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## *Reflections on Proposed Law Reforms for Unfair Dismissal*

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### ABSTRACT

The NEDLAC social partners have been engaged in a process of formulating amendments to a number of key pieces of labour legislation and their accompanying codes. In an attempt to foster job creation, policymakers have, among others, published proposals with the view to relaxing the seemingly onerous requirements in respect of unfair dismissal law. Although the negotiating parties have not reached consensus on key aspects of the amendments, significant suggestions have been placed on the table regarding amendments to the Code of Good Practice: Dismissal, as well as important provisions of the Labour Relations Act. The proposed amendments seek to relax unfair dismissal provisions in respect of small employers; they exclude unfair dismissal protection during probation; they recognise incompatibility as a separate ground of dismissal; and they place a cap on the maximum compensation which higher earning employees might be eligible to claim. This contribution analyses these proposed amendments, focusing on their projected effects on the regulatory landscape of unfair dismissal in South Africa.

*Keywords:* Code of Good Practice: Dismissal — unfair dismissal — compensation — Labour Relations Amendment Bill — National

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## 1 INTRODUCTION

During 2021 and 2022 government, business, and organised labour tabled proposals for labour law reform at the National Economic Development and Labour Council (NEDLAC). The social partners articulated that there is a current need for reforms, among others, to provide an enabling environment to support job creation and to ensure the sustainability of small and medium businesses.<sup>1</sup> The suggested reforms also seek to provide protection to workers in the changing world of work and to promote the efficiency of labour market institutions such as the Commission for Conciliation, Mediation and Arbitration (CCMA). NEDLAC established a labour law reform task team (task team) consisting of representatives of the social partners. This body guided a process from April 2022 until October 2024, which resulted in the following documents: the Final NEDLAC Report on the Law Reform Process (NEDLAC report);<sup>2</sup> the draft Labour Relations Amendment Bill, 2024 (LRA Bill); the Basic Conditions of Employment Amendment Bill, 2024 (BCEA Bill); the Employment Equity Amendment Bill, 2024 (EEA Bill); and the National Minimum Wage Amendment Bill, 2024 (NMWA Bill).

In addition to these documents, the Department of Employment and Labour also published on 21 January 2025 a new Draft Code of Good Practice: Dismissal (draft code) for public comment.<sup>3</sup> The draft code will replace, rather than merely amend, the current Code of Good Practice: Dismissal (current code). The draft code will also consolidate two of the current codes of good practice. In essence, it will repeal the current code, and the Code of Good Practice: Dismissal Based on Operational Requirements (code on operational requirements), and the new items will be included in the draft code.

This contribution does not cover all of the proposed amendments in each of the amendment bills, which include significant amendments to essential services and to the definition of an unfair labour practice.<sup>4</sup> The spotlight falls on the proposals relating to unfair dismissal protection of employees based on misconduct, incapacity, and operational requirements. It compares the current and proposed legislative amendments as well as the current and the draft codes. The article concludes with suggestions

<sup>1</sup> Final NEDLAC Report on the Law Reform Process <https://nedlac.org.za/wp-content/uploads/2025/02/FINAL-Nedlac-report-LLRTT-1102-v13.pdf>, accessed 11 March 2024 3.

<sup>2</sup> *ibid.*

<sup>3</sup> GN 51947 GG 11786 of 21 January 2025 published in terms of s 203(2) of the LRA.

<sup>4</sup> As defined in the current s 186 of the LRA. A large part of the current definition of 'unfair labour practice' has been removed in the suggested s 34 of the LRA Bill.

regarding the improvement of the draft code and the relevant provisions of the LRA Bill.

## 2 NATURE OF CODES OF GOOD PRACTICE AND LEGISLATION

The status and enforceability of the codes of good practice of the Labour Relations Act (LRA) are not controversial. The codes consist of guidelines rather than binding rules.<sup>5</sup> Whereas labour legislation, including the LRA, is passed by parliament and constitutes binding and enforceable rules, codes of good practice are the product of agreement by the social partners at NEDLAC.<sup>6</sup> In *Engen Petroleum Ltd v CCMA & others*<sup>7</sup> it was confirmed that the LRA prevails over any interpretation and application that may be given to the items of any code of good practice. It follows that any changes that may be implemented subsequent to the enactment of the LRA Bill will trump the provisions of the draft code.

Despite the non-binding status of codes of good practice, these guidelines are extremely important. In the words of the LRA, ‘any person’ contemplating whether the dismissal of an employee was in accordance with fair procedures, or for a fair reason, ‘must take into account any relevant code issued in terms of this Act’.<sup>8</sup> It follows that the implementation of legislative changes and the introduction of new codes of good practice regarding the dismissal of employees will be of paramount importance to, among others, chairpersons of disciplinary enquiries, arbitrators of the CCMA and bargaining councils, and judges of the labour courts.

## 3 GROUNDS OF UNFAIR DISMISSAL

### 3.1 *Contextual background*

The Explanatory Memorandum to the LRA 1995<sup>9</sup> emphasised the need for dismissal law that was void of legal formalities and expense. Therefore, it sought to move away from the time-consuming, court-like proceedings adopted during the era of the Industrial Court. One of the objectives of the LRA was to provide for a fair, but brief, pre-dismissal procedure to protect small employers from time consuming, elaborate processes, which was based on the acknowledgement that not all procedural defects result in substantial prejudice to employees.<sup>10</sup>

<sup>5</sup> D du Toit, S Godfrey, C Cooper et al *Labour Relations Law* 7 ed (LexisNexis 2023) 514.

<sup>6</sup> LRA s 203(2).

<sup>7</sup> (2007) 28 *ILJ* 1507 (LAC), [2007] 8 *BLLR* 707 (LAC).

<sup>8</sup> See LRA s 188(2).

<sup>9</sup> ‘Explanatory Memorandum’ prepared by the Ministerial Task Team (1995) 16 *ILJ* 278 315-316.

<sup>10</sup> *ibid* 317.

A further objective was to adopt a simple, quick, cheap, and non-legalistic approach to dispute resolution through arbitration.<sup>11</sup>

The drafters of the LRA, being cognisant of international law, notably the ILO's Termination of Employment Convention 158 of 1982,<sup>12</sup> formulated the LRA in a manner that sets out two components to a fair dismissal, substantive and procedural fairness.<sup>13</sup> In respect of substantive fairness, the LRA recognises misconduct, incapacity, and operational requirements as fair reasons for dismissal.<sup>14</sup> In respect of procedural fairness, the LRA provides that a dismissal is unfair if the employer fails to prove that the dismissal was brought about in accordance with a fair procedure.<sup>15</sup>

The LRA does not go further to explain what constitutes a fair procedure. This is done in the current code.<sup>16</sup> The LRA does, however, highlight the importance of the code.<sup>17</sup>

### 3.2 *General amendments to dismissal law and implications for small business*

The LRA Bill will not affect the fair reasons for a dismissal as contained in 188(1)(a) of the LRA.<sup>18</sup> However, the proposal will place limitations on an employee's right to rely on the unfair dismissal provisions. While the LRA's current unfair dismissal provisions apply to anyone who can satisfy the requirement of being an employee, the LRA Bill proposes that unfair dismissal protection will not apply to a new employee:

- '(a) during the first three months of employment; or
- (b) if it is a longer period, a period of probation that is specified in a contract of employment and is both reasonable and operationally justifiable'.<sup>19</sup>

The LRA Bill, therefore, seeks to introduce qualifying periods in respect of unfair dismissal protection. This notion is endorsed in international law. Article 2 of ILO Convention 158 confirms that member states may exclude 'workers serving a period of probation or a qualifying period of employment' from all, or some of the provisions of the convention. While South Africa has not ratified the convention, its dismissal law

<sup>11</sup> *ibid* 318-319.

<sup>12</sup> *ibid* 317.

<sup>13</sup> See s 188(1)(a-b) of the LRA and current code item 2.

<sup>14</sup> LRA s 188(1)(a).

<sup>15</sup> *ibid* s 188(1)(b).

<sup>16</sup> Current code item 4.

<sup>17</sup> LRA s 188(2) as explained in part 2 above.

<sup>18</sup> LRA s 188(1)(a) states that 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. See also draft code item (1), which states that the code provides guidance on how the legal obligations under the Act in respect of dismissals for misconduct, incapacity and operational requirements apply to employers and employees.

<sup>19</sup> LRA Bill s 188(4).

was formulated with the convention in mind, and the LRA's dismissal provisions are substantially compliant with its provisions.<sup>20</sup>

Despite the current LRA remaining silent on the specifics of procedural fairness, the LRA Bill clarifies that, subject to any applicable collective agreement, a fair procedure under s 188(2) requires that an employee be given 'an adequate and reasonable opportunity to respond to the reason for dismissal'.<sup>21</sup>

Although it is the code that outlines procedural requirements for dismissals based on misconduct and incapacity, the LRA Bill appears to introduce an overarching guiding principle pertaining to procedural fairness. It confirms that an employee must receive a fair opportunity to 'respond'.<sup>22</sup> However, the phrasing raises concerns. The wording 'to respond to the reason for dismissal' implies that the opportunity arises *after* the dismissal has occurred. Yet both the current and draft codes require this opportunity to be provided *before* the decision is made. Similarly, Convention 158 reinforces this principle, stipulating that a worker may not be dismissed without first having the chance to defend her- or himself against the allegations.<sup>23</sup>

Item 3 of the draft code introduces new principles, which are arguably some of the most controversial and most significant changes that may be incorporated. If adopted, this will be the first code where the term 'small business' is used. Under the subheading 'small businesses', item 3(1) of the draft code states that '[t]his Code shall not be interpreted as requiring small businesses to comply with obligations that are not practical or feasible for their operation'. Therefore, any person determining the fairness of a dismissal must consider the circumstances in which small businesses operate, in addition to any other guidelines set out in the code.<sup>24</sup>

Admittedly, the current code already recognises that procedures followed in the process of dismissals can vary depending on the size and

<sup>20</sup> See for example *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* (2006) 27 ILJ 1644 (LC) 14 (*Avril Elizabeth Home*).

<sup>21</sup> Section 188(2) states that subject to subsection (3), 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 of good practice issued in terms of this Act.

<sup>22</sup> Section 35 of the LRA Bill suggests the inclusion of a new s 186(3) which will state that '[s]ubject to any applicable collective agreement, a fair procedure for the purpose of subsection (2) is one in which the employee has been given an adequate and reasonable opportunity to respond to the reason for dismissal'.

<sup>23</sup> ILO Termination of Employment Convention 158 of 1982 art 7.

<sup>24</sup> Draft code item 3(2).

nature of the employer's business.<sup>25</sup> This accommodates small businesses to some extent. Nonetheless, as pointed out by Cheadle as far back as 2006, unfortunately, these concessions have not been properly utilised by CCMA commissioners and in practice have offered limited reprieve for small businesses. Cheadle commented that 'arbitrators and the courts just do not take size into account'. Van Niekerk echoed this by explaining that some CCMA commissioners continue to apply 'a stricter level of workplace procedure than that which is required by the Code of Practice', negatively affecting smaller businesses.<sup>26</sup>

Cheadle has also criticised the complex pre-dismissal procedures being applied. He contends that small businesses are characterised by limits on internal expertise and resources, a lack of systems, and the personal nature of working in a small workplace. He has argued that procedural requirements must be simplified and that all that must be required is that the employee be given an opportunity to be heard before dismissal.<sup>27</sup>

In light of the above, it comes as no surprise that the new item 3(3) places specific emphasis on the fact that small businesses cannot reasonably be expected to engage in 'time-consuming investigations or pre-dismissal processes' while keeping the operation going. The draft code highlights that small businesses do not have 'human resource departments staffed by people with skills and experience in these matters'.

Considering the important role played by small businesses<sup>28</sup> and the goal of economic development and job creation sought to be achieved by the LRA and the LRA Bill,<sup>29</sup> there is a clear need to limit pre-dismissal procedures for small businesses, particularly as onerous dismissal

<sup>25</sup> Item 1 of the current code states that 'each case is unique, and departures from the norms established by this Code may be justified in proper circumstances. For example, the number of employees employed in an establishment may warrant a different approach'. Item (3) of the code states that 'the form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business. In general, a larger business will require a more formal approach to discipline'. Furthermore item 4(4) which deals with procedural fairness for misconduct dismissals states that 'in exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures'.

<sup>26</sup> See H Cheadle 'Regulated flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663 at 686 and A van Niekerk 'Regulating flexibility and small business: Revisiting the LRA and BCEA: A response to Halton Cheadle's concept paper' Working Papers 07119, Development Policy Research Unit, University of Cape Town. <https://ideas.repec.org/p/ctw/wpaper/07119.html>

<sup>27</sup> *ibid* Cheadle.

<sup>28</sup> See A Ayandibu and J Houghton 'The role of small and medium scale enterprise in local economic development' (2017) 11 (2) *J of Business and Retail Management Research* 134 explains that small businesses 'contribute significantly to the provision of productive employment opportunities, the generation of income and, eventually, the reduction of poverty'. See also 'The Small, Medium and Micro Enterprise Sector of South Africa' research note 2016 (1) commissioned by the Small Enterprise Development Agency January 2016 <https://www.seda.org.za/Publications/Publications/The%20Small,%20Medium%20and%20Micro%20Enterprise%20Sector%20of%20South%20Africa%20Commissioned%20by%20Seda.pdf> at 5.

<sup>29</sup> Section 1 of the LRA states that 'the purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace'.

laws have been identified as a significant challenge for them.<sup>30</sup> The draft code seeks to ensure that small businesses are not subjected to impractical or unfeasible processes.

It is submitted that this approach attempts to strike a balance. On the one hand, it envisages protecting small businesses from burdensome dismissal procedures that hinder their operations, and on the other, it seeks to safeguard employees' rights as enshrined in s 23(1) of the Constitution.<sup>31</sup> The LRA was enacted to give effect to s 23(1),<sup>32</sup> and while one of its stated aims is to promote economic development, another equally important goal is to advance social justice. Therefore, it is crucial to balance these two imperatives carefully.

The LRA also seeks to give effect to South Africa's obligations as a member state of the ILO,<sup>33</sup> which stems from the constitutional recognition given to international law.<sup>34</sup> As discussed above, article 7 of Convention 158<sup>35</sup> requires compliance with a fair procedure before a worker's employment is terminated for reasons relating to the worker's conduct or performance. ILO Recommendation 166<sup>36</sup> introduces further requirements for procedural fairness.<sup>37</sup> However, both the convention and recommendation provide for exceptions. Convention 158 states that workers should be provided an opportunity to defend themselves against the allegations made, *unless the employer cannot reasonably be expected to provide this opportunity*.<sup>38</sup> The recommendation permits the exclusion of certain categories of employees from its provisions. One category is the size or nature of the undertaking in which the employees are employed.<sup>39</sup>

It is evident from the above that relaxing pre-dismissal procedures for small businesses would be permissible from an ILO perspective and aligns with the LRA's objective of promoting economic development. Nonetheless, a crucial question remains to be answered. How should a 'small business' be defined? The social partners at NEDLAC have been reluctant to establish a clear definition of small business. This ambiguity creates an opportunity for relatively small employers, whether they have five, ten, or twenty employees, to attempt to bypass fundamental

<sup>30</sup> See 'The Small, Medium and Micro Enterprise Sector of South Africa' research note 2016 n 28 above 8-9.

<sup>31</sup> Section 23(1) states that everyone has the right to fair labour practices. As explained by A van Niekerk and N Smit *Law@Work* (LexisNexis 2023) 47 the right to fair labour practices includes unfair conduct relating to work security.

<sup>32</sup> LRA s 1(a).

<sup>33</sup> *ibid* s 1(b).

<sup>34</sup> Constitution s 39(2).

<sup>35</sup> ILO Termination of Employment Convention 158. See also Van Niekerk n 26 above 22.

<sup>36</sup> ILO Termination of Employment Recommendation 166 of 1982.

<sup>37</sup> *ibid*. Articles 9, 12 and 13 explain that an employee is entitled to be assisted by another person when defending her- or himself, to receive written notification of termination of employment and to receive a written statement from the employer of the reasons for the termination.

<sup>38</sup> ILO Termination of Employment Convention 158 art 7.

<sup>39</sup> ILO Recommendation 166 art 2(4).

principles of procedural fairness in dismissals by asserting that they fall within the undefined category of small business. It is recommended that to prevent CCMA commissioners and judges from determining on a case-by-case basis whether an employer qualifies as a small business, a clearly defined definition should be provided in the draft code.

Cheadle argued that while the simplest approach would be to base the definition on the number of employees, this method had shortcomings. He explained that such a mechanism prioritised ease of implementation and enforcement over the motivating purpose for the policy of differentiation. Instead, he advocated defining small businesses based on their turnover.<sup>40</sup> Van Niekerk, drawing on comparative studies, noted that small businesses in other countries were typically defined by the number of employees.<sup>41</sup>

In some contexts, 'small business' has been equated with small, medium, and micro enterprises (SMMEs).<sup>42</sup> However, the definition of a small enterprise in the National Small Enterprise Act 102 of 1996 (as amended) is broad. This Act defines small enterprises based not only on employee numbers but also on turnover, which varies across sectors. Furthermore, small enterprises are categorised into three tiers: micro (0-10 employees), small (11-50 employees), and medium (51-250 employees).

Although the term 'small business' does not appear in the LRA, s 30(1)(b) makes reference to small and medium enterprises insofar as bargaining councils must provide for their representation.<sup>43</sup> There are also provisions in the LRA, the BCEA, and the EEA where provisions have been relaxed for certain employers. Section 198B(2) of the LRA, which provides protection to employees on fixed-term contracts earning below the earnings threshold, exempts employers with fewer than ten employees. It also exempts employers with fewer than 50 employees where their businesses have been operational for less than two years.

In terms of the BCEA, certain provisions do not apply to businesses employing fewer than five employees.<sup>44</sup> Furthermore, the Minister of Employment and Labour previously issued a determination for the small business sector regarding overtime, working hours, and family responsibility leave.<sup>45</sup> Here, small businesses are defined as those employing fewer than ten workers.<sup>46</sup>

<sup>40</sup> Cheadle n 26 above 699-700.

<sup>41</sup> Van Niekerk n 26 above 13.

<sup>42</sup> The Small Enterprise Development Agency (January 2016) 30.

<sup>43</sup> Du Toit et al n 5 above 33.

<sup>44</sup> Sections 30, 31 and 33 of the BCEA respectively exempt employers with fewer than five employees from informing employees of their rights, keeping of records and keeping of information about remuneration.

<sup>45</sup> Ministerial Determination 1: Small Business Sector GN 1295 GG 20587 of 15 November 1999.

<sup>46</sup> *ibid* item 1.1.

In addition, chapter III of the EEA applies only to designated employers. Originally, a designated employer was defined in s 1 of the EEA as an employer who employed 50 or more employees or an employer who employed fewer than 50 employees, but had a total annual turnover that was equal to or above the applicable annual turnover of a small business listed in Schedule 4 to the EEA. This schedule contained varying annual turnovers depending on the sector in which the business operated. However, this provision has recently been amended, and a designated employer is now solely defined based on the number of employees employed (those who employ 50 or more employees).<sup>47</sup> The Employment Equity Amendment Bill of 2020 clarified that this change was intended to reduce regulatory burdens on small employers.<sup>48</sup>

The above indicators serve as a reference point for defining a small business. It is suggested that the most effective method is to base the definition on the number of employees, as experience has shown that other criteria, such as turnover, introduce regulatory burdens and unnecessary complexity.

The critical question then arises: what should that threshold be? To strike the right balance between protecting small businesses and ensuring the right of employees to a fair dismissal, the number must be carefully calibrated. It should not be excessively high, nor unreasonably low. We suggest that a reasonable threshold would be ten employees. However, before settling on a specific figure, it would be prudent for the Department of Employment and Labour to gather more empirical data on the number and size of small businesses in South Africa. This can be facilitated through collaboration with the Department of Small Business Development. For these amendments to have real impact, they must be appropriately targeted, something that can be more accurately achieved through further consultation and data-driven analysis.

### 3.3 *Dismissals for misconduct*

#### 3.3.1 *Substantive fairness*

The draft code repeats a number of aspects which are contained in the current code. Item 6 highlights that the purpose of implementing disciplinary processes is ‘corrective’ and that this should be done ‘through graduated disciplinary measures’.<sup>49</sup> It reiterates that formal procedures do not have to be implemented every time a rule is breached and that informal advice and correction may be effective to deal with minor

<sup>47</sup> Employment Equity Amendment Act 4 of 2022 GN 3280 GG 48418 of 14 April 2023, with effect from 1 January 2025.

<sup>48</sup> GN 798 GG 43535 of 20 July 2020.

<sup>49</sup> Draft code item 6(2).

violations. It emphasises that warnings may be warranted in instances of repeated misconduct.<sup>50</sup>

In line with item 3, item 6(3) of the draft code relaxes the form and content of disciplinary rules and procedures for small businesses by stating that smaller employers may adopt a less formal approach to discipline. It further states that it is preferable for medium and larger employers to adopt written disciplinary codes to establish certainty and to promote consistency of application.<sup>51</sup>

The leniency extended to small businesses is a noticeable trend throughout the draft code. While this is commendable for the reasons articulated in part 3.2 above, the terminology used is inconsistent. Item 3 refers to 'small businesses', whereas item 6(3) mentions 'smaller employers'. If these two terms are intended to be synonymous, the same wording should be used throughout. Moreover, for consistency, the terms 'medium' and 'large employers' should ideally also be clearly defined.

There has been a reorganisation of information pertaining to substantive and procedural fairness. Following item 6, four headings have been included dealing with substantive fairness. Thereafter, procedural fairness is addressed under item 11. Under the sub-heading 'fair reason for misconduct dismissal', the new item 7 of the draft code reconfirms that an employee may be dismissed for 'serious misconduct if the misconduct renders the continuation of the employment relationship intolerable'. Item 7 does not add anything new, as it merely restates and replaces item 3(4) of the current code, which provides that 'it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such a gravity that it makes continued employment intolerable'.

It is interesting to note, though, that whereas the current item 3(4) provides examples of serious misconduct, such as 'gross dishonesty', 'wilful damage to property' and 'gross insubordination' these specific examples have been left out in the draft code. Although it may be argued that the draft code sets out to streamline and shorten the current code, it is submitted that the current provision is useful in so far as it provides examples rather than leaving it open to the interpretation and creativity of chairpersons of disciplinary enquiries, arbitrators and judges to determine what constitutes serious misconduct.

Item 8, which has the heading 'Guidelines for deciding a fair sanction' is similar to the current code item 7 under the heading 'Guidelines in cases of dismissal for misconduct'. This item essentially sets out the factors that must be considered by a person determining whether dismissal for misconduct is fair. The first factor is whether the employee contravened a rule or standard regulating conduct in, or of relevance

<sup>50</sup> *ibid* item 6(6).

<sup>51</sup> *ibid* item 6(3) and (5).

to, the workplace.<sup>52</sup> The draft code introduces changes to the second factor, which specifies the aspects to be considered if a rule or standard is contravened. The following four factors in the current code remain unchanged namely, whether the rule was a valid and reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; whether the rule or standard has been consistently applied by the employer; and whether dismissal is an appropriate sanction for the contravention of the rule or standard.<sup>53</sup>

However, the draft code includes two new aspects. The importance of the rule or standard in the workplace is emphasised and the actual or potential harm or damage caused by the employee's contravention of the rule or standard is highlighted.<sup>54</sup>

In an important development, a number of additional aspects have been included in item 9 of the draft code, under the heading '[t]he sanction of dismissal'. The factors are: the nature and requirements of the job, the nature of the misconduct and its 'effect' on the employer's business; whether progressive discipline might prevent a recurrence of the misconduct; acknowledgement of wrongdoing by the employee; and the circumstances of the employee such as length of service, disciplinary record and the effect of dismissal on the employee. While the current code under item 3(5) requires some of these factors to be taken into account by the employer when deciding whether or not to impose the penalty of dismissal,<sup>55</sup> the draft code requires that these factors be taken into account by arbitrators when considering the fairness of the employer's decision to dismiss.

The inclusion of these requirements arguably arises from the jurisprudence, which highlights that there are two elements to determining whether dismissal for misconduct is fair. The one being the guilt of the employee, the second being whether dismissal is an appropriate sanction.<sup>56</sup> A number of these requirements also accord with the factors that were set out by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,<sup>57</sup> where the reasonable commissioner test was introduced.<sup>58</sup>

Although not new, the draft code discusses 'consistency' under a new heading and in a new item 10. The item repeats the current code's item 3(6), which requires consistency in applying the sanction of dismissal to employees. It does, however, explain in a footnote that inconsistency does not preclude an employer from dismissing an

<sup>52</sup> See current code item 7(a) and draft code item 8(1).

<sup>53</sup> Current code item 7(b)(i)-(iv) and draft code item 8(2)(a, b, e, f).

<sup>54</sup> Draft code item 8(2)(c-d).

<sup>55</sup> Current code item 3(5).

<sup>56</sup> A Myburgh and C Bosch *Reviews in the Labour Courts* (LexisNexis 2016) 271. See also Van Niekerk and Smit n 31 above 295.

<sup>57</sup> (2007) 28 ILJ 2405 (CC) (*Sidumo*).

<sup>58</sup> *ibid* paras 78 and 110.

employee if the employee's misconduct has rendered the continuation of the employment relationship intolerable.

It is our submission that the additions to substantive fairness are well founded, offering more comprehensive guidance on the factors to consider when assessing whether dismissal constitutes a fair sanction. Given South Africa's high unemployment rate and broader social challenges,<sup>59</sup> greater emphasis on the appropriateness of dismissal as a sanction is both necessary and justified. While these factors have already become embedded in our jurisprudence through judicial intervention, their formal inclusion in the draft code enhances clarity.

### 3.3.2 *Procedural fairness*

The requirements for procedural fairness are set out in item 4 of the current code. It states that 'normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry'. It further requires that the employee be notified of the allegations in a form and language that is understandable, that the employee be allowed to state a case in response to the allegations, that the employee be given a reasonable time to prepare the response, and that the employee be entitled to assistance by a trade union representative or fellow employee. After the enquiry the employee must be informed of the decision, preferably in writing. If the employee is dismissed, the reason for dismissal must be provided and the employee must be informed of the right to lodge an unfair dismissal dispute with the CCMA or bargaining council. Importantly, room is made for the relaxation of these requirements. Item 4(4) states that 'in exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures'.

Item 11 of the draft code differs from the well-known item 4 of the current code. It starts off by explaining that the 'purpose of a fair procedure is to ensure a genuine dialogue and an opportunity for reflection before any decision is taken' and proceeds to state that the prerequisite of a fair procedure is to give employees 'an adequate and reasonable opportunity to respond to the allegation of misconduct'. Similar wording is used in the proposed amendment to the LRA discussed under part 3.2. The proposed s 188(3) states that 'a fair procedure is one in which the employee has been given an adequate and reasonable opportunity to respond to the reason for dismissal'. However, as stated in 3.2 above, the

<sup>59</sup> Statistics South Africa Quarterly Labour Force Survey (QLFS) – Q1: 2025 <https://www.gov.za/news/media-statements/statistics-south-africa-quarterly-labour-force-survey-qlfs-%E2%80%93-q1-2025-13-may> accessed on 30 May 2025. D Francis and E Webster 'Poverty and inequality in South Africa: critical reflections' *Development Southern Africa* 2019 36 (6) 788–789 <https://doi.org/10.1080/0376835X.2019.1666703>, accessed 30 May 2025.

latter part of the amendment presents challenges and should be aligned to the wording of the draft code.

Another noticeable provision in the draft code is item 11(3) which states ‘an investigation or enquiry does not have to be formal. Its nature should be appropriate to the circumstances, including the type of allegation and the nature and size of the employer’. First, the use of ‘or’ acknowledges that an investigation and an enquiry are distinct concepts rather than interchangeable terms. Second, it reinforces the principle that a uniform approach is not always appropriate; instead, the process must be tailored to the specific circumstances.

Several of the other requirements are similar to those outlined in the current item 4(1), with some notable changes. It states that usually before a decision to dismiss is taken, the employee must be notified of the allegations; be given an opportunity within a reasonable period of time to prepare and make representations on both the misconduct allegations and appropriate sanction; where reasonably possible be given an opportunity to converse in a language that the employee is comfortable with; and be allowed the assistance of a fellow employee or trade union representative.

Two key changes stand out. First, each of these requirements is now preceded by the term ‘usually’, suggesting that compliance may not always be mandatory. It is surmised that this was included to accommodate small businesses. Second, employees must now be given an opportunity to make representations not only on the allegation itself but also on the proposed sanction. This reinforces the understanding that determining substantive fairness in a misconduct inquiry consists of two distinct phases: first, determining whether the employee is guilty of the misconduct; and second, if guilty, deciding on the appropriate sanction. The inclusion of this requirement highlights the significance of the second stage, emphasising that dismissal should be carefully considered before being imposed.

Similar to the current code, the draft code provides for a relaxation of these requirements in exceptional circumstances. It states that ‘if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with some or all of them’. However, this is subject to the condition that the employer be required to justify non-compliance with the procedural requirements if the employee lodges a dispute challenging the procedural fairness of the dismissal.

This contribution argues that there is justification for the revision of the current approach to procedural fairness.<sup>60</sup> As explained by Van Niekerk, procedural fairness requirements have fuelled perceptions of

<sup>60</sup> Cheadle n 26 above at 686 explained that until the courts and arbitrators change their approach to procedural fairness, employers will continue to engage in costly formal hearings or pay dearly for not doing so and without any advance in justifiable employment security. It is accordingly necessary to strengthen the code to make its objective clear and to train and to require commissioners to apply the code.

South African labour law's rigidity. He noted that labour consultants often exaggerate the complexity of these requirements, creating the impression that workplace discipline requires professional intervention. This has led to some parastatals budgeting up to R1 million per hearing for senior employees, which was conducted by legal counsel. He called for procedural requirements to be limited to an opportunity to state a case in response to employer allegations of misconduct and incapacity, without the need for a formal hearing.<sup>61</sup> It is important to note that relaxing these procedural requirements does not mean employers can act with impunity. Dismissal decisions remain subject to the dispute resolution process outlined in the LRA. These decisions will continue to be examined by the CCMA and bargaining councils, and any findings of unfairness will result in employers being held accountable.

The key question that remains is whether item 11 of the draft code will effectively resolve the challenges previously identified, especially given that these concerns arose while the current code was in effect. It is recognised that the current code's procedural fairness requirements for misconduct dismissals do not mandate a formal enquiry, indicating an existing degree of flexibility. However, despite this, many employers continue to implement policies and negotiate collective agreements that impose complex and rigid pre-dismissal procedures. Even where rigid procedures are not provided for in policy, strict procedural requirements are demanded from adjudicators.<sup>62</sup> This raises the concern that the intended flexibility of the draft code may not fully translate into practical application.

### 3.4 *Dismissal during probation*

Dismissal while on probation is dealt with in item 8 of the current code. This item is regarded as being part of dismissals for incapacity as it is based on the premise that an employer has the prerogative not to confirm the appointment of a probationary employee on the exclusive ground of poor performance. It does this by stating that 'the purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment'.

The draft code expands the scope, stating that probation is intended to assess both performance and overall suitability for employment.<sup>63</sup> Item 18(2) further clarifies that dismissal decisions made during or at the expiry of probation related to the employee's conduct or capacity, including

<sup>61</sup> This he stated at 18, 20 and 45 in his response to Cheadle n 26 above.

<sup>62</sup> In the recent Labour Court decision of *Schouten v Safety and Security Sectoral Bargaining Council (SSSBC) and Others* [2025] ZALCCT 36 the court found that the employer had failed to adhere to a fair procedure by not enabling the employee to question witnesses during the opportunity to make representations. This occurred despite the disciplinary regulations not stipulating this requirement and the dismissal being deemed substantively fair.

<sup>63</sup> Draft code item 15(1) and (2). See also *Avril Elizabeth Home* n 20 above, also decided by Van Niekerk J (as he then was), where court-like and legalistic disciplinary enquiries were criticised.

poor work performance, may rely on reasons less compelling than those required post-probation. This contrasts with the current code, which only applies the principle of requiring less compelling reasons to dismissals for poor performance.<sup>64</sup> Under the draft code, employers may decline to confirm an employee's appointment for reasons beyond performance, reinforcing the principle that probation serves as a broader evaluation of workplace suitability rather than focusing solely on performance.<sup>65</sup>

The employer's obligations towards an employee on probation are set out in item 8(1)-(4) of the current code. The employer is required to assess the employee's performance and provide reasonable evaluation, instruction, training, guidance, or counselling to support the employee in achieving satisfactory performance. If the employee's performance falls below the required standard, the employer must identify and communicate the specific areas where improvement is needed. Similarly, if the employer deems the employee incompetent, it must clearly outline the aspects in which the employee lacks competence.

The employer may choose to extend the probationary period or dismiss the employee, provided certain conditions are met. Any extension must align with the intended purpose of probation and be proportionate to the objectives the employer seeks to achieve. Dismissal or extension of probation can only occur after the employer has invited the employee to present representations and has duly considered them. A trade union representative or fellow employee may submit these representations on behalf of the employee. If the employer decides to extend probation or proceed with dismissal, it must inform the employee of her or his right to refer a dispute to the CCMA or bargaining council.

The draft code has streamlined and slackened these obligations, requiring only that the employer provide reasonable guidance tailored to the nature and size of the business and the specific role. This guidance may include instruction, training or counselling, ensuring the employee has a fair opportunity to achieve satisfactory performance. Before dismissing the employee or extending the probationary period the employer must give the employee the opportunity to make representations, and the employer must consider these representations.<sup>66</sup>

The proposed changes present clear advantages by streamlining the often burdensome obligations imposed by the current code.<sup>67</sup> This refinement offers a more practical framework while maintaining the fundamental responsibility of employers to assist probationary employees and uphold fair procedures. Recognising the distinction between pre-dismissal procedures for long-standing permanent employees and newly

<sup>64</sup> Current code item 8(1)(j).

<sup>65</sup> Van Niekerk and Smit n 31 above 349. See also P Benjamin and H Cheadle 'South African labour law mapping the changes — Part 2: The history of labour law and its institutions' (2020) 41 *ILJ* 15.

<sup>66</sup> Draft code items 17 and 18(1).

<sup>67</sup> Benjamin and Cheadle n 65 above 5.

hired probationary employees is a necessary and logical step. Moreover, it aligns with the proposed amendments to the LRA, which seek to exclude probationary employees from lodging unfair dismissal disputes, illustrating the justifiability of lessening employers' obligations towards such employees.

### 3.5 *Dismissal for incapacity*

The current code recognises two forms of incapacity, namely poor performance and incapacity for ill health and injury. Item 8 discussed above, which deals with employees on probation, also makes provision for the requirements that apply to dismissals for unsatisfactory performance after probation.<sup>68</sup> After probation, an employee should not be dismissed for poor performance unless the employer has provided appropriate evaluation, instruction, training, guidance, or counselling, and allowed a reasonable period for improvement. The procedure leading to dismissal should include an investigation into the reasons for poor performance and consideration of alternatives to dismissal. During this process, the employee has the right to be heard and to receive assistance from a trade union representative or fellow employee.

Item 9, titled 'Guidelines in Cases of Dismissal for Poor Work Performance', in the current code outlines the factors that should be considered by arbitrators in deciding whether a dismissal for poor performance was fair. It requires assessing whether the employee failed to meet a performance standard. If the employee did not meet such a standard, it should be considered whether the employee was aware or could reasonably be expected to have been aware of it, whether she or he was given a fair opportunity to improve, and whether dismissal was an appropriate sanction.

The draft code, like the current code, places an obligation on the employer to assist through the provision of appropriate evaluation, instruction, training, guidance, and counselling, and providing a reasonable time for improvement.<sup>69</sup> However, where the employee does not improve, no mention is made of an investigation. It merely states that before dismissing, 'the employer should give the employee an opportunity to respond to the allegations of unsatisfactory performance'.<sup>70</sup>

The draft code contains provisions similar to those contained in item 9 of the current code. The heading 'guidelines in cases of dismissal for poor work performance' is retained.<sup>71</sup> The draft code includes an additional factor to be considered where the employee failed to meet a performance standard. Apart from the arbitrator considering whether the employee was aware of the performance standard; was given a fair opportunity to

<sup>68</sup> Current code item 8(2).

<sup>69</sup> Draft code item 19(1).

<sup>70</sup> *ibid* item 19(2).

<sup>71</sup> *ibid* item 20.

meet the standard and whether dismissal was an appropriate sanction, the arbitrator must also consider whether the required performance standard was reasonably achievable.<sup>72</sup>

It is to be noted though that the draft code proposes relaxing some of the obligations imposed on employers. Item 20(2) states that ‘depending on the circumstances, an employer may not be required to warn an employee that if their performance does not improve, they might be dismissed’. This provision applies to managers and senior employees, who, based on their knowledge and experience, should be capable of assessing their own performance. This inclusion seeks to acknowledge the jurisprudence developed by the courts in this regard.<sup>73</sup>

Dismissal for incapacity due to ill health or injury is addressed in items 10 and 11 of the current code. Item 10 states that such incapacity can be either temporary or permanent. For temporary incapacity, the employer should assess the extent of the absence and explore alternatives if the absence is unreasonably long. Factors to consider include the nature of the job, duration of absence, severity of the condition, and possibilities for alternative employment.

For permanent incapacity, the employer should consider alternative employment or adapting the duties or work circumstances of the employee to accommodate the employee’s disability. During this process, the employee must be given an opportunity to respond and be supported by a trade union or fellow employee. The current code highlights that the cause and severity of incapacity may influence the fairness of dismissal. In cases of alcoholism or drug addiction, counselling and rehabilitation are appropriate steps. When incapacity arises from work-related injuries or illnesses, the employer’s duty to accommodate the employee is more demanding.

Item 11 of the current code outlines the guidelines arbitrators must follow when assessing the fairness of a dismissal due to ill health or injury. They must consider whether the employee can perform the work. If not, they should evaluate the employee’s capacity to perform, potential adjustments to work or duties to accommodate the disability, and the availability of suitable alternative work.

The draft code addresses this type of incapacity in only one item. Item 21, similar to the current code, distinguishes between temporary and permanent incapacity and places comparable obligations on the employer to accommodate both. It also requires that the employee be given an opportunity to present her or his case and be supported by a trade union or fellow employee. The draft code retains the provisions from the current code regarding the degree and cause of incapacity. What is notably absent though are guidelines for arbitrators, as the draft code lacks similar provisions to item 11 of the current code.

<sup>72</sup> *ibid* item 20(b)(iii).

<sup>73</sup> Van Niekerk and Smit n 31 above 353.

Significantly, the draft code introduces other forms of incapacity under item 21, titled ‘Incapacity: Ill health, injury, and other forms of incapacity’. After addressing ill health and injury, items 21(6)–(7) discuss factors unrelated to health, such as imprisonment (and potentially other factors), that may prevent employees from performing their duties. It states that such incapacity can be temporary or permanent, requiring the employer to assess its extent and explore alternatives short of dismissal. Item 21(7) makes reference to an employee’s ‘incompatibility’ and explains that incompatibility is manifested by an inability to work in harmony with an employer’s business culture or with fellow employees and that it can constitute a form of incapacity which may warrant dismissal.

The acceptance that incapacity extends beyond just poor performance and ill health is an important development, as there has long been recognition that incapacity can take other forms.<sup>74</sup> Therefore, expanding the concept of incapacity to include types like imprisonment and incompatibility is appropriate. However, placing these non-health-related forms of incapacity under the broader heading of ‘ill health and injury’ seems somewhat misplaced. It gives the impression of an afterthought rather than an attempt to give other forms of incapacity proper acknowledgment. A more structured and detailed discussion of these different forms of incapacity would provide clearer guidance. Such clarity would aid in understanding the scope of incapacity and ensure that legal responses are appropriately tailored, recognising the distinct underlying issues without conflating them under a broad umbrella.

### 3.6 *Dismissal based on operational requirements*

#### 3.6.1 *Background*

Contrary to the position regarding the dismissal of employees on grounds of misconduct and incapacity, the procedures regarding the termination of employment on grounds of operational requirements are set out in detail in ss 189 and 189A of the LRA. Section 189 contains the binding principles in respect of all employers’ obligation to consult with a prescribed list of employee representatives,<sup>75</sup> or directly with the employees if they do not have representatives. The section also explains that the employer and employees must engage in ‘meaningful joint consensus-seeking’ consultations and they must attempt to reach consensus on, amongst others, measures to avoid dismissals, selection

<sup>74</sup> Van Niekerk and Smit n 31 above 354–358. See also K Newaj ‘Defining fairness in dismissals of unauthorised foreign nationals’ *PER/PELJ* (2020) 23 14–16.

<sup>75</sup> s 189(1) of the LRA. The employer must consult any person whom the employer is required to consult in terms of a collective agreement; if there is no collective agreement a workplace forum; if there is no workplace forum any registered trade union whose members may be affected; and if there is no such union, the employees likely to be effected or their representative selected for that purpose.

criteria, and severance pay.<sup>76</sup> Importantly, s 189(3) requires employers to extend a written invitation to the other consulting parties and this notice must among others contain relevant information, including the reasons for the proposed dismissal, alternatives to the dismissal that the employer may have considered, timing of the dismissal and severance pay.<sup>77</sup> It is to be noted that the social partners made no suggestions regarding the amendment of s 189(1)–(7) of the LRA.

Nonetheless, a number of significant amendments were suggested regarding the regulation of large-scale operational requirement dismissals in terms of s 189A of the LRA as well as changes to the draft code. We firstly discuss the proposed amendments to s 189A, before turning to the amendments to the current Code of Good Practice.

### 3.6.2 *Amendments to large-scale operational requirements*

The primary amendments to large-scale retrenchments relate to the removal of s 189A(13) to (18). Section 189A(13) states the following:

‘If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order —

- (a) compelling the employer to comply with a fair procedure;
- (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
- (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
- (d) make [sic] an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.’

This subsection gives employees the right to refer disputes regarding procedural unfairness directly to the Labour Court, not only after the retrenchment has taken place, but while the retrenchment process is still ongoing. The purpose was to attempt to address procedural irregularities during the retrenchment process with the intention of getting the process back on track.<sup>78</sup> The Constitutional Court in *Steenkamp & Others v Edcon Ltd* held that

‘where procedural irregularities arise, the process provided for in section 189A(13) of the LRA allows for the urgent intervention of the Labour Court to correct any such irregularities as and when they arise so that the integrity of the consultation process can be restored and the consultation process can be forced back on track’.<sup>79</sup>

While this appears to be a positive development as it provides for court intervention prior to employees being dismissed, it alters the recourse that employees have to challenge the fairness of a large-scale operational requirements dismissal. Prior to the enactment of s 189A and as is the case with conventional dismissals for operational requirements, an

<sup>76</sup> LRA s 189(2).

<sup>77</sup> LRA s 189(3).

<sup>78</sup> *Steenkamp & others v Edcon Ltd* (2019) 40 ILJ 1731 (CC) (*Steenkamp*).

<sup>79</sup> *ibid* para 52.

employee can in terms of s 191(5)(b)(ii) challenge both the substantive and procedural fairness of the dismissal by referring the unfair dismissal dispute to the Labour Court for adjudication. However, with the advent of s 189A(13) came s 189A(18). Section 189A(18) states that ‘the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer’s operational requirements in any dispute referred to it in terms of s 191(5)(b)(ii)’.

Therefore, s 189A(13) results in an employee’s recourse to challenge the procedural unfairness of a large-scale operational requirements dismissal in terms of s 191(5)(b)(ii) being taken away. The effect of these two subsections (s 189A(13) and (18)) is that separate dispute resolution procedures must be followed to challenge the substantive and procedural fairness of large-scale retrenchments. Challenges to substantive fairness must be referred in terms of s 191(5)(b)(ii), while challenges to procedural fairness must be referred in terms of s 189A(13). Apart from this, questions arose about whether s 189A(13) can only be utilised in instances where the retrenchment process can be brought back on track. In other words, do employees lose their right to challenge the procedural fairness of the dismissal, if the dismissal is final and if there is no possibility of bringing the parties back to the consultation phase.

This question was addressed by the Constitutional Court in *Steenkamp & others v Edcon Ltd, Solidarity obo Members v Barloworld Equipment SA & others*<sup>80</sup> and *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga & others*.<sup>81</sup> The most recent decision, in *Regenesys*, diverged from the earlier rulings by rejecting the view that procedural fairness can only be challenged if the retrenchment process can be reinstated. The court held that the scope of s 189A(13) is sufficiently broad to be applicable even when a considerable amount of time has passed since the dismissal, which would prevent the retrenchment process from being brought back on track. In such cases, the remedy provided in s 189A(13)(d), namely compensation, would be appropriate to address the employer’s breach of the employee’s right to procedural fairness.<sup>82</sup>

The preceding discussion demonstrates that, despite the well-meaning intentions behind the referenced sections, they have inadvertently introduced complexities that were likely unforeseen. Furthermore, s 189A(13) had to be interpreted on more than one occasion by the apex court. It is probably for these reasons that its removal has been proposed, which is regarded as a favourable change.

<sup>80</sup> (2022) 43 *ILJ* 1757 (CC).

<sup>81</sup> (2024) 45 *ILJ* 1723 (CC).

<sup>82</sup> *ibid* paras 98 and 99.

### 3.6.3 *Amendments to the code regarding retrenchments*

The first significant structural change in the draft code is the inclusion of 'retrenchments', which is regulated under the current code on operational requirements. Item 2(4) of the draft code also refers to the fact that the term 'retrenchment' will be used in the future code instead of 'dismissal for operational requirements'. This simplification is welcomed, but it should be noted that a similar change has not been proposed regarding the amendment of ss 189 and 189A of the LRA. Such an amendment would have aligned the future code and the provisions of the LRA.

The second major difference is the fact that the draft code has introduced two new subheadings, the one covering the 'fair reason'<sup>83</sup> for retrenchment, and the second covering the 'fair procedure'.<sup>84</sup> This seems like a departure from the earlier view of the courts in so far as consultations prior to retrenchment constitute both a procedural and substantive element. Du Toit et al,<sup>85</sup> regarding the overlap between procedural and substantive fairness in the instance of dismissal on operational grounds, aptly state that

'the separation of disputes over procedural fairness from those over substantive fairness is not without problems. The enquiries into procedural fairness and substantive fairness are integrally connected. A fundamental purpose of consultation is to establish whether a fair reason for dismissal exists'.

The authors of this contribution are of the view that Du Toit et al are correct in their approach in so far as it may not always be possible to separate substantive and procedural aspects in relation to retrenchments. Nonetheless, based on the fact that codes of good practice merely provide broad guidelines, and the fact that the courts will in any event adopt a holistic approach in determining the fairness of retrenchments, which will inevitably consist of an assessment of substantive and procedural aspects, we are of the view that the inclusion of this distinction under the two sub-headings in the draft code will not have a material impact on the development of the principles relating to retrenchments going forward.

However, it is predicted that the next point of discussion may have a more meaningful impact on the evolution of retrenchment law in general. Under the heading 'fair reason' the draft code introduces a notion which is not covered under the current code. In the proposed item 23(2) the draft code states that '[d]ismissal is a measure of last resort. It should only take place if it cannot be avoided by alternatives identified in the consultation process'. This inclusion is to be welcomed as it lays

<sup>83</sup> Draft code item 23.

<sup>84</sup> *ibid* item 24.

<sup>85</sup> Du Toit et al n 5 above 581. See also *United National Breweries (SA) Ltd v Khanyeza & others* (2006) 27 ILJ 150 (LAC).

to rest the notion that employers are permitted to retrench workers with a view to increasing profits.<sup>86</sup>

As pointed out by Van Niekerk and Smit, the courts were initially disinclined to subject the employer's rationale for retrenchment to extensive scrutiny.<sup>87</sup> The courts previously merely required that the employer should demonstrate a bona fide commercial rationale for its decision to dismiss employees. Nonetheless, this approach changed. In *SA Commercial Catering & Allied Workers Union & others v Woolworths (Pty) Ltd*,<sup>88</sup> the Constitutional Court held that the dismissal based on operational requirements was substantively unfair because the employer had failed to establish that the retrenchments were operationally viable, as it had not properly considered alternatives to retrenchments, such as implementing a wage freeze. It should therefore come as no surprise that the requirement regarding substantive fairness was introduced into the draft code as it merely confirms what has already been established by the Constitutional Court.

A further significant amendment to the draft code is the incorporation of a new standardised form that goes hand-in-hand with the s 189(3) notice. This is a positive development in so far as it will improve clarity and promote uniformity by outlining the required disclosures in a tabular format. The proposed form under the title 'Notice of possible retrenchments' includes questions such as how many employees are likely to be affected, what alternatives were considered, what selection criteria were considered, and during which period the proposed retrenchments will take place. This table of questions correlates with the topics mentioned in s 189(2) of the LRA.

## 4 STRIKE RELATED DISMISSAL

### 4.1 Introduction

Section 68(5) of the LRA states the following:

'Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.'

In order for a strike to be protected, chapter IV of the LRA outlines the procedural and substantive requirements. Procedurally, s 64 mandates that a dispute must first be referred to the CCMA or the relevant bargaining council for conciliation. If the dispute remains unresolved after 30 days, or if a certificate of non-resolution is issued, employees must provide at least 48 hours' written notice to the employer before

<sup>86</sup> See, for example *General Food Industries Ltd v Food & Allied Workers Union* (2004) 25 ILJ 1260 (LAC) 668E-G.

<sup>87</sup> Van Niekerk and Smit n 31 above 363.

<sup>88</sup> (2019) 40 ILJ 87 (CC) 88K-J.

commencing a strike. Section 65 imposes substantive limitations on the right to strike, prohibiting participation in a strike if a binding collective agreement prohibits it, if the dispute is subject to arbitration or Labour Court adjudication, or if the employees are engaged in essential or maintenance services.

A strike that does not meet these procedural and substantive requirements, in other words a strike that does not comply with the provisions of chapter IV, renders it unprotected and participation in such a strike may justify dismissal for misconduct.<sup>89</sup> Guidelines for the dismissal of employees involved in unprotected strikes are specifically provided for in the current code. Item 6 has two sub-paragraphs. Item 6(1) begins by highlighting that participation in a strike that does not comply with the provisions of chapter IV of the LRA is regarded as misconduct.<sup>90</sup> However, like a dismissal for any other act of misconduct, it must be both substantively and procedurally fair. Item 6(1) of the current code lists three substantive fairness requirements that must be considered in light of the facts of each case before a dismissal takes place. These are the seriousness of the contravention of the LRA, attempts made to comply with the LRA and whether or not the strike was in response to unjustified conduct by the employer.<sup>91</sup>

The wording of the current code and the draft code remains the same in terms of item 6(1)(a)-(b). However, the wording of the current code's item 6(1)(c), which provides for 'unjustified conduct' by the employer, has been broadened to include 'unlawful, unfair or unreasonable conduct' by the employer. It is argued though that replacing the term 'unjustified conduct' with 'unlawful, unfair, and unreasonable conduct' by the employer is essentially a mere refinement. This change may not represent a new development, as courts, both before and after 1996, have consistently interpreted 'unjustified conduct' by the employer to encompass unfair, illegal, and unreasonable actions that led to unprotected strikes.

*Mzeku & others v Volkswagen SA (Pty) Ltd & others*<sup>92</sup> is one such illustration where the court accepted that it was unfair that the employer unilaterally changed the terms and conditions of the employees' contracts, which provoked the employees to engage in an unprotected strike. Similarly, in *Transport & General Workers Union & others v Coin Security Group (Pty) Ltd*<sup>93</sup> the court held that the conduct of the employer was unreasonable and unjustified and clearly played a major part in the

<sup>89</sup> LRA s 68(5).

<sup>90</sup> Current code item 6(1).

<sup>91</sup> *ibid* item 6(1)(a)-(c).

<sup>92</sup> (2001) 22 ILJ 1575 (LAC) (*Mzeku*) para 17, upheld in *Transport & Allied Workers Union of SA obo Ngedle & others v Unitrans Fuel & Chemical (Pty) Ltd* (2016) 37 ILJ 2485 (CC).

<sup>93</sup> 2001 (22) ILJ 968 (LC) (*Coin Security Group*).

decision of the workers not to make their own way to their posts and to demand company transport to enable them to do so.<sup>94</sup>

The draft code further introduces a new subparagraph that deals with relevant factors that must be considered when assessing the seriousness of the contravention. The factors include

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

Although the current code does not specify criteria for assessing the seriousness of a contravention, the courts have addressed this issue in past cases. In *National Union of Metalworkers of SA & others v CBI Electric African Cables*,<sup>95</sup> the LAC noted that item 6 of the code is not exhaustive. The court held that, in assessing the substantive fairness of a dismissal related to a strike, courts should consider additional factors including the strike's duration, the harm caused, the legitimacy of the demands, the timing, the conduct of the strikers, and the parity principle.<sup>96</sup> The factors introduced to the draft code resemble those endorsed by the LAC. Therefore, the inclusion of these factors serves to codify the jurisprudence that has been developed.

Turning to procedural fairness, item 6(2) of the current code states that the employer should, prior to dismissing the employee, at the 'earliest opportunity' contact a trade union official to discuss the course of action it intends to adopt. The employer must then issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. After the ultimatum is issued to the employees, the employer must allow employees sufficient time to consider and respond to the ultimatum by accepting or rejecting it. Apart from this, the item makes no reference to a disciplinary enquiry or the notion of the principle of *audi alteram partem*.

The draft code aims to introduce three new aspects in relation to procedural fairness. Firstly, whereas the current code only mentions instances where employees are represented by trade unions, the draft code introduces a new provision relating to a due process that must be

<sup>94</sup> *ibid* para 123.

<sup>95</sup> (2014) 35 *ILJ* 642 (LAC).

<sup>96</sup> *ibid* paras 28–30. See also *SA Clothing and Textile Workers Union & others v Berg River Textiles — A Division of Seardel Group Trading (Pty) Ltd* (2012) 33 *ILJ* 972 (LC) where factors such as the attempts made by the parties to resolve the dispute and the extent of the damage and disruption to the employer's business was taken into account in assessing the seriousness of the contravention.

followed in instances where employees are not represented by a union.<sup>97</sup> The draft code requires employers in these circumstances to consult the employees and outline the actions they intend to adopt. The employer is required to contact and engage with leaders or representatives of the striking employees. It is argued that this inclusion seeks to comply with the constitutional commitment to fair labour practices and to preserve job security by opening channels of communication in the absence of trade unions during industrial action.

Secondly, in relation to ultimatums, the draft code provides that it may be unfair to dismiss employees for participating in the unprotected strike where they obey the ultimatum by returning to the workplace in the stipulated timeframe.<sup>98</sup> This confirms the principles endorsed by the LAC in *Association of Mineworkers and Construction Union obo Members & another v Samancor Western Chrome Mines*,<sup>99</sup> where it was held that an employer's right to dismiss striking employees is waived in instances where the demands of an ultimatum have been met. The court held that where an ultimatum is issued and subsequently employees comply with it, the employer would have achieved its purpose, and this would normally be that employees cease participating in an unprotected strike. Thus, if employers were to retain a right to dismiss this would undercut the purpose of an ultimatum.

Thirdly, unlike the current code, which is silent on the issue of an opportunity to state a case, items 12(3)(g) and 12(3)(h) of the draft code attempt to address the requirements regarding audi alteram partem. Item 12(3)(g) states that 'if participating employees reject an ultimatum, the employer may dismiss the employees after considering the conduct and any representations of the employees in accordance with the provisions of this Code'. The draft code aligns with case law that has developed over the years, which requires that some form of audi alteram partem be observed prior to a dismissal.<sup>100</sup>

Item 12(3)(h) of the draft code introduces a new concept by stating that, 'in cases of collective misconduct, the employer may, depending on the circumstances, satisfy the requirements of procedural fairness by calling for collective representations'. Despite not being mentioned in the current code the idea of collective hearings has been recognised and accepted by the courts, under certain circumstances.<sup>101</sup> The LAC in *SA Commercial Catering & Allied Workers Union obo Mokebe & others v Pick 'n Pay Retailers* stated that while it was accepted that a collective

<sup>97</sup> Draft code item 12(3)(c).

<sup>98</sup> *ibid* item 12(3)(f).

<sup>99</sup> (2020) 41 *ILJ* 2771 (LAC) para 27.

<sup>100</sup> *Modise & others v Steve's Spar Blackheath* (2001) 21 *ILJ* 519 (LAC) (*Modise*) where the court held that some form of hearing is required before unprotected strikers are dismissed, but that the circumstances of each case will determine the nature of the hearing. See also *Mzeku* n 92 above para 55.

<sup>101</sup> *Modise* *ibid* para 96.

hearing could be used in the context of a strike dismissal, it did not give an employer carte blanche to use collective enquiries irrespective of the specific circumstances of a particular case.<sup>102</sup>

Including a collective hearing in the draft code affirms its permissibility and is a significant provision that can simplify the process for employers. Allowing for collective, rather than individual representations aligns with the draft code's overarching goal of reducing the procedural burden on employers. However, the wording clearly indicates that the use of a collective procedure is contingent on the circumstances, according to the LAC's pronouncements.

Lastly, the draft code like the current code acknowledges that there may be instances where the employer cannot reasonably be expected to comply with procedural requirements, in which case they may be dispensed with.<sup>103</sup>

The amendments to the draft code clarify several important points. These include the undesirability of dismissing employees who comply with an ultimatum, the requirement to give employees an opportunity to be heard before dismissal, and the permissibility of providing such an opportunity through collective representations. These issues have frequently raised questions over the years, and while courts have offered guidance, incorporating this clarity directly into the code helps promote greater legal certainty.

One of the primary uncertainties, however, concerns whether actions taken in support of an unprotected strike — such as violence, intimidation, or other forms of misconduct — are covered under item 6 of the draft code. While s 68(5) of the LRA states that furtherance of such a strike is part of an unprotected strike, this wording is not reflected in the current or draft codes. Both codes state that 'participation in a strike that does not comply with Chapter IV is misconduct', but make no mention of conduct in furtherance thereof.

This raises the question whether such conduct should be considered misconduct under item 6 or regarded as a separate form of misconduct. This distinction is significant because it has an effect on the disciplinary process and the procedures for dispute resolution.<sup>104</sup> In *Association of Mineworkers and Construction Union obo Matebele v CCMA and Others*<sup>105</sup> employees who were engaged in an unprotected strike proceeded to block the employer's premises and prevent trucks from entering and exiting the mine, which the employer regarded as sabotage.<sup>106</sup> The

<sup>102</sup> (2018) 39 *ILJ* 201 (LAC) para 50.

<sup>103</sup> Draft code item 12(3).

<sup>104</sup> s 191(5)(a)(i) states that an unfair dismissal dispute for misconduct must be referred to the CCMA or council for arbitration if conciliation fails, while s 191(5)(b)(iii) states that an unfair dismissal dispute relating to an employee's participation in an unprotected strike must be referred to the Labour Court for adjudication where conciliation fails.

<sup>105</sup> [2025] ZALCJHB 163.

<sup>106</sup> *ibid* paras 6-7.

Labour Court found that their participation in the unprotected strike was not the reason for their dismissal, it was their further conduct relating to the strike.<sup>107</sup> This case clearly demonstrates that engaging in additional misconduct beyond mere participation in an unprotected strike is recognised as a separate form of misconduct.

The question is whether this conduct, which emanates from the strike, can be separated from participation in the unprotected strike. If an employer charges an employee with both participation and further conduct, what procedures should be followed? If an employee is dismissed for participation in and furtherance of the unprotected strike, would the employee need to challenge different aspects of the dismissal in the Labour Court and the CCMA? This disjointed approach seems impractical. The intention behind s 68(5) is arguably to consider conduct in furtherance of an unprotected strike as part of misconduct for participation. Therefore, consideration should be given to aligning the draft code with the wording of s 68(5) to ensure clarity and consistency.

## 5 DISPUTE RESOLUTION AND REMEDIES

During the negotiation process of the LRA Bill, the task team revisited the idea that higher earning employees should not be afforded the same level of protection as in the case of lower earning employees. This argument had already been mooted during deliberations regarding the Labour Relations Amendment Bill of 2012 but never came to fruition.<sup>108</sup>

The NEDLAC report confirms that the government argued that the rights of higher paid employees should be limited because these cases often lead to protracted disputes which clog the CCMA roll of cases.<sup>109</sup> Business, labour and government agreed to amend ss 193 and 194 of the LRA.

Section 193 of the LRA currently makes provision that the Labour Court or the CCMA may order the employer to reinstate an employee,<sup>110</sup> or to reemploy a dismissed employee<sup>111</sup> or to pay compensation in respect of the unfair dismissal. Section 193(2) goes further and stipulates that the CCMA or Labour Court 'must require' the employer to reinstate or reemploy the employee unless the employee does not want to be reemployed, or if the continued employment has become intolerable, or if it is not reasonably practicable to reinstate or reemploy an employee, or if the only reason for the unfair dismissal is that the dismissal was not preceded by a fair procedure.

In essence, s 39 of the LRA Bill excludes higher earning employees from the remedy of reinstatement and reemployment by including a new

<sup>107</sup> *ibid* para 19.

<sup>108</sup> See the concept paper by Van Niekerk n 26 above, accessed 18 March 2025.

<sup>109</sup> NEDLAC report n 1 above 9.

<sup>110</sup> s 193(1)(a).

<sup>111</sup> s 193(1)(b).

subsection (2A) after s 193(2). The proposed subsection will introduce the principle that s 193(1)(a) and (b) as well as s 193(2) do not apply to an employee who earns more than an amount prescribed by the Minister in terms of s 208B, unless the dismissal was automatically unfair.

Added to this exclusion, the amendments also place a cap on the current s 194(4) which limits compensation in respect of unfair dismissals and unfair labour practice disputes to 12 months' compensation. In both instances compensation will be capped in respect of higher earning employees 'to a maximum of the amount prescribed by the Minister in terms of section 208B of the LRA'. The higher earnings threshold will be based on an amount of R1 800 000 per annum for the period from May 2024 to April 2025, adjusted annually on 1 May in line with the consumer price index.<sup>112</sup>

It is not all too clear why the social partners pinpointed the amount of R1 800 000 as the dividing line in respect of those employees who are either entitled, or disentitled, to the full array of remedies. However, on a principled level, the authors of this contribution do not have an issue with the introduction of the differentiation. It has become a common practice in South African labour legislation to provide different levels of protection to employees earning different levels of remuneration. These limitations on the entitlements of remedies support the situation where lower earning employees are generally entitled to more protection. Improved protection has been extended to lower earning employees in respect of, among others, the presumption as to who is an employee,<sup>113</sup> protective measures in respect of temporary employment services,<sup>114</sup> fixed term contracts,<sup>115</sup> and maximum hours of work and overtime.<sup>116</sup> In this instance, limitations are placed on the entitlements of higher earning employees. Generally speaking, higher earning employees may be in a better position to build up savings to soften transitions after their dismissal and to secure new employment opportunities compared to lower earning employees.

## 6 CONCLUSIONS

The authors of this article welcome the fact that steps have been taken to reform aspects relating to the current unfair dismissal regime in South Africa. Eminent experts in the arena of labour policy development have over many years stressed the importance of revisiting and relaxing the current unfair dismissal framework and this has never really been done. The overarching idea of this current round of reforms is among others to lessen the burden on employers to adhere to legalistic pre-dismissal

<sup>112</sup> NEDLAC report n 1 above 10.

<sup>113</sup> LRA s 200A and BCEA s 83A.

<sup>114</sup> LRA s 198A.

<sup>115</sup> *ibid.*

<sup>116</sup> ch II of the BCEA.

procedures under circumstances where it may be impracticable to do so. The most notable instances are the emphasis placed on the relaxation of pre-dismissal procedures in respect of small business, limiting unfair dismissal regulations during the probationary period, and removing the complexity that has arisen in regard to large-scale operational requirement dismissals.

Many of the proposed amendments aim to formalise the jurisprudence developed by courts over the years. Key among these is the recognition that incapacity dismissals extend beyond cases of poor performance or ill health. They also emphasise that the substantive fairness of dismissals for misconduct should consider not only whether the employee is guilty but also whether dismissal is an appropriate disciplinary measure. Additionally, the reforms acknowledge the right of employees involved in unprotected strikes to be given the opportunity to make representations prior to dismissal, and it clarifies the broader aims of probation.

Nonetheless, even though the overall sentiments of the amendments are to be welcomed, it is submitted that the proposed amendments may have paid more attention to some of the aspects. Firstly, it is suggested that the notion of a small business should be defined by the number of employees employed by a particular employer. The threshold of ten or fewer employees is not uncommon in South Africa's current regulatory framework. It is suggested that this would be the appropriate defining factor.

Secondly, the draft code and the provisions of the current LRA and the Draft Bill should have been synchronised. The draft code suggests that the word 'retrenchment' should be utilised and it is suggested that the LRA Bill should have aligned the current LRA, the LRA Bill and the draft code in this regard. Additionally, the procedural fairness requirements for dismissals introduced in the LRA Bill must be consistent with the draft code.

Thirdly, greater emphasis should have been placed on the inclusion of additional forms of incapacity. It is considered inappropriate to group incapacity arising from factors such as imprisonment or incompatibility together with incapacity due to ill health. These issues should be addressed under a separate heading and possibly examined in more detail.

Fourthly, there appears to be a disconnection between s 68(5) of the LRA, which remains unchanged, and item 6 of the current code. Given that the draft code proposes several amendments to item 6, it provides an opportune moment to consider the extent to which item 6 should encompass conduct that furthers an unprotected strike, and to possibly align s 68(5) accordingly with the revised provisions of item 6 in the draft code.

In the final instance it must be stressed that it is by no means clear that the proposed amendments will come to fruition through their implementation and promulgation in legislation. It is to be noted that the social partners did not reach agreement on a number of the proposals

discussed in this article. In fact, organised labour recorded their opposition to these proposals. To us, it seems that government and labour have not been able to garner the same level of momentum and public approval as was the case prior to the amendments which occurred in respect of the protection of non-standard employees in terms of ss 198A-C of the LRA; the provisions in respect of limiting the damage caused by protracted and violent strikes; the introduction of advisory arbitration; and the amendments to the provisions relating to picketing.

Nevertheless, these proposed amendments must be assessed within the context of South Africa's current economic realities. The country continues to grapple with the triple challenges of poverty, inequality, and unemployment. Government has faced ongoing criticism for its failure to attract sufficient investment, stimulate economic growth, and create meaningful employment opportunities. In this regard, the proposed amendments to the LRA have the potential to contribute meaningfully to addressing these structural problems. For these reasons, the proposals deserve serious consideration.

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