sup>148</sup> In

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<sup>143</sup> Rycroft "Blurring the lines between incapacity, misconduct and operational requirements" (2009) *SA Merc LJ* 426.

<sup>144</sup> *SABC v CCMA & Others* (2006) 6 *BLLR* 587 (LC).

<sup>145</sup> *Idem* at 591 par 22.

<sup>146</sup> *Zillio Maletswai Municipality & Others*.

<sup>147</sup> *Isrealstam* (2006) 118.

<sup>148</sup> *Grogan* (2009) 166.



order for a dismissal based on misconduct to be substantively fair, item 7 of the Code<sup>149</sup> must be complied with. The following is required:

- there must have been a contravention of a rule or standard regulating conduct in the workplace;
- if a rule or standard was contravened it must have been valid or reasonable;
- there must have been knowledge by the employee of the rule or standard;
- it must have been consistently applied; and
- dismissal must be an appropriate sanction.

The requirements for procedural fairness are set out in item 4.<sup>150</sup> The primary obligations are as follows:

- employer should conduct an investigation to determine whether there are grounds for dismissal;
- employee should be notified of allegations in an understandable manner;
- employee must be allowed an opportunity to state a case in response to the allegations after being given a reasonable time to prepare;
- employee should be entitled to be assisted by a trade union representative or fellow employee; and
- after the enquiry the employee must be informed of the decision.

The essence of the above procedural requirements was interpreted in *Avril Elizabeth Home for the Mentally Handicapped v CCMA*<sup>151</sup> to require a dialogue between the employer and the employee and an opportunity for reflection before any decision is taken to dismiss the employee.

It has been suggested that incompatibility cannot be categorised as a form of misconduct, due to the lack of wilfulness on the part of the employee.<sup>152</sup> However, there is also support for the view that in many instances the element of wilfulness is present, and in such situations it should be treated as

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<sup>149</sup> Schedule 8: Code of Good Practice Dismissal.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (2006) 9 BLLR 833 (LC).

<sup>152</sup> Van Jaarsveld *Principles of Labour Law* (1998) 294.

misconduct.<sup>153</sup> The presence of wilfulness in cases of incompatibility, and the consequent link between incompatibility and misconduct is illustrated in the cases below.

In *McDuling v MIF*<sup>154</sup> an employee was summoned to a disciplinary hearing on the charge of incompatibility, as a result of disparaging remarks made by him about senior employees. It was believed that his intention was to sow discord in the office and to create a mutinous atmosphere. The arbitrator followed the reasoning of the Court in *Wright*,<sup>155</sup> in that it was held that dismissal for incompatibility is a form of operational requirements dismissal. Notwithstanding this, the arbitrator did not require that any of the procedures for an operational requirements dismissal, as set out in the LRA,<sup>156</sup> be followed. Although the charges were labelled incompatibility, the evidence suggested that he was guilty of misconduct, and his dismissal bore all the hallmarks of a dismissal for misconduct.

Similarly, in *Klaasen v Atlantic Fishing Enterprises*<sup>157</sup> incompatibility was cited as the reason for the applicant's dismissal, but the actions that resulted in the alleged incompatibility were mainly acts of misconduct, *inter alia*, the use of foul language, making racist remarks and assault. The commissioner believed that misconduct could have been the reason for the applicant's dismissal as an alternative to incompatibility.

In *Black v Voltex Pty Ltd*,<sup>158</sup> *Fentum v Fantasea Promotions*<sup>159</sup> and *Moloi v Marine Equipment Supplies (Pty) Ltd*,<sup>160</sup> employees were charged with incompatibility and disciplinary hearings were held. The dismissal of Black was held to be substantively fair, as he was found to be a disruptive employee who had a demoralizing influence on his colleagues. Fentum's dismissal came about after he failed to obey a reasonable instruction and subsequent to several

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<sup>153</sup> Grogan (2010) 452 "If the employees concerned are to blame for their behaviour, termination of their employment can be viewed as a dismissal for misconduct".

<sup>154</sup> *McDuling v MIF* (1998) 3 BALR 287 (CCMA).

<sup>155</sup> *Wright v St Mary's Hospital*.

<sup>156</sup> The Labour Relations Act 66 of 1995.

<sup>157</sup> *Klaasen v Atlantic Fishing Enterprises* (2002) EC1662 (CCMA).

<sup>158</sup> *Black v Voltex Proprietary Limited* (2004) GA84826 (CCMA).

<sup>159</sup> *Fentum v Fantasea Promotions* (2005) FS2148 (CCMA).

<sup>160</sup> *Moloi v Marine Equipment Supplies Proprietary Limited* (2006) WE16225 (CCMA).

warnings being given to him to change his attitude and behaviour. While Moloï, was accused of not getting along with various staff members and being unco-operative and destructive.

In these cases the commissioner's did not consider the specific requirements of incompatibility dismissals. It seemed to be accepted that acts of misconduct culminated into charges of incompatibility and the disciplinary procedure was found to be appropriate. What was of importance to the commissioners was that it had to be shown that the employee was the cause of the dissension. In *Black v Voltex*<sup>161</sup> the commissioner found that the incompatibility was caused substantially by the applicant and despite being given an opportunity to remove the cause of the disharmony, the applicant persisted with his appalling attitude.

The above is an illustration of the fact that there have been a number of cases in which incompatibility has been accepted as portraying characteristics of misconduct, resulting in the application of misconduct procedures being regarded appropriate.

In the recent case of *Sondolo v Howes*<sup>162</sup> the employee was dismissed after a disciplinary enquiry found him guilty of serious misconduct relating to incompatibility and disregarding working and communication standards. In *Sekgobela v State Information Technology Agency*<sup>163</sup> the employee was charged with a host of offences relating to incompatibility, but if one has regard to the charges against him, many of them are nothing more than acts of misconduct relating to insubordination. These cases indicate that employers continue to regard incompatibility, as being closely related to misconduct, for which disciplinary like procedures are applied.

A leading case on the issue of incompatibility under the new labour law dispensation is *Jardine v Tongaat Hulett Sugar*.<sup>164</sup> In this case a manager was rebuked at a morning coffee meeting over attendance. The rebuke elicited a

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<sup>161</sup> *Black v Voltex Proprietary Limited*.

<sup>162</sup> *Sondolo IT (Pty) Ltd v Howes & Others* (2009) 30 ILJ 1954 (LC).

<sup>163</sup> *Sekgobela v State Information Technology Agency (Pty) Ltd* (2008) 29 ILJ 1995 (LC).

<sup>164</sup> *Jardine v Tongaat Hulett Sugar Limited*.

written grievance as the employee felt that it constituted an unjustified reprimand inappropriately done in public. Though the employee was technically competent, his behaviour was regarded as misconduct and a disciplinary charge was laid. The essence of the charge was that he continued to be incompatible with middle management colleagues and senior management, to the extent that the trust relationship was detrimentally affected.

The arbitrator found in favour of Jardine, and in considering this case the commissioner accepted that incompatibility is more correctly classified as either misconduct or incapacity. He acknowledged that certain authors had classified incompatibility as a form of incapacity and had the following view regarding this:

The categorization of incompatibility as incapacity may not necessarily be a neat fit. It may be inappropriate to regard incompatibility, which is essentially an attitudinal problem, as poor work performance, particularly where the employee's technical performance is highly competent. While it may be validly argued that compatibility is in itself a performance standard, particularly for a manager, the wilfulness inherent in incompatibility suggests that on occasions it should more appropriately be categorized as misconduct.<sup>165</sup>

The commissioner in drawing from the decisions of other cases and authorities provided the following guidance in establishing whether a dismissal is justified on the basis of incompatibility:

- The starting point is that an employer is entitled to insist on reasonably harmonious interpersonal relationships within its business. Just as the employer has an obligation not to destroy or damage the relationship of confidence and trust, so too there is an implied term that the employee must not act in a way which results in disharmony and a breakdown in the relationship.
- The essence of incompatibility has been seen to be an irremediable breakdown in the working relationship caused through personality differences, an inability to work together in harmony, friction between employees, a discordance in approaches and so on.
- Assessing compatibility of managerial interaction necessarily involves the exercise of a subjective judgment. Provided the employer acts in good

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<sup>165</sup> *Ibid.*

faith and has reasonable and supportable grounds for concluding that the employment relationship cannot be continued, interference is unwarranted.

- The golden rule is that prior to reaching a decision to dismiss, an employer must make some sensible, practical and genuine efforts to effect an improvement in interpersonal relations when dealing with a manager whose work is otherwise perfectly satisfactory. The offending employee has to be advised what conduct allegedly causes disharmony, who is upset by the conduct, and what remedial action is suggested to remove the cause of the disharmony. A reasonable period must be allowed for the employee to make amends.
- In order to justify dismissal, incompatibility must be entirely or substantially attributable to the employee.
- The incompatibility that causes the breakdown in a working relationship must be irremediable. Dismissal is regarded as a last resort.

The above synopsis illustrates that there is most definitely merit in the view that there is a fine line between incompatibility and misconduct. Despite the fine line identified one cannot overlook the distinguishable aspects between these two categories. The essence of incompatibility is the disharmony created by the employee's conduct, which is not the central issue in misconduct cases. I therefore agree with the view taken that while acts of misconduct are present in cases of incompatibility the charge is still one of incompatibility and the conduct displayed serves to support the incompatibility.

Insubordination, abusive behaviour, disrespect, undermining of leadership etc, are commonplace around incompatibility and are to be treated as forms of misconduct, but the charge is still one of incompatibility and the examples of misconduct are examples thereof.<sup>166</sup>

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<sup>166</sup> Butterworths *Beaumonts Express* Volume 5 (2002) 166 "If only we could talk about incompatibility".

## 5.5.2 INCOMPATIBILITY IN RELATION TO INCAPACITY

Capacity refers to an employee's ability to perform their work adequately.<sup>167</sup> Incapacity implies that, unrelated to any intentional or negligent conduct or performance by the employee, the employee is not able to meet the standard of performance required by the employer – the employee is not capable of doing the work.<sup>168</sup> While culpability is the vital element in dismissals for misconduct, an employee cannot be blamed in cases of dismissal for incapacity, and hence it is regarded as a no fault dismissal. Poor performance is not fundamentally a matter for discipline. Rather, it falls under the considerations of incapacity as set out in the LRA and the Code.<sup>169</sup>

The LRA recognizes incapacity as a valid ground for dismissal, provided that it is both substantively and procedurally fair. Two types of incapacity are recognised in the Code. These are incapacity for poor performance and incapacity for ill-health or injury. It is trite that the category of poor work performance rather than ill health is regarded to be suitable to encompass the concept of incompatibility.

In terms of poor performance, section 9 of the Code<sup>170</sup> requires the following:

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

- whether or not the employee failed to meet a performance standard; and
- if the employee did not meet a required performance standard whether or not-
  - (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
  - (ii) the employee was given a fair opportunity to meet the required performance standard; and

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<sup>167</sup> Grogan (2009) 166.

<sup>168</sup> Basson, Christianson, Garbers, Le Roux, Mischke, Strydom *Essential Labour Law* (2005) 131.

<sup>169</sup> Venter, Levy, Conradie, Holtzhausen *Labour Relations in South Africa* (2009) 314.

<sup>170</sup> Schedule 8: Code of Good Practice Dismissal.

- (iii) dismissal was an appropriate sanction for not meeting the required performance standard.”

Section 8(2) of the Code requires that prior to an employee being dismissed for poor performance he must be given appropriate evaluation, instruction, training, guidance or counselling, and a reasonable time to improve.

Though incompatibility has hovered in a grey area since the advent of the LRA, there has been great support for the view that it most aptly falls under incapacity. Van Niekerk et al states that incompatibility is probably best dealt with as a form of incapacity since it generally assumes a form of inability to work within the particular circumstances in which the employee is engaged.<sup>171</sup> Grogan supports this view on the basis that both incompatibility and poor work performance affect the employee's ability to work according to their contracts.<sup>172</sup>

This view has been followed in a number of cases.<sup>173</sup> The commissioner in *Jardine v Tongaat Hullett Sugar*<sup>174</sup> accepted that in certain instances incompatibility should be classified as a dismissal based on incapacity.

In *Lotter v SA Red Cross Society*<sup>175</sup> the applicant a provincial manager, had circulated an open letter containing certain disrespectful and disparaging remarks about the council. He was suspended for alleged incapacity arising from poor performance and a breakdown in the employment relationship and his services were consequently terminated. The Commissioner proposed the following guidelines to establish whether an incompatibility dismissal is fair:

- whether disharmony caused was of such an extreme nature that it was irremediable;
- whether the disharmony had an adverse or potentially adverse effect on the employers business;

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<sup>171</sup> Van Niekerk, Christianson, McGregor, Smit, and Van Eck *Law@work* (2008) 267.

<sup>172</sup> Grogan (2009) 262.

<sup>173</sup> *Gomes v Meridian Sales and Marketing* (2005) WE14505 (CCMA), *GIWUSA obo Ponka Rosina Mamathe v Amandabult Eating House* (2005) LP705 (CCMA), *MWU obo Calitz/Toyota South Africa & Another* (2003) 2 BALR 152 (CCMA)

<sup>174</sup> *Jardine v Tongaat Hullett Sugar Limited*.

<sup>175</sup> *Lotter and SA Red Cross Society* (2006) 27 ILJ 2486 (CCMA).

- whether the employee was put on terms to correct the behaviour causing the disharmony and given a reasonable opportunity to make amends; and
- whether dismissal was the only reasonable way in which to deal with the matter.

*Jabari v Telkom*<sup>176</sup> is one of the more prominent cases dealing with the issue of incompatibility. The Court in considering whether the applicant's conduct was incompatible, commenced by accepting the definition of incompatibility as a species of incapacity, that relates essentially to the subjective relationship of an employee and other co-workers within the employment environment, regarding the employee's inability or failure to maintain cordial and harmonious relationships with his peers.

The employee was dismissed for reasons relating to insubordination, lack of respect, trust, honesty and incompatibility. The respondent alleged that the applicant's attitude, behaviour, and general personality, had created an irredeemable incompatibility within the employment relationship, which is contrary to the respondent's corporate culture. An incompatibility enquiry was convened, and the chairperson determined that the relationship had irretrievably broken down.

The Court emphasised that there is an onus on the respondent, not only to prove incompatibility, but also to show that the applicant is the party substantially responsible for the disharmony, and that the proven incompatibility constitutes a fair reason for the applicant's dismissal. The procedure followed was found to be deficient, as the respondent had not afforded the applicant the following:

- an opportunity to confront the alleged disharmonious behavioural conduct he was accused of;
- he had not had the benefit of counselling, and
- he had not been afforded the opportunity to remedy this perceived incompatibility, if any, in order to restore an amicable employment relationship with the respondent.

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<sup>176</sup> *Jabari v Telkom SA (Pty) Ltd.*



The above cases support the view taken by authors that instances of incompatibility can be sustained under the category of incapacity dismissals, as contained in the Code, provided that proper procedures are followed. However, if one has regard to the cases under discussion it is clear that they present with clear elements of wilful behaviour and the appropriateness of classifying them as incapacity cases is questionable.

It appears that the courts and tribunals do not interrogate the correct categorisation of incompatibility cases, but merely accept it as being a form of incapacity.<sup>177</sup> In *PETUSA obo Scott/Baci t/a D & G Fashions* the commissioner held as follows:

The Code contained in Schedule 8 to the Act does not deal with dismissals for incompatibility and no guidance is given as to what factors are to be considered when determining the fairness or otherwise of the dismissal in relation to same. As the provisions of items 8 and 9 of the Schedule have previously been applied to disputes of this nature, I will apply items 8 and 9 to the facts relating to Scott's dismissal, both in relation to the poor work performance and incompatibility.<sup>178</sup>

Landman contends that the concept of incapacity for poor performance is a broad one that embraces just about any inability arising from any cause which gives rise to the performance of work which is below the appropriate or expected standard.<sup>179</sup>

There have also been suggestions that although incompatibility should be classified as an incapacity dismissal, it does not amount to incapacity for poor work performance. Du Toit maintains that incapacity is not limited to the two forms mentioned in the code, but extends to other instances, one being incompatibility.<sup>180</sup>

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<sup>177</sup> In *Glass and Liberty Group Limited* (2007) 12 BALR 1172 (CCMA) a senior employee, was dismissed for incompatibility after the head of her division complained that she was undermining her authority and team work in the department. In *McPherson v North West University* (2009) 9 BALR 920 (CCMA) a Professor was dismissed for incompatibility, as a result of his reluctance to take instructions or to heed advice. It was accepted that incompatibility is a form of incapacity.

<sup>178</sup> *Petusa obo Scott/Baci t/a D & G Fashions* (1998) 11 BALR 1439 (CCMA) at 1443 par E.

<sup>179</sup> Landman "Unfair Dismissal: The new rules for capital punishment in the workplace (Part One) (1995) CLL 5(5) 49.

<sup>180</sup> Du Toit (2006) 419.

An interesting case dealing with the scope of incapacity dismissals is *Samancor Tubatse Ferrochrome v MEIBC & others*.<sup>181</sup> Here the Labour Appeal Court (LAC) found that incapacity is wider than just ill health and poor performance, but also includes instances such as incompatibility. The implication of this judgment is that incapacity extends beyond the narrow confines of the term. The LAC concurred with the following comments made by Brassey in Commentary on the LRA at paragraphs A8–76:

Incapacity may be permanent or temporary and may have either a partial or a complete impact on the employee's ability to perform the job. The Code of Good Conduct: Dismissal conceives of incapacity as ill-health or injury but it can take other forms.<sup>182</sup>

Considering the key element of an incapacity dismissal, I am of the view that it is ill conceived to classify any of the cases under discussion, as an incapacity dismissal. The key requirement attached to an incapacity dismissal is that it is not accompanied by fault. It is not a case of an employee not wanting to do what is expected of him or her, but it's really a case of a genuine inability to do it. Hence it has nothing to do with the employee's attitude but has everything to do with his or her level of competence and ability. The law is very clear that such issues should not be treated in the same manner, as misconduct. The reason for this is as follows:

Incapacity is distinguished from misconduct by the fact that, in the former case, the employee is not to blame for failing to attain the employers performance standards; the employees concerned have simply proved incapable of doing so for reasons beyond their control. Incapacity is manifested by conduct which is neither intentional nor negligent in the legal sense.<sup>183</sup>

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<sup>181</sup> In *Samancor Tubatse Ferrochrome v MEIBC & Others* (2010) 8 BLLR 824 (LAC) the employee was dismissed for what was termed "operational incapacity", as he was physically unable to tender his services, as a result of him being in custody. The LAC noted that both the arbitrator and the Court *a quo* had found that the notion of "incapacity" is confined to incapacity arising from ill health, injury or poor work performance, and both the arbitrator and the reviewing court had concluded that the charge against the employee fell outside the defined scope of that term. The LAC disagreed with such an interpretation and held that so constricting the notion of incapacity was not in accordance with existing jurisprudence.

<sup>182</sup> *Samancor Tubatse Ferrochrome v MEIBC & Others* para 10.

<sup>183</sup> *Grogan Dismissal* (2010) 312.

Notwithstanding the opinion espoused by me in respect of the cases under discussion, I acknowledge that there may be circumstances where the behaviour that gives rise to incompatibility may not necessarily amount to blameworthy conduct. In such cases the undesirable behaviour will be more akin to incapacity rather than misconduct. However, having assessed the available incapacity procedures, I do not believe that it is adequate to deal with situations of incompatibility.

### **5.5.3 INCOMPATIBILITY IN RELATION TO OPERATIONAL REQUIREMENTS**

The definition of operational requirements in terms of section 213 of the LRA is requirements based on the economic, technological, structural or similar needs of an employer. It has been suggested that economic reasons are those that relate to the financial management of the enterprise, technological reasons refer to new technology that affects work relationships, and structural reasons relate to the redundancy of posts consequent on the restructuring of the employers enterprise.<sup>184</sup> With regard to the category of similar needs it has been said that it must be determined with reference to the circumstances of the case. "It is a very broad category and it is not possible to compile a full and exhaustive list of what would fall within the ambit of similar needs."<sup>185</sup>

Dismissals based on operational requirements are regulated by sections 189 and 189A of the LRA. These sections impose an obligation on employers to consult with the affected employees prior to dismissal, and to set out the subject matter for consultation. In these circumstances the dismissals are through no fault of the employees. It is the employer's constraints and needs rather than any act or omission on the part of the employee that causes the termination of employment.

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<sup>184</sup> Van Niekerk, Christianson, McGregor, Smit and Van Eck 269.

<sup>185</sup> Basson, Christianson, Garbers, Le Roux, Mischke, Strydom 147.

Dismissals for operational requirements share the label as being a no fault dismissal with incapacity dismissals. However, the distinction between these two types of dismissals is aptly captured by Le Roux and Van Niekerk:

While both are 'no fault' dismissals and it is entirely logical that the operational requirements of a business are prejudiced by the continued employment of incompetent or seriously ill employees, the notion of incapacity is not one which is related to any need to restructure the business or to reorganize work or the patterns of work in response to fluctuating market conditions. Dismissals for operational requirements are effected by reason of some external factor relating to the operation of the employer's undertaking which results in the loss of employment rather than any inherent inability on the part of the employee to do the job.<sup>186</sup>

Despite the authority from earlier cases<sup>187</sup> that incompatibility is a dismissal based on operational requirements, the introduction of the LRA has brought about a significant shift from this notion. Purporting to dismiss an incompatible employee for operational reasons, it is submitted, is likely to be unfair.<sup>188</sup> The above view is supported in *Klaasen v Atlantic Fishing Enterprises*<sup>189</sup> where the Commissioner agreed that there is no merit in the argument that a dismissal for incompatibility is one based on the employer's operational requirements.

However, there may still be support for the view that incompatibility can find application under dismissals for operational requirements. Marlice Van Jaarsveld<sup>190</sup> has raised an interesting argument by indicating that when an employee causes disharmony in the workplace, his employer may be justified in terminating his employment based on incompatibility by effecting a dismissal based on the operational requirements of the business. She states that from a contractual point of view, it should be borne in mind that the employee's only obligation is to keep his employer in business and to achieve maximum profitability for it.

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<sup>186</sup> Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* (1994) 219.

<sup>187</sup> *Wright v St Mary's Hospital and Lubke v Protective Packaging Proprietary Limited* (1994) 15 ILJ 422 (IC).

<sup>188</sup> Du Toit 420.

<sup>189</sup> *Klaasen v Atlantic Fishing Enterprises*.

<sup>190</sup> Van Jaarsveld "An employee's contractual obligation to promote harmonious relationships in the workplace – when are the stakes too high? Some pointers from the judiciary" (2007) SA Merc LJ 204.

While the contractual obligations of an employee as espoused above are not disputed, the fairness requirements which the LRA seeks to enforce cannot be overlooked. Though an employee's incompatibility impacts on the viability of a business, the view of Van Niekerk is shared, which clearly illustrates that the dismissal of an incompatible employee does not appropriately fall within the confines of a dismissal for operational requirements.

The above view is endorsed in the recent case of *Sondlo v University of Fort Hare*.<sup>191</sup> In this case there were a host of complaints about the applicant's conduct, including initiating fights with a colleague and circulating derogatory emails about her head of department. The employee was dismissed for operational requirements, whereas the commissioner found that the true reason for the dismissal was the applicant's alleged incompatibility with her colleagues. The commissioner noted that the university by following the retrenchment procedure implied that the employee was not at fault, yet the evidence led at the arbitration contradicted the no fault contention, as it implied that the employee was the cause of incompatibility.

Notwithstanding the above view, there is a class of incompatibility dismissals, which is closely related to dismissals for operational requirements. Dismissals effected as a result of pressure on employers from third parties have been held to overlap with dismissals for incompatibility.<sup>192</sup> Two such cases dealing with this issue is *Lourens v Baisch Engineering*<sup>193</sup> and *Lebowa Platinum v Hill*.<sup>194</sup>

The Labour Court (LC) in *Tiger Food Brands Limited v Levy*<sup>195</sup> has endorsed the view that the definition of operational requirements need not be interpreted too narrowly. Here the LC held that the dismissal of a group of about 49 employees

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<sup>191</sup> *Sondlo v University of Fort Hare* (2011) 5 BALR 551 (CCMA).

<sup>192</sup> Grogan (2010) 454 "The two classes of dismissal may merge because the employees' demand that an offending employee be dismissed may be caused by the latter's unacceptable conduct".

<sup>193</sup> In *Lourens v Baisch Engineering* (2002) GA22957 (CCMA) the applicant was dismissed as a result of the threat posed to the business by the resignation of key personnel. However, the tribunal acknowledged that a dismissal for incompatibility does not fall neatly within the procedural safeguards set out in section 189 of the Act.

<sup>194</sup> In *Lebowa Platinum Mines v Hill* (1998) 19 ILJ 1112 (LAC) the court listed a number of factors that should be taken into account by the employer before dismissing an employee at the behest of others.

<sup>195</sup> *Tiger Foods Brands Limited t/a Albany Bakeries v L. Levy N.O.* (unreported case no: C104/07).

who had embarked on a strike and who resorted to violence could be regarded as a dismissal for operational requirements as their actions affected the economic viability of the enterprise and resulted in the employer being faced with problems of having to turn around the business because of losses. They reached this decision despite the fact that the employees involved were named and already suspended for reasons relating to misconduct. However, the LC qualified its decision by stating that this does not mean that for any misconduct, the employer may decide to have the employee dismissed for operational reasons, as it will depend on the facts of the case.

While there may be circumstances where an incompatible employee affects the economic viability of a business to such an extent that the effect of the employee's conduct can be held to fall within the definition of operational requirements, I am of the view that one cannot ignore the presence of fault on the part of the incompatible employee. Furthermore, it will be very difficult for such cases to be dealt with in terms of the procedures prescribed for an operational requirements dismissal.

#### **5.5.4 ANALYSIS OF THE CASES**

The above cases illustrate that there are still differing views from the courts and arbitrators, as to the correct classification of incompatibility dismissals. However, it is unlikely that incompatibility can appropriately be defined as a dismissal for operational requirements, considering its specific description and precise procedure.

The disharmony caused by an individual employee, or an individual employees inability to fit in with the corporate culture, does not aptly fall into the ambit of economic, technological, structural or similar needs of an employer. If one considers the defined procedures set out to deal with dismissals for operational requirements, it becomes evident that they cannot adequately be applied to deal with an incompatible employee. These procedures were developed with quite a different scenario in mind.

Having eliminated dismissals for operational requirements, one is left with misconduct and incapacity dismissals respectively. In deciding on the appropriate classification of incompatibility, the important aspect to be borne in mind is that of culpability, as culpability is a factor that affects the fairness of a dismissal. In all the cases under discussion it was clear that some sort of alleged misconduct gave rise to the charges of incompatibility. The conduct of the employee's ranged from initiating fights with a colleague, circulating derogatory emails, reluctance to take instructions, to undermining of managements authority. Even where the courts and arbitrators accepted incompatibility to be a form of incapacity, the underlying problem was a misconduct related issue. *Lotter*<sup>196</sup> was accused of circulating an open letter containing certain disrespectful and disparaging remarks, while *Jabari*<sup>197</sup> was charged for conduct relating to insubordination, lack of respect, trust, honesty and incompatibility.

If one has regard to these incompatibility cases, a strong element which comes out is the element of fault. The fact that the courts in a number of these cases have required employers to show that the applicant is the party substantially responsible for the disharmony, further illustrates the prevalence of this element.

Notwithstanding the trends identified from the cases under discussion, it is understood that incompatibility is often linked to incapacity because of its association to poor interpersonal skills and undesirable personality traits. However, one cannot lose sight of the fact that all employees have a duty to adapt their behaviour so that cordial workplace relations can be maintained. If an employee is unwilling to adapt to the workplace culture despite being informed that such behaviour is creating dissonance, then this is clearly an attitudinal problem for which the employee is accountable and blameworthy, as the display of such traits and behaviour can be avoided by the employee.

Despite the afore-mentioned, it is accepted that there will be circumstances where the behaviour of an employee which leads to allegations of

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<sup>196</sup> *Lotter and SA Red Cross Society.*

<sup>197</sup> *Jabari v Telkom SA (Pty) Ltd.*

incompatibility, though attributable to the employee, does not translate into conduct accompanied by fault. An apt example of this is the eccentric employee.<sup>198</sup>

## 5.6 CONCLUSION

The essence of incompatibility has adequately been defined by Mischke<sup>199</sup> as the inability of an employee to work harmoniously with fellow workers or managers or the inability of an employee to fit in with the corporate culture. Despite the Industrial Courts description of corporate culture as an amorphous concept,<sup>200</sup> I am akin to the definition given to it by Mischke.<sup>201</sup> He describes corporate culture as generally constituting unwritten rules governing relationships, interactions, work flow and approaches to work, but also various softer issues such as forms of address, respect, conduct before clients and even dress code. If one has regard to this definition it invariably spells out the conduct required of employees.

Therefore, just as the employer must refrain from doing anything unfair which might render the employment relationship intolerable, employees too carry a reciprocal obligation to support and engender effective working relationships. To comply with this obligation they have to conduct themselves in a manner that prescribes to the corporate culture. If an employee is cynical or negative, uncooperative, rude and disrespectful it is inevitable that working relationships will become strained and disharmony will be created.

It is clear that while there may be instances where incompatibility is more akin to incapacity, the prevalence has changed, as in most instances the behaviour that gives rise to incompatibility is accompanied by fault. Incompatibility will only on occasion amount to incapacity, and as such it can no longer generally be accepted that incompatibility is a species of incapacity.

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<sup>198</sup> *Joslin v Olivettit Systems and Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC).

<sup>199</sup> Mischke "Incompatibility as a ground for dismissal" (2005) CLL 71.

<sup>200</sup> *Lubke v Protective Packaging Proprietary Limited*.

<sup>201</sup> Mischke (2005) 74.



However, it is clear that there are two categories of incompatibility that exist, the one accompanied by fault which is akin to misconduct, and the other resulting from inherent personality traits such as eccentricity, which is akin to incapacity.

Irrespective of which category one is dealing with, I am of the view that incompatibility may not necessarily be neatly accommodated within the substantive and procedural confines of either a misconduct or incapacity dismissal. Incompatibility is primarily about the disharmony that arises from the actions and/or disposition of an employee, and it is this characteristic that sets it apart. Whether the cause of the disharmony is blameworthy or not, a separate category and procedure that encompasses this concept in its entirety is proposed. In this way there will be one clearly defined procedure to deal with both forms of incompatibility. This will aid the work of the employer faced with the incompatible employee, as there will be no confusion regarding the correct route to be followed.

## CHAPTER 6

### INTERNATIONAL COMPARISON

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	Page
6.1 Introduction.....	53
6.2 The United Kingdom	
6.2.1 General overview of UK dismissal law.....	54
6.2.2 Incompatibility as a ground of dismissal.....	55
6.2.3 Relevant case law.....	56
6.2.4 Analysis of the case law.....	58
6.3 New Zealand	
6.3.1 General overview of NZ dismissal law.....	59
6.3.2 Incompatibility as a ground of dismissal.....	61
6.3.3 Relevant case law.....	61
6.3.4 Analysis of the case law.....	63
6.4 Conclusion.....	63

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#### 6.1 INTRODUCTION

The two countries under investigation are the United Kingdom (UK) and New Zealand. Insofar as their jurisdictions are concerned, I have been able to identify something akin to dismissals for incompatibility. The law on incompatibility in the countries under discussion does not appear to be more progressive than it is in South Africa, but an attempt will be made to look at what is prevalent in these foreign jurisdictions and how the foreign courts have dealt with this issue.

## 6.2 THE UNITED KINGDOM

### 6.2.1 GENERAL OVERVIEW OF UK DISMISSAL LAW

Labour Law in the United Kingdom is governed by the Employment Rights Act (ERA)<sup>202</sup> and the Employment Act (EA).<sup>203</sup> Section 94 of the ERA states that, subject to exceptions, an employee shall have the right not to be unfairly dismissed by the employer. Section 98 of the ERA requires that dismissals be both procedurally and substantively fair.

In terms of substantive fairness, the employer under section 98(1) of the ERA is required to show the reason for the dismissal and to show that it comes within one or other of the 'gateways' of potentially fair reasons.<sup>204</sup> Davies<sup>205</sup> holds potentially fair reasons for dismissal to be those which the employer can rely on provided that it has acted 'reasonably' in dismissing the employee for that reason. According to her, the law offers four options that would justify the dismissal of an employee. These are conduct, capability, redundancy and 'some other substantial reason'.

With regard to procedural fairness, it is held that in considering whether an employer acted reasonably in dismissing an employee for one of the potentially fair reasons, the procedural aspects of the dismissal are viewed to be of great importance.<sup>206</sup> The role of procedural fairness in UK dismissal law is aptly captured by Collins, in the following extract:

Just as the criminal law system insists upon a fair procedure prior to any punishment, so too, before depriving a person of their livelihood and tarnishing them with a label of misconduct or incompetence, an employer should follow a procedure that gives the employee a fair opportunity to defend him or herself. In their interpretations of the standard of fairness in dismissals, the tribunals in the UK have acknowledged the importance of fair disciplinary procedures.<sup>207</sup>

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<sup>202</sup> The Employment Rights Act of 1996.

<sup>203</sup> The Employment Act of 2002 Schedule 2.

<sup>204</sup> Deakin and Morris *Labour Law* (2009) 424.

<sup>205</sup> Davies *Perspectives of Labour Law* (2009) 167.

<sup>206</sup> Honeyball and Bowers *Textbook on labour law* (2002) 188.

<sup>207</sup> Collins *Employment Law* (2003) 177.

The dismissal and disciplinary procedures are contained in Schedule 2,<sup>208</sup> and the essence of the procedure is as follows:

- the employer must set out in writing the issues, which lead them to contemplate taking disciplinary action;
- the employee must be invited to attend a meeting to discuss the issues in the written notice. The meeting must take place before action is taken; and
- after the meeting, the employer must inform the employee of their decision and notify them of the right to appeal against the decision if they are not satisfied with it.

Apart from the legislation, the importance of procedural fairness in practice is evident from the fact that in a number of cases, dismissals have been held to be unfair, as a result of a fair process not being followed.<sup>209</sup>

## 6.2.2 INCOMPATIBILITY AS A GROUND OF DISMISSAL

The concept of incompatibility is not recognized in the United Kingdom, but they deal with a similar employment problem, termed personality conflict. It appears that this employment problem falls within the category of dismissal for some other substantial reason. Anderman<sup>210</sup> held that a further category of dismissals for some other substantial reason consists of behaviour by employees causing conflict at the workplace. This view continues to be endorsed<sup>211</sup> and is also evident from the discussion of the case law that follows.

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<sup>208</sup> Employment Act of 2002.

<sup>209</sup> *Quartz Eclipse, Limited v Mr B R Dunseth* (2004) UKEAT 0467 and *The Royal Veterinary College v Miss J Yerbury* (2005) UKEAT 0202.

<sup>210</sup> Anderman *The law of unfair dismissal* (1985) 232.

<sup>211</sup> Deakin and Morris 442.

### 6.2.3 RELEVANT CASE LAW

A dismissal for a personality conflict was recognised in UK law as early as 1975.<sup>212</sup> However, robust discussion on this issue only surfaced in the case of *Perkin v St Georges Healthcare NHS Trust*.<sup>213</sup> The case involved the dismissal of a financial director for reasons relating to his personality and management style. He was dismissed following a disciplinary hearing.

The tribunal considering his unfair dismissal claim found the dismissal to be fair, as he had contributed 100% towards his dismissal. The matter was referred to the Court of Appeal subsequent to the Employment Appeal Tribunal (EAT) upholding the findings of the Employment Tribunal.

The Appeal Court held that for personality to be a potentially fair reason for dismissal, it must manifest itself in a way which results in conduct which could justify dismissal, or in some other substantial reason justifying dismissal. The Courts view was that a dismissal for personality can be a fair reason even if there are no problems with the employee's competence or integrity, as long as a fair procedure is followed. Such a dismissal would come under the "some other substantial reason" provisions for a fair dismissal.

The importance of this case in respect of dismissals for personality conflict is distilled from an article published, where it is suggested that though personality issues are common problems for many employers, such cases rarely reach an employment tribunal.<sup>214</sup>

Following on the Perkins case, a dismissal for personality conflict was recently dealt with in *Ezsias v North Glamorgan NHS Trust*.<sup>215</sup> Mr Ezsias was a dental surgeon who was dismissed because of his inability to work with colleagues,

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<sup>212</sup> In *Treganowan (C.A.) v. Robert Knee & Co. Ltd.* (1975) *I.C.R.* 405, Ms Treganowan was dismissed without notice for a personality clash for which she was to blame.

<sup>213</sup> *Perkin v St George's Healthcare NHS Trust* (2004) *UKEAT* 0293.

<sup>214</sup> Accessed on [www.shepwedd.co.uk](http://www.shepwedd.co.uk) e-bulletins "Personality can be grounds for dismissal" 21 October (2005). It is stated that although the courts have previously acknowledged that a dismissal for a personality clash could be a dismissal for SOSR (some other substantial reason) this is the first decision at this level.

<sup>215</sup> *Ezsias v North Glamorgan NHS Trust* (2011) *UKEAT* 0399.

which led to the irretrievable breakdown of relationships between them. Because of these difficulties, the trust established an inquiry panel, who unhesitatingly found that it was Mr Ezsias who had caused, or at least contributed significantly to the sense of alienation from him which his colleagues felt.

A decision was subsequently taken to dismiss Mr Ezsias on the basis of the fundamental and irretrievable breakdown of trust and confidence between him and his colleagues. The Employment Tribunal who considered the unfair dismissal dispute categorised the reason as amounting to a dismissal, not for misconduct or any lack of capability on Mr Ezsias' part, but for some other substantial reason of a kind such as to justify the dismissal. The tribunal reached that conclusion in the light of the Court of Appeal's observations in *Perkin*.<sup>216</sup> On the question of whether the dismissal for that reason had been fair, the court found that Mr Ezsias had been the author of his own misfortune.

Mr Ezsias's primary ground of appeal was that the trust had failed to follow the disciplinary procedures which applied. He accused the trust of using the rubric of "some other substantial reason," as a pretext for getting rid of him. Hence the primary issue for consideration by the Court was how the reason for his dismissal should be classified, as this would determine whether the disciplinary procedure had any application.

The Court acknowledged that if his dismissal was based on his conduct, the disciplinary procedure was appropriate. However, they found that although as a matter of history his conduct was blamed for the breakdown, his contribution to that breakdown was not the reason for his dismissal. Due to the fact that he was not dismissed for his conduct, the ground of appeal was not sustained. Reference was made to the decision taken in *Perkin*,<sup>217</sup> and the court seemed to agree that it was a dismissal for some other substantial reason.

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<sup>216</sup> *Perkin v St George's Healthcare NHS Trust*.

<sup>217</sup> *Ibid*.

## 6.2.4 ANALYSIS OF CASE LAW

These cases are authority for the fact that incompatibility is recognised as a valid ground for dismissal in the UK. However, the courts do not consider them to be dismissals for conduct or capacity, but rather they are classified under a separate category (some other substantial reason).

My observation of these cases is that both Mr Perkin and Mr Ezsias were to blame for the situations, which gave rise to their dismissals. I find it difficult to understand how the court of appeal in *Ezsias*,<sup>218</sup> agreed that his contribution to the breakdown of the employment relationship was not the reason for his dismissal. A lot turned on whether he was dismissed because his conduct caused a breakdown in relationships or whether he was dismissed because of the breakdown in relationships and not his contribution to that breakdown. If one considers this logically, his conduct was inextricably linked to the breakdown of the relationship. My view is that though these dismissals were classified as being for some other substantial reason, they were caused by the conduct of the respective employee's and were most definitely accompanied by fault.

It could be argued that having a wide category of dismissals such as some other substantial reason may be of assistance in addressing the research problem under consideration. However, there has been a lot of criticism in respect of this category of dismissal. The problems with this category of dismissal came under discussion in the 1980's where the view was that its scope was too wide and that it impacted on employee's protection to their jobs, which the law of unfair dismissal was intended to accord.<sup>219</sup> Anderman<sup>220</sup> referred to this category of dismissal as an unfortunate development in a statute explicitly proclaiming itself to provide a right to protection against unfair dismissal.

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<sup>218</sup> *Ezsias v North Glamorgan NHS Trust*.

<sup>219</sup> Bowers and Clarke "Unfair dismissal and managerial prerogative: A study of other substantial reason" (1985) *ILJ* 43-44.

<sup>220</sup> Anderman 233.

This view continued to be supported, as it was held that the dangers of an over extended definition have been recognised.<sup>221</sup> The problem with this category of dismissal is appositely captured by this commentary:

The provision has been variously described as a 'dustbin category' or employers charter, intended as a safety net to catch substantial reasons for dismissal which did not fall within other potentially fair gateways to dismissal. It has a 'rubberband' quality which arguably stretchers too far. Its language is indeed rather wider than the provisions of ILO Recommendation 119 on which most of the unfair dismissal legislation is based. This has important implications for the whole policy of unfair dismissal. For the delicate balance at its heart between employer and employee is subtly tilted in favour of the employer.<sup>222</sup>

## 6.3 NEW ZEALAND

### 6.3.1 GENERAL OVERVIEW OF NEW ZEALAND DISMISSAL LAW

In New Zealand workplace relations and the termination thereof are governed by the Employment Relations Act (ERA)<sup>223</sup> and the overarching obligation of good faith imposed on both parties to the relationship by the Act, together with the relevant employment agreement between the parties, the common law and by other employment related legislation.<sup>224</sup> The ERA does not set out the specific grounds for a fair dismissal. However, what is required is that there must be a good reason for a dismissal and the dismissal must be carried out fairly.<sup>225</sup> The importance of substantive and procedural fairness is highlighted in the following extract:

Procedural fairness and substantive justification have always been integral parts of a justified dismissal or of any disciplinary procedure. The Employment Relations Act 2000 emphasises the duty of good faith owed by both parties to an employment agreement and it is clear that since the passing of the Act these two matters remain of the utmost importance.<sup>226</sup>

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<sup>221</sup> Honeyball and Bowers 186.

<sup>222</sup> *Idem* 182-183.

<sup>223</sup> The Employment Relations Act of 2000.

<sup>224</sup> Kiely, Thompson and Caisley *Termination of Employment: A best practice guide* (2008)1.

<sup>225</sup> Noian *The Australasian law reforms* (1998) 42 "A lawful dismissal must be substantively justified and procedurally fair".

<sup>226</sup> Kiely, Thompson and Caisley 1.



Though not specifically legislated, fair reasons for a dismissal have been identified in guidelines issued by the Department of Labour.<sup>227</sup> In terms of these guidelines, fair reasons for a dismissal include misconduct, poor performance, redundancy, incapacity and incompatibility.

The ERA<sup>228</sup> sets out a test of justification, which is relied on by the courts in assessing the fairness of a dismissal. The question of whether a dismissal or an action was justifiable must be determined on an objective basis, by applying the following test: whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. In applying the test, the authority or the court must consider—

- whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee;
- whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee;
- whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee;
- whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee; and
- in addition to the factors described above, the authority or the court may consider any other factors it thinks appropriate.

The Employment tribunals play a fundamental role in unfair dismissal cases, as they have been given vast powers. As indicated by Rudman the Employment Relations Act creates the Employment Relations Authority and the Employment Court, and gives them exclusive jurisdiction to determine what employment law means.<sup>229</sup>

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<sup>227</sup> Accessed on [www.dol.govt.nz](http://www.dol.govt.nz) "A guide for employers on disciplinary action, dismissal, redundancy and ill health issued by the New Zealand Department of Labour".

<sup>228</sup> Section 103A of the Employment Relations Act 2000.

<sup>229</sup> Rudman *New Zealand Employment Law Guide* (2009) 7.

### 6.3.2 INCOMPATIBILITY AS A GROUND OF DISMISSAL

Incompatibility, which is regarded as a situation where there is a fundamental breakdown in the relationship between two or more individuals, such that they can no longer work together,<sup>230</sup> is a recognised ground for dismissal in New Zealand.

Dismissal for incompatibility is regarded as rare and as being very difficult to get right.<sup>231</sup> The view is that ideally, any problems between staff members should be resolved by the parties concerned discussing their respective concerns and issues and coming to a workable agreement. However, it is acknowledged that there will be situations where the problems are so severe that incompatibility becomes virtually chronic. In circumstances where the employment relationship is irreparable and can be attributed substantially to the employee concerned, it is accepted that dismissal of that employee is a possibility if carried out in a procedurally fair manner.<sup>232</sup>

### 6.3.3 RELEVANT CASE LAW

Dismissals of such a nature were recognised in the case of *Reid v New Zealand Fire Services Commission*.<sup>233</sup> The Court of Appeal accepted that in unusual and rare cases an employer can justify an employee's dismissal because of an irreconcilable breakdown of trust and confidence in the employment relationship.

In *Mabry v West Auckland Living Skills Home Trust Board*<sup>234</sup> a community service worker was dismissed, subsequent to her insulting and insubordinate manner, resulting in the irreparable breakdown in the relationship. Prior to dismissal she was issued with warnings and provided with opportunities to improve, which proved unsuccessful. In deciding that Ms Mabry's dismissal was

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<sup>230</sup> Accessed on [www.dol.govt.nz](http://www.dol.govt.nz) "A guide for employers on disciplinary action, dismissal, redundancy and ill health issued by the New Zealand Department of Labour" 14.

<sup>231</sup> *Ibid.*

<sup>232</sup> Accessed on [www.dol.govt.nz](http://www.dol.govt.nz) "Paper on incompatibility in the workplace by Department of Labour" September (2005) 2.

<sup>233</sup> *Reid v New Zealand Fire Service Commission* (1999) 1 ERNZ.

<sup>234</sup> *Mabry v West Auckland Living Skills Home Trust Board (Inc)* unreported, Travis J, (19 December 2001), AC 86/01.

justified, the Employment Court said the employer must show that the incompatibility was largely the employee's fault. The test was held to be essentially whether the decision to dismiss was one, which a reasonable and fair employer could have taken in the particular circumstances.

The court summarised the following factors that need to be considered in determining whether dismissal on the grounds of incompatibility will be justified:

- whether the employer was entitled to come to the conclusion that the employment relationship was irreparable;
- if so, whether the irreconcilable breakdown was attributable wholly or substantially to the employee;
- whether the manner in which the employer carried out the dismissal was fair; and
- a procedurally fair process was held to include: a full and fair investigation; making the employee aware that their employment is in jeopardy; informing the employee of the allegations against them; allowing the employee an opportunity to respond to the allegations; advising the employee of the right to have a representative at any disciplinary meetings.

In *Hayward v Tairawhiti polytechnic*<sup>235</sup> the Court found that the alleged grounds of incompatibility were insufficient to justify dismissal. The Court held that for incompatibility to amount to serious misconduct depended on whether the incompatibility was largely the plaintiff's fault and amounted to an undermining of trust and confidence. The Court found that there were insufficient attempts made by the employer to deal with the matter, as she was only made aware of the problem at a disciplinary meeting, where after she was dismissed for serious misconduct on the grounds of incompatibility. The employee received no prior communication, nor was she warned that unless she changed her attitude it would be viewed as serious misconduct on her part.

Cases of incompatibility dismissals continue to be the subject of litigation. In many of the recent cases, such dismissals have been found to be unjustified, as they were not preceded by a fair process or they were not serious enough to

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<sup>235</sup> *Hayward v Tairawhiti Polytechnic* unreported, Travis J, (3 August 2005), AC 43/05.

justify dismissal.<sup>236</sup> However, the dismissal in *Maria Campuzano and Western Bay Dental Care Limited*<sup>237</sup> was found to be justified. The Court found that many efforts had been made to get the employee to improve her behaviour, but the employee continued with her attitude, which created a situation whereby it was impossible for the employment relationship to continue.

#### 6.3.4 ANALYSIS OF CASE LAW

Incompatibility is a recognised workplace problem in New Zealand and is viewed as an independent ground of dismissal. However, if one has regard to the cases under discussion it is clear that the incompatibility is caused by the unbecoming behaviour of the employee, and as such is accompanied by fault. In *Mabry*<sup>238</sup> the court held that the employer must show that the incompatibility was largely the employee's fault. Similarly, in *Hayward*<sup>239</sup> the Court held that for incompatibility to amount to serious misconduct depended on whether the incompatibility was largely the plaintiff's fault. The reference in *Hayward* to misconduct suggests that incompatibility is most aptly related to misconduct dismissals, which is further supported by the fact that disciplinary like procedures are followed. Incompatibility dismissals are therefore akin to dismissals for misconduct.

#### 6.4 CONCLUSION

Incompatibility dismissals are recognised in both the UK and in New Zealand. In the UK it is classified under the dismissible ground of some other substantial reason, while in New Zealand it is viewed as a separate dismissible ground.

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<sup>236</sup> In *Kirsteen Bennett and NZ Mushrooms* (2008) AA 73/08 5070606 the court felt that a fair and reasonable employer in the circumstances of this case would have issued a warning as the appropriate penalty, as a precursor to stronger action. In *Vicki Jane Walker and Procare Health Limited* (2009) AA 276/09 5117221 the court held that for dismissal to be justified the cases require that the disharmony must be severe or serious and that the employee must be substantially responsible for the incompatibility. In *Paige Louise Ward and Malcolm Tubb t/a Otipua Takeways* (2010) CA193/10 5302248 the court acknowledged that an employee can be dismissed for incompatibility, but dismissal needs to be preceded by a fair process which includes warning an employee that their position is at risk if they do not improve.

<sup>237</sup> *Maria Campuzano and Western Bay Dental Care Limited* (2011) NZERA Auckland 198.

<sup>238</sup> *Mabry v West Auckland Living Skills Home Trust Board*.

<sup>239</sup> *Hayward v Tairawhiti Polytechnic*.

Notwithstanding the categorisation of incompatibility dismissals, both the UK and New Zealand require that a dismissal for incompatibility be accompanied by fault on the part of the employee. In New Zealand this point has come out very decisively. The courts have made it very clear that dismissal of an employee for incompatibility is a possibility in circumstances where the employment relationship is irreparable and where the employee concerned is to blame. In the UK, despite the court in *Ezsias*<sup>240</sup> trying to differentiate it from a misconduct matter, the words echoed that he was the author of his own misfortune, makes it clear that the employee was to blame. In both countries incompatibility is therefore regarded as a fault dismissal and they provide authority for the view that incompatibility cases are most analogous to dismissals for misconduct.

No consideration has been given to the issue of whether incompatibility constitutes a dismissal based on capacity or operational requirements. Hence, no support can be found in international law for the view taken in South Africa that incompatibility in most cases generally fits within a capacity dismissal, because of the absence of fault.

I do not support the approach of having an open ended category for dismissals, as followed in the UK. Some of the criticisms levelled against this category of dismissal are not without merit, and I believe that there are better ways of accommodating incompatibility dismissals other than using the category of some other substantial reason.

The approach followed in New Zealand is preferable, as it accepts incompatibility as being a fault dismissal, which largely supports my findings in chapter 5. While at the same time, there is appreciation for its distinction from misconduct, in its recognition of them as two distinct grounds for dismissal.

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<sup>240</sup> *Ezsias v North Glamorgan NHS Trust*.

## CHAPTER 7 CONCLUSION

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	Page
7.1 Introduction.....	65
7.2 Research questions answered.....	65
7.3 Recommendations.....	66

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### 7.1 INTRODUCTION

It is not disputed that incompatibility may in certain circumstances be a valid ground for dismissal. However, there are only three legitimate grounds for a dismissal listed in the Labour Relations Act (LRA),<sup>241</sup> and incompatibility is not one of them. The importance of the correct classification of any dismissal lies in the statutory requirements of procedural and substantive fairness, which illustrates the importance of finding the rightful place for incompatibility in South African dismissal law.

The purpose of this research report is to resolve the issue of whether the existing grounds of dismissal, as espoused in the LRA, adequately accommodate incompatibility dismissals.

### 7.2 RESEARCH QUESTIONS ANSWERED

From the research done it has been established that an employee's incompatibility is in most instances accompanied by fault. Due to the high incidence of culpability in such cases, it can therefore no longer generally be accepted that incompatibility is most often a species of incapacity.

With the element of fault being present in a considerable number of incompatibility cases, it may be argued that incompatibility is nothing more than

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<sup>241</sup> The Labour Relations Act 66 of 1995.

a form of misconduct. However, it would be inappropriate to classify incompatibility as misconduct, because to do this would be to ignore the fact that there are genuine instances where the behaviour giving rise to incompatibility is not accompanied by fault on the part of the employee concerned. Furthermore, the primary feature present in instances of incompatibility is of key importance, and it is this apparent characteristic that distinguishes it from misconduct.

As such, a separate category and distinct procedure encompassing both categories of incompatibility, which recognises the distinctive component of an incompatibility dismissal, is proposed. It is therefore concluded that the existing grounds of dismissal, as espoused in the LRA do not adequately accommodate incompatibility dismissals. Incompatibility will most effectively be dealt with as a separate ground of dismissal, for which a specific procedure should be formulated.

### **7.3 RECOMMENDATION**

The approach adopted by New Zealand is supported, in that it is recommended that incompatibility be included into South African dismissal law, as a fourth ground of dismissal.

Section 188(1) (a) of the LRA should be amended to read as follows:

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-
  - (a) that the reason for dismissal is a fair reason-
    - (i) related to the employee's conduct, capacity, incompatibility; or
    - (ii) based on the employer's operational requirements

In addition to section 188(1)(a) being amended, a section on incompatibility should be included in the Code of Good Practice: Dismissal. The proposal for such a section is as follows:

### **Incompatibility dismissals**

An employer is entitled to insist on reasonably harmonious interpersonal relationships and to expect that employee's comply with the corporate culture of its organisation. Just as the employer has an obligation not to destroy or damage the relationship of confidence and trust, there is a reciprocal duty on an employee not to act in a manner which causes disharmony and which fails to engender effective working relationships.

Should an employee behave in a manner and/or exhibit personality traits which causes disharmony in the workplace, resulting in a substantial breakdown in working relationships, the employee can be dismissed on grounds of incompatibility.

### **Incompatibility procedure**

1. Prior to reaching a decision to dismiss an employee for incompatibility, an employer must make some sensible, practical and genuine efforts to effect an improvement in the disharmony caused by the employee.
2. The cause of the incompatibility must firstly be established. In order to ascertain this, the employer must initiate a corrective counselling process whereby the offending employee is given an opportunity to confront the alleged disharmonious behavioural conduct that he or she is accused of. At the meeting he or she must be advised of the conduct displayed by him or her which allegedly causes disharmony and who is upset by the conduct.
3. If it is established that the employee is to blame for the disharmony, i.e. the conduct giving rise to the incompatibility is wilful, then:
  - 3.1 the employee should be given a reasonable period to make amends and to restore an amicable employment relationship with the employer. It is up to the employee to change his or her attitude and to ensure that he or she conducts him or herself in a manner that prescribes to the corporate culture and engenders cordial workplace relations;
  - 3.2 if the employee fails to remedy the conduct causing the disharmony, then efforts should be made to correct the employee's behaviour



- through the issuing of warnings. The type and number of warnings to be issued will depend on the type of conduct and the impact of the conduct;
- 3.3 should progressive disciplinary steps fail to address the conduct, then an incompatibility enquiry should be held. The charge of incompatibility will be informed by the discordant conduct displayed by the employee, which the employer is required to document, and should not be based on subjective feelings;
  - 3.4 the employer should notify the employee about the allegations of incompatibility using a form and language that the employee can reasonably understand;
  - 3.5 the employee should be allowed the opportunity to state a case in response to the allegation. The employee should be entitled to a reasonable time to prepare his or her response and to the assistance of a trade union representative or fellow employee;
  - 3.6 if the employee is dismissed, the employee should be informed of the reasons for the decision reached and reminded of any rights to refer the matter to the applicable external dispute resolution body.
4. Where the incompatibility is not accompanied by fault, i.e. it is the result of an employee's inherent personality trait or traits for which he or she cannot be blamed, then:
- 4.1 a training initiative should be put in place. This must be aimed at assisting the employee to manage or control his/her personality trait or traits in such a manner that the disharmony being caused is diminished;
  - 4.2 a timeframe for the training initiative should be agreed upon and the behaviour of the employee, while undergoing the training initiative, should be monitored;
  - 4.3 if subsequent to the completion of the training initiative there is no substantial improvement in the disharmony being caused by the employee, then an incompatibility hearing should be held;

- 4.4 the purpose of the hearing should be well documented and should be issued in a form and language that the employee can reasonably understand;
  - 4.5 the procedures stipulated in paragraphs 3.5 and 3.6 above, will be applicable.
5. Any person who is determining whether a dismissal for incompatibility is unfair should consider-
- 5.1 whether the employee was put on terms (where employee was to blame) or provided with assistance (where employee was not blameworthy) to correct the behaviour causing the disharmony;
  - 5.2 whether the employee was given a reasonable opportunity to make amends or given a reasonable opportunity to complete the training initiative put in place;
  - 5.3 whether sufficient progressive disciplinary steps had been initiated, where the employee was entirely or substantially to blame for the incompatibility;
  - 5.4 whether the disharmony caused was of such a nature that it resulted in a substantial breakdown in the working relationship; and
  - 5.5 whether dismissal was the only reasonable way in which to deal with the incompatible employee, having regard to the recurrence of such behaviour and the steps that have been taken to address it.

I conclude by saying that though the existence of incompatible employees is manifest in many workplaces, they regrettably, despite their unsuitability, continue to be employed as employers have difficulty in dealing with the incompatible employee. This is due to all the ambiguity that exists around this area of dismissal law. Having a precise classification and procedure for incompatibility will go a long way in adequately addressing this workplace problem. The aforementioned process is believed to be the answer to effectively tackling the tricky employee.

## BIBLIOGRAPHY

- Anderman** - *The law of unfair dismissal* (1985)
- Basson, Christianson, Garbers, Le Roux, Mischke, Strydom** - *Essential Labour Law* (2005)
- Basson** - "Labour Law and the Constitution" (1994) 57 *THRHR* 493
- Bowers and Clarke** - "Unfair dismissal and managerial prerogative: A study of Other substantial reason" (1985) *ILJ* 34
- Brassey, Cameron, Cheadle, Olivier** - *The New Labour Law* (1987)
- Butterworths** - "If only we could talk about Incompatibility" Volume 5 No 8 May 2002 *Beaumonts Express* 166
- Cassim** - "Unfair Dismissal" (1984) 5 *ILJ* 275
- Christianson** - "Incapacity and Disability: A Retrospective and Prospective Overview of the past 25 Years" (2204) 25 *ILJ* 880
- Christianson** - "2003 Annual Survey of SA Law"
- Collins** - *Employment Law* (2003)
- Currie and De Waal** - *The New Constitutional and Administrative law* (2002)
- Currie and De Waal** - *The Bill of Rights Handbook* (2005)

- Davies** - *Perspectives of Labour Law* (2009)
- Davies and Freedland** - *Kahn-Freunds Labour and the Law* (1983)
- Deakin and Morris** - *Labour Law* (2009)
- Devenish** - *The South African Constitution* (2005)
- Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles and Rossouw** - *Labour Relations Law A Comprehensive Guide* (2006)
- Grogan** - *Dismissal, Discrimination & Unfair Labour Practice* (2007)
- Grogan** - *Workplace Law* (2009)
- Grogan** - *Dismissal* (2010)
- Grogan & Myburgh** - "Cracking the Code - The Code of Good Practice: Dismissal October (1997) *ELJ* 118
- Honeyball and Bowers** - *Textbook on Labour Law* (2002)
- Isrealstam** - "Incompatibility is not a Reason Within Itself; An Employee should be given the chance to resolve the problem" (2006) *The Star* 1
- ILO** - Convention 158 and Recommendations 119 and 166

- Kiely, Thompson and Caisley** - *Termination of Employment: A Best Practice Guide* (2008)
- Le Roux and Van Niekerk** - *The South African Law of Unfair Dismissal* (1994)
- Landman** - "Unfair Dismissal: The new rules for capital punishment in the workplace (1995) *CLL* 5(5) 41
- Mboweni** - "Address to the International Labour Conference" (1994) 15 *ILJ* 737
- Mischke** - "Incompatibility as a ground for dismissal" (2005) *CLL* 71
- Mureinik** - "Unfair Labour Practices: Update" (1980) 1 *ILJ* 113
- New Zealand Department of Labour** - A Guide for Employers on Disciplinary Action, Dismissal, Redundancy and Ill Health accessed on [www.dol.govt.nz](http://www.dol.govt.nz)
- New Zealand Department of Labour** - Paper on incompatibility in the workplace September (2005) accessed on [www.dol.govt.nz](http://www.dol.govt.nz)
- Nolan** - *The Australasian Law Reforms* (1998)
- Rautenbach and Malherbe** - *Constitutional Law* (2009)
- Rossouw and Conradie** - *A Practical Guide to Unfair Dismissal Law in South Africa* (1999)
- Rudman** - *New Zealand Employment Law Guide* (2009)
- Rycroft and Jordaan** - *A Guide to South African Labour Law* (1992)

- Rycroft** - "Blurring the Lines Between Incapacity, Misconduct and Operational Requirements" (2009) *SA Merc LJ* 426
- Van Niekerk, Christianson, McGregor, Smit and Van Eck** - *Law@work* (2008)
- Van Niekerk** - "The International Labour Organisation (ILO) and South African Labour Law" (1996) *CLL* 5(12) 111
- Van Jaarsveld and Van Eck** - *Principles of Labour Law* (2002)
- Van Jaarsveld** - "An Employee's Contractual Obligation to Promote harmonious relationships in the workplace" 2007 *SA Merc LJ* 204
- Venter, Levy, Conradie and Holtzhausen** - *Labour Relations in South Africa* (2009)