

CHAPTER 8
CONSTITUTIONAL RIGHT TO FAIR LABOUR
PRACTICES
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A Introduction

Section 23(1) of the Constitution¹ provides that everyone has the right to fair labour practices. This provision is becoming very influential and factorial in labour legislation.² Although the exact content of this right is not capable of precise definition,³ it will be demonstrated herein that it is capable of wide definition and scope and that it could be utilized by both typical and atypical employees in order to protect their legitimate interests.⁴ The purpose of this chapter is to provide some clarity as to who can turn to section 23(1) for relief and to shed some light on what constitutes an 'unfair labour practice'. After considering who this section is applicable to, the meaning of the concept of fairness and its determination is considered. Discussion of the old Industrial Court's approach to the meaning of fairness provides some alternatives of how to determine the fairness or otherwise of certain conduct. Finally, a brief overview of some of the latest cases where section 23(1) of the Constitution was considered provide the reader with examples of the type of conduct that can possibly qualify as an unfair labour practice.

The changing world of work has resulted in a growing number of 'atypical employees'. The Department of Labour and the legislature are aware of this fact.⁵

¹ Act 108 of 1996.

² Le Roux "the New Unfair Labour Practice: The High Court Revives the Possibility of a Wide Concept of Unfair Labour Practice" 2002 *Contemp LL* 91.

³ See *National Union of Health and Allied Workers Union v University of Cape Town* 2003 *ILJ* 95 (CC).

⁴ In fact, this right can even be utilized for the protection of employer interests- see *National Union of Health and allied Workers Union v University of Cape Town op cit.*

⁵ In the Department of Labour's Green Paper: Policy Proposals for a New Employment Statute (GG 23 Feb 1996) the legislature expressed itself as follows: 'The current labour market has many forms of employment relationships that differ from full-time employment. These include part-time employees, temporary employees, employees supplied by employment agencies, casual employees, home workers and workers engaged under a range of contracting relationships. They are usually described as non-standard or atypical. Most of these employees are particularly vulnerable to exploitation because they are unskilled or work in sectors with little or no trade union organisation or little or no coverage by collective bargaining. A high proportion is women. Frequently, they have less favourable terms of employment than other employees performing the same work

This knowledge prompted the 2002 amendments to the LRA which provide that a person will be presumed to be an employee if one of the following conditions is met:⁶

- (i) There is control or direction in the manner the person works;
- (ii) there is control or direction in the person's hours of work;
- (iii) the person forms part of the organisation;
- (iv) an average of 40 hours per month has been worked for the last 3 months;
- (v) the person is economically dependent on the provider of work;
- (vi) the person is provided with tools or equipment; or
- (vii) the person only works for one person.

This amendment is also found in the Basic Conditions of Employment Act⁷ (hereinafter the BCEA). The Minister of Labour has the power to extend the provisions of BCEA to persons who do not qualify as employees in terms of the legislation.⁸

However, the legislature's attempt to extend the net of protection to atypical employees has not been altogether successful. The fact that the administrative power of extension of the Minister of Labour provided for in terms of the BCEA has never been utilized has been attributed to 'a lack of capacity within the Department of Labour'.⁹ The courts' traditional approach to defining an employee has also been described as "unimaginative" with the result that there is a certain amount of lack of protection for a "significant proportion of the workforce".¹⁰ The criteria that

and have less security of employment. Often they do not receive 'social wage' benefits such as medical and or pension or provident funds. These employees therefore depend upon statutory employment standards for basic working conditions. Most have, in theory, the protection of current legislation, but in practice the circumstances of their employment make the enforcement of rights extremely difficult.¹

⁶ S 200A. This presumption will only be operative where an employee earns less than approximately R116 000 per annum.

⁷ S 83(A) of Act 75 of 1997.

⁸ S 83(1).

⁹ Benjamin "Who Needs Labour Law? Defining the Scope of Labour Protection" in Conaghan, Fishl and Klare *Labour Law in an Era of Globalization* (2002) 91.

¹⁰ Benjamin *op cit* note 76.

are relied upon for the operation of the presumption of being an employee are based on the 'traditional tests' as applied by the courts. As such the criticisms,¹¹ levelled against the courts' approach to determining who qualifies as an employee, are applicable to the 2002 Amendments of the LRA¹² as well. In short therefore, some 'atypical employees' are not in a position to enjoy the protection granted in terms of the LRA, BCEA and other labour legislation.

Much research to establish the extent of atypical employment in South Africa has been undertaken.¹³ Various categories of such atypical employees have been identified including part-time work, temporary work, day work, outsourcing, sub-contracting, homework, self-employment and so forth. After collecting all the available data in South Africa, Theron concludes:¹⁴ "The extent and effects of the processes of casualization, externalisation and informalization cannot be measured quantitatively at this stage, nor is it realistic to expect to be able to do so. Yet the quantitative indicators are consistent with what is described in qualitative studies and trends that are well established in both developed and developing countries. It does not seem that there is any basis to argue that South Africa is an exception to these trends."

Although many 'atypical employees' enjoy protection in terms of labour legislation¹⁵ some of these 'atypical employees' may still not qualify as employees in terms of the legislation. Consequently they do not enjoy protection in terms of these Acts. These 'atypical employees' can conceivably turn to section 23(1) of the Constitution for protection against employer abuse. Those who are specifically excluded from the legislation¹⁶ may also conceivably turn to section 23(1) of the

¹¹ Benjamin *op cit* 82-85; Brassey "The Nature of Employment" 1990 *ILJ* 528.

¹² S 200A.

¹³ See Theron "Employment is not What it Used to be" 2003 *ILJ* 1247 where a summary of all the available studies and surveys undertaken in South Africa is undertaken; see also ch 6 subsection F *infra*.

¹⁴ Theron *op cit* 1278.

¹⁵ See s 200A of LRA and s 83(A) of BCEA.

¹⁶ S 2 of the LRA provides that it is not applicable to members of the National Defence Force, the National Intelligence Agency and the South African Secret Service.

Constitution for relief. Finally, section 23(1) may possibly also be utilised for relief where the alleged unfair labour practice does not fall within the scope of the definition of an unfair labour practice in terms of section 186(2) of the LRA.¹⁷ This constitutional provision will also have an influence on how individual contracts of employment are interpreted by our courts. Contracts or terms of contracts that are contrary to the spirit of the Constitution or that prevent or limit fundamental rights guaranteed in the Constitution may be set aside.¹⁸ In the light of the worldwide trend towards individualisation of employment contracts, this provision can play a very useful role in redressing the imbalance of power between employers and employees.

B Historical Perspective

This concept originated in the United States as a “handy description for a clutch of statutory torts designed to curb employer action against trade unions organizing.”¹⁹ The phrase was imported into South Africa, in a different context, at a time of political upheaval.²⁰ The concept was introduced into the South African labour law dispensation as a result of recommendations of the Wiehahn Commission.²¹ The first definition of unfair labour practice to be found in legislation was a very open-ended and non-specific definition. An “unfair labour practice” was defined as “any labour practice that in the opinion of the Industrial Court is an unfair labour practice”.²² This obviously gave the Industrial Court enormous leeway and ‘amounted to a licence to legislate’.²³

In 1980 the legislature intervened and a new definition of unfair labour practice was introduced. It was more specific and the definition referred to four

¹⁷ This provision is discussed under heading 5 *infra*.

¹⁸ See Basson “Labour Law and the Constitution” 1994 *THRHR* 498 at 502.

¹⁹ Landman “Fair Labour Practices – The Wiehahn Legacy” 2004 *ILJ* 805.

²⁰ *Idem*.

²¹ Commission of Enquiry into Labour Legislation appointed under GN 445 GG 5651 of 8 July 1977.

²² S 1(f) of the Industrial Conciliation Amendment Act 94 of 1979.

²³ Thompson and Benjamin *South African Labour Law* (1997) A!-60.

consequences that might arise as a result of an act or omission.²⁴ Nevertheless, this was still a general and open-ended definition requiring the Industrial Court to use its discretion in interpreting it.²⁵ In 1988 the definition was once again amended.²⁶ This time it contained a list of specific unfair labour practices with an *omnibus* clause that corresponded with the 1980 definition. Thus it was still open ended and open to interpretation. Unions had negative perceptions concerning the dispositions of the presiding officers of the Industrial Court. Consequently, they were very unhappy about the fact that the new definition allowed the Industrial Court to sit in judgement on the fairness of a strike.²⁷ As a result of union opposition to the 1988 definition an agreement between COSATU, NACTU and SACCOLA was entered into in terms of which the 1991 definition was enacted.²⁸

The 1991 definition reads as follows:²⁹

“An unfair labour practice is defined as any act or omission, other than a strike or lock-out, which has or may have the effect that:

- (a) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
- (b) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
- (c) labour unrest is or may be created or promoted thereby; or
- (d) the labour relationship between employer and employee is or may be detrimentally affected thereby.”

It is this definition of an unfair labour practice that is of relevance with reference to section 23(1) of the Constitution. As pointed out by Van Jaarsveld, Fourie and

²⁴ S 1(h) of the LRA Amendment Act Amendment Act 95 of 1980.

²⁵ Thompson and Benjamin *op cit* A1-60.

²⁶ S 1(h) of the LRA Amendment Act 83 of 1988.

²⁷ Thompson and Benjamin *op cit* note 28 at 45 A1–30; see also Cameron, Cheadle and Thompson *The New Labour Law* (1989) 139 *et seq.*

²⁸ See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* 2004 par 775.

²⁹ S 1 of the LRA Amendment Act 9 of 1991.

Olivier,³⁰ since this is the definition that was in place at the time of the enactment of the Constitution, this is the definition that should be used as a 'guideline to determine the meaning of the concept or, alternatively, the broad parameters of the concept of fairness.'³¹ Consequently the old Industrial Court's interpretation of the concept of 'fairness' in the context of unfair labour practices becomes relevant.³²

C Meaning of Fairness

1 Introduction

'Fairness' can be used as a synonym for equitable, reasonable, impartial, just, honest, balanced, according to the rules, right.³³ All these synonyms contain a high degree of ethical and moral notions and consequently so does the notion of fairness.³⁴ As such the notion of fairness is not only difficult to define but is also flexible.³⁵ Different people from different cultures and backgrounds also might have different views as to exactly what constitutes fairness.³⁶ As Baxter points out, fairness is a concept that is ambiguous and difficult to ascertain. Consequently its meaning must be deduced with reference to surrounding circumstances.³⁷

In *WL Osche Webb & Pretorius (Pty) Ltd v Vermeulen*³⁸ the court explained the concept of fairness as containing both procedural and substantive aspects. The

³⁰ *Op cit* par 778.

³¹ *Idem*; see too *NEHAWU v University of Cape Town* 2000 ILJ 1618 (LC).

³² See Landman "Fair Labour Practices-The Wiehahn Legacy" 2004 ILJ 805.

³³ See Poolman *Principles of Unfair Labour Practices* (1985) 42, and *SADWV v Master Diamond Cutters Association of SA* 1982 ILJ 87 (IC).

³⁴ In *The Press Corporation* 1992 ILJ 391 (A) at 400 C Grosskopf JA in referring to the determination of unfair labour practices stated: 'In my view a decision of the court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions.'

³⁵ See Cameron, Cheadle and Thompson *The New Labour Relations Act* (1989) at 139.

³⁶ Poolman *op cit* 58. See also Van Zyl "The Significance of the Concepts 'Justice' and 'Equity' in Law and Legal Thought" 1988 SALJ 272.

³⁷ *Administrative Law* (1984) 543.

³⁸ 1997 ILJ 361 (LAC) at 366A-366C.

court opined that although the courts readily enforce procedural fairness,³⁹ they do not so easily enter the debate on whether the result of the process is fair since this would be tantamount to an intrusion that would impede the flexibility an employer needs to operate efficiently in the marketplace.⁴⁰ Since a certain amount of creativity and hence subjectivity is inevitable in deciding what is fair or not, not only must there be recourse to substantive fairness, but there must also be procedural fairness.⁴¹

Natural justice as it is understood in its broader sense refers to procedural fairness.⁴² Procedural fairness serves to 'legitimize the outcome.'⁴³ This concept comprises two principles, namely *audi alteram partem* and *nemo iudex in propria causa*.⁴⁴ These two principles are discussed hereunder.

The essence of the *audi alteram partem* principle is that the individual should be given notice of the intended action; and a proper opportunity to be heard.⁴⁵ It is obvious that where there is no notice or inadequate notice, there can also be no opportunity to be heard.⁴⁶ Notice of the impending action should state when and where the opportunity to be heard may be exercised as well as the reasons and salient factors motivating the pending proceedings.⁴⁷ In other words, the individual must be made aware of the charges against him. Secondly the individual must be

³⁹ Baxter *Administrative Law* (1984) 540 states: "The principles of natural justice are considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of particular case in question."

⁴⁰ As Baxter *op cit* 541 states: The courts have 'nearly always taken care to distinguish between the merits of a decision and the process by which it is reached. The former cannot justify a breach in the standards of the latter. The isolated decisions which have overlooked this have seldom received subsequent judicial endorsement.'

⁴¹ Marais *Onbillike Arbeidspraktyke* (1989) 12.

⁴² Baxter *op cit* 541.

⁴³ *Idem*.

⁴⁴ Baxter *op cit* 542.

⁴⁵ Baxter *op cit* 544; see also Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 1097; *Mhlangu v CIM Deltak* 1986 ILJ 346 (IC); *Holgate v Minister of Justice* 1995 ILJ 1426(E).

⁴⁶ Baxter *op cit* 544.

⁴⁷ *Idem*.

given reasonable time to prepare his case.⁴⁸ What is a reasonable time is dependent on the circumstances.⁴⁹ Furthermore the individual should be given an opportunity to present and controvert evidence,⁵⁰ to cross-examine witnesses⁵¹ and to legal representation.⁵²

Since fairness is measured with reference to objectivity and also with the public interest and public confidence,⁵³ the principle of *nemo iudex in propria causa* is very important.⁵⁴ It is obvious that as soon as doubts concerning bias on the part of the judge or arbiter arise, the fairness of the procedure is put into question.

Substantive fairness is concerned with the reason for treating someone unfavourably. Fairness is determined by having regard to equity and the substantial merits of the case in all its circumstances.⁵⁵ In determining the substantial fairness or the reason for the labour practice an objective test of what the reasonable employer or employee would or should have done in the circumstances is applied. What a reasonable employer or employee should have done is determined by reference to the standards of fairness or the boni mores of the community.⁵⁶ In order to ascertain the fairness of a situation one must have recourse not only to the consequences of the action or omission in question, but also to the reasons for such action or omission and the manner which such action

⁴⁸ Baxter *op cit* 551.

⁴⁹ *Idem.*

⁵⁰ Baxter *op cit* 553.

⁵¹ Baxter *op cit* 554.

⁵² Baxter *op cit* 555.

⁵³ Baxter *op cit* 557-558.

⁵⁴ In the case of *Gotso v Afrox Oxygen Ltd* [2003] BLLR 605 (Tk), at par 11, for example, the court held that the plaintiff had been unfairly dismissed because the presiding officer in the disciplinary enquiry had acted as judge and prosecutor. The court stated: "The nub of the applicant's case is that Mr Nel's conduct in the disciplinary hearing constituted an irregularity which caused his dismissal to be unfair. On a proper analysis the respondent is alleged to have breached a fundamental principle of natural justice that no one may be a judge in his own case. The principle is entrenched in our legal jurisprudence and pervades our constitutional law. A proven breach of this principle by the respondent will render his actions both unlawful, and with equal force, an unfair labour practice.

⁵⁵ Poolman *op cit* 64.

⁵⁶ *Idem.*

or omission took place. In other words the notion of fairness must be interpreted with reference to all the surrounding circumstances in a particular situation.⁵⁷ It is not possible to make a *numerus clausus* of what would be fair and unfair. This is so because of the potential different situations and circumstances that could arise.⁵⁸

Procedural and substantive fairness are interdependent.⁵⁹ This is so because procedural fairness requires certain facts to be proved before discretionary power to take disciplinary action is exercised.

2 Interpretation of Concept of Fairness by Courts before 1994

2.1 Introduction

The concept of fairness is of paramount importance in the definition of unfair labour practice. Since it was the 1991 definition of an unfair labour practice that was in force at the time the Constitution was enacted the decisions of the Industrial court dealing with the concept of fairness are relevant.⁶⁰ In analysing the Industrial Court's interpretation of the concept of fairness Marais has identified 3 different approaches to giving content to the term fairness. They are the following:

(i) The first approach⁶¹ uses the definition of an unfair labour practice as its starting point. Commission reports and dictionaries, international law and the laws of other countries are used to interpret the meaning of unfair labour practice. In the process the term is fragmented and each word is interpreted in turn. In the end the words are put back together to give them a meaning. I will call this the 'interpretation of statutes approach'.⁶²

⁵⁷ Baxter *op cit* 533.

⁵⁸ Marais *op cit* 12.

⁵⁹ Baxter *op cit* 533.

⁶⁰ Landman "Fair Labour Practices-The Wiehahn Legacy" 2004 *ILJ* 805.

⁶¹ Marais *Onbillike Arbeidspraktyke* (1989) 15-39.

⁶² Marais calls this the 'wetsuitleg werkwyse'.

(ii) The second approach⁶³ poses the question whether the reasonable employer would have reached the same conclusion as the respondent. I will call this the 'reasonable employer approach'.

(iii) The third approach⁶⁴ poses the question whether there were valid and justified business considerations that were taken into account. I will call this the 'economic rationale approach'.

2.2 *Interpretation of Statutes Approach*

Criticism levelled against this approach is that the definition should be read in context, and that the legislature's intention and the Act as a whole should also be considered.⁶⁵ Such an approach is superficial and as it ignores the scope and content within which the definition is required to operate. Reference to the meaning of the words in a vacuum will result in a failure to consider any underlying policies or objectives.⁶⁶ Secondly, reliance on other legal systems is not always appropriate. Different legislation, different socio-economic circumstances and the like can render comparisons inappropriate. For example English legislation does not provide for an unfair labour practice jurisdiction.⁶⁷ Each legal system also has its own unique problems and might have their own statutory principles.⁶⁸

In summary therefore, to only look to the meaning of individual words with reference to foreign law, commission reports and the like is superficial. Regard should also be had to the surrounding circumstances of the facts at hand, the context of the piece of legislation, as well as the intention of the legislature.⁶⁹

2.3 *The Reasonable Employer Approach*

⁶³ Marais calls this the 'redelikheidskriterium werkwyse'.

⁶⁴ Marais calls this the 'kommersiële rede werkwyse'.

⁶⁵ Marais *op cit* 23.

⁶⁶ Marais *op cit* 23.

⁶⁷ Brassey *et al The New Labour Law* (1987) 78.

⁶⁸ Marais *op cit* 24.

⁶⁹ *Idem*.

The test has its origins in the English law.⁷⁰ However the English law version of 'unfair labour practice' centres on unfair dismissals.⁷¹ The test is not applicable to unfair labour practices in general.⁷² The English court's and tribunal's interpretation of unfair dismissals guided the South African Industrial Court in giving content to the term unfair labour practice in its different versions in respect of dismissals.⁷³ The approach of the Industrial Court with reference to dismissals has more or less been codified in our present legislation.⁷⁴ Even though an unfair dismissal may entail an unfair labour practice in terms of the section 23(1) of the Constitution,⁷⁵ unfair labour practices in terms of the LRA are not limited to unfair dismissals.⁷⁶ Nevertheless, comparisons with English law are still relevant to the question of the interpretation of general and all embracing concepts such as fairness and reasonableness that are inherent in any concept of unfair labour practice. The reasonable employer test can provide guidance as to the determination of both procedural and substantive fairness not only with reference to dismissals but also with reference to other forms of employer conduct that may constitute unfair labour practices.

English legislation provides that in determining whether a dismissal is unfair or not recourse is to be had as to whether or not the employer acted reasonably or unreasonably in treating the conduct in question as sufficient to warrant dismissal.⁷⁷ That question is to be determined in accordance with equity and the substantial merits of the case. The test requires an examination of whether the employer had reasonable grounds for believing that the employee committed the alleged misconduct; whether the procedure adopted was reasonable in the

⁷⁰ See s 57(3) of the English Employment Protection (Consolidation) Act.

⁷¹ *Brassey et al op cit* note 70 at 369.

⁷² See *Brassey et al op cit* 78.

⁷³ See for example *Lefu v Western Areas Gold Mining Co* 1985 6 ILJ 307 (IC); *NUM v Nuclear Fuels Corp of SA* (IC 24.10 1985, unreported); *NUM v Western Areas Gold Mining Co* 1985 6 ILJ 380 (IC); *Robbertze v Matthew Rustenburg Refineries (Wadeville)* 1986 7 ILJ 64 (IC).

⁷⁴ Code of Good Practice: Dismissal in Schedule 8 of LRA

⁷⁵ See *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 130 (A).

⁷⁶ See definition of unfair labour practice contained in the LRA s 186(2).

⁷⁷ S 94 of Employment Rights Act 1996.

circumstances; and whether the penalty imposed by the employer was a reasonable one.⁷⁸

This approach focuses on the conduct of the employer and not on the effect of the employers' conduct. Even though such conduct might be found to be reasonable, and hence fair, the results or consequences of such conduct or actions might be unfair on the employee.⁷⁹ Once the employer has shown that it was reasonable in its conclusion on the facts i.e. that it had reasonable grounds for the belief that the employee was guilty of the alleged misconduct, then the employer cannot have committed an unfair labour practice. This is so even if it is later discovered that the employee did not in fact commit the alleged offence or misconduct.⁸⁰

The Industrial Court in *Lefu v Western Areas Gold Mining Co*⁸¹ followed this approach. The facts of the case are briefly as follows: The employer dismissed 205 employees for either inciting or partaking in a riot in its mine. This riot had resulted in nine deaths and the employer had suffered huge financial losses. The employer did not hold a disciplinary enquiry since the process would have taken at least five days during which period the employer would have had to house those it believed guilty of the offences in its hostels. Furthermore, it felt that immediate dismissal would help alleviate the highly emotional state of affairs that existed at the workplace. The dismissed employees alleged that they were innocent and that they had not committed the alleged offences. The court held that the employer had not committed an unfair labour practice. In reaching its conclusion it relied on the English law and referred with approval to *Ferodo v R Barnes*.⁸² It was held in that case that the courts should not enquire as to whether or not an offence was committed, but rather as to whether or not the employer at the time of dismissal had reasonable grounds to believe that the employees had in fact committed the offence.

⁷⁸ *Halsbury's Laws of England* (Employment Law) (2000) 6th ed par 480.

⁷⁹ See *Brassey et al op cit* 72-73.

⁸⁰ *Idem*.

⁸¹ 1985 *ILJ* 307 (IC).

⁸² [1976] *IRLR* 302.

A similar approach was adopted by the Labour Appeal Court in *Yichiho Plastics (Pty) Ltd v Muller*,⁸³ where it was stated⁸⁴ that what is of relevance is what the employer did and not what the employer might have done in other circumstances. The approach taken in the *Lefu* case was followed in *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd*⁸⁵ where Bulbulia AM stated: “An employer need not be satisfied beyond reasonable doubt that an employee has committed an alleged offence. The test to be applied is whether the employer has reasonable grounds for believing that the employee has committed the offence.”

However, in *Hoechst (Pty) Ltd v CWIU & Another*⁸⁶ the Labour Appeal Court was of the view that the Industrial Court should embark on a complete re-hearing of the matter and that it could take into account new evidence that was not available to the employer at the time of the dismissal in its determination of the fairness or otherwise of the employers’ conduct. In other words it was held that the courts should concern themselves with the fairness of the act or omission (*i.e.* its effect). In this case the employee, accused of unlawful possession of property belonging to a co-employee, gave evidence in court, which he had withheld at the disciplinary enquiry. This evidence served to exonerate him from the alleged misconduct.

In 1989 in *Food and Allied Workers Union & others v CG Smith Sugar Ltd, Noodsberg*⁸⁷ the court referred to the *Lefu* case⁸⁸ and *National Union of Mineworkers & Others v East Rand Gold and Uranium cases*⁸⁹ with approval. The court held that in determining whether the alleged conduct constitutes an unfair labour practice the court was limited to evidence available to the employer at the

⁸³ 1994 ILJ 593 (LAC).

⁸⁴ P 4.

⁸⁵ 1986 ILJ 739 (IC).

⁸⁶ 1993 ILJ 1449 (LAC).

⁸⁷ 1989 10 ILJ 907 (IC).

⁸⁸ *Op cit.*

⁸⁹ *Op cit.*

time of the employer's decision and could not take evidence that subsequently became available into account.

In 1990 in *Govender v Sasko (Pty) Ltd t/a Richards Bay Bakery*⁹⁰ it was held that the approach adopted in the *CG Smith Sugar case*⁹¹ was no longer applicable because of the 1988 amendments to the definition of an unfair labour practice. In terms of the 1988 definition an unfair labour practice includes:

“(a) the dismissal, by reason of any disciplinary action against one or more employees without a valid and fair reason.”

The court was of the view that this provision rendered it necessary for the court to establish the fairness and validity of the employer's reason for dismissal. In order to establish such fairness and validity the court should have recourse to all available evidence including evidence that was not available to the employer at the time the employer took its decision.⁹² But the 1991 amendments to the legislation rendered the definition virtually the same as the definition considered by the court in the *Lefu and L Smith* cases. In other words it was no longer required that the courts determine a valid and fair reason for dismissal.⁹³

The reasonable employer test focuses on the actions of the employer and not on the effect of such actions. The most obvious criticism that can be levied against the approach is that there may be circumstances where an employers' conduct can be found to be reasonable, but the effect thereof might be unfair on the employee. This can happen if the employers' reasonable decision is based on incorrect or inaccurate facts, or a misinterpretation of facts. If the employer erred reasonably, there will be no unfair labour practice.⁹⁴ This is unfair. In order to determine whether or not the effects of an act or omission are unfair it is necessary to have recourse to evidence 'beyond the factual circumstances which pertained at the

⁹⁰ 1990 ILJ 1282 (IC).

⁹¹ *Op cit.*

⁹² This decision was followed in *FAWU v South African Breweries Ltd* 1992 ILJ 209 (IC).

⁹³ Van Niekerk 1994 CLL 68-69.

⁹⁴ S98 (4) and (6) of Employment Rights Act 1996.

time of the dismissal.⁹⁵ Since the court has to establish the effect on the employee, it is necessary for the court to establish whether or not the alleged misconduct was committed by the employee or not, not whether the employer was justified in its beliefs. As such the court should have recourse to all evidence, including evidence that was not made available to the employer. The employer can also lead evidence to demonstrate that the effects on the employee are not unfair.⁹⁶

The problem with this approach is that where an employee chooses to withhold evidence at the employers' enquiry and then later (at the court proceedings) leads that evidence, this will render an employers' attempt to apply procedural fairness meaningless. It will result in wasted time and money for the employer even where the employer acts reasonably. If the courts make an order for re-instatement this will be most disruptive for the employer. For these reasons the reasonable employer test is preferable for employers.

Despite this, in the light of the fact the 1988, 1990 and 1991 definitions focus on effects rather than employer conduct, and that labour unrest can be caused by unfairness, my view is that the reasonable employer test is inappropriate for the purposes of the 1991 definition of unfair labour practice and consequently for purposes of section 23(1) of the Constitution..

2.4 *Economic Rationale Approach*

The basis of this approach is that the purpose of the employment relationship for both employer and employee is financial gain.⁹⁷ The legislature accepts this and therefore, if there is an economic rationale the conduct can be justified and it will not be an unfair labour practice. Brassey explains: "A rational employer dismisses an errant employee so as to get a better employee in his place. He aims at improving the quality of his workforce. If there are no better employees available,

⁹⁵ Van Niekerk *op cit* 71.

⁹⁶ *Halsbury's Laws op cit* par 483.

⁹⁷ Van Niekerk *op cit* 65.

dismissal is senseless; the employee would not sooner be dismissed than he would have to be recruited again, because he would be the most suitable applicant for the job. Dismissal, therefore, looks to the future of a better workforce - it does not look to the past. It is remedial, not punitive – punishment in our society being the prerogative only of the parent, the schoolmaster and the bench.”⁹⁸

By the same token, where an employee’s work is not up to standard, a dismissal will be justified on the basis of an economic rationale. Disciplinary action short of dismissal can likewise be justified on the basis of economic rationale. Dismissals based on operational requirements (retrenchments) likewise, will be unfair where there is no commercial rationale. In short, where the conduct complained of is not accompanied by a commercial or economic rationale it will most likely be unfair. The courts have confirmed this when deciding whether or not discrimination is unfair.⁹⁹ One of the criticisms levelled against this approach is that conduct that has an economic rationale is not necessarily fair.¹⁰⁰ Also, it is difficult to confine or limit the boundaries of what exactly is meant by ‘economic or commercial rationale’. It is necessary to emphasize the procedural fairness in implementing decisions that have an economic rationale especially where the employee is not at fault, for example, where there has been no misconduct.

D Who Can Rely on Section 23(1)?

Having established that there may be ‘atypical employees’ that have slipped through the net of legislative protection and spies and soldiers are excluded from the ambit of the LRA,¹⁰¹ it is necessary to discuss what is intended by the word ‘everyone’ in section 23(1) of the Constitution.

⁹⁸ Brassey *et al* *The New Labour Law* (1987) 70.

⁹⁹ See *Kadiaka v Amalgamated Beverage Industries* 1999 ILJ 373 (LC) 380I and *Woolworths (Pty) Ltd v Whitehead* 2000 ILJ 571 (LAC).

¹⁰⁰ Marais *op cit* 36.

¹⁰¹ S 2.

The broad terms used in s 23(1) of the Constitution in describing not only the rights accorded but also the beneficiaries of the right to fair labour practices (namely everyone, all workers) have prompted the suggestion that an extensive interpretation of the definition of an employee would be possible, and that if such an extensive interpretation of employee were to be accepted, it would lay the foundation for the possibility of the Constitutional Court finding the exclusion of some workers from other labour legislation to be unconstitutional.¹⁰²

According to Cheadle,¹⁰³ the subject of the sentence in section 23(1), namely 'everyone' should be interpreted with reference to the object of the sentence, namely 'labour practices'. Since 'labour practices are the practices that arise from the relationship between workers, employers and their respective organisations'¹⁰⁴ the term everyone should be understood in this sense and should only include the persons and organisations specifically named in section 23, namely workers, employers, trade unions and employers' organisations. This interpretation would be in line with an approach that looks to the section as a whole in ascertaining the true intention of the legislature.

This approach renders it essential to ascertain who qualifies as a worker and who does not. In *SA National Defence Union v Minister of Defence & Another*,¹⁰⁵ in considering the meaning of 'worker' the Constitutional Court stressed the importance of its duty in terms of section 39 of the Constitution to consider international law. The Court then in applying the approach of the ILO concluded that even though members of the armed forces did not have an employment relationship with the defence force *strictu sensu*, they nevertheless qualified as workers for purposes of the Constitution.¹⁰⁶ Cheadle also argues for a less

¹⁰² Benjamin *op cit* 79-80.

¹⁰³ Cheadle, Davis, Haysom *South African Constitutional Law: The Bill of Rights* (2002) 364-365.

¹⁰⁴ *Idem*.

¹⁰⁵ 1999 4 SA 469 (CC); 1999 *ILJ* 2265 (CC).

¹⁰⁶ Pars 25 –27.

restrictive meaning than that ascribed to 'employee'¹⁰⁷. The policy consideration put forward in support of this argument is the growth in number and forms of atypical employees who remain vulnerable to employer exploitation.¹⁰⁸ Such broader interpretation is supported by international practice.¹⁰⁹ The crux of the enquiry as to whether a person qualifies as a worker for purposes of section 23 of the Constitution is that the relationship must be 'akin' to the relationship resulting from a contract of employment. What renders such relationship 'akin' to the relationship in terms of the common law contract of service is the presence of an element of dependency on the provider of work.¹¹⁰

E A New Unfair Labour Practice?

1 Introduction

The present LRA does not contain a broad concept of an unfair labour practice. Initially, in the form of a 'residual unfair labour practice' contained in Item 2(1) of Schedule 7 of the LRA, employees enjoyed protection against a *numerus clausus* of certain employer practices that did not amount to dismissal.¹¹¹ In terms of the

¹⁰⁷ S 213 of the LRA defines an employee as follows: "(a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer and 'employed' and 'employment' have meanings corresponding to that of 'employee'.

¹⁰⁸ Cheadle, Davis, Haysom *op cit* 365-366.

¹⁰⁹ *Ibid.*

¹¹⁰ 'Dependency' in this context refers to a situation where the worker is financially dependent on the provider of work in the sense that the worker has no other means of earning a living.

¹¹¹ Schedule 7 Part B 2 headed "Residual Unfair Labour Practices " reads as follows:

- '(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arise between an employer and an employee, involving-
- (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief political opinion, culture, language, marital status or family responsibility;
 - (b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;
 - (c) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;

2002 amendments to the LRA¹¹² the concept of 'unfair labour practice' is no longer 'residual'. However the thrust of the definition has remained the same. In terms of section 186(2) of the LRA an unfair labour practice amounts to any unfair act or omission that arises between an employer and an employee involving-

- (i) unfair conduct of the employer relating to the promotion or demotion of an employee;
- (ii) unfair employer conduct with reference to the training of an employee;
- (iii) unfair employer conduct relating to employee benefits;
- (iv) the unfair suspension of an employee;
- (v) disciplinary action short of dismissal which is unfair; and
- (vi) failure or refusal by an employer to reinstate or re-employ a former employee in terms of an agreement.¹¹³

This definition of 'unfair labour practice' is limited: Firstly it is limited with reference to what an unfair labour practice entails and; secondly, it is limited in the scope of its application since as discussed above, not everyone can rely on the provision for protection.¹¹⁴ Since section 23(1) of the Constitution 'serves a general function as a conceptual foundation for labour legislation'¹¹⁵ the view that 'it could never have been the intention of the legislature to limit the meaning of the constitutional 'fair labour practices' only to the non-dismissal cases provided for in the Labour Relations Act of 1995'¹¹⁶ is not uncommon.¹¹⁷ An argument in favour of this view is the fact that one of the objects of the Basic Conditions of Employment Act (BCEA)¹¹⁸ is to give expression to the concept of 'fair labour practices'.¹¹⁹ In other

-
- (d) the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement.'

¹¹² S 186(2).

¹¹³ The provision contained in Item 2 (1) (a) of schedule 7 is now contained almost verbatim in s6 (1) of the Employment Equity Act 55 of 1998.

¹¹⁴ S 213 of the LRA defines an employee as: "(a) any person excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer."

¹¹⁵ Grogan "Organisational Rights and the Right to Strike" 2002 11(7) *Comp LL* 92.

¹¹⁶ Van Jaarsveld *et al op cit* par 778.

¹¹⁷ See Grogan *op cit* 95; and the cases discussed in this section, namely section E.

¹¹⁸ 75 of 1997.

words, other pieces of legislation, aside from the LRA can be used to give content and meaning to section 23(1) of the Constitution. Recent court decisions that have sought to interpret the constitutional right to fair labour practices have led one writer to the following conclusion: 'Unwillingly it seems South African labour law has returned to a point from which it sought to escape – an open textured, wide in scope interpretation – dependent unfair labour practice'.¹²⁰

2 Case Law and the Content of the Right to Fair Labour Practices¹²¹

2.1 Dismissals

In *Fedlife Assurance Ltd v Wolfaardt*,¹²² the respondent claimed damages for a breach of contract. The respondent claimed that the contract of employment was for a fixed term of five years and that after only two years the employer had repudiated the contract by terminating it. The reason given for such termination was that the respondent's position had become redundant. The Supreme Court of Appeal concluded that implicit in the constitutional right to fair labour practices is the right not to be unfairly dismissed. This right, on the basis of the Constitution was read into the contract of employment.¹²³

In *Ndara v the Administrator, University of Transkei*¹²⁴ the court held that the plaintiff had been unfairly dismissed in violation of his constitutional right to *inter alia* fair labour practices. Again in *Gotso v Afrox Oxygen Ltd*¹²⁵ the High Court found that an unfair dismissal constituted an unfair labour practice. The reason the

¹¹⁹ S 1.

¹²⁰ Anonymous "The New Unfair Labour Practice: The High Court Revives the Possibility of a Wide Concept of Unfair Labour Practice" 2002 *CLL* 91.

¹²¹ What follows is not concerned with arguments as to whether the High Court or the Supreme Court of Appeal have concurrent jurisdiction with the Labour Court and labour Appeal Court over certain issues. For a discussion of these issues see Ngcukaitobi 'Sidestepping the Commission for Conciliation, Mediation & Arbitration: Unfair Dismissal Disputes in the High Court' 2004 *ILJ* 1.

¹²² [2001] 12 *BLLR* 1301 (A).

¹²³ S 39(2) of the Constitution provides: 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and object of the Bill of Rights'.

¹²⁴ Case no 48/2001 (Tk) (unreported).

¹²⁵ [2003] 6 *BLLR* 605 (Tk).

dismissal was found to be unfair in this case was that the principle that no one may be a judge in his own case was not adhered to.

In *Van Dyk v Maithufi NO & Andere*¹²⁶ the court found that it would amount to an unfair labour practice if an employer were to condone conduct which was in contravention of a statutory provision and subsequently without warning prosecute the employee for the contravention.

2.2 Transfers

In *Nelson & Others v MEC Responsible for Education in the Eastern Cape and Another*,¹²⁷ the High Court expressed the view (albeit obiter) that the transfer of the applicants amounted to 'the antithesis of fair treatment'¹²⁸ and that if it had jurisdiction it would have set aside the redeployment directives.

2.3 Constitutional Right to Fair Labour Practices as a 'General Unfair Labour Practice'

In *Ntlabezo & Others v MEC for Education, Eastern Cape & Others*¹²⁹ the High Court made a distinction between what constitutes a (residual) unfair labour practice¹³⁰ and a 'general' unfair labour practice. The court found that the LRA does not deal with general labour practices as provided for in the Constitution and therefore, the Labour Court lacked jurisdiction to pronounce on these general unfair labour practices. The conclusion is that the unfair labour practices against which employees are protected in terms of the LRA are distinct and different from what would constitute an unfair labour practice in terms of the Constitution.

¹²⁶ 2004 ILJ 220 (T).

¹²⁷ [2002] 3 BLLR 259 (Tk).

¹²⁸ At 272.

¹²⁹ [2002] 3 BLLR 274 (Tk).

¹³⁰ Prior to the 2002 Amendments to the LRA Item 2 of Schedule 7 of the LRA contained the definition of a 'residual unfair labour practice'. A very similar definition now appears in s 186(2) and they are now referred to as 'unfair labour practices' not 'residual unfair labour practices'.

In *National Union of Health and Allied Workers Union v University of Cape Town & Others*¹³¹ the Constitutional Court held that the word ‘everyone’ in section 23(1) of the Constitution is broad enough to include employers and juristic persons. As such it is possible for an employee to commit an unfair labour practice. The court expressed the view that the focus of section 23(1) of the Constitution is the relationship between the employer and the worker and its continuation, so as to achieve fairness for both parties. In order to achieve balance between the conflicting interests of the parties these interests should be accommodated. With regard to giving content to the constitutional right to fair labour practices the court stated: “the relevant Constitutional provision is s 23(1) which provides that: ‘everyone has the right to fair labour practices’. Our Constitution is unique in constitutionalising the right to fair labour practices. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgement. It is therefore neither necessary nor desirable to define this concept...In giving content to this concept the courts and tribunals will have to seek guidance from international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA.”¹³²

In *Denel (Pty) Ltd v Vorster*¹³³ the employer (appellant) submitted that since the procedure adopted by it in dismissing the respondent was one that respected respondent’s constitutional right to fair labour practices, it would constitute an infringement on the appellant’s (employer’s) right to fair labour practices if the dismissal were to be regarded as unlawful. In accepting this submission the court

¹³¹ (2003) 24 ILJ 95 (CC).

¹³² Par 33.

¹³³ 2004 ILJ 659 (SCA).

stated that the constitutional dispensation introduced into the employment relationship “a reciprocal duty to act fairly”.¹³⁴

In the case of *National Entitled Workers Union vs. CCMA, Nana Keisho NO and George Laleta Manganyi*¹³⁵ the Labour Court like the Constitutional Court in *National Union of Health and Allied Workers Union v University of Cape Town*¹³⁶ also expressed the view that what constitutes an unfair labour practice for purposes of section 23(1) is not capable of precise definition and that much depends on what is fair in the circumstances and that this concept is flexible. The court found that the concept as provided for in the Constitution was broad enough (unlike the concept in the LRA) to include employee conduct vis-à-vis an employer that might be unfair. The crux, therefore, turns on what would be fair or unfair in the circumstances.

3 Conclusion

The court decisions that have attempted to give some content to the constitutional right to fair labour practices indicate that it is an imprecise concept, incapable of definition, open-ended and that the over-riding criterion should be fairness. The old Industrial Court also had to deal with an open-textured definition and ultimately decide what was fair in the circumstances. The old Industrial Court decisions provide useful precedents to assist the courts in deciding what constitutes fairness in the context of unfair labour practices. In order for conduct not to be considered unfair it should be both procedurally and substantively fair. In the light of the fact that the 1991 definition of an unfair labour practice was in force at the time the Constitution was enacted, it seems appropriate that in determining the fairness of employer conduct the effects of the conduct on the worker or employee should be considered. It is in this sense that the reasonable employer test should be rejected. These effects should then be weighed against the possible justification of employer conduct in terms of the economic rationale approach.

¹³⁴ P 667.

¹³⁵ Case JR 685/02 (unreported).

¹³⁶ 2003 ILJ 95 (CC).

As seen,¹³⁷ the concept of an unfair labour practice can be extended to include unfair employee conduct vis-à-vis the employer. It may also include dismissals¹³⁸ and redeployment or transfer of employees.¹³⁹ Fairness as opposed to lawfulness will be the determining factor. Ultimately, what the judge considers to be fair or unfair in the circumstances will prevail. What is certain, as Landman concludes is that: “The unfair labour practice has crept into the heart of our labour law jurisprudence and it may be expected that it will continue to grow, by conventional and unconventional means, as long as lawful, unilateral action is regarded by the courts, in their capacity as custodians of industrial justice, as unfair and inequitable. This is the legacy of the Wiehahn Commission.”¹⁴⁰

F England

The South African common law has commonalities with the English common law.¹⁴¹ It is not surprising therefore that in interpreting the term ‘unfair labour practices’ the South African industrial court referred to statutory definitions, court cases, judicial opinions emanating from England and the USA.¹⁴² Nevertheless, in undertaking comparative studies, one should not lose sight of the fact that different legislation might have different underlying policies and objectives and national and socio- economic circumstances might also differ. Furthermore, and even more importantly, the statutes that are being compared are different.

Be that as it may, it is nevertheless useful to have recourse to other systems when our law lacks clarity. As was stated in the industrial court: “...one should be cautious of relying on foreign sources in interpreting and developing the concept of

¹³⁷ *National Entitled Workers Union case and National Health and Allied Workers Union case supra.*

¹³⁸ *Fedlife Assurance Ltd v Wolfaardt supra.*

¹³⁹ *Nelson & Others v MEC Responsible for Education in the Eastern Cape & Another supra.*

¹⁴⁰ “Fair Labour Practices – The Wiehahn Legacy” 2004 *ILJ* 805, 812.

¹⁴¹ Poolman *Principles of Unfair Labour Practice* (1985) 128.

¹⁴² Brassey, *et al The New Labour Law* (1987) 367.

‘unfair labour practice ... although ... such development might be enriched by taking cognisance of what is happening overseas on this specialized field.’¹⁴³

The English law version of ‘unfair labour practice’ centres on unfair dismissals.¹⁴⁴ The English courts and tribunal’s interpretation of unfair dismissals guided the South African Industrial Court in giving content to the term unfair labour practice in its different versions in respect of dismissals.¹⁴⁵ Guidance as to what constitutes a fair reason for dismissal (substantive fairness) and what the procedural requirements for a fair dismissal should be is available in English law. Our Industrial Court made use of such guidance.¹⁴⁶ As stated by Brassey *et al.*¹⁴⁷ “The English unfair dismissal cases are also helpful. They can teach us, for example, about the place of warnings in discipline, about the nature and purpose of a disciplinary enquiry and about the function of an internal appeal hearing. They can shed light on the weight to be attached to internal disciplinary codes when they are unilaterally imposed by the employer, and when they are agreed. And, though we know that one case of misconduct is never on all fours with another, they can suggest standards to us by which we can decide whether the misconduct was grave enough to justify dismissal.”

The approach of the Industrial Court with reference to dismissals has more or less been codified in our present legislation.¹⁴⁸ One major difference is that in South Africa unfair labour practices, are not limited to unfair dismissals and entail other

¹⁴³ See also *Mahlangu v CIM Deltak* 1986 7 ILJ 346 (IC) at 354C-D where it was stated: “The decisions of foreign jurisdictions ought to have a strong persuasive influence on the industrial court’s decision and serve as guidelines in the absence of any relevant South African case law”.

¹⁴⁴ Brassey *et al* op cit 369.

¹⁴⁵ See 1980, 1988 and 1991 definitions *supra*.

¹⁴⁶ See for example *Lefu v Western Areas Gold Mining Co* (1985) 6 ILJ 307 (IC); *NUM v Nuclear Fuels Corp of SA* (IC 24.10 1985, unreported); *NUM v Western Areas Gold Mining Co* 1985 6 ILJ 380 (IC); *Robbertze v Matthew Rustenburg Refineries (Wadeville)* 1986 7 ILJ 64 (IC).

¹⁴⁷ *Op cit* 71.

¹⁴⁸ Code of Good Practice: Dismissal in Schedule 8 of LRA

conduct as well, including other disciplinary action, short of dismissal, conduct relating to promotion, training, demotions, the provision of benefits and so forth.¹⁴⁹

Comparisons with English law are also relevant to the question of the interpretation of general and all embracing concepts such as fairness and reasonableness that are inherent in any concept of unfair labour practice.¹⁵⁰

G United States of America

1 Introduction

Until the middle of the 19th century trade unions were regarded as criminal associations. Nevertheless, from 1890 to 1932 the trade union movement grew rapidly.¹⁵¹ Despite trade unions no longer being considered criminal associations their activities were restricted by labour law injunctions (interdicts).¹⁵² Gradually however, the suppression of trade unions was progressively relaxed by legislation. The result of such legislation is that the American system is based on the following premise: Collective bargaining is the principal means of settling disputes of interest.¹⁵³ Consequently the right to freedom of association and organisation for the purposes of collective bargaining is protected.¹⁵⁴ The underlying policy of this legislation is the pursuit of self-determination by the majority of employees and the encouragement and protection of the process of collective bargaining.¹⁵⁵

This change in policy towards trade unions was a result of powerful social, economic and political forces at the end of World War II. When the National Labour Relations Act 1935 (the Wagner Act) was passed one in five Americans

¹⁴⁹ See definition of unfair labour practice contained in the LRA s 186(2).

¹⁵⁰ See ch 7 subsection C where the English courts' application of the concept of fairness in employment contracts is discussed.

¹⁵¹ Gregory *Labor and the Law* (1946) 15.

¹⁵² *Idem*.

¹⁵³ See Raza and Anderson *Labour Relations and the Law* (1996) 4-12 for a detailed analysis of the progression of US law towards tolerance and even encouragement of trade unions.

¹⁵⁴ See the National Labour Relations Act 1946 (NLRA; also known as the Taft Hartley Act). This Act replaced the National Labour Relations (Wagner) Act of 1935 and has been amended on several occasions.

¹⁵⁵ Raza and Anderson *op cit* 167.

was unemployed.¹⁵⁶ Sympathy for the working people, patriotism, a determination to reduce unemployment and increase wages were all underlying goals that helped shape the underlying policy of the National Labour Relations Act 1947 (hereafter the NLRA).

The objectives of this legislation are to encourage economic activity by defining and protecting the respective rights of employers and employees and creating orderly and harmonious procedures in order to prevent disregard of these rights by the parties to the employment relationship. All this is in the interests of public policy as is the encouragement of orderly collective bargaining. Ultimately the objective is to prevent or at least curtail industrial action.¹⁵⁷

2 Specific Unfair Labour Practices

2.1 Introduction

Unlike under English law the NLRA makes provision for certain unfair labour practices which do not deal directly with dismissals at all. Instead the Act grants both employers and employees certain rights in order to promote collective bargaining. The most important of these unfair labour practices will be mentioned briefly hereunder.¹⁵⁸

2.2 Unfair Labour Practice of Employers

The NLRA prohibits any employer from:

- (a) interfering with restraining or coercing employees in the exercise of their rights to organize and bargain collectively;¹⁵⁹
- (b) dominating or interfering with the formation or administration of any labour organization or contributing financial or any other support to it;

¹⁵⁶ *Idem.*

¹⁵⁷ S 1 of NLRA.

¹⁵⁸ Only a brief discussion is necessary because the focus of this article is the protection of the individual employee (i.e. individual labour law as opposed to collective labour law).

¹⁵⁹ S 7 of NLRA guarantees employees the right to organize and bargain collectively.

- (c) Discriminating or hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labour organisation;
- (d) discharging or otherwise discriminating against an employee because he/she filed charges or gave testimony under the NLRA; and
- (e) refusing to bargain in good faith with representatives of their employees.¹⁶⁰

2.3 *Employer Interference with Protected Employee Rights*

Section 8(a) (i) prohibits employers from interfering with, restraining, or coercing employees in the exercise of their collective bargaining rights. The decisions of the National Labour Relations Board (NLRA) and the Supreme Court have given content to this right. For example employer speech held to be *per se* coercive must consist of threats of discharge, lay-offs, or demotion because of union activity.¹⁶¹ It has at times been difficult to distinguish between a threat of reprisal and a legitimate prediction about the future state of affairs within the company. An important determining factor is whether or not the predictions are based on 'objective facts'. Secondly the court and NLRB also look to the 'surrounding context' in determining whether or not employer speech constitutes a threat or coercion.¹⁶² It is still unclear as to whether employer intent is a prerequisite for such violations.¹⁶³

Employer interrogation of employees concerning union membership and/or union activity has been found to be unlawful where such interrogations would restrain or interfere with employee's lawful rights.¹⁶⁴

2.4 *Employer Domination of Labour Unions*

Section 8(a) (2) of the NLRA outlaws employer interference or domination with the formation or administration of union activity as well as the provision of financial and

¹⁶⁰ S 8(a) and 8(e) of NLRA.

¹⁶¹ Raza and Anderson *op cit* 237.

¹⁶² Raza and Anderson *op cit* 238.

¹⁶³ *Ibid* 236.

¹⁶⁴ *Ibid* 240-241.

other assistance to unions. This is to prevent the creation of company unions. Both the Supreme Court and the NLRB have found difficulty in differentiating between unlawful employer support for a union and lawful co-operation with the union. Generally, what is decisive is the 'totality of the employer's conduct and the tendency to coerce employees in their choice of bargaining agent'.¹⁶⁵

2.5 *Discrimination Against Employees for Engaging or not Engaging in Union Activity.*

Section 8(a) (3) of the NLRA outlaws discrimination against employees for taking part in union activities or for not taking part in union activities. Such discrimination includes dismissal, denying promotion, reduction of benefits, change in work conditions and less favourable working conditions than other employees.¹⁶⁶ The purpose of this section is to prevent employers from encouraging or discouraging trade union membership.

Employers are prohibited from discriminating against employees for taking their grievances to the NLRB in terms of section 8(a) (4). prohibits Employer actions that are prohibited include hiring, firing, lay off, demotion, transfer and forced resignation. Protected employee action includes participating in NLRB investigations, refusing to testify, testifying, filing charges and announcing an intention to file an unfair labour practice charge.¹⁶⁷

2.6 *Refusal to Bargain in Good Faith*

The employer's refusal to bargain in good faith is prohibited.¹⁶⁸ This prohibition is problematic because the legislation does not oblige either unions or employers to accept proposals in the bargaining process. In terms of this section the employer must bargain in accordance with the principles contained in Section 8(d), which defines good faith bargaining. The test of good faith is flexible and dependent on

¹⁶⁵ *Ibid* 259.

¹⁶⁶ Poolman *Principles of Unfair Labour Practice* (1985) 141.

¹⁶⁷ Raza and Anderson *op cit* 260.

¹⁶⁸ S 8(a) (5).

the surrounding circumstances and what the reasonable employer would do. The employer must display an open mind and sincere intention to bargain.¹⁶⁹

2.7 *Unfair Labour Practices of Unions*

Since South African law does not deal specifically with union unfair labour practices it is not necessary for the purposes of this article to discuss these unfair labour practices in detail.¹⁷⁰ Briefly, it is an unfair labour practice for a union to inter alia:

- (i) restrain or coerce employees in the exercise of their rights to join a union, to bargain collectively, or refrain from such activities;¹⁷¹
- (ii) to discriminate against an employee or cause an employer to discriminate against an employee who has been denied union membership on a ground other than failure to pay membership fees;¹⁷²
- (iii) to refuse to bargain collectively in good faith;¹⁷³
- (iv) to engage in secondary strikes, boycotts, picketing and other actions specified in the Act.¹⁷⁴
- (v) To attempt to or to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.¹⁷⁵ The purpose of this provision is to create and maintain more jobs than are required by the employer.
- (vi) To engage in organizational and recognitional picketing by uncertified unions.¹⁷⁶

¹⁶⁹ Poolman *op cit* 144.

¹⁷⁰ For a detailed discussion of these unfair labour practices, see Raza and Anderson *op cit* ch 10.

¹⁷¹ S 8(b) (1).

¹⁷² S 8(b) (2).

¹⁷³ S 8(a) (3).

¹⁷⁴ S 8(b) (4).

¹⁷⁵ S 8(b) (6).

¹⁷⁶ S 8(e).

3 Conclusion

American labour law attempts to regulate labour relations by collective bargaining. As such it sets the ground rules for collective bargaining and creates rights for both parties so as to protect and encourage the collective bargaining process. Much can be gleaned from American law with reference to the process of collective bargaining including what is meant by bargaining in good faith,¹⁷⁷ and what constitutes reasonable procedures.¹⁷⁸

However, it must be borne in mind that the South African legislative system deals with unfair labour practices in a completely different manner. It follows therefore that our courts should not rely too heavily on the American labour law. 'Arbitrator law', on the other hand, could provide some assistance in determining both substantive and procedural fairness of employer's disciplinary action.¹⁷⁹

H Conclusion

The court decisions that have attempted to give some content to the constitutional right to fair labour practices seem to indicate that it is an imprecise concept, incapable of definition, open-ended and that the over-riding criterion should be fairness. The old Industrial Court also had to deal with an open-textured definition and ultimately decide what was fair in the circumstances. It follows, therefore, that the old Industrial Court decisions will provide useful precedents to assist the courts in deciding what constitutes an unfair labour practice. As seen,¹⁸⁰ the concept can

¹⁷⁷ *SADWU v The Master Diamond Cutters Association of SA* 1982 3 ILJ 87 (K) 120E-G where the Industrial Court applied the American principle of *bona fide* negotiation.

¹⁷⁸ See *NAAWU v Pretoria Precision Castings* 1985 6 ILJ 369 (IC) 378D-E.

¹⁷⁹ For an analysis of the interpretation of the concepts of fairness and reasonableness in the context of the employment relationship by the courts in the USA, see ch 7 sub-section E *infra*.

¹⁸⁰ *National Entitled Workers Union case (supra)* and *National Health and Allied Workers Union case (supra)*.

be extended to include unfair employee conduct vis-à-vis the employer. It may also include dismissals¹⁸¹ and redeployment or transfer of employees.¹⁸²

Fairness as opposed to lawfulness will be the determining factor. As such recourse to other systems of labour law, especially the English system might be useful to the courts. In the end, what the judge considers to be fair or unfair in the circumstances will prevail.

¹⁸¹ *Fedlife Assurance Ltd v Wolfaardt (supra)*.

¹⁸² *Nelson & Others v MEC Responsible for Education in the Eastern Cape & Another (supra)*.