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1. DISMISSALS

1.1 Jurisdiction of CCMA and Labour Court

SACCAWU v Speciality Stores Ltd (1998) 19 ILJ (LAC)
Determination of jurisdictional facts
Richards Bay Iron & Titanium (Pty) Ltd r/a Richards Bay Minerals & another v Jones & another (1998) 19 ILJ (LC)
CCMA has jurisdiction to determine existence of employment relationship
Moropane v Gilbey's Distillers & Vintners (Pty) Ltd and another (1998) 18 ILJ 635 (LC)
Court does not have general jurisdiction to hear misconduct and incapacity dismissal disputes
Gibb v Nedcor Ltd (1998) 19 ILJ 364 (LC)
Nature of CCMA proceedings, power of Court to give declarator during disciplinary hearing
Sasko (Pty) Ltd v Buthelezi & others (1997) 18 ILJ 1399 (LC)
CCMA cannot hear discrimination disputes
Magubane & other v Mintroad Saw Mills (Pty) Ltd (1998) 2 BLLR 143 (LC)
Employee can choose forum
Vant Rooy v Nedcor Bank Ltd (1998) 5 BLLR 540 (LC)
Employee choice of forum
SANWU v Stevenson Mining Supplies CC (1997) 5 BLLR 673 (CCMA)
Jurisdiction to hear operational requirements disputes
Zeuna-Strarker Bop (Pty) Ltd v National Union of Metalworkers of SA (1999) 20 ILJ 108 (LAC): (1998) 11 BLLR 1110 (LAC)
The Labour Appeal Court held that the commissioner was bound to enquire into the facts to decide whether he had jurisdiction to conciliate the dispute. He was not bound by the description and date of the dispute provided by the union. Having determined the real dispute, the commissioner was obliged to determine the actual date that the dispute arose.

1.2 Desertion

Sibeko v Tshoaedi [1996] 3 BLLR 369 (IC)
The court noted that desertion was distinguishable from absence without leave in that the employee who deserted did so with the intention of not returning to his post. While it is not possible to lay down a rule for establishing at what point an employee could be considered to have deserted, the dominant factors were the lack of communication from the employee and the length of his absence. These are to be assessed in the light of such considerations as the nature of the employee's work, his status, the importance of the employee to the enterprise and operational requirements. Where there was no clause in the contract of service indicating the period after which the employee could be deemed to have deserted, the employer is usually obliged to terminate the contract. Although an employer is entitled to summarily dismiss an employee who has deserted, it is nevertheless required to hold an inquiry before terminating the services of the employee, especially where the period of absence was relatively short. The court held that the respondent's failure to hold an inquiry into the reasons for the applicant's absence rendered her dismissal an unfair labour practice, but dismissed the prayer for reinstatement on account of the applicant's conduct and limited compensation to the equivalent of one month.

Seabelo v Belgravia Hotel [1996] 6 BLLR 829 (CCMA)

Desertion - What constitutes - Desertion takes place when employees leaves employment with intention of not returning - Such intention to be established from, inter alia, absence of communication with employer and length of absence

Disciplinary procedure - Hearing - Employer should hold hearing when employee returns after period of suspected desertion.

Dismissal - Misconduct - Desertion - Employer not entitled to assume employee deserted without being appraised of facts which indicate an intention not to return.

Seabelo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)

Desertion - What constitutes - Desertion takes place when employee leaves employment with intention of not returning - Such intention to be established from inter alia, absence of communication with employer and length of absence.

Disciplinary procedure - Hearing - Employer should hold hearing when employee returns after period of suspected desertion.

Dismissal - Misconduct - Desertion - Employer not entitled to assume employee deserted without being appraised of facts which indicate an intention not to return.

SACWU v DYASI [2001] 7 BLLR 731 (LAC)

The Court held that, when the whereabouts of a deserting employee is known, an employer must hold a disciplinary hearing before terminating the contract.

1.3 Operational Requirements:

Atlantis Diesel Engines (pty) LTD v NUMSA (1994) 15 ILJ 1247: (1995) 1 BLLR (AD)z

The duty to consult arose when an employer, having foreseen the need for it, contemplated retrenchment and before a final decision to retrench was reached.

Mamabolo & others v Manchu Consulting CC (1999) 20 ILJ 1826 (LC)

SACTWU & others v Discreto – a division of Trump & Springbok Holdings (1998) 19 ILJ 1451 (LAC)

Brendan Colin Vickers v Aquahydro Projects (Pty) LTD (1997) LC D424/97

Applicant – Employee – received monthly salary, no deductions, no uif, company car, garage card, for 7 months no issue of invoices to company, answerable to directors – oral agreement between respondent and applicant that applicant would be retrenched – dismissal unfair

Air Products (Pty) Ltd v CWIU & another [1998] 1 BLLR 1 (LAC)

Dismissal - Operational reasons - Employer not obliged to consult with employee or his union before transferring him from one department to another, even if reason for transfer a redundancy in one department.

Western Cape Workers Association v Halgang Properties CC [2001] 6 BLLR 693 (LC)

An employer is not permitted to retrench employees in anticipation of the sale of its business on the grounds of operational requirements of the purchaser. Employer must prove the dismissal was for a fair reason related to its own operational requirements.

STRAUSS & ANOTHER V PLESSEY (PTY) LTD [2002] 1 BLLR 105 (LC)

Pre-retrenchment consultation must be genuinely aimed at reaching consensus before the decision to dismiss is confirmed.

SATAWU & others v Forecourt Express (Pty) Ltd [2003] 8 BLLR 823 (LC)
The Court held that, while a reasonably lenient approach had been adopted in he past when assessing the commercial rationale underlying retrenchments, a court is now required to assess whether a reasonable basis existed for the employer's decision to retrench. A Court must also consider whether there were viable alternatives to dismissal and whether the consultation process was a sham.
Liberty Life Association of Africa Ltd v Kachelhoffer & others [2004] 10 BLLR 1043 (C)
The correct view is that employers must commence consultation as soon as retrenchment is recognised as a possibility.

1.3.1 Determination of length of service: Severance pay

Solomons v Usabco (Pty) Ltd (2002) 23 ILJ 786 (CCMA)
Section 41 of the BCEA must be read with section 84 of the BCEA, in determining the length of service for purposes of calculating an employees severance pay.

1.3A Bumping

Unilever S.A. (Pty) LTD v Salence [1996] 5 BLLR 547 (LAC)
*Retrenchment – Alternatives – Practice of **" Bumping "** should be applied where possible to avoid dismissal of employee with longer service – Senior employee retrenched though capable of performing jobs of others with shorter service or appointed subsequent to the decision to retrench him – Retrenchment unfair.*
NATIONAL CONSTRUCTION BUILDING & ALLIED WORKERS UNION & OTHERS v NATURAL STONE PROCESSORS [2000] 21 ILJ 1405 (LC)
Retrenchment – Bumping Employer to consult employees on possibility of bumping – Employer to give serious consideration to union's proposals on bumping – Failure to do so unfair. Retrenchment – Selection criteria – Bumping – When employer to consider principle of bumping – Where employees longer serving, where little retraining required and where transfer will not cause serious hardship to company.
PORTER MOTOR GROUP v KARACHI [2002] 4 BLLR 357 (LAC)
Operational requirements – Fair selection – Principles of " bumping " restated and applied – Employee offered position at significantly lower salary than another position which could and should have been offered – Dismissal of employee for refusing offer of lower-paid post unfair.
Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC)
Contract of employment – Fixed term contract – Termination Employee on fixed-term contract may not be retrenched before expiry of contract – Retrenchment in such circumstances unfair perse
The court held that at common law a party to a fixed-term contract has not right to cancel the contract before the termination date in the absence of repudiation or material breach by the other party. The Court rejected the respondent's argument that labour legislation and the Constitution rendered obsolete the common-law rule that a fixed-term contract cannot be prematurely terminated for operational requirements before its expiry.

1.4 Operational Requirements: Fairness

BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union (2001) 22 ILJ 2264 (LAC)
The word 'fair' introduces a comparator, that is a reason must be fair to both parties. Fairness, not correctness, is the mandated test.

Liberty Life Association of Africa Ltd v Kachelhoffer & others [2004] 10 BLLR 1043 (C)
Dismissal – Operational requirements – Industrial court correctly finding that proper approach when evaluating fairness of retrenchment is to view consultation as single process commencing when retrenchment is first contemplated – Application for review dismissed

1.5 Other forms of operational requirement dismissals

Lebowa Platinum Mines Ltd v Hill (1998) 7 BLLR 666 (LAC)
Manager's dismissal due to employee pressure- While the question whether it was fair for an employer to dismiss an employee in response to a demand from a third party depended on the circumstances, certain principles had to be taken into account. These were - (i) the mere fact that such a demand has been made was not enough to justify dismissal, (ii) the demand had to have sufficient foundation; (iii) the threat of action by the third party if its demand was not met had to be real and serious; (iii) the employer had to have no other option but to dismiss; (iv) the employer must have made a reasonable effort to dissuade the third party from carrying out its threat; (v) the employer should investigate and consider alternatives to dismiss and consult with the employee; (vi) the blameworthiness of the employee's conduct should be taken into account. The test was not whether the dismissal of the employee amounted to a reasonable option in the circumstances, but whether it was fair.
SACWU v Afrox Ltd (1998) 19 ILJ 62 (LC)
To change conditions of employment
Monyela & others v Bruce Jacobs t/a LV Construction (1998)) 19 ILJ (LC)
To change conditions of employment
Van Zyl v Department of Labour (1998) 3 BALR 438 (CCMA)
Dismissal to facilitate representativeness within the Public Service not an operational requirement, unfair
Watson v Denel (Pty) Ltd (1998) 4 BALR 456 (CCMA)
Employee refusing to accept changes to conditions of employment, dismissal fair

1.5A Religious grounds which interfere with operational requirements

In a serious of cases the principle seems to have been established that, provided an employer has not acted in an irrational and arbitrary manner, it may not be unfair action to dismiss an employee whose religious beliefs prevent him or her adapting to changing operational requirements.
The following cases appear to have relevance;
SACCAWU v Sun International SA Limited and others [2003] 24 ILJ 594 (LC)
Freshmark (Pty) Limited v CCMA and others [2003] 24 ILJ 373 (LAC)
Food and Allied Workers Union & Others v Rainbow Chicken Farms [2000] 5 LLD 153 (LC)
Mabasu and Others v Universal Product Network (Pty) Ltd [2003] 9 BLLR 871 (LC)

1.6 Definition of Employee (*most of these adopt the dominant impression test)*

Board of Executors Ltd v McCafferty (1997) 18 ILJ 949 (LAC)
Discussion of test, an employee can have more than employer

SAAPAWU v Premier (Eastern Cape) & others (1997) 18 ILJ 1317 (LC)
Composite employer
Msibi v World Television News (1998) 19 ILJ (CCMA)
The true nature of the relationship must be determined, irrespective of the characterisation. By the parties.
Gordon v St John's Ambulance (1997) 6 BLLR (CCMA)
Dominant impression test.
SADTU v Marine Taxis CC (1997) 6 BLLR) 823 (CCMA)
Economic realities test.
Niselow v Liberty Life Association of Africa LTD (1998) ILJ 752 (SCA)
SA Broadcasting Corporation v McKenzie (1999) 20 ILJ (LAC); (1999) 1 BLLR 1 (LAC)
McKenzie had represented himself to the Receiver of Revenue as an independent contractor. He had at all times been paid for the product of his work, not his capacity to work.
Oosthuizen v CAN Mining & Engineering Supplies CC (1999) 20 ILJ 910 (LC)
Mashaba v Cuzen & Woods (1998) 19 ILJ 1486 (LC)
Mpungose v Ridge Laundries CC (1999) 20 ILJ 704 (CCMA)
Caetano v Carousel Dance & Dine (1999) 4 BALR 397 (CCMA)
Dempsey v Home & Property (1995) 3 BLLR 10 (LAC)
***Golden rule of construction* – The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, eg where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.**
Employee – Dominant impression test – Industrial Court to look at the relationship in its totality and identify those aspects indicating an employment relationship and those indicating some other form of association – Factors to be weighed and the dominant impression to prevail
Beverley Whitehead v Woolworths (Pty) LTD, [1999] 8 BLLR 862 (LC)
In terms of definition a person is only an employee when such person actually works for another person – The employee must therefore have rendered a service to another which services are not that of an independent contractor. – In the circumstances where an offer of employment is made to another and the offer is accepted a contract of employment may come into existence, but the parties to that contract do not enjoy the protection of the Act until such time as the offeree actually commences her performance or at least tenders performance in terms of the contract.
WOOLWORTHS (PTY) ltd V Whitehead [2000] 6 BLLR 640)LAC)
On appeal, the Court held that the court ***a quo*** *had correctly dismissed the respondent's claim that she had been unfairly dismissed* ***(see above).***
NUCCAWU v Transnet Ltd t/a Portnet [2000] 21 ILJ 2288 (LC)
Employee determination - Casual employee - Although employed for short time or without fixed employment, such person is an employee entitled to protection of LRA 1995. Employees considered for work on day-to-day basis from pool of workers according to needs of employer - Such persons special class of employees retained on books of employer to render services on ad hoc basis - Employees for purpose of LRA 1995

Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & another

Employees induced by employer to resign and enter into agreements as "sub-contractors" but continuing to do same work - Employer perpetrating a sham

Wyeth SA (Pty) LTD v Manqele & others [2003] 7 BLLR 734 (LC)

Dismissal – Existence of – Termination of contract of employment before employee commences service a dismissal for purposes of LRA

Employee – Who constitutes – Person who has concluded contract of employment but has not yet commenced working an employee for purposes of the LRA. ***(This judgement takes precedent over the Beverley Whitehead v Woolworths (Pty) LTD judgement in [1999] 8 BLLR 862 (LC).***

Wyeth SA (Pty) Ltd v Manqele & others [2005] 26 ILJ 749 (LAC); [2005] 6 BLLR 523 (LAC)

Contract of employment – Termination – Whether person whose contract of employment terminated before commencement of employment an employee as defined in s 213 of LRA – Interpretation of 'employee' – Adoption of literal interpretation leads to gross hardship, ambiguity and absurdity – Common sense, justice and values of Constitution best served by extending construction to include person who has concluded contract of employment which is to commence at future date.

1.6A Are applicants employees prior to commencement of work?

Beverley Whitehead v Woolworths (Pty) LTD, [1999] 8 BLLR 862 (LC); (2008) 29 ILJ 1480

In terms of definition a person is only an employee when such person actually works for another person – The employee must therefore have rendered a service to another which services are not that of an independent contractor. – In the circumstances where an offer of employment is made to another and the offer is accepted a contract of employment may come into existence, but the parties to that contract do not enjoy the protection of the Act until such time as the offeree actually commences her performance or at least tenders performance in terms of the contract.

Wyeth SA (Pty) LTD v Manqele & others [2003] 7 BLLR 734 (LC)

Dismissal – Existence of – Termination of contract of employment before employee commences service a dismissal for purposes of LRA

Employee – Who constitutes – Person who has concluded contract of employment but has not yet commenced working an employee for purposes of the LRA. ***(This judgement takes precedent over the Beverley Whitehead v Woolworths (Pty) LTD judgement in [1999] 8 BLLR 862 (LC).***

Wyeth SA (Pty) Ltd v Manqele & others [2005] 6 BLLR 523 (LAC)

Employee – Person who has concluded contract of employment but has not yet commenced working for an employer for purposes of the LRA.

1.6A(A) Foreign persons

Discovery Health Limited v CCMA & others [2008] 7 BLLR 633 (LC)

The Labour Court ruled that a foreigner who had been employed without a work permit fell within the statutory definition of "employee" even though the applicant had committed an offence by employing him. The Court held that the days in which courts had ruled such contracts void and unenforceable are over; the Constitution of the Republic of South Africa, 1996 now gives everybody the right to fair labour practices. The termination of the foreigner's contract of employment therefore constituted a dismissal.

1.7 Casual Employee

NUCCAWU v Transnet LTD t/a Portnet (2000) 21 ILJ 2288 (LC).
Employee - Determination - Casual employee - Although employed for short time or without fixed employment, such person is an employee entitled to protection of LRA 1995. The definition of 'employee' was wide enough to include persons who were retained on the books of an employer to render services, albeit on an ad hoc basis. Moreover, the label 'casual' did not detract from the fact that members remained employees.

1.8 Real Employer

Pearson v Sheerbonnet SA (Pty) LTD (1999) 20 ILJ 1580 (LC)(D225/98)
Employer – Real employer – Determination – Employee employed in UK and transferred to SA – Whether employee employed by UK company or SA company – Factors considered by court – SA company found not to be employer – Labour Court not having jurisdiction.
Labour Court – Jurisdiction – Unfair dismissal dispute – Employee employed in UK and transferred to SA – Court finding that employee employed by UK company and not SA company – Court not having jurisdiction
Buffalo Signs Co LTD & others v De Castro & another (1999) 20 ILJ (LAC)(JA36/98)
Employer – Real employer – Determination – Employer in equity – Whether and when equitable policy considerations come into play in determining true employer.
Employer – Real employer – Determination – Piercing corporate veil – Use of separate corporate identities to be ignored to give employees proper protection against unscrupulous employers who use corporate identities to avoid legal obligations.
Employer – Real employer – Determination – Piercing corporate veil – When court will do so – Where use of separate corporate identities used to perpetrate fraud on employees.
Retrenchment – Employer – Deceit practised by corporate entities to relieve true employer from complying with proper retrenchment procedure and payment – Court determining true employer – True employer liable to compensate employees.
Board of Executors Ltd v McCafferty [1997] 7 BLLR 835 (LAC)
Employment relationship - Existence of - Contract of employment not definitive proof that employment relationship confined to single employer - Independent entities of group of companies each having elements of employment relationship with employee - Contract with one not determinative.
August Lapple (South Africa) v Jarrett & others [2003] 12 BLLR 1194 (LC)
Bargaining council – Jurisdiction – Council having jurisdiction over dispute concerning dismissal of managing director of South African subsidiary of foreign company, even though MD also employed by holding company and having claim against it in foreign court. If foreign companies could avoid South African law by simple stragem of concluding contracts with employees employed in South Africa, all such employees would be deprived of the protection of the South African law. This was neither fair nor constitutional.

1.9 Constructive Dismissal

Unilong Freight Distributors (Pty) Ltd v Muller (1998) 19 ILJ 229 (SCA)
Employee forced to accept voluntary retrenchment.
Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ (LAC): (1997) 6 BLLR *Test for constructive dismissal :Not necessary for court to show employer intended any repudiation of contract – Court to look at employer's conduct*

as a whole and determine whether effect, judged reasonably and sensibly, is that employee cannot be expected to put up with it.

Moser Industries (Pty) Ltd v Venn (1997) 11 BLLR 1402 (LAC)

Test for constructive dismissal, employee forced to accept a termination package., constructive dismissal not necessarily unfair.

Quince Products CC v Pillay (1997) 12 BLLR 1547 (LAC)

Withdrawal of company transport.

Van der Riet v Leisurenet Ltd t/a Health and Racquet Club (1998) 5 BLLR 471(LAC)

Demotion arising from restructuring of managerial posts.

Masondo v Crossway (1998) 19 ILJ 177 (CCMA)

Employee with child required to work at night.

Puren v Victorian Express (1998) 19 ILJ 404 (CCMA)

Test for constructive dismissal, assault of co-employees

Pretorious v Britz (1997) 5 BLLR 649 (CCMA)

Sexual harassment.

Jooste v Transnet t/a South African Airways (1995) 4 LCD 223 (LAC): (1995) 16 ILJ 629 (LAC)

Lubbe v ABSA Bank Bpk (1998) 12 BLLR 1224 (LAC)

Dismissal - Constructive - Employee resigning after critical report about his performance without giving employer opportunity to respond to his submissions - Constructive dismissal not proved.

SAPPI Kraft (Pty) Ltd v t/a Tugela Mill NO & others (1998) 19 ILJ 1240 (LC)

Higgs v African Transport Services (1998) 19 ILJ 1649 (CCMA)

Raad v Expressit (Pty) Ltd (1997) 7 BALR 828 (CCMA)

Campher v Redgewoods (1999) 3 BALR 245 (CCMA)

Leburu v Department of Home Affairs (1999) 2 BALR 146 (CCMA)

Pretorious v Britz (1997) 5 BLLR 649 (CCMA)

Dismissal-Constructive- Employee who resigned due to constant sexual harassment deemed to have been dismissed - Compensation awarded.

SACTWU v Celrose Limited (1997) 7 BLLR (CCMA) 946

Engelbrecht v Cape Truss Manufacturing (1997) 4 BLLR (CCMA) 432

McGilvray v Trade Up Front [2000] vol 5 July LCD 426 (CCMA)

Constructive dismissal - Resignation must be last resort or only reasonable option available to employee - Where employee subjected to unilateral changes to conditions of employment, demotion, and unfair disciplinary action, LRA 1995 provides alternative remedies - Resignation for such reasons not constituting constrFive dismissal.

Halgreen v Natal Building Society (1996) 7 ILJ 769

Dallyn v Woolworths (Pty) Limited (1995) 16 ILJ 696 (IC)

Goliath Medscheme (Pty) Limited (1996) 17 ILJ 760 (IC)

W L Ochse Webb & Pretorious (Pty) Limited v Vermeulen (1997) 2 BLLR 124 (LAC)

Old Mutual Group Schemes v Dreyer & Another [1199] vol 4 LLD 548 (LAC): [1999] 20 ILJ 2030.

Constructive Dismissal – Resignation to avoid disciplinary hearing and appeal hearing – Employee not entitled to bypass procedures to gain access to court to air dispute – Employee to follow correct internal disciplinary procedures, including appeal procedure, provided by employer – Constructive dismissal not shown. *.Employee's are bound by the company's prescribed internal procedures and must first exhaust these before approaching Court*

Coetzer and The Citizen Newspaper (2003) 24 ILJ 622 (CCMA)

Constructive dismissal – Determination whether situation so unbearable that employee cannot continue to do the job he/she was doing at relevant time – Test

objective – Employers conduct to be reasonable and sensibly assessed and its particular circumstances taken into account – Alternatives to resignation – Employee must show termination of employment contract only reasonable option available – Where employee does not exhaust all other remedies available, resignation unjustified and premature.

MILADYS, A DIVISION OF MR PRICE GROUP LTD v NAIDOO & OTHERS [2002] 9 BLLR 808 (LAC)

Dismissal – Constructive – Employee's over-reaction to management style of which she disapproved not a ground for claim of constructive dismissal

ALDENDORFF v OUTSPAN INTERNATIONAL LIMITED [1997] 6 BLLR 772 (CCMA)

Constructive dismissal – What constitutes – Mere resentment by employee at employer's conduct not warranting conclusion that employment relationship intolerable – Manager demoted with his apparent consent not constructively dismissed.

Moyo and Standard Bank of SA LTD [2005] 26 ILJ (CCMA)

Constructive dismissal – Onus – On employee to prove that employer made continued employment intolerable – Employee failing to show resignation the only option.

1.10 Fixed Term Contracts

Mediterranean Woollen Mills (Pty) Ltd v SACTWU (1998) 6 BLLR 549 (SCA)

Employment relationship - Can remain in existence after termination of contract of employment - Employer placing dismissed strikers on temporary contracts - Such not breaking continuity of employment relationship.

Unfair labour practice - Refusal to re-employ - Employer refusing to re-employ some dismissed strikers who had been placed on temporary contracts of employment - Such refusal unfair as employees not informed of the basis for non-selection or given opportunity to challenge employer's decision.

Naidoo & others v Portnet (1997) 18 ILJ 1109 (CCMA)

Renewal of contract did not create reasonable expectation of further renewal.

Magubane & others v Amalgamated Beverages (1997) 18 ILJ 1112 (CCMA)

Renewal of contracts did not create reasonable expectation of further renewal.

Dierks v University of South Africa (1999) 20 ILJ 1227 (LC)

The employee, who had been employed on a series of fixed-term contracts, argued that he had been unfairly retrenched. He sought a remedy, which, in effect, would have made him a permanent employee. The Labour Court found that an employee who has an expectation of permanent employment (whether reasonable or not) cannot make use of s 186 and the unfair dismissal provision of the IRA to gain permanent employment. It expressed the opinion that the unfair labour practice provisions of the LRA could provide a remedy.

Zamisa & another v SANS Fibers (1999) 20 ILJ 726 (CCMA)

Alvillar v National Union of Mine Workers (1999) 20 ILJ 419 (CCMA)

Zwane v Elegance Jerseys (1998) 19 ILJ 969 CCMA

Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115: 25 ILJ 2317 (LAC)

Contract of employment – Fixed term contract – Termination Employee on fixed-term contract may not be retrenched before expiry of contract – Retrenchment in such circumstances unfair perse

The court held that at common law a party to a fixed-term contract has not right to cancel the contract before the termination date in the absence of repudiation or material breach by the other party. The Court rejected the respondent's argument that labour legislation and the Constitution rendered obsolete the common-law rule

that a fixed-term contract cannot be prematurely terminated for operational requirements before its expiry.

1.11 Contracts of employment – enforceability

Dube v Classique Panelbeaters (1997) 7 BLLR 869 (IC)(11/2/27326)
Contract of employment – Illegal – Contract entered into in violation of pre-emptory statutory provision void ab initio – No employment relationship arising in consequence of conclusion of such contract.
***Employee – illegal alien – Illegal alien not an employee within the meaning of the Act as contract between him and employer void* ab initio.**
Industrial Court – Section 46(9) – Jurisdiction – Court lacking jurisdiction over application lodged by illegal immigrant – No employment relationship as contract void ab initio. **See the Discovery case, the Labour Court has no ruled differently**.
Norval v Vision Centre Optometrists (1995) 4 LCD (IC)
Contract of employment – Illegality – Effect of on Industrial Court's unfair labour practice jurisdiction – Contract entered into in contravention of statute – Statute rendering contract void – No employment relationship existing between parties – Termination of services not constituting dismissal or unfair labour practice – Court lacking jurisdiction to determine dispute arising from termination of employee's services.
Mills and Drake International SA (Pty) LTD [2004] ILJ 1519 (CCMA)
Dismissal – What constitutes dismissal- Contract of employment terminated by employer before employee tendered services in terms of contract – Constitues dismissal in terms of s 186(1)(a) of LRA 1995 – Section does not qualify termination or direct that it must not predate employee's reporting for duty.
Contract of employment – Offer and acceptance – Employer alleging offer made subject to suspensive condition that the employee be released from pre-existing restraint of trade agreement – Offer found not to be subject to such condition – Employee accepting offer – Employer's refusal to employ employee constitutes dismissal.

1.12 Transfer of contracts of employment

Schutte & others v Powerplus Performance (Ptt) Ltd & another [1999] 2 BLLR 169 (LC)
Transfer of contracts of employment - When permissible - Employer can transfer contracts of employees without consent only in circumstances envisaged by the Act - Whether business is transferred depends not on form of agreement, but on substance of transaction - Primary indication is extent to which business retains its identity after sale.
Kgethe & others v LM Manufacturing (Pty) Ltd & another [1998] 3 BLLR 248 (LAC)
Transfer of contract of employment - Disclosure of information - Employees entitled to have sight of agreement of sale to verify employer's claim that sale amounted not to transfer of business, but to disposal of assets - Separate application to CCMA not required.
Manning v Metro Nissan – a Division of Venture Motor Holdings Ltd & another (1998) 19 ILJ 1181 (LC) (J1034/97) (LCD vol 3 part 7 1998 398)
Ndima & others v Waverley Blankets Ltd Sithukuza & others v Waverley Blankets Ltd (1999) 20 ILJ 1563 (LC) (P14/98 and P193/98) (LLD vol 4 1999 July 423)
Foodgro, a Division of Leisurenet Ltd v Keil (1999) 20 ILJ 2521 (LAC) (JA63/98): LLD vol 4 October – December 667
Contract of employment – Continuity of employment – Transfer of business as going concern under s 197 of LRA 1995 – Continuity of employment a fact, not a right or

obligation – Continuity cannot be interrupted by transfer of business. Amendment of contract of employment between employee and new employer – Section 197(2)(a) not allowing for contracting out of transfer of contract or for interruption of continuity of employment – Continuity of employment a fact, not a right or obligation between old employer and employee.

NEHAWU v University of Cape Town & others (1) [2000] 7 BLLR 803 (LC)

*Transfer of bus*iness - Effect on contracts of employment - Contracts of employment of employees not automatically transferred when employer transfers whole or part of its business to another employer – Act aimed only at empowering employer to transfer contracts without employees' consent, provided that they do so on same terms and conditions. If an employer contemplating transfer of its business decides not to transfer the contracts of employment without their consent, it must treat them fairly. They may not simply be dismissed. Employers are obliged to rely on section 189.

CEPPWAWU & OTHERS V HERBER PLASTICS (PTY) LTD & ANOTHER [2002] 1 BLLR 44 (LC)

An employer is obliged in fairness to consult with it's employees before the sale of it's business and to explain to them the implications of the sale for their contracts of employment.

1.13 Breach of contract: no automatic termination of contract

Coetzee & Another v Pitani (Pty) Ltd t/a Pitani Electrification Projects & Others [2000] 8 BLLR 907 (LC)

The court held that although the first respondent had acted unfairly towards the applicants by failing to assure them they had not been dismissed, and by not consulting them prior to taking the drastic action of suspending them without pay, the applicants had not been dismissed. ***However, the respondent had breached its obligations under the Act and the contract of employment. In terms of the law, an employer is not permitted to suspend employees without pay. This amounted to a breach of contract.*** *In terms of the common law, such a breach gave the applicants a choice to either cancel the contract or enforce it.*

However, the breach did not in itself terminate the contract. The applicants would have to exercise their right to terminate the contract be resigning. ***The court pointed out however, that the applicants could bring an action for constructive dismissal or sue for contractual damages.***

1.14 Insolvency

SA Agricultural Plantation & Allied Workers Union v HL Hall & Sons (Group Services) Ltd & others (1999) 20 ILJ 399 (LC)

Company – Liquidation of employer – Section 339 of Companies Act 61 of 1973 providing that s 38 of Insolvency Act 24 of 1936 applicable on winding-up of company unable to pay its – LRA 1995 nor applicable on insolvency – Law of insolvency administered by High Court applicable to employees – Contracts of employment automatically terminated by insolvency. Employees would have a claim for damages but nothing more.

Ndini & others v Waverly Blankets Ltd; Sithukuza & others v Waverly Blankets Ltd (1999) 20 ILJ 1563 (LC)

National Union of Leather Workers v Barnard NO & Another (2001) ILJ 2290 (LAC)

The Court found that a distinction should be drawn between the compulsory winding-up of a company in which a court has a clear discretion whether to grant an order and voluntary winding-up where a court cannot interfere with a right which the Companies Act gives to the requisite majority of shareholders to effect a winding-up after following proper procedures. The Court held that

the decision to pass the special resolution caused the contracts of employment to be terminated in that they were brought to and end by action of the employer. The decision to wind up and in a manner recognized by law being section 38 of the Insolvency Act.
Dismissal – Company in liquidation – Section 186(a) of LRA 1995 – Employer has 'terminated the contract of employment with or without notice' – Interpretation – Whether employer has engaged in act which brings contract of employment to end recognized by law.

1.15 Retirement age reached

Schweitzer v Waco Distributors (a Division of Voltex (Pty) Ltd) (1998) 19 ILJ 1537 (LC): (1999) 2 BLLR 188 (LC).
The Labour Court had to consider whether an employee who had continued working after reaching retirement age was entitled to protection against dismissal. The court came to the conclusion that he did not.
Schmahmann v Concept Communications Metal (Pty) Ltd (1997) 18 ILJ 1333 (LC) and **Coetzee v Moreesburgse Koringboere Kooperatief Bpk (1997) 18 ILJ 1341 (LC): (1997) 8 BLLR 1092 (LC).**
The Labour Court expressed the view that where employees have reached the agreed or normal retirement age applicable to them their contracts expire automatically and there is no dismissal.
Gqibitole v Pace Community College (1999) 20 ILJ 1270 (LC)
The court found that, on the facts, and based primarily on the terms of her retirement policy, an employee who was 68 years of age had not reached the agreed or normal retirement age applicable to her.
SACTWU & others v Rubin Sportswear [2003] 5 BLLR 505 (LC)
Discrimination – Age – Employer dismissing elderly employees before they reached normal retirement age – Dismissal automatically unfair

1.16 Selective re-employment

Mediterranean Woollen products (Pty) Ltd v SACTWU (1998) 6 BLLR 549 (SCA)
Unfair labour practice - Refusal to re-employ - Employer refusing to re-employ some dismissed strikers who had been placed on temporary contracts of employment - Such refusal unfair as employees not informed of the basis for non-selection or given opportunity to challenge employer's decision
FGWU obo Ndeya v Pritchard Cleaning (1997) 11 BLLR 1510 (CCMA)

1.17 Other

Kynoch Fertilisers Ltd v Webster (1998) 1 BLLR 27 (LAC)
Effect of acceptance of resignation
NETU v Meadow Feeds (1998) 1 BLLR 99 (CCMA)
Employee resigning rather than face disciplinary enquiry for negligence, later discovered that there was no basis for enquiry.

1.18 Strikes

Modise and Others v Steve's Spar Blackheath LAC
Striking workers – even those involved in illegal action – must be given a hearing. before they are dismissed – The court found that employers could comply with the right to a hearing by calling for "collective representations" on why the strikers should not be dismissed.

County Fair Foods (Pty) LTD v Food & Allied Workers Union & Others [2001] 22 ILJ 1103: [2001] 5 BLLR 494 (LAC)

Protected strike - Procedure - Party has choice of either following pre-strike procedure agreed in collective agreement or following statutory procedure in s 64(1) of LRA 1995 - Compliance with either procedure leads to protected strike.

Majola & others v D & A Timbers [1996] 9 BLLR 1091 (LAC)

*Prior hearings not necessary before **dismissal of illegal strikers***

Dealt with the fairness of a strike dismissal. The Court dismissed the applicant's complaint that their dismissals were unfair because they had not been given hearings, but found that the ultimatums they had been given were inadequate in that they did not give sufficient time for the workers to contact their union and reflect on their action.

Machabakwe & others v Pletonic CC t/a Pletonics Gear [1996] 9 BLLR 1143 (IC)

The court reinstated workers who had been dismissed for embarking on an illegal strike on the grounds, inter alia, that the ultimatums had been issued while negotiations over the problem were still in progress and the ultimatums were intended solely to lay a basis for the dismissal of the strikers.

NUMSA v Bader Bop (Pty) Ltd & another [2003] 2 BLLR 103 (CC)

Strikes – Right to strike – Unrepresentative unions entitled to strike in support pf demands for organisational rights – Strikes by minority union in support of demand for recognition of elected shop stewards lawful and protected

1.19 Date of Dismissal

Morake v Consol Glass 20 ILJ 2753 (1999) CCMA : LCD vol 4 747 (1999) October - December

*Date of dismissal to be calculated from dismissal, not from date of internal appeal decision – Practical problems arising from this ruling considered **Edgars Stores Ltd v SACCAWU & others (1998) 19 ILJ 771 (LAC)***

Chetty v Shoprite Checkers KN31607 (CCMA) 1999

Date of dismissal – date of disciplinary hearing – not date of internal appeal

Edgars Stores Ltd v SACCAWU & others (1998) ILJ 771 (LAC)

First National Bank of SA Ltd v CCMA & others [2000] v 5 LLD 399 (LC): Nzimande v Inkosi Protection Services [2000] v 5 LLD 429 (CCMA)

The Labour Court and the CCMA respectively have reaffirmed that the 30 day period prescribed for the referral of a dispute concerning an unfair dismissal to the CCMA runs from the date of dismissal, not from the date of any internal appeal.

Franken v Metal and Engineering Industiries Bargaining Council & others [2000] 10 BLLR 1174 (LC)

*The Court held that the **date of the applicant's dismissal was his last day of service**, and that it was irrelevant that he had been paid a month's salary in lieu of notice*

1.20 Probationary employee

Whitfield v Inyati Game Lodge [1995] BLLR 188 (IC)

Probationary employee – Where a probationary employee's services are found to be unsatisfactory he can be dismissed prior to the expiry of the probationary period but is entitled to the same f of fair treatment as permanent employees – Employee dismissed for insubordination and incompatibility after being afforded opportunity to state case and improve performance – Dismissal fair.

PETUSA obo van der Merwe v Libra Bathroomware and Spas (Pty) LTD [1999] 2 BALR 177 (CCMA)

This case reiterates the lesson that employers cannot rely on a probationary clause to dismiss a new employee for poor work performance without following a fair

procedure. The commissioner observed that while the Code of Good Practice Dismissal does not require an employer to use counselling forms, the employer had chosen to do so. These forms indicated that the parties were to attempt to reach agreement on how to resolve a performance problem. This had not been done. Good practice required that an employer should describe the problem to the employee and try to agree on a plan to resolve it. At the second meeting, management should address deficiencies. Only at the third meeting should the employee be warned of the consequences of a failure to improve. Mr van der Merwe had failed to understand the problem and had not been aware that he faced dismissal. That he was on probation did not relieve the employer of the obligation to follow a fair procedure.

1.21 Incompatibility

SUBRUMUNY and AMALGAMATED BEVERAGE INDUSTRIES LTD [2000] 21 ILJ 2780 (ARB)

Not expressly recognised as separate ground for dismissal in LRA 1995 – Akin to incapacity – Incapacity not arising from poor work performance but from inability to conform to employer's standards set to achieve harmony in workplace – Procedural requirements for dismissal for incapacity to be followed. Resultant breakdown in employment relationship must be irremediable – Levels of compatibility must for business and economic reasons be left for employer to decide – Provided employer acting in good faith interference by court or CCMA unwarranted.

Jabari v Telkom SA (Pty)(Ltd) [2006] 10 BLLR 924 (LC)

Incompatibility was defined as "a species of incapacity" relating to "the subjective relationship of an employee and other co-workers, within the employment environment, regarding the employee's inability to maintain cordial and harmonious relationships with his peers" To prove incompatibility, "independent corrobative evidence in substantiation is required to show that an employee's intolerable conduct was primarily the cause of the disharmony"

2. Subpoena: Application in terms of s 142

National Bargaining Council for the Road Freight Industry v Roets & Others LC (1999) 20 ILJ 2087 (J2258/98): LCD Vol. 4 1999

Subpoenas were issued, served on members of close corporation – employer association advised them not to attend in person – employer association to represent them – members guilty of contempt – fined R500.00 each. Revelas J commented as follows; ***"Common sense dictated that such an official, when appearing alone and without the actual employers or managers, would be unable to give any meaningful input into the conciliation process."***

Building Industry Bargaining Council Cape of Good Hope (Boland Area) v Hatline t/a The Homestyles Co [2001] ILJ 1143 (LC)

A subpoena may not be issued where a council simply requires information. A subpoena may only be issued where there is an alleged dispute.

3. Representation

Mavundla & others v Vulpine Investments Ltd t/a Thistle & others [2000] 9 BLLR 1060 (LC)

Commission or Conciliation, Mediation and Arbitration - Conciliation proceedings - ***Commissioner under duty to ensure that parties' representatives not only have authority to represent other parties at conciliation meeting, but also have mandate to enter into settlement on their behalf***

Commission for Conciliation, Mediation and Arbitration - Conciliation proceedings - Representation - Statutory provisions limiting representation peremptory and cannot be waived by agreement of parties or with consent of commissioner.

Settlement agreement - Validity - Employees entering into deed of settlement at conciliation proceedings without authority from employees they were representing Agreement invalid.

Legal Representation: automatic right

Netherburn Engineering CC t/a Netherburn Ceramics v Robert Mudau & others [2003] 23 ILJ 1712 (LC)

The court held it was not unconstitutional to deny legal representation to a litigant in the CCMA in certain circumstances. It was held that although there is a constitutional right to legal representation in appropriate circumstances, there is no absolute and automatic right in terms of the Constitution of the Republic of South Africa, (Act 108 of 1996), and the right to legal representation would arise when the requirements of a fair hearing made legal representation appropriate.

MEC: Department of finance, Economic Affairs & Tourism, Northern Province v Mahamani [2004] 25 ILJ 2311 (SCA)

Practice and procedure – Representation – The appellant appeals against the finding that the respondent was entitled to be legally represented at a disciplinary hearing – clause 7.3(e) of the disciplinary code and procedures for the public service ('the code') discussed – held that clause 7.3(e) is a fundamentally important provision and it should not lightly be departed from – but there may be circumstances in which it would be unfair not to allow legal representation – it will be for the presiding officer to apply his mind to the need for legal representation after considering the circumstances of the case – held that the presiding officer erred in holding that he had no discretion to allow such a departure – appeal is dismissed – the matter will of necessity have to be referred to the presiding officer for him to exercise his discretion.

Molope v Mbha & others [2005] 3 BLLR 267 (LC)

Practice and procedure – Representation – Applicant sought to have the first respondent's decision set aside – one of the requirements of a procedurally fair and just hearing embraces the entitlement of an employee to be represented thereat by a co-employee or a trade union representative or a lawyer – representation is not a matter of discretion, it is a matter of entitlement – dismissal of the applicant was tainted by procedural unfairness – the matter was remitted to the first respondent for determination of compensation

4. MISCONDUCT

4.1 Absence without leave

East Rand Gold & Uranium Co v NUM (1997) 6 BLLR 781 (CCMA)

DismFissal - Misconduct - Absenteeism - Employer obliged to hold appeal hearing after employee dismissed in absentia - Employer failing to do so before matter referred to Commission - Dismissal substantively and procedurally unfair.

Seabelo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)

Desertion - What constitutes - Desertion takes place when employee leaves employment with intention of not returning - Such intention to be established from inter alia, absence of communication with employer and length of absence.

Disciplinary procedure - Hearing - Employer should hold hearing when employee returns after period of suspected desertion.

Dismissal - Misconduct - Desertion - Employer not entitled to assume employee deserted without being appraised of facts which indicate an intention not to return.

KIEVITS KROON COUNTRY ESTATE (PTY) LTD v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION (2011) 32 ILJ 923 (LC)
Disciplinary penalty – Dismissal – Absence without leave – Employee adsent without leave to attend traditional healer initiation – Employee believing that life in danger if she did not heed call to become sangoma – Employer not recognizing employee's calling as illness and refusing leave – Factors considered in assessing fairness of dismissal for absenteeism – Commissioner finding explanation tendered by employee justifying breach of rule – Court declining to interfere with decision of commissioner – Dismissal unfair

4.2 Breach of good faith

Concorde Platics (Pty) Ltd v NUMSA & others (1998) 2 BLLR 781 (CCMA)
Dismissal for attending a court case to give evidence against employer in a libel action
SAPPI Novoboard (Pty) Ltd v Bolleurs (1998) 5 BLLR 460 (LAC)
Employee receiving secret commission
Suncrush Ltd v Nkosi (1998) 5 BLLR 464 (LAC)
Dismissal of employee for making report to police regarding alleged criminal conduct of manager
Geerdts v Multichoice Africa (Pty) Ltd (1998) 9 BLLR 895 (LAC)
Employee secretly recording meeting of her manager.

4.3 Collective guilt

NUM v DURHAM ROODEPOORT DEEP TD (1987) 8 (IC)
It was held to be *wholly repugnant to our law and any policy in terms of which all members of a group – must bear collective punishment for the wrong doings of some members*
FAWUA v Amalgamated Beverage Industries (1994) 8 ILJ 156 (LAC)
It was held – *in the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remains passive in circumstances like the present, and that his failure to assist in an investigation of this sort may itself justify disciplinary action.*
SACCAWU and others v Cashbuild Ltd (19996) 4 BLLR 457 (IC)
It was permissible for the Respondent to hold the Applicants', under circumstances of the matter liable as a group not withstanding that the concept of collective guilt is repugnant to our law ….The response to the shrinkage problem was that it was the teams obligation to control shrinkage and this was based on the company's philosophy.
FEDCRAW & others v Librapac CC (1997) 9 BLLR 1246 (CCMA)
Notion foreign to our legal system, no duty on employee to divulge names of other employees committing acts of misconduct.
SACCAWU V Pep Stores (1998) 6 BALR 719 (CCMA)
Entire staff of store dismissed for failure to control shrinkage
The Foschini Group v Maidi & others [2010] 7 BLLR 689 (LAC)
The Labour Appeal Court confirmed the concept of "team liability" where the entire staff of the store were dismissed after massive shrinkage confirming that employees shared collective responsibility for protecting the employer's goods and meeting the employers standards

4.3A Collective Misconduct

Chauke & others v Lee Service Centre CC t/a Leeson Motors JA91/97 (LAC)
Substantive fairness in dismissal – damage to property – appellants who were employed by the respondents were dismissed for allegedly being involved in malicious acts of damage at the workplace – Court was faced with the question of deciding on what circumstances it would be permissible to dismiss a group of workers where management was unable to pinpoint the perpetrator – in casu the Court found that the facts justified drawing a primary inference of culpable participation and therefore the failure of the appellants to assist in the investigations was indicative of them associating themselves with acts of sabotage – held that dealing with the applicants collectively did not mean that the audi alteram partem rule had not been complied with – appeal was dismissed

4.4 Dishonesty

NYALUNGA v PP WEBB CONSTRUCTION (1990) 11 ILJ 819 (IC)
Theft – Employer should suspend employee on full pay pending disciplinary inquiry – Summary dismissal without hearing unfair.
The court found that the employer was obliged to hold an enquiry. An employer would normally, on suspicion of theft, suspend the employee on full pay until such time as the inquiry could be held. Whether the employer held the inquiry before or after a criminal charge had been dealt with was a decision which the employer had to make according to the facts of the case.
Khoza v Gypsum Industries Ltd (1997) 7 BLLR 857 (LAC)
Medical aid fraud
SACWU & others v Plascon Paints (Tvl) (Pty) Ltd (1997) 12 BLLR 1550 (LAC)
Participation in fake hijacking
Lahee Park Club v Garrat (1997) 9 BLLR 1137 (LAC)
Writing off of club member's debt.

Ndlovu v Transnet Ltd t/a Portnet (1997) 18 ILJ 1031 (LC): (1997) 7 BLLR 887 (LC).
Failure by employee to disclose information at employment interview.
Standard Bank of South Africa Ltd v CCMA & others (1998) 6 BLLR 622 (LC)
False entries in attendance register, breach of trust in the form of dishonesty goes to the heart of the employment relationship and is destructive of it.
Edgars Stores Ltd v Ogle (1998) 9 BLLR 891 (LAC)
Theft
SAPA obo Voster v SA Poskantoor (1997) 11 BLLR 1524 (CCMA)
Recording of incorrect overtime
Komanne v Fedsure Life (1998)2 BLLR 215 (CCMA)
Theft almost invariably justifies dismissal.
Miyambo v Commission for Conciliation Mediation & Conciliation & others (2010) 31 ILJ 2031 (LAC) This is an important judgement.
Dismissal – Theft – Distinction between theft in technical sense and theft in true sense – Distinction between outright theft and absence of prior permission or unauthorized possession is artificial - Disciplinary procedure that draws subtle distinctions between degrees of theft impractical. Theft of scrap metal – Breach of trust relationship – Courts placing high premium on honesty in workplace – Distinction between degrees of theft impractical – Dismissal justified for operational reasons and fair.

4.4A Theft

Miyambo v CCMA & others [2010] 10 BLLR (LC)
Employee's theft of scrap metal undermining trust relationship – Dismissal a fair operational response. The Court found that the distinction between theft and petty theft would render disciplinary proceedings impracticable. What mattered was that the employee's conduct had breached a trust relationship that had been built up over many years.

4.5 Insubordination

Air Products (Pty) Ltd v CWIU & another (1998) 1 BLLR 1 (LAC)
Misconduct - Insubordination - Refusal to obey instruction to transfer - Such amounting to gross insubordination where only reason is employee's desire to avoid night shifts..
Johannes v Polyyoak (Pty) Ltd (1998) 1 BLLR 18 (LAC)
Dismissal - Misconduct - Insubordination Employee persistently refusing to obey instruction until certain alleged grievances were met - Employer not required to put up with persistent defiance in absence of reasonable explanation, no matter how well employee had worked in past - Dismissal fair
SACCAWU & Others v Mahawane Country Club [2002] 1 BLLR 20 (LAC)
Employees can be held to be guilty of insubordination only if they disobeyed instructions relating to their contractual obligations.

4.6 Insulting behaviour/racial remarks

R & C X-Press Freight v Munro (1998) 19 ILJ 540 (LAC) : [1999] 4 BLLR 295 (LAC)
Dismissal – Misconduct – Verbal abuse – Employee repeatedly swearing at subordinate – Dismissal justified as verbal assault was sustained, aggressive and directed at female, and because employee showed no real remorse.
Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others [2002] 6 BLLR 493 (LAC)
Dismissal – Misconduct – Racist remarks – Employee referring to injured employee as "kaffir" – Term has no place in workplace and can only be visited with dismissal.

4.7 Intoxication

Tanker Services (Pty) Ltd v Magudulela (1997) 12 BLLR 1552 (LAC)
Meaning of 'under the influence of alcohol', failure to take breathalyser

4.8 Sexual harassment

Reddy v University of Natal (1998) 19 ILJ 49 (LC)
Pretorious v Britz (1997) 5 BLLR 649 (CCMA)
Dismissal-Constructive- Employee who resigned due to constant sexual harassment deemed to have been dismissed - Compensation awarded.
Sexual harassment - Employee's resignation justified in view of constant sexual advances and suggestions to which she was subjected - Compensation awarded.

4.9 Sleeping on duty

Boardman Brotheers (Natal) (Pty) Ltd v CWIU (1998) 19 ILJ 517 (SCA)
Employees working longer hours than statutory limitations

Ntsabo v Real Security CC [2003] 12 (LC) C259/2000
Sexual harassment – vicarious liability of employer for acts of sexual harassment perpetrated by an employee against a co-employee - employee reported incident to employer, but employer failed to take steps to investigate the complaints – court awarded employee amounts for unfair dismissal and for discrimination in terms of EEA.

4.10 Incapacity/Poor Performance

Unilong Freight Distributors (Pty) Ltd v Muller (1998) 19 ILJ 229 (SCA)
Poor work performance, senior manager
Somyo v Ross Poultry Breeders (Pty) Ltd (1997) 7 BLLR 862 (LAC)
Poor work performance senior manager: Dismissal for poor work performance – Normal rules regarding counselling and warning for poor work performance may be dispensed with in case of senior employees capable of appraising their own performance and where consequence of single lapse has potentially disastrous
Eskom v Mokoena (1997) 8 BLLR 965 (LAC)
Poor work performance manager
Palmer v S Mazor Aluminium CC (1997) 6 BLLR 812 (CCMA)
Probationer's rights
Yeni v South African Broadcasting Corporation (1997) 11 BLLR 1531 (CCMA)
Probationer manager
SACCAWU v Pep Stores (1998) 6 BALR 719 (CCMA)
Entire staff of store dismissed for failing to control shrinkage
SA Transport & Allied Workers Union v Spoornet, Orex, Saldanha, (2001) 22 ILJ 2120 (Arb)
Probationary employee – Employer entitled to assume that a qualified artisan does not require same level of counselling and guidance as employee who has to be trained into complex job – Nevertheless, employer must provide clear regular analysis of alleged incapacity, or guidance towards achievable goals – Dismissal in absence of such guidance unfair.
New Forest Farming CC v Cachalia & others (2003) 10 BLLR 1051 (LC)
Dismissal – Poor work performance – Employer need not warn employee or grant further opportunity to improve when employee knows or ought reasonably to know standard set by employer

4.11 Polygraph tests

FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River [2010] 9 BLLR 903 (LC)
The Court concluded that, while polygraph machines reliably record physical reactions to questions, the reliability of the analysis of these tests is controversial. The Court accepted that, while, polygraph testing may prove deception, it cannot prove conclusively that people were guilty of offences. That being the case, the company's suggestion that refusal to undergo polygraph testing should serve as a basis for selecting employees for retrenchment was neither fair nor objective. Failure by employees to undergo polygraph test cannot be relied on to prove that employee committed misconduct.

4.12 Double Jeopardy

BMW (SOUTH AFRICA)(PTY)LTD v Van der Walt [2000] 2 BLLR 121 (LAC)

Disciplinary procedure – Whether re-hearing permissible depending on circumstances- Employee charged with new offence arising from same facts after being acquitted at earlier hearing – Re-hearing fair as new evidence disclosed true gravity of employee's misconduct- Whether a second disciplinary hearing can be opened against an employee for the same misconduct depends on whether it was, in all the circumstances, fair to do so. It would be unfair to compel an employer to retain the services of an employee in whom it had lost all confidence.

Branford v Metrorail Services (Durban) & others [2004] 3 BLLR 199 (LAC)

Double jeopardy- Arbitration award- Review- Arbitrator misconstruing law relating to double jeopardy principle and declining to examine reasons why employer re-opened inquiry after accused employee received warning – Arbitrator's error constituting gross irregularity – Award set aside.

Employer dismissing employee who had already received warning for fraud – Dismissal fair as evidence before manager who had imposed warning did not disclose true gravity of offence – Test in such cases is whether it is fair to deny employer opportunity to re-institute disciplinary proceedings.

RAKGOLELA and TRADE CENTRE [2005] 26 ILJ 392 CCMA

The commissioner distinguished a decision of the Labour Appeal Court in which a second hearing was found to be justified in the light of additional evidence against the employee. In the present case there was no fresh evidence. The commissioner did not dispute an employer's right to hold a second hearing should fairness require it, but found that in the present case the employer had simply used a peripheral issue (the employee's alleged lie) to justify another hearing on the original issue of taking the cell phone without permission. This amounted to 'double jeopardy) and was grossly unfair. Compensation equal to 12 months' remuneration was awarded.

4.13 Derivative Misconduct

National Union of Mineworkers & others and RSA Geological Services (A division of De Beers Consolidated Mines LTD) [2004] 25 ILJ 410 (ARB)

Dismissal – Misconduct – Derivative misconduct – Requirements for proof of derivative misconduct – Onus on employer to prove employee knew or could have acquired knowledge of wrongdoing, and that employee failed without justification to disclose that knowledge, or to take reasonable steps to help employer to acquire that knowledge. To discharge the general onus placed on it by s 192(2) of the LRA the employer must prove on a balance of probabilities that each and every one of the applicant employees was in possession of information that would have assisted the employer, and refused to disclose it.

4.14 Customer Complaints

Magic Company v Commission for Conciliation, Mediation & Arbitration [2005] 26 ILJ 271 (LC)

The Court was satisfied with the commissioner's finding that the employee had not enjoyed the benefit of the audi altrem partem principle and that the company had relied exclusively on the letter of complaint from a customer. While it was correct that employers should be granted some leeway in applying the audi principle flexibly to their particular circumstances, the court found that mere reliance on a letter of complaint from an agitated customer, who may have an axe to grind, will of itself usually not be enough to justify a summary dismissal of an employee with a clean disciplinary record. Ideally, before a dismissal can follow, the employee should be

given an opportunity to hear the complaint against him or her and be afforded the right to challenge the complainant's version in the presence of the complainant. Alternatively, and at the very least, the employer should adduce evidence tending to corroborate the allegations made in the letter of complaint.

4A Automatically unfair dismissals

Mashava v Cuzen & Woods Attorneys [2000] 6 BLLR (LC)

Dismissal – Probationary employee – Probationary employee dismissed for concealing facts of pregnancy – Dismissal automatically unfair

Pregnancy – Pregnant employee not obliged to disclose fact of pregnancy during probationary period

Fry's Metals (Pty) LTD v NUMSA & others [2003] 2 BLLR 140 (LAC)

The Court considered the relationship between the provision of the LRA that permits dismissals for employers' operational requirements, and the provision that renders automatically unfair dismissals to compel employees to comply with demands over matters of mutual interest between employers and employees. The Court held that there is no conflict between these provisions: the prohibition of dismissals for the purpose of inducing the employees to comply with a demand applies only to situations in which employees are given the opportunity of accepting changed conditions of service after their dismissal. ***Where the dismissal is final and irrevocable, there can be no question that it is effected to compel the employees to comply with a demand.*** *The Court held that it was clear from the evidence that the respondent employees had been dismissed in order to replace them with others who were willing to comply with the appellant's requirements. The appeal was dismissed.*

NATIONAL UNION OF METALWORKERS OF SA & OTHERS v FRY'S METALS (PTY) LTD 2005 (5) SA 433 (SCA); [2005] 26 ILJ 689 (SCA)

Automatically unfair dismissal – Dismissal to compel employee to accept demand (s 187(1)© of LRA 1995) – Difference between such dismissal and dismissal defined in s 186 – Only conditional dismissals fall under s 187(1)© - Dismissals intended to be final and not reversible on acceptance of demand can never have as their reason 'to compel employee to accept' that demand – Only factual enquiry confronting court is employer's reason for effecting dismissal – Once compulsion to accept disputed demand is excluded, dismissal not automatically unfair.

SACTWU & others v Rubin Sportswear [2003] 5 BLLR 505 (LC)

Discrimination – Age – Employer dismissing elderly employees before they reached normal retirement age – Dismissal automatically unfair

CWIU & others v Algorax (Pty)Ltd [2003] 11 BLLR 1081 (LAC)

Dismissal – Automatically unfair – Dismissal in support of demand – Employer dismissing employees who refused to work new shift system and offering to reinstate them if they agree to do so – Dismissal automatically unfair. – Operational requirements – Fair reason – While courts will not normally interfere with employer's solution to operational problem, court will substitute its own decision where solution entails unnecessary dismissal – Employer dismissing employees for refusing to work new shift system without considering obvious alternative – Dismissal unfair.

NUMSA & others v Fry's Metals (Pty)Ltd [2005] 5 BLLR 430 (SCA)

Dismissal – Operational requirements – Dismissal of employees who refuse to accept changes to terms and conditions of employment permissible, provided changes serve genuine operational requirements and dismissal not conditional

4AA PREGNANCY

Mashava v Cuzen & Woods Attorneys [2000] 6 BLLR (LC)

Dismissal – Probationary employee – Probationary employee dismissed for concealing facts of pregnancy – Dismissal automatically unfair

Pregnancy – Pregnant employee not obliged to disclose fact of pregnancy during probationary period

5. Referrals Section 191(5)(b)(ii) (Arbitration)

De Vries v Lionel Murray Schwormstedt and Low [2001] 8 BLLR 902 (LC); [2001] 22 ILJ 1150 (LC)
Dismissal disputes - Unfair dismissal disputes can be referred for arbitration or adjudication 30 days after a dispute was referred for conciliation - Possession of certificate stating that dispute remains unresolved not required
NATIONAL UNION OF MINEWORKERS v HERNIC EXPLORATION (PTY) LTD (2003) 24 ILJ (LAC)
Certificate of outcome (s 135(5) of LRA 1995) Issue of certificate – No time limit prescribed for issue of certificate – Ninety-day period for referral to Labour Court runs from date when commissioner certifies that the dispute remains unresolved

6. Severance pay

Kynoch Feeds (Pty) Ltd v CCMA & others (1998) 4 BLLR 384 (LC)
Employee not entitled to severance pay in the case of resignation after the acceptance of an alternative job.
IRVIN & JOHNSON LTD v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (2006) 27 ILJ 935 (LAC)
Retrenchment- Alternative employment – Employer finding alternative employment for employee facing dismissal for operational requirements – Right to severance pay –Section 41(4) of Basic Conditions of Employment Act 75 of 1997 – Employee accepting alternative employment – Employee forfeiting right to severance pay. Incentive to employer to try to find alternative employment for employee.

7. General

Mncube v Cash Paymaster Services (Pty) Ltd (1997) 5 BLLR 639 (CCMA)
Use of polygraph : by agreement.
Dube v Classique Panelbeaters (1997) 7 BLLR 868 (LC)
Validity of employment contract of illegal alien

8. Contractual claims

Key Delta v Marriner (1998) 6 BLLR 647 (E)
Contract of employment – Termination of – Employer not entitled to terminate contract without good reason or hearing where parties were at time of contracting aware of legislative developments in labour law prohibiting same – Right not to be dismissed arbitrarily implied in contract.
Notice – Employee may be entitled to compensation exceeding what he would have earned during contractual notice period where employer has breached contract.

9. Suspension

Koka v Director General: Provincial Administration, North West Government (1997) 18 ILJ 1018 (LC): [1997] 7 BLLR 874 (LC).
Suspension can take two forms, either as disciplinary sanction or pending inquiry into alleged misconduct. Suspension of the latter type may have effect of former, hence potentially constituting unfair labour practice. Authority exists for proposition that hearing not required before suspension pending inquiry. An employer must have positive grounds on which to decide whether an employee should be suspended because wrongful suspension could make the employer liable to a claim for damages

and could constitute a residual unfair labour practice. The suspension of an employee which is not effected by way of a fair procedure and for a fair purpose will constitute an unfair labour practice in terms of item 2(1)(c) of schedule 7 of the Labour Relations Act 66 of 1995 (at 884F-G).

Venter v South African Tourism Board (1999) 10 BLLR 1111 (LC)

Disciplinary procedure - Suspension from duty - Employer not required to give employee hearing before suspending him pending disciplinary inquiry- Interdict refused.

PSA obo Matemane v Department of Education, Arts, Culture & Sport (2000) 5 BALR 555 (CCMA)

Coetzee & Another v Pitani (Pty) Ltd t/a Pitani Electrification Projects & Others [2000] 8 BLLR 907 (LC)

However, the respondent had breached its obligations under the Act and the contract of employment. In terms of the law, an employer is not permitted to suspend employees without pay. This amounted to a breach of contract.

Sajid v Mahomed NO & others (2000) 21 ILJ 1204 (LC)

Ngwenya v Premier of KwaZulu-Natal [2001] 8 BLLR 924 (LC)

Suspension – Pending disciplinary enquiry – Employee entitled to be heard before being suspended on full pay, as suspension damages employee's reputation

City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union & others (2009) 30 ILJ 2064 (LC)

Suspension – Preventative suspension – Requirements to be complied with by employer to ensure that such suspension fair – Employer to be satisfied that offence serious and that employee's continued presence may jeopardize investigation or endanger safety of person or property ***– Employee must be given opportunity to make representations before decision to suspend taken.***

10. Suspension without pay as a disciplinary sanction

Wahl v AECI Ltd [1983] 4 ILJ 298 (IC)

One month's suspension rather than outright dismissal deemed appropriate for the offence of fighting

SOUTH AFRICAN BREWIES LTD (BEER DIVISION) v WOOLFREY & OTHERS [1999] 5 BLLR 525 (LC)

Basic Conditions of Employment Act 3 of 1983 – Deductions of amounts from employee's wages – Prohibition not precluding employer from imposing penalty of suspension without pay.

Disciplinary penalty – Suspension without pay – Suspension without pay permissible sanction for disciplinary offence.

Coetzee & another v Pitani (Pty) Ltd t/a Pitani Electrification Projects & others [2000] 8 BLLR 907 (LC)

In terms of law, an employer is not permitted to suspend employees without pay.

SAPPI FORESTS 9PTY) LTD v CCMA & OTHERS [2009] 3 BLLR 254 (LC)

Unfair labour practice – Suspension – Suspension without pay constituting unfair labour practice and breach of contract if employee does not consent.

11. Applicants – Employment – Dismissal

Grogan, Workplace Law, sixth edition, page 28-29

The employment contract commences from the moment the parties reach agreement on its essential terms. The contract may, however, be made subject to suspensive clause, in terms of which the parties agree that the employee will commence work only at some future date. Where this is the case, the employer is obliged to allow the employee to commence work on the arrival of the specified date. Failure without good cause to allow the

employee to do so could constitute a breach of contract at common law. However it has been held not to amount to a dismissal for the purposes of the LRA.

Wyeth SA (Pty) LTD v Manqele & others [2003] 7 BLLR 734 (LC)

Dismissal – Existence of – Termination of contract of employment before employee commences service a dismissal for purposes of LRA

Woolworths (Pty) Ltd v Whitehead [2000] 21 ILJ 571 (LAC)

12. CONDONATION

Fundaro v McLachlan & Lazar (Pty) Ltd t/a M&L Inspection Services [1996] 4 BLLR 420 (LAC)

Condonation - Late referral - Plea for condonation for late lodging of section 46(9) application must be made by applicant himself - Application based solely on affidavit by applicant's attorney insufficient.

National Union of Metalworkers of SA & others v Cementation Africa Contracts Contracts (Pty) Ltd 1998 19 ILJ 1208 LC *(LLD vol 3 part 7 396*)

CCMA – Conciliation proceedings – commissioner – powers of and role in conciliation proceedings CCMA – Conciliation proceeding – Issues not raised at conciliation – Section 135 and s 191 of LRA 1995 – Party may not change nature of dispute at arbitration or adjudication – Party non-the-less entitled to raise new issues or defences at arbitration or adjudication not canvassed at conciliation – Reasons.

CCMA – Conciliation proceedings – Purpose of and process to be followed at conciliation proceedings.

Practice and procedure – Pleadings – Amendment to pleadings – Labour Court proceedings – No rules provided – Rules to be developed by practice – Requirements crucial to amendment of pleadings enumerated

Dempster v Kahn N0 & others (1998) 19 ILJ 1475 LC *(LLD vol. 3 part 8 1998)*

CCMA – Conciliation proceedings – Commissioner's powers – No power to make final and binding award

CCMA – Conciliation proceedings Commissioner's powers – Objection based on whether person referring dispute to CCMA an employee – Commissioner has no power to make final and binding award- Commissioner exceeding powers by ruling that person referring dispute an employee.

*Employee – Determination – Cannot be determined by commissioner in conciliation proceedings. **Landman J in Tier Hoek v Commission for Concilation, Mediation & Arbitration C147/98 Labour Court 17 September 1998 disagrees with the above and stated that it was incumbent on the commissioner in conciliation proceedings to consider whether parties are employer and employee and to make a ruling***

Etschmair v CCMA & others [1998] 12 BLLR 1277 (LC)

The Zeuna-Strarker judgment is a Labour Appeal Court judgment will apply a conciliator must investigate jurisdictional matters which include whether the applicant was an employee. Unreported case no Ja10/98.

Tyler v Donaldson Filtration Systems (Pty) Ltd LC C82/98 *(LLD vol. 4 February 1999)*

*Labour Court – Jurisdiction - Section 191(5) of LRA 1995 – Process – leading to Labour Court must be instituted by timeous referral to bargaining council or CCMA – If bargaining council refuses to condone late referral CCMA lacks jurisdiction – Where CCMA lacks jurisdiction, Labour Court lacks jurisdiction. **Landman J stated "If the referral is not timeous the bargaining council is entitled to condone it. If it refuses, there is no review against that decision, and it must stand."***

Fidelity Guards Holdings (Pty) Ltd v Epstein & others D104/99 & D158/99 (2000) 3 BLLR 271 (LC): (2000) 21 ILJ 2009 (LC)

The Court observed that a pernicious practice had developed whereby parties went through the process of conciliation and arbitration without raising the issue of late referral and then the losing party in the arbitration subsequently approached the Court and argued that the entire process was void because the late referral had not been condoned. ***This practice was unconscionable and bordered on fraud and frustrated the process of the Act.*** *The applicant had waited until he heard the outcome of his internal appeal before referring the matter to the CCMA.*

An employee who's application is late for this reason must inevitably be granted condonation, as it is perfectly reasonable for the employee to await the result of an appeal before referring a dismissal to the CCMA.

PPWAWU & others v AF Dreyer & Co (Pty) Ltd [1997] 9 BLLR 1141 (LAC)

Employees not entitled to rely on the tardiness of their representative. Delay caused by negligence of representative – Limits to which applicants can relay on such negligence even when they are personally innocent of any tardiness.

Gianfranco Hairstylists v Howard & others (2000) 3 BLLR 292 (LC)

Dismissal disputes referred outside time limit prescribed by Act must be condoned prior to conclusion of conciliation process – ***If late referral is not condoned prior to conclusion of proceedings, valid certificate of outcome cannot be issued and CCMA cannot arbitrate.*** *"At any time" (section 191(2)) – For purposes of condonation, phrase "at any time" means at any time during the conciliation process.*

Ngcamu v Bargaining Council for the Restaurant, Catering & Allied Traders & another [2000] Vol 5 April LLD (LC) J1814/98

Bargaining Council - Conciliation proceedings - Powers and duties - In considering applications for condonation of late referral must adopt a neutral stance - Any appearance of lack of neutrality sufficient to undermine system of dispute resolution.

Bargaining council - Conciliation proceedings - Application for condonation of late referral - Review of council's refusal to grant condonation - ***Council calling for employer's representations on employee's applications, but not making these available to employee - Foundamental breach of audi alteram partem principle and a gross irregularity - Refusal set aside.***

Abrahams v AM Moolla Group [2000] v 5 LLD 421 (CCMA KN 45312)

Practice and procedure - Conciliation proceedings - Rules Regulating Practice and Procedure: CCMA (GN R245 in GG 20981 of 31 March 2000) - Employee referring dispute to CCMA late but failing to attend preliminary hearing to consider condonation of late referral - Referral regarded as abandoned on accordance with rule 7.7 - CCMA having no jurisdiction to consider further application for condonation.

Franken v Metal & Engineering Industries Bargaining Council & others [2000] 10 BLLR 1174 (LC)

Bargaining Council - condonation application - Council deciding application for condonation of late referral on papers, without warning applicant that he would not be granted oral hearing - Although councils not obliged to grant oral hearings for condonation applications, failure by council to forewarn applicant unfair - Refusal to grant condonation set aside

. **Ndokweni v Game Stores & others [2001] 22 ILJ 1398 (LC)**

Commissioners should provide reasons which would demonstrate that they have applied their minds.

France v National Bargaining Council for the Road Freight Industries & others [2004] 12 BLLR 1262 (LC)

Bargaining Council – Condonation – Applicant failing to make essential averments – Condonation properly refused.

Fortuin v CCMA & OTHERS [2004] 12 BLLR 1252 (LC)

Commission for Conciliation Mediation and Arbitration – Condonation – In refusing application for condonation for late filing of dismissal dispute, commissioner failing to have regard to facts that referral had been delayed for technical reasons, and that

unsophisticated employee had not been properly served by unions – Decision set aside.

13. Collective Agreement – Precedence over provision of LRA

Mthimkhulu v Commission for Conciliation, Mediation & Arbitration & Another (1999) 20 ILJ 620 (C318/98) LC *(LLD vol. 4 March 1999)*
CCMA – Jurisdiction – Dispute resolution procedure provided in collective agreement CCMA not having jurisdiction
Collective agreement – Dispute resolution procedure in agreement – Agreement concluded on voluntary basis in keeping with objects of LRA 1995 – Labour Court will generally uphold product of collective bargaining.
Fidelity Gaurds Holdings (Pty) v National Union of Security Officers & Gaurds [2000] vol 5 February 83 (LAC)
Collective agreement - Agreement providing that disputes concerning dismissals must be referred to private arbitration - Order of Labour Court declaring that CCMA had jurisdiction to conciliate such dispute - Order not competent.
Labour Court - Jurisdiction - Collective agreement - Dispute concerning interpretation and application - Court having no jurisdiction to entertain.
Building Industry Bargaining Council (East London) v Naidoo t/a Dev's Construction Trust & another [2000] 21 ILJ 2253 (LC)
Bargaining Council - Agreement - Binding nature of agreement - Employer not entitled to contract out of agreement by entering into private agreements with employees - If employees unjustly enriched, employer having claim against employees.

14. APPLICATION TO AMEND STATEMENT OF CASE

Bargaining Council : Conciliation proceedings

National Union of Metalworkers of SA & Others v Driveline Technologies (Pty) Ltd 20 ILJ 2900 (J324/97) (1999):LLD (1999) vol. 4 October – December 787
Commissioner is obliged to examine all the facts in order to ascertain the real dispute between the parties ***Zeunna-Starker Bop (Pty) Ltd v National Union of Metalworkers (1999) 20 ILJ 108 (LAC)***

15. DISCRIMINATION

Wage discrimination on grounds of race

Louw v Golden Arrow Bus Services (Pty) LTD 21 ILJ 188 (C37/97): Vol. 5 January 2000 LLD.
Racial discrimination – Disproportional wage differential as proof of race discrimination – Such not proven.
Equal pay for equal work/equal pay for work of equal work of equal value – Applicant must prove objective equality of jobs being compared.
Permissible and impermissible grounds for discrimination – question of causation relevant – Principle of proportionality applicable to determine whether race cause of discrimination.
Statistical evidence to prove race discrimination – Use of such evidence may be permissible.
Unfair Labour Practice – Residual – Item 2(1)(a) of schedule 7 to LRA 1995
- *Equal pay for equal/work pay for work of equal value – Applicant must prove objectively equality of jobs being compared.*

- *Equal pay for equal work/equal pay for work of equal value – Principles of justice, equity and logic to be considered when determining unfair labour practice.*
- *Form of strict liability – No need to prove fault.*
- *Must be practice involving discrimination – Racial discrimination – how party must prove discrimination.*
- *Onus of prove – Rests on applicant – Proof on balance of probabilities required.*

Discrimination on grounds of pregnancy

Beverley Whitehead v Woolworths (Pty) LTD LC, (C122/98)
A party claiming to be discriminated against is simply required to establish that he/she was discriminated against – the respondent must prove that the discrimination was not unfair on any arbitrary ground – respondent required incumbent to remain in post for a period of at least 12 months – uninterrupted job continuity not a necessary requirement
WOOLWORTHS (PTY) LTD V Whitehead [2000] 6 BLLR 640(LAC): [2000] 21 ILJ 571 (LAC)
*On appeal, the Court held that the court **a quo** had correctly dismissed the respondent's claim that she had been unfairly dismissed. The court, however noted that no causal connection between failure to appoint and the pregnancy existed. The requirement of uninterrupted attendance was recognised but held not to be sufficient grounds on its own. **(see above).***

Discrimination on basis of HIV/AIDS

Hoffmann v South African Airways [2000] ILJ 891 (W): Hoffmann v S.A. Airways [2000] 21 ILJ 2357 (CC)
Discrimination _ Unfair discrimination - At heart of prohibition of unfair discrimination is recognition that under Constitution all human beings, regardless of position in society, must be accorded equal dignity - Discrimination against HIV - positive people is fresh instance of stigmatisation and assault on their dignity. HIV/AIDS status of applicant for employment - Applicant discriminated against because of HIV status.

Fund rules, equality and discrimination

Leonard Dingler Employees Representative Council & others v Leonard Dingler (Pty) LTD & others [1997] 18 ILJ 285 (LC)
And indirect discrimination on the basis of race was found to exist in the rule that weekly paid employees were excluded from joining the staff benefit fund. Indirect discrimination was found in that a higher percentage was contributed to the staff benefit fund than the other funds to which the employees belonged. The policy of hiring new black employees on a weekly paid basis only ant not offering membership of the staff benefit fund to black monthly paid employees was direct unfair discrimination. The court held that is was not necessary to show that there was an intention to discriminate in order to prove that direct discrimination occurred.

Failure to appoint/consequent dismissal on basis of race and/or sex

McInnes v Technikon Natal [2000] 21 ILJ 1138 (LC)
Appointment on purported affirmative action grounds is illegitimate if not in terms of a formulated policy against which the appointment can be tested. It is necessary for an employer to show it was adopting or implementing employment policies and practices to achieve adequate protection and advancement of persons or groups disadvantaged by unfair discrimination. What the affirmative action policy requires is

a critical assessment of all relevant factors and a reasoned and balanced ultimate decision. (Agreement to pay the candidate an extra premium was held to be in breach of policy and contrary to the aim of the corporate culture.)

South African nationality as a limiting factor in affirmative action policy application

Auf der Hyde v University of Cape Town [2000] 21 ILJ 1758 (LC)
In implementing employment equity, the court stated that the preferred view is that it was not necessary for each potential beneficiary to establish actual disadvantage; it was sufficient that they be members of groups that have been disadvantaged. (A person who could not legitimately fall into a category of persons to whom the affirmative action policy was directed, due to not being a member of a group disadvantaged by general societal discrimination, could not have the principles embraced in such a policy rendered applicable to him.)

Rights derived from an affirmative action policy

Abbot v The Bargaining Council for the Motor Industry (Western Cape) [1999] 20 ILJ 330 (LC)
A claim to be appointed in terms of an affirmative action policy was rejected in a case where the candidate was never in serious contention for a position for which he had applied. The Labour Court stated that an applicant from a disadvantaged background derives no right from an affirmative action policy or programme, and certainly not the right to be employed.

Unfair discrimination as an unfair labour practice

Kadiaka v Amalgamated Beverage Industries [1999] 20 ILJ 373 (LC)
A decision, taken at executive level, not to employ ex-employees of a competitor company, was disputed and considered by the Labour Court on a number of grounds including the definition of 'applicant', direct and indirect discrimination, discrimination on racial grounds and specific and general grounds on which unfair discrimination is prohibited (as contained in Schedule 7, Part B, item 2 of the Labour Relations Act).
The decision not to employ the person was found to be based on sound economic reasons and was not arbitrary nor unfair on social or moral grounds.

Discrimination on grounds of religion.

Food and allied Workers Union & others v Rainbow Chicken Farms [2000] 21 ILJ 615 (LC)
Dismissal for failing to attend work on a Muslim holiday was held by the court not to be unfair discrimination since the day was not an official public holiday and the applicants had been specifically employed because they were Muslim. In addition, the effect would have been that all other employees would also have had to be given the day off and paid.

Discrimination promotion EEA

Coetzer &others v Minister of Safety & Security & another [2003] 2 BLLR 173 (LC)
The Labour Court held that the SAPS was guilty of discriminating unfairly against 12 officers of the explosives unit by not promoting them to vacant posts in the unit. The respondents claimed that the posts had been reserved for designated employees in terms of the SAPS employment equity plan. The Court held that the Employment

Equity Act must be interpreted in the context of the whole Constitution. Employment equity was not the only value promoted by the constitution: the SAPS was also expressly enjoined to provide an efficient service. The vacancies in the explosive unit had been advertised twice, but no designated applicants had applied. In deciding not to make appointments, the national commissioner of the SAPS had considered only the requirements of the equity plan. However, in terms of the Constitution he was also required to heed the imperative of efficiency. The SAPS was ordered to promote the applicants to the vacant posts.

16. Compensation

CWIU v Johnson & Johnson (Pty) LTD LC (P3/97)

*The court or arbitrator who is faced with a sec 194(1) situation is only entitled to award compensation which, in the words of sec 194(1) **"must be equal to"** the remuneration therein described – no less and no more – legislature has provided for a precise statutory formula.*

Johnson & Johnson (Pty) LTD v Chemical Workers Industrial Union [1998] 12 BLLR 1209 (LAC)

*If a dismissal is found to be unfair solely for want of compliance with a proper procedure the Labour Court, or an arbitrator appointed under the LRA, thus has a discretion whether to award compensation or not. **If compensation is awarded it must be in accordance with the formula set out in s. 194(1); nothing more, nothing less**. The discretion not to award compensation in the particular circumstances of a case must, of course, also be exercised judicially.*

Brendan Colin Vickers v Aquahydro Projects (Pty) LTD LC (D424/97)

Compensation in unfair retrenchment not to exceed 12 months remuneration – s 194(1) of Act.

De Groot v Character Castings CC (2000) vol 5 LLD 181 (CCMA)

Dismissal – Procedural unfairness – Section 194(1) of LRA 1995 – Commissioner given discretion whether or not to award compensation – Employee of small business worked for only 10 days and refused offer of re-employment made at conciliation – Compensation not awarded.

Northern Province Local Government Association v CCMA & Others [2001] 5 BLLR 539 (LC)

Before deciding whether an unfairly dismissed employee is entitled to compensation, a court or arbitrator must inquire into all the circumstances of the dismissed employee, including whether he had obtained alternative employment after his dismissal. A commissioner's failure to do so rendered his award null and void.

Penny v 600 SA Holdings [2003] 2 BLLR 200 (LC)

The applicant sought an order making an arbitration award an order of court. Although the respondent had tendered an amount lower than the compensation granted, it claimed that it had complied with the award because the amount deducted represented income tax owing to the Receiver and a sum the respondent owed on a loan. The Labour Court held that it was competent to decide neither whether tax was payable on compensation, nor the amount payable, if any. However, the court rejected the respondent's attempt to rely on set-off o the amount claimed under the loan, because the amount was in dispute. The respondent was ordered to pay the compensation ordered, less the estimated tax pending a directive by the Receiver.

PENNY v 600 SA HOLDINGS (PTY) LTD (2003) ILJ 967 (LC)

CCMA arbitration proceedings – Award – Set-off of liquidated debt against award of CCMA – Common-law principles applicable – Debt admitted but amount not capable of prompt and easy ascertainment – Set-off not permitted in circumstances
Award – Tender of payment of award less tax directed by Receiver of Revenue to be deducted – Such tender constitutes compliance with award.

Rawlins v Kemp t/a Centralmed (2010) 31 ILJ 2325 (SCA)
Compensation – Unfair dismissal – Substantively and procedurally unfair dismissal – Employee rejecting offer of reinstatement – Rejection of repeated offers of reinstatement unreasonable – No objective grounds advanced why perceived breach of trust not capable of restoration – Employee only having herself to blame for financial loss –Appellant chose not even to explore that possibility but rejected it out of hand - Appeal dismissed – Compensation not awarded

17. Unilateral Change to terms and conditions

Chemical Workers Industrial Union v Sasol Fibers (Pty) Ltd [1999] 20 ILJ 1222 (LC) and **Staff Association for Motor and Related Industries [SAMRI] v Toyota of South Africa Motors (Pty) Ltd [1997] 18 ILJ 374 (IC)**
A change is unilateral if it is pushed through without consent, even if there has been preceding consultation.

18. UNFAIR LABOUR PRACTICES

Sithole v Nogwaza NO & others [1999] 12 BLLR 1348 (LC)
Unfair labour practice - Application - Unfair labour practice can be committed only during existing relationship between employer and employee

19. Arbitrator

de novo hearing

County Fair Foods (Pty) LTD v CCMA & others [1999] 11 BLLR 1117 (LAC)
Commissioner must reach decision on evidence presented at arbitration, and is not limited to evidence that was before employer at time of its decision
MINISTER OF SAFETY & SECURITY V SAFETY & SECURITY SECTORIAL BARGAINING COUNCIL & OTHERS [2001] 22 ILJ 2684(LC)
*An arbitration hearing arising from a dismissal is a hearing **de novo**. It is not simply a review of the employer's disciplinary proceedings and decisions*

19.1 Jurisdiction

Shoprite Checkers (Pty) Ltd v CCMA & others (1998) 5 BLLR 510 (LC)
Arbitration proceedings – Witnesses required to give oath or affirmation before testifying.
*Arbitration proceedings Jurisdiction – **Parties cannot confer jurisdiction on commissioner to entertain dispute where jurisdiction is lacking – Commissioners bound to make inquiry into whether jurisdiction exists**.*
Gianfranco Hairstylists v Howard & others (2000) 3 BBLR 292 (LC)
Arbitration proceedings – Condonation for late referral of dismissal dispute for conciliation cannot be considered or granted during arbitration proceedings
Hi Alloy Castings (Pty) Ltd v Smith & others (2000) 2 BLLR 165 (LC)
*Dismissal – Referral of dispute – If dispute is not referred within 30 days of date of dismissal, non-compliance with Act must be condoned – **Failure to condone fatal to all subsequent proceedings.***
Etschmair v CCMA & others [1998] 12 BLLR 1277 (LC)
Commission for Conciliation, Mediation and Arbitration - Commissioner - Powers of - Commissioner acting as arbitrator permitted to pronounce on validity of referral to conciliation - Such determination not amounting to "review" of conciliating commissioner's conduct.

Fidelity guards Holdings (Pty) Ltd v Epstein & others (2000) 21 ILJ 2009 (LC)

CCMA - Conciliation proceedings - Certificate of outcome - Section 135(5) of LRA - Commissioner issuing certificate performs administrative act with many consequences under Act- ***Once certificate issued, arbitrator must arbitrate dispute unless administrative act reviewed and certificate set aside - Validity of certificate to be challenged within reasonable time****.*

CCMA - Conciliation proceedings - Referral of dispute - Condonation of late referral not precondition for issue of certificate of outcome - Certificate valid unless challenged within reasonable time and set aside on review.

Gianfranco Hairstylists v Howard & others (2000) 3 BLLR 292 (LC)

Dismissal disputes referred outside time limit prescribed by Act must be condoned prior to conclusion of conciliation process – ***If late referral is not condoned prior to conclusion of proceedings, valid certificate of outcome cannot be issued and CCMA cannot arbitrate.*** *"At any time" (section 191(2)) – For purposes of condonation, phrase "at any time" means at any time during the conciliation process*

Softex Matress (Pty) Ltd v Paper Printing Wood & Allied Workers Union & others [2000] 21 ILJ 2390 (LAC)

CCMA - Arbitration proceedings - Commissioner - Powers - ***Certificate that dispute unresolved issued by bargaining council - Commissioner not called upon to go behind certificate May presume that certificate validly issued***

Discovery Health Limited v CCMA & others [2008] 7 BLLR 633 (LC)

The Labour Court ruled that a foreigner who had been employed without a work permit fell within the statutory definition of "employee" even though the applicant had committed an offence by employing him. The Court held that the days in which courts had ruled such contracts void and unenforceable are over; the Constitution of the Republic of South Africa, 1996 now gives everybody the right to fair labour practices. The termination of the foreigner's contract of employment therefore constituted a dismissal.

"Kylie" v CCMA & others [2010] 7 BLLR 705 (LAC) *Commission having jurisdiction to entertain disputes between sex workers and their employers, even though employment contract is unlawful. Contract for performance of illegal work not necessarily void* ab initio *and capable of creating relationship falling within terms of labour legislation. Remedies – in principle entitled to compensation, but possibly only as* solatium *– Compensation to be determined after application of* par delictum *rule.*

19.2 Review

County Fair Foods (Pty) Ltd v CCMA & others (1999) 11 BLLR 1117 (LAC)

Test for review is whether award is justifiable according to reasons given – Commissioner must reach decision on evidence at arbitration, and is not limited to evidence that was before employer at time of its decision. ***This has now been over ridden b Sidumo & another v Rustenburg Platinum Mines Ltd & others. In this matter the Constitutional Court replaced the test for review.***

Etschmaier v CCMA & others [1998] 12 BLLR 1277 (LC)

Commission for Conciliation, Mediation and Arbitration - Arbitration proceedings - Review of - Commissioner acting as arbitrator permitted to pronounce on validity of referral to conciliation - Such determination not amounting to "review" of conciliating commissioner's conduct.

Ngcamu v Bargaining Council for the Restaurant, Catering & Allied Traders & another [2000] Vol 5 April LLD (LC) J1814/98

Bargaining council - Conciliation proceedings - Application for condonation of late referral - Review of council's refusal to grant condonation - Council calling for employer's representations on employee's applications, but not making these

available to employee - Fundamental breach of audi alteram partem principle and a gross irregularity - Refusal set aside.

Shoprite Checkers (Pty) Ltd v Ramdaw NO & others [2000] 7 BLLR 835 (LC)

Administrative law - Administrative act - All acts by administrative tribunals not necessarily administrative acts for purposes of judicial review ***- Arbitration not an administrative act. "Justifiability" not constituting ground of review - Only permissible grounds are those set out in the Act.***

CHAR TECHNOLOGY (PTY) LTD v MINISI & OTHERS [2000] 7 BLLR 778 (LC)

Commission for Conciliation, Mediation and Arbitration - Arbitration proceedings - Commissioner failing to advise employer's lay representatives that they should call witnesses and prove documents - Failure amounting to gross misconduct - Award set aside

Mncwabe v Ntulu NO & Others [2000] LLD vol 5 357

Labour Relations Act 66 of 1995 – Dispute resolution – Conciliation proceedings – Scheme of LRA not compelling applicant to attend personally where represented as contemplated in s 135(4)

Seardel Group Trading (Pty) Ltd t/a the Bonwit Group v Andrews NO & others [2000] 10 BLLR 1219 (C483/99)

The Labour Court drew a distinction between ***arbitration under the auspices of bargaining councils in terms of collective agreements which it found to be consensual in nature and arbitration before the CCMA, which is compulsory and in which the CCMA acts as an organ of state. Nevertheless, the private arbitrator was held to be bound by decisions of the Labour Courts in arriving at a determination.***

Volkswagen SA (Pty) Ltd v Brand NO & Others [2000] 5 BLLR 558 (LC)

The Court held that the Promotion of Administrative Justice Act 3 of 2000 did not apply as arbitration awards by the CCMA did not amount to administrative action. The enactment of the PAJ means the wording of the administrative justice provision of the interim Constitution has fallen away and is now replaced by the words of the final Constitution. ***This means that the test for review adopted in Carephone (Pty) Ltd v Marcus NO & others [1998] 11 BLLR 1093 (LAC) is no longer applicable. The Constitutional Court has held that arbitrations do not amount to administrative action for the purpose of constitutional review. Section 145 of the LRA must be applied in the same manner as section 133 of the Arbitration Act 42 of 1965****. Awards can therefore be set aside only if the arbitrator has committed "misconduct" which indicates that he or she has been impartial*

Blue Marine (Pty) Ltd v Commission fof Conciliation Mediation and Arbitration (2003) 24 ILJ 1528 (LC)

The court commented that it is important to realize that once an award is made an order of court, the award falls away. In other words, the two instruments cannot coexist alongside each other. Therefore, upon the award being made an order of court, there can be no question of an application for review aimed at reviewing and setting aside the award. By then, the award no longer exists. Any party who feels aggrieved by the effect of the award can then only look to challenge the court order itself or the procedure followed which culminated in such order being made, and not the award.

Indoor Amusements (Pty) Ltd v CCMA & others [2004] 10 BLLR 1004 (LC)

The commissioner issued a certificate of outcome about two years after the matter was referred for conciliation and the employee the referred the matter for arbitration. The Court held that the LRA requires commissioners to issue certificates within 30 days of the date on which the matter is referred, unless the parties agree to extend that period. The commissioner accordingly had no power to issue a certificate after

that period. The certificate was set aside and the referral for arbitration was declared invalid.

Review : Bargaining Council Arbitration Awards

Seardal Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & others. [2000] 10 BLLR 1219 (LC)
Arbitration - Review of arbitration award - Bargaining council arbitration in terms of dispute procedure in main agreement - Section 33 of Arbitration Act of 1965 - Arbitration Act, not LRA 1995, applicable to review.
Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & another
Arbitration - Review - Review of decisions of arbitrators appointed by bargaining councils to arbitrate disputes over collective agreements to be conducted in terms of Arbitration Act, not in terms of section 145 of Act

20. Disciplinary penalty: Interference

County Fair Foods (Prt) Ltd v CCMA & others (1999) 11 BLLR 1117 (LAC)
Disciplinary penalty – Employer's prerogative – Employers entitled to set standard of conduct for employees and to determine sanction for non-compliance – Interference justified only if employer's decision unreasonable and unfair. Commissioners must not interfere with reasonable sanction imposed by employer – If commissioner interferes with sanction when he should not have done so, award defective.
Pretoria Heart Hospital v Commission For Conciliation Mediation & Arbitration & others. [2000] 21 ILJ 634 (LC)
Commissioner was only entitled to intervene if he was of the opinion that dismissal for theft of particular items was such that it did not render the employment relationship intolerable and that the dismissal was so excessive as to induce in him a sense of shock.
Toyota SA Motors (Pty) LTD v Radebe & others (2000) 21 ILJ 340 (LAC)
Arbitration - Review of proceedings, decision and awards of commissioners - Grounds - Gross irregularity - Court will interfere where sanction imposed by CCMA inappropriate, that is sanction so egregious that it shocks and alarms court. Award set aside by Labour Appeal Court.
RUSTENBURG PLATINUM MINES LTD (RUSTENBURG SECTION) v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (2006) 27 ILJ 2076 (SCA); [2006] 11 BLLR (SCA)
The SCA reaffirmed the established view of the Labour Appeal Court that the discretion whether to dismiss an employee lies primarily with the employer, and should be overturned only with caution. The CCMA Commissioner enjoys no discretion, but bears the duty of determining whether the employer's discretion was exercised fairly. ***This has been overturned by the Constitutional Court see 61 below.***

20(A) Standard of test – Reasonableness

Goodyear SA (Pty) Ltd v Bargaining Council for the New Tyre Manufacturing Industry & others (2008) 29 ILJ 1912 (LC)
The third respondent employee, a forklift driver, had been found guilty of gross negligence and had been dismissed. In arbitration proceedings before the relevant bargaining council, the arbitrator found that the employee had only been guilty of negligence and that the sanction of dismissal was, in the circumstances too harsh. The Court relying on ***Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC),*** *confirmed that the Labour Court is entitled to interfere with an arbitration award only if it has been shown that the decision of the*

arbitrator is not reasonable. The reasonable decision maker's test is obviously an objective test which requires that all evidence and issues which were before the arbitrator should be taken into account in determining whether or not the decision or ruling of the arbitrator is reasonable. The test does not allow arbitration awards or decisions to be set aside simply because the court or another arbitrator would have arrived at a different decision to that of the arbitrator. In assessing the fairness or unfairness of the sanction of dismissal, the arbitrator ought to have taken into account all the circumstances of the case, including the importance of the rule that was breached and the reasons why the employer imposed the sanction of dismissal. The employer\s reasons must be weighed against the employee's inputs. Other factors that the arbitrator needs to take into account in assessing the fairness of the dismissal are the harm caused by the employee's conduct, whether a repetition thereof may be avoided through training or counselling, the length of service of the employee and the impact and effect of the dismissal on the employee.

National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others (2008) 29 ILJ 1966 (LC)

The Court observed that the general standard for reviewing CCMA arbitration awards was that laid down in Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC). The question to be asked in determining whether there had been compliance with the standard was whether the decision of the commissioner was one which a reasonable decision maker could have reached. ***According to Sidumo there were two enquiries that a commissioner had to conduct: the first was a factual enquiry to determine whether or not the misconduct had been committed, and once this had been determined, the second enquiry was to determine the fairness of the dismissal,*** *ie whether in the circumstances of the case dismissal was an appropriate sanction. In conducting this enquiry the commissioner had to take into account the reasonableness of the rule breached by the employee and the circumstances of the infringement. In deciding whether or not dismissal was fair, the commissioner exercised a value judgment, and in exercising this value judgment the commissioner needed to take into account all the circumstances of the case, including the importance of the rule breached and the reasons why the employer imposed the sanction of dismissal. The employee's inputs also needed to be taken into account. Further relevant factors were the harms caused by the employee's conduct; whether a repetition could be avoided through training or counselling; the length of service of the employee, and the impact and effect of the dismissal on the employee.*

21. COST

Van Rooy v Nedcor Bank Ltd [2000] 2 BLLR 225 (LC)

Practice and procedure - Costs - Dismissed employee relying on unsubstantiated claim that she was victim of race discrimination - Employee ordered to pay employer's costs even though her dismissal was procedurally unfair.

Nkuna v Leonard Dingler (Pty) Ltd [2000] 5 BLLR 563 (LAC)

Practice and procedure - Costs - Union representative launching application based on perverse view of law in which representative could not reasonably have believed - Representative ordered to pay costs de bonis propriis.

Aluvial Creek Limitrd (1929) CPD 532 at 535

"Sometimes an order is given because of the conduct of a party which the court considers should be punished; malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where proceedings are vexatious and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side through unnecessary trouble and expense which the other side ought not to bear"

Strydom v Usko Limited (1997) 3 BLLR 343 (CCMA) 352

African Towns & Townships v Cape Town Municipality (1963) (2) SA 555 AD

An action is vexatious and an abuse of the process of court inter alia if it is obviously unsustainable

Western Cape Workers Association v Minister of Labour [2005] 26 ILJ 2221 (LC)

The Court noted that the union organizer who represented the union had not submitted proof that he had been properly authorized to do so. The organizer was accordingly ordered to pay the costs of the appeal.

22. EVIDENCE

Blyvooruitzicht Gold Mining Co Ltd v Pretorious [2000] 7 BLLR 751 (LAC)

Evidence - Single witness - Evidence need not be treated with caution only because attested to by single witness - Cautionary rule applicable to single witness only in criminal cases where evidence is challenged by accused.

Early Bird Farms (Pty) LTD v Mlambo [1997] 5 BLLR 541 (LAC)

Held that the employer did not have to prove with absolute certainty that the employee was guilty of the alleged misconduct (in this case theft) but that proof on a balance of probabilities was sufficient. In other words, even in cases of misconduct that constitute crimes, the onus of proof on the employer alleging this misconduct is that of the civil onus, or a balance of probabilities.

Marapula & others v Consteen (Pty) LTD [1999) 20 ILJ 1837 (LAC); [1999] 8 BLLR 829 (LC)

The proper approach to evaluation of evidence is;

'The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer's version, an investigation where questions of demeanour and impression are measured against the content of the witnesses' evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safty.'

Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & others (2007) 28 ILJ 2238 (LAC)

The Court approved the finding of Wallis AJ in Naraidath v Commission for Conciliation, Mediation & Arbitration & others (2000) 21 ILJ 1151 (LC) that: 'It would stultify the entire purpose of the legislation if this court were, in the face of such clearly stated intentions, to insist on arbitrators appointed by the CCMA to resolve unfair dismissal disputes conducting those proceedings in slavish imitation of the procedures which are adopted in a court of law and subject to the technical rules of evidence which apply in those courts.' The court found that Wallis AJ was correct to point arbitrators seeking to conduct an arbitration in a manner which is fair to both parties and which expeditiously resolves a dispute, in the direction of s 26(1) of the Small Claims Courts Act 61 of 1984 which provides, inter alia, that 'subject to the provisions of this Chapter, the rules of the law of evidence should not apply in respect of the proceedings in a court and a court may ascertain any relevant fact in such a manner that it mat deem fit'.

FAWU OBO KAPESI v PREMIER FOODS LTD [2010] 9 BLLR (LC)

The law permits employers to rely on written statements in disciplinary hearings Where witnesses are afraid to testify. In the present case the respondent could have called the employee who collected the statements to verify their authenticity. A

presiding officer could in the circumstances have allowed this procedure because it was in the interest of justice to do so The rule of thumb by which a adjudicator decides whether to admit or exclude an oral or written statement tended as evidence should be whether the statement is relevant, reliable and logically probative and of such a nature that responsible people would rely upon it in serious affairs.

23. BARGAINING COUNCIL AGREEMENTS: ENFORCEMENT

Kem-Lin Fashions v Brunton & another [2000] 8 BLLR 930 (LC): [2000] 21 ILJ 1357: [2000] vol 5 LLD 349

Arbitration proceedings – Review of – Arbitrator appointed by bargaining council empowered to decide dispute between council and non-party – Fact that arbitrator chosen by council not giving rise to reasonable apprehension of bias

Building Industry Bargaining Council (East London) v Naidoo t/a Dev's Construction Trust & another [2000] 8 BLLR 898 (LC)

*Bargaining council - Agreement - Binding nature of agreement - **Employer not entitled to contract out of agreement by entering into a private agreement with employers -** If employees unjustly enriched, employer having claim against employees.*

24. RESCISSION OF AWARDS

Duarte v Carrim NO [1998] 9 BLLR 935 (LC)

Party applying for rescission must prove bona fide case and provide reasonable explanation for default – Mere denial that he received telexfax notifying him of hearing not sufficient explanation.

Mit Tissue v Theron & others [2000] 8 BLLR 947 (LC)

Commission for Conciliation, Mediation and Arbitration – Arbitration award – Rescission of – Rescission permissible under act only when there was irregularity in proceedings, where CCMA lacked legal competence to make award, or where commissioner was at the time unaware of facts which, had he been aware of them, would have precluded him granting order

Els Transport v Du Plessis & Others [2001] 6 BLLR 599 (LC)

The Labour Court held that CCMA arbitration awards can be rescinded by commissioners other than those who actually issued the award.

Northern Province Local Government Association v CCMA & Others [2001] 22 ILJ (LC)

Section 144 of LRA 1995 – Applicant must show it has a bona fide case to place Before tribunal and that it has not lost interest in having case heard – Absence of applicant at hearing must be reasonably explained.

TONY GOIS t/a SHAKESPEARS'S PUB v VAN ZYL & OTHERS [2003] 11 BLLR 1176 (LC)

Commission for Conciliation, Mediation and Arbitration – Arbitration award – Enforcement – Certification not having effect of converting award into order of Labour Court and thus depriving commission of jurisdiction to consider rescission

Northern Training Trust v Maake & others [2006] BLLR (LC)

Rescission of award – Review – Consideration of application for rescission entails two-stage investigation: first: whether notice of set-down was properly transmitted; second whether defaulting party had reasonable explanation for non-appearance – Commissioner failed to consider second leg of test – Ruling set aside.

MTN SOUTH AFRICA v VAN JAARSVELD & OTHERS (2002) 23 ILJ 1597 (LC)

Practice and procedure – Rescission – Award granted by CCMA in absence of respondent – What presiding officer to consider when determining whether respondent genuinely ignorant of hearing – Explanation of unawareness and

reasonableness of explanation basis for rescission of award – Holistic appreciation of all factors, including prospects of success necessary.

INZUZU IT CONSULTING (PTY) LTD v CCMA [2010] 12 BLLR 1288 (LC)

The Court held that commissioner had unlawfully proceeded to arbitrate the matter by default. The CCMA rules make it quite clear that commissioners may not proceed to arbitrate matters in the absence of a party when the matter has been set down for conciliation only. See 1293 at H & I

25. DECLARATORY ORDER

25.1 REFERRAL OF DISPUTE BARGAINING COUNCIL: WHO MAY SIGN REFFERRAL

National Union of Metalworkers of SA v Commission for conciliation, Mediation & Arbitration & others [2000] 21 ILJ 1634 (LC J4873/99): [2000] 11 BLLR 1330 (LC)

Conciliation - Referral of dispute - Section 200 of LRA 1995 - Registered union empowered to refer dispute on behalf of member - Only authorisation required is membership of union. The court declared that referrals to bargaining councils, which were not subject to the regulations applicable to the CCMA, could validly be signed by a trade union, office-bearer or official of a registered trade union.

Dismissal disputes – Referral forms can be signed on behalf of dismissed employees by legal practitioners and officials, office bearers union officials. No express authority required when unions sign on behalf of employees.

25.2 PUBLIC HOLIDAYS ACT 36 OF 1994

RANDFONTEIN ESTATES LTD v NATIONAL UNION OF MINEWORKERS (2006) 27 ILJ 1200 (LC)

Public holidays – Sundays – Section 2(1) 0f Public Holidays Act 36 0f 1994 – Interpretation – Public holiday that falls on Sunday does not cease to be public holiday – Following Monday automatically becomes additional public holiday.

26. REFERRALS OF DISPUTE

Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others [1997] 11 BLLR 1475 (LC)

Conciliation requirements for valid referral – Referral form to be signed by employee or (quare) employees' union on his behalf. – Form signed by labour consultant invalid and such irregularity cannot be condoned.

National Union of Mineworkers v Hernic Exploration (Pty) Ltd [2000] 22 ILJ 203 (LC)

Union may represent members and be party to the proceedings if the members are party to the proceedings, it was held that the union must identify the members in a schedule containing the full names, addresses and signatures of each member, and where a union fails to do so it lacks locus standi.

National Union of Mineworkers v Hernic Exploration (Pty) LTD (2003) 24 ILJ 787 (LAC)

*CCMA & Labour Court – jurisdiction – Dismissal dispute – Parties to dispute – Section 200(1) of the LRA – Only union and not dismissed employees cited in referral of dispute – **Trade union having right to refer dispute without citing dismissed members as co-applicants** – CCMA & Court having jurisdiction.*

National Union of Metalworkers of SA v Commission for conciliation, Mediation & Arbitration & others [2000] 21 ILJ 1634 (LC J4873/99): [2000] 11 BLLR 1330 (LC)

Conciliation - Referral of dispute - Section 200 of LRA 1995 - Registered union empowered to refer dispute on behalf of member - Only authorisation required is membership of union. The court declared that referrals to bargaining councils, which were not subject to the regulations applicable to the CCMA, could validly be signed by a trade union, office-bearer or official of a registered trade union.

Dismissal disputes – ***Referral forms can be signed on behalf of dismissed employees by legal practitioners and officials, office bearers union officials. No express authority required when unions sign on behalf of employees***

26A REFERRAL OF DISPUTE s147(7)

Botha & another v Cristodulou & another [2000] 21 ILJ 2398 (LC)

The Court adopted a purposive approach to the LRA. This led it to conclude that where the referral would have been in time had the CCMA exercised its power in terms of s 147(7), the rule also applies where the party subsequently and with due haste, refers the same dispute, albeit as a new referral, to the bargaining council.

27. CONCILIATION- EXCEEDING 30 DAY

Louw v Micor Shipping [2000] v 5 LLD 401 (LC P86/98)

Conciliation proceedings - Certificate of outcome - Section 135(2) and (5) of LRA 1995 both peremptory - Conciliation proceedings held later than 30 days after referral of dispute, in absence of agreement by parties, a nullity - Certificate of outcome may be issued at any time after prescribed 30 day period.

28. WORDS AND PHRASES

Benefit

Schoeman & another v Samsung Electronics SA (Pty) Ltd (1997) 18 ILJ (LC)

Sales commission not a benefit

Gaylard v Telkom South Africa (pty) Ltd (1998) 9 BLLR 942 (LC)

Payment for accumulated leave not a benefit

Maartens v Spoornet Northern Cape (1997) 18 ILJ 1153 (CCMA)

Annual bonus

Sithole v Nogwaza NO & others [1999] 12 BLLR 1348 (LC)

"Benefits" (residual unfair labour practice) - "Benefit" means material benefit such as pension, medical aid, housing and insurance subsidies, ie must have monetary value for employee and be a cost for employer.

Legal Practioner

Marx v STALCOR & OTHERS; GLAUBITZ v PRESTON ANDERSON CC [2001] 12 BLLR 1338 (LC): [2001] 22 ILJ 2669 (LC)

The Court held that whether a person is an attorney must be determined with reference to the Attorneys Act. The definition of the term "legal practitioner" in the Labour Relations Act uses customary terminology. The phrase "admitted to practice as an attorney" has always been taken to mean a person who has been admitted to practice as attorney and who is enrolled as such. They must, at least, be on the roll

kept by the registrar of the High Court. Furthermore, any practising attorney must be in possession of a Fidelity Fund certificate.

National Education Health & Allied workers Union obo Ndlovu and The British Council [2002] 23 ILJ 603 (CCMA)

CCMA arbitration – Representation – Legal practitioner - Admitted attorney practising as consultant not 'legal practitioner as defined in s 213 of LRA 1995.

Trade Union Representative

CUSA obo Tshidiso Hlahla & six others v Pizza Palour FS4326-01 ARB (CCMA)

Section 213 of the LRA a 'trade union representative' is defined as a member of a trade union who is elected to represent employees in a workplace. Schedule 8 does not therefore make provision that a trade union official may represent employees

ECCAWUSA v Russels Furnishers EC1998 ARB (CCMA)

In terms of Schedule 8, item 4(1) of the LRA No 66 of 1995 the employee is entitled to the "assistance of a trade union representative or fellow employee". The term "trade union representative" is defined as a "member of a trade union, who is elected to represent employees in a workplace". If this definition is read within the context of the Act e.g. s 14(2) of the Act, it is clear that "trade union representative" means a member of the union that is employed in the workplace in which it is elected as a "trade union representative". Trade union representative in the context of s 4(1) dos not set a minimum requirement that an employee should be afforded the right to be represented by a union official

29. STARE DECISIS - RULE

Le Roux v Commission for Conciliation, Mediation & Arbitration & others [2000] 21 ILJ 1366 (LC)

Stare decisis - CCMA proceedings CCMA bound to follow decisions of Labour Appeal Court and Labour Court - Where divergent views expressed in courts commissioner may properly select view he regards to be more in accordance with proper interpretation of the LRA 1995.

30. MATTER OF MUTUAL INTEREST

Northern Cape Provincial Administration v Hambidge NO & others[1999] 7 BLLR 698)LC)

A salary or wage was an essential element of a contract of service. Other rights advantages or benefits were derived from collective or individual bargaining or from the operation of law. A fringe benefit was a supplement for which no work was done. The word " benefit " in the Act was, at least, a non-wage benefit. A claim that an employer acted unfairly by not paying an employee a higher rate could not be said to concern a benefit in that sense. It was a salary or wage issue, and hence a matter of mutual interest.

De Beers Consolidated Mines Ltd v CCMA & others [2000] 5 BLLR 578 (LC)

Phrase to be interpreted widely - Can include disputes that may be referred to arbitration or adjudication, as well as issues that must be resolved through industrial action.

31. SERVICE OF DOCUMENTS

Northern Province Local Government Association v CCMA & Others [2001] 5 BLLR 539 (LC)

A CCMA commissioner is not entitled simply to ask whether a notice of the arbitration hearing had been faxed to the defaulting party's number. It is incumbent on the

commissioner, not only to consider the prospect of the applicant's success in defending the main application, but also whether its claim that the fax was not received could possibly be true.

MTN SOUTH AFRICA v VAN JAARSVELD & OTHERS (2002) 23 ILJ 1597 (LC)

Practice and procedure – Service of documentation – Labour Court proceedings – Telefax – Practice of service by telefax provided for in LRA 1995 dangerous – Should be reappraised by rules board.

Transman (pty) Ltd and SA Post Office Ltd & another (2006) 27 ILJ (BCA)

Practice and procedure – Service of documentation – Bargaining Council proceedings – Telefax – Where notice of set down successfully transmitted to party's telefax number prima facie inference arises that notice has come to party's attention. Practice of service by telefax requiring reappraisal by rules board.

32. PRE-TRIAL AGREEMENTS: BINDING UPON PARTIES

Fuel Retailers Association of SA v Motor Industry Bargaining Council [2001] 6 BLLR 605 (LC): Shoredits Construction (Pty) Ltd v Pienaar NO and others [1995] 4 BLLR 32 (LAC): Checkers Shoprite (Pty) Ltd v Busane [1996] 17 ILJ (LAC)

A pre-trial agreement is binding on the parties. It cannot be retracted unless there are proper, recognised grounds for doing so. Moreover where the pre-trial agreement permits the ascertainment of certain facts in a particular manner, which it is agreed will form the basis of a court's judgement, the findings cannot be attacked, in this case, except on the basis of fraud.

Fuel Retailers Association of SA v Motor Industry Bargaining Council [2000] 6 BLLR 605 (LC)

A pre-trial agreement is binding on the parties ***[Shoredits Construction (Pty) LTD v Pienaar NO and others [1995] 4 BLLR 32 (LAC) and Checkers Shoprite (Pty) Ltd v Busane [1996] 17 ILJ (LAC).***

It cannot be retracted unless there are proper, recognised grounds for doing so. Moreover, where the pre-trial agreement permits the ascertainment of certain facts in a particular manner, which is agreed will form the basis of a court's judgement, the findings cannot be attacked, in this case, except on the basis of fraud.

33. INDEPENDENT CONTRACTOR

Motor Industry Bargaining Council v Mac-Rites Panel Beaters & Spray Painters (Pty) LTD [2001] 22 ILJ 1077 (N)

Relationship in first place to be determined by contract between parties - Manner in which parties label contract not determining substance of relationship - Contract purporting to designate workers as independent contractors, but granting workers no independence - Contract bizarre subterfuge designed to strip workers of protection they were entitled to according to law and fair labour practices - Workers held to be ' employees ' within the meaning of s 213 of LRA 1995.

34. Administrative Decision

Softex Mattress (Pty) Ltd v Paper Printing Wood & Allied Workers Union & others [2000] 21 ILJ2390 (LAC)

The Court observed that generally an administrative official may not revisit his or her decision but that the rule is by no means an absolute one, for it is dictated by considerations of finality and administrative efficiency which are at times best served by permitting the decision to be reconsidered. But the rule does not come into play until the decision has been pronounced.

35. Section 147(7) LRA

Botha & another v Christodoulou & another [2000] 21 ILJ 2398 (LC)
The Court adopted a purposive approach to the LRA. This led to it to conclude That where the referral would have been in time had the CCMA exercised its powers in terms of s 147(7), the rule also applies where the party subsequently and with due haste, refers the same dispute, albeit as a new referral, to the bargaining council.
Grilo v Julius Solomon Group & others [2002] 12 BLLR 1184 (LC)
Bargaining Council- Dispute resolution – If dispute falling under council's Jurisdiction is referred to council by CCMA, date of referral to CCMA is the deemed date of referral to council.

36 Internal Procedures to be exhausted

Old Mutual Group Schemes v Dreyer & Another [1999] vol 4 LLD 548 (LAC): [1999] 20 ILJ 2030.
Constructive Dismissal – Resignation to avoid disciplinary hearing and appeal hearing – Employee not entitled to bypass procedures to gain access to court to air dispute – Employee to follow correct internal disciplinary procedures, including appeal procedure, provided by employer – Constructive dismissal not shown. .Employees are bound by the company's prescribed internal procedures and must first exhaust these before approaching Court.
Minister of safety & Security v Safety & Security Sectoral Bargaining Council [2002] 1 BLLR 56 (LC)
*Bargaining Council – Jurisdiction – Council not deprived of jurisdiction to entertain dispute concerning dismissal by collective agreement requiring dismissed employees to appeal internally and declaring decision on appeal "final and binding". **Disciplinary procedure – Appeal – Employee's failure to exercise right of appeal not precluding employee from referring dispute for statutory resolution.***

37. CONCILIATORS – POWERS

DEMPSTER V KAHN NO & OTHERS (1998) 19 ILJ 1475 (LC)
A commissioner appointed to conciliate a dispute does not have the power to make a final and binding award. A commissioner may not rule on whether or not the person referring the dispute to the CCMA is an employee. Any such objection may be entertained only in any subsequent arbitration or adjudication.
BHT Water Treatment (a division of Afchem(Pty) Ltd incorporating PWTSA) v CCMA & others [2002] 2 BLLR 173 (LC)
*Commission for Conciliation Mediation and Arbitration – Conciliation – Conciliating commissioner not permitted or required to decide on merits of dispute during conciliation – Dispute concerning whether employee resigned or was dismissed to be decided at arbitration. Commissioner at conciliation has no power to make final and binding award **(Dempster v Kahn NO & Others [1998] 19 ILJ 1475 (LC).** If parties cannot reconcile their differences, their dispute is resolved for them in the next stage by arbitration or adjudication.*
Virgin Active South Africa (Pty) Ltd t/a Roclands Poultry v Kapp & Others (2002) 6 BLLR 593 (LC)
The Labour Court held that CCMA commissioners are empowered to decide at conciliation meetings whether there was an employment relationship between the

parties, even though the Act required the dispute to be ultimately referred to the Labour Court on the merits.

38 ARBITRATION AWARDS MADE ORDERS OF COURT

BARGAINING COUNCIL FOR HAIRDRESSING & COSMETOLOGY TRADE (PRETORIA) v SMIT t/a HAIR MISTIQUE [2002] 3 BLLR 218 (LC)
Arbitration award – What constitutes – Bargaining council agent's compliance order not "award" for purposes of Act. Compliance orders not enforceable by Labour Court under section 158(1)(c) of Act.

39 REPRESENTATION AFTER DISMISSAL

GENERAL INDUSTRIES WORKERS UNION & OTHERS V LC VAN AARDT (TVL) (PTY) LTD [1991] 12 ILJ 122 (LAC)
The Court held that a union can represent employees who joined after their dismissal with a view to enforce their legal right.

39(A)LEGAL REPRESENTATION AT DISCIPLINARY HEARING

Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others (2002) 23 ILJ 1531 (SCA)
MEC: Department of Finance, Northern Province v Mahumani (2004) 25 ILJ 2311(SC)

40 Procedural Fairness

Blauw v Oranje Soutwerke (Pty) Ltd (1998) 3 BALR 254 (CCMA)
An employer using legal practitioner present case at disciplinary hearing should afford employee the same right.
Van Rooy v Nedcor Bank Ltd [2000] 2 BLLR 225 (LC)
Disciplinary procedure - Fair hearing - Employee not informed of purpose of meeting that was intended to investigate charges of misconduct - Dismissal procedurally unfair.
Disciplinary procedure - Appeal - Presiding officer refusing to allow employee's union to proceed with various grounds of appeal on advise of labour consultant - Dismissal procedurally unfair.
Dismissal - Automatically unfair - Employee relying on generalised claims of race discrimination by employer to support allegation that she was dismissed on grounds of her race - Evidence not supporting such claim.
Dismissal - Misconduct - Abusive language - Manager systematically abusing staff over long period - Dismissal justified.
***Practice and procedure - Costs - Dismissed employee relying on unsubstantiated claim that she was victim of race discrimination - Employee ordered to pay employer's costs even though her dismissal was procedurally unfair**.*
Highveld District Council v CCMA & Others [2003] 24 ILJ 517 (LAC)
Disciplinary code and procedure – Collective agreement – Procedural requirements of collective agreement not followed during disciplinary enquiry – Distinction between contractual rights and statutory rights to fair procedure – Failure to follow agreed procedure not necessarily rendering actual procedure followed unfair – Fairness of actual procedure followed to be determined in all circumstances of case.
Avril Elizabeth Home for the Mentally Handicapped v CCMA and others (JR782/05)
The Labour Court examined the history of the procedural fairness requirement in unfair dismissals. It traced the development of the 'criminal justice' model, developed

by the Industrial Court in the 1980's. This model required a workplace enquiry along the lines of a criminal trial, with charges of misconduct, evidence, the application of the rules of evidence, rules in relation to bias and the like. The Court noted that the new LRA had introduced an entirely different model. This model, which finds reflection in the Code of Good Practice: Dismissal, requires only an investigation by the employer, the formulation of any allegation that may flow from that enquiry, an opportunity for the employee to state a case in response to the allegation with assistance if required, a decision, and notice to the employee that he or she was free to pursue any dispute in the CCMA. The balance struck, said the Court was one that lessened the procedural burden on employers while establishing a right to expeditious arbitration, on the merits and in the form of a rehearing, if the fairness of a dismissal was disputed. This meant that the 'criminal justice' model had no place under the LRA, unless employers continued to apply it in terms of their own procedures, or in the public sector, where administrative law requirements might demand it. But as a general rule, there was no need for employers to hold formal hearings before dismissal. This conclusion was fortified by the Code of Good Practice (the Code states that a 'formal hearing' is not required and makes no mention of a right to an appeal) and by international labour standards. The rule of bias applied by the Commissioner was held to be part of the 'criminal justice' model, and out of line with the new conception of procedural fairness that the LRA introduced. The Commissioner's decision was therefore reviewable.

Tshongweni v Ekurhuleni Metropolitan Municipality [2010] 10 BLLR 1105 (LC)

*Disciplinary procedure – Fair hearing – Employer conducting lengthy and complex disciplinary inquiry chaired by advocate – **No need for arbitrator to assess technical points, because sole issue is whether employee had opportunity to state case***

Practice and procedure – hearsay evidence – Record of disciplinary proceedings – Record of disciplinary inquiry admissible to prove that dismissal was fair and employee had the opportunity to state a case.

Nitrophoska (Pty) Ltd v CCMA & others [2011] 8 BLLR 765 (LC)

Disciplinary procedure – Senior manager interviewed by management after manager's wife convicted of defrauding company and asked to suggest how employment relationship could be sustained – Informal procedure sufficient in circumstances to satisfy requirement of procedural fairness – Dismissal procedurally fair

41 Protected Disclosures Act

Grieve v Denel (Pty) LTD [2003] 4 BLLR 366 (LC)

Act protecting employees who make bona fide disclosures from disciplinary action

CWU & another v Mobile Telephone Networks (Pty) LTD [2003] 8 BLLR 741 (LC)

Requirements for protection – Employee accusing management of fraud and corruption – Accusation not protected by Act because mere opinion unsupported by fact.

Words and phrases – "Disclosure" (section 1 of Protected Disclosures Act 26 of 2000) – Disclosure must contain information regarding criminal offence, failure by person to discharge legal obligation, or miscarriage of justice.

42 Trade Union Membership

IMATU & others v Rustenburg Transitional Council [1999] 12 BLLR 1299 (LC)

Managerial employee – Senior managers have unfettered right to join and hold office in trade unions, but are still bound to perform duties for employer – Employees who

breach duty of fidelity towards employers in course of trade union activities may still be disciplined but not for holding union office per se.

FOOD & ALLIED WORKERS UNION & ANOTHER v THE COLD CHAIN [2007] 28 ILJ 1593 (LC)
The Labour Court held that an employee enjoys an absolute right in terms of the Constitution 1996 and ss 4 and 5 of the LRA to join a trade union and to take part in its activities. Where, therefore, an employee was appointed to a managerial position on condition that he gave up his position as a shop steward, and where he accepted the post but refused to relinquish his union position, the court found the employer's demand was unlawful, and that the employee's subsequent dismissal was automatically unfair.

43 Basic Conditions of Employment Act

43.1 Annual Leave

Jardine v Tongaat-Hulett Sugar LTD [2003] 7 BLLR 717 (LC)
Requirement that employees must be granted leave within six months of end of leave cycle obliges employers to grant leave – Leave not taken in that period not forfeited.
Payment on termination of employment – Employee entitled to be paid for all accumulated leave on termination of employer obliged to ensure that employee takes leave.
The BCEA sets no ceiling on amount of leave that may be accumulated, and therefore superseded the respondents' leave policy
Jooste v Kohler Packing Ltd [2003] 12 BLLR 1251 (LC): [2004] 25 ILJ 121
Annual leave – Accrued leave – Employee not entitled under BCEA to claim payment in lieu of accrued leave in years preceding latest leave cycle – Contractual leave in excess of that provided for in BCEA may also be forfeited by agreement. Employee obliged to take annual leave provided by BCEA, otherwise he forfeits claim to payment thereof unless he resigns – However, payment in lieu of leave not taken in previous leave cycles not recoverable.

43.2 Bonus: Payment

Jooste v Kohler Packing Ltd [2003] 12 BLLR 1251 (LC)
The respondent claimed it was not obliged to pay employees a bonus at year end if the employee was not then in its employ. While there was nothing in the evidence to support this claim, the applicant was unable to remember whether any specific qualifying criteria had been set for him. The respondent had testified that the other employee had been paid the bonus because, in its view, he had earned one. There was accordingly no merit to the contention that the applicant was entitled to a bonus merely because another employee had been paid one.

44 Settlement Agreements

PPWAWU & Others v Delma (Pty) LTD (1989) 10 ILJ 424 (IC)
It was held – 'The acceptance by an applicant of an amount tendered by the respondent "in full and final settlement" of a claim does not preclude the applicant from approaching the Industrial Court in terms of section 43 of the Labour Relations Act
Roberts & Others v W.C. Water Comfort (Pty) LTD (1999) 1 BLLR 33 (LC)
The Labour Court acknowledged the concern that if a court fails to give effect to settlement agreements, there will be little point in even to attempt to negotiate them. The Judge went on to add, however, that the words " in full and final settlement "

cannot always be held to constitute a waiver of employees rights to persue an application for unfair dismissal.

PPC Cement (Beestekraal) v Khunou & Others (2000) 2 BLLR 153 (LAC)

The insertion of the phrase " in full and final settlement ", however, does not necessarily entail the giving up of one's right to approach a court regarding the fairness of the dismissal. Upon a proper construction of the agreement it may transpire that the parties were merely referring to a specific aspect of the employment relationship, such as monies owed to the employee.

45 Testing for HIV/AIDS

Irvin & Johnson Ltd v Trawler & Line Fishing Union & Others (2003) 24 ILJ 565 (LC)

The Court granted an order declaring that voluntary and anonymous testing of employees for HIV/AIDS does not enquire prior authorization from the Labour Court in terms of s 7(2) read with s 50(4) of the Employment Equity Act 55 of 1998.

PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood & Allied Workers Union & others (2003) 24 ILJ 974 (LC)

The Court concluded that s 7(2) of the EEA is not a limitation on the right of employees to exercise control over their bodies in terms of s 12(2)(b) of the Constitution if they voluntarily give their informed consent to HIV testing, even if such testing is at the instance of the employer. The Court rejected the earlier decision that anonymous test is not prohibited because it is not discriminatory.

46 Constitutional Right to Fair Labour Practices

Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others (2003) 24 ILJ 1712 (LC)

Constitutional Law – Right to have dispute decided in fair public hearing – Section 34 of Constitution 1996 – Whether right includes right to legal presentation at CCMA arbitrations – Tribunal may have discretion to allow legal representation – Such right not implicit in s 34.

MHLAMBI v MATJHABENG MUNICIPALITY & ANOTHER (2003) 24 ILJ 1659 (O)

Disciplinary code and procedure – Request for further particulars – Purpose – To enable party to prepare for hearing – Principles of natural justice demand that person facing hearing be furnished with information reasonably required for purposes of preparation – Argument that because LRA 1995 not providing for furnishing of further particulars they are excluded, is untenable.

47 Agency Shop

National Manufactured Fibres Employers Association & another v Bikwani & others [1999] 10 BLLR 1076 (LC)

Application of – Agency shop agreement applies to all employees to whom it is extended who are not members of majority union, whether or not they are members of other unions.

48 Extension of Security of Tenure Act 62 of 1997

Malan v Bulring NO & others [2004] 10 BLLR 1010 (LC)

The Labour Court set aside an award because the arbitrating commissioner incorrectly reasoned that an employee's refusal to comply with the terms on which on which he was granted accommodation concerned the lease between the employer and the employee, and had nothing to do with the employment relationship. The Court held that the commissioner had erred by assuming that employees can be

dismissed only if they breach their contracts of employment; the real issue is wether the employee's conduct impacts on the employment relationship. Conduct by an employee can harm or destroy the employment relationship even if it is committed off the workplace and outside working hours. The employee's refusal to pay rent for his two adult sons, as required by the terms of his contract, had a direct bearing on the employment relationship because the employee was given accommodation on the applicant's farm only because he was an employee. The commissioner further erred by failing to consider whether the dismissal was fair in the circumstances.

49 Con-arb. process

Ceramic Industries LTD v Commission for Conciliation and Arbitration & Solomon Bokako [2005] 12 BLLR 1235 (LC): (2005) 26 ILJ 89 (LC).

If one party objects to taking part in the Con-Arb the CCMA is precluded from invoking section 191(5A). The CCMA may not rely on Rule 17 which provides for the conducting of the Con-Arb process. The effect of this is that the procedure which was in place prior to 1 August 2002 must be used. This means that after conciliation, the commissioner must issue a certificate of non-resolution, should this be the case, and thereafter the employee must request the CCMA to conduct an arbitration by completing form LRA 7.13 and serving it on the employer. ***The effect of this judgement is that even where there is no objection, the CCMA may not enrol the matter for arbitration without the necessary request for arbitration****.*

Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking (Duens Bakery) v CCMA & others [2011] 8 BLLR 771 (LC)

Commission for Conciliation, Mediation and Arbitration – "Con-arb" in terms of section 191 (5A) (c) of LRA – Commissioners obliged to arbitrate matter immediately if employer fails to appear, or no party has objected, but retaining discretion to postpone arbitration on good cause shown – Commissioner issuing award in favour of employee despite clear indication that employer intended opposing matter – Award set aside

50 Restraint of trade

Alum-Phos (Proprietary) Limited v Spatz and Another(2002) 11 HC 8.34.2 Case no 29371/95 *High Court, Witwatersrand Local Division*

substantive fairness in dismissal - contract of employment - restraint of trade provisions ***- onus on party against enforcement thereof to prove provisions were unreasonable and therefore unenforceable*** *– restraint of trade contract must protect some proprietary interest of the party seeking to enforce the same – determination of the proprietary interest is a question of fact – factors that can aid in making this determination*

Fisher v Clinic Holdings Ltd [1995] 8 BLLR 27 (IC)

Constitution of the Republic of South Africa Act 200 of 1993 – restraint of trade- In the circumstances imposition of restraint of trade in conflict with employee's constitutional right to freely engage in economic activity. Unilateral imposition of restraint of trade on employee which is not negotiated to impasse or justified by employer's operational requirements constitutes an unfair labour practice.

Fidelity Guards Holdings (Pty) Ltd v Pearmain [1998] 3 BLLR (SE)

Constitution of the Republic of South Africa Act 108 of 1996 – Freedom of economic activity- Parties free to restrict freedom of economic activity by restraint of trade agreements – Restraint agreements meeting requirements of limitation clause if it passes common-law tests of reasonableness and compliance with public policy

Enforcement- Party seeking to enforce agreement not bound by undertaking that respondent will comply with it unless such undertaking offers complete protection of its interests – Former employee undertaking not to contact applicant's customers or entice its employees still possessing confidential information – Interdict granted

Forwarding African Transport Services CC t/a FATS v Manica Africa (Pty) Ltd & others [2005] 1 BLLR 104 (D)
Restraint of trade – When enforceable- Employer seeking to restrain former employee from working for any employer anywhere in the world for one year – Restraint agreement too wide to be legally enforceable.
Unlawful competition- Mere act of entering service of business in competition with former employer while in possession of confidential information relating to former employer not constituting unlawful competition.

51 Certification of award

TONY GOIS t/a SHAKESPEARS'S PUB v VAN ZYL & OTHERS [2003] 11 BLLR 1176 (LC)
Commission for Conciliation, Mediation and Arbitration – Arbitration award – Enforcement – Certification not having effect of converting award into order of Labour Court and thus depriving commission of jurisdiction to consider rescission
Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others [2009] 12 BLLR 1214 (LC)
Certificate having no legal effect on whether matter is referred for arbitration or adjudication – Later forum determined by employee. Arbitrating commissioners are not bound by the designation given the dispute in certificates of outcome by conciliating commissioner.

52 Set-off

Penny v 600 SA Holdings (Pty) Ltd [2003] 2 BLLR 200 (LC): [2003] 24 ILJ 967 (LC)
Set-off – When allowed – Employer may set off from compensation awarded to unfairly dismissed employee any liquidated amount owing by employee to employer – Employer failing to prove amount claimed by way of set-off – Set-off disallowed.

53 Employment Equity

Independent Municipal & Allied Workers Union & another v City of Cape Town [2005] 26 ILJ 1404 (LC): [2005] 11 BLLR 1084 (LC)
The respondent had placed a blanket ban on the employment of diabetics which the applicant union contended amounted to unfair discrimination in terms of s 6(1) of the Employment Equity Act. The respondent, relying on s 6(2)(b), asserted that the ban was fair and justified on the basis of the inherent requirements of the job of a fire fighter. Murdoch was an optimally controlled diabetic and had been a volunteer fire fighter for over 13 years. The Court noted that the approach to unfair discrimination to be followed by our courts was spelt out in ***Harksen v Lane NO & others (1) SA 300 (CC)*** *The Court was satisfied that the type of diabetes suffered by Murdoch was an analogous ground to the listed grounds of disability, HIV and, given its genetic origins. Controlled diabetics sought dignity with the demand that their capacity to function as normal members of society be recognized to the extent that modern pharmacological and technical advances have made that possible. Arbitrary, irrational and unfair exclusions predicated upon anachronistic generalized assumptions impaired their dignity and seriously affected them adversely by limiting the full enjoyment of the right guaranteed by s 22 of the Constitution. The Court was satisfied therefore that the respondent, contrary to the provisions of the EEA, had unfairly discriminated against Murdoch in its employment policy and practice on the grounds of his medical condition.* **Please read the full judgment.**

54 Labour Brokers – Temporary Employment Services

Smith v Staffing Logistics [2005] 10 BALR 1078 (MEIBC)

In a nutshell the arbitrator determined that where an employee is placed on indefinite "standby" after a labour broker's client decided that the employee's services were no longer required, that such employee is deemed to be dismissed, as well as same constituting an unfair dismissal. The summarised facts of the case are:

- *Smith a boiler maker/welder, was recruited and employed to work for Staffing Logistics, a labour broker in order to undertake a certain assignment at a client of Staffing Logistics.*
- *The written employment contract detailed the duration, namely from "October 14 2004 to end of the assignment".*
- *According to Staffing Logistics witness, Smith's assignment was terminated, however, Smith's "employment was not terminated as he was being placed on standby" (placed in the labour pool or standby pool).*
- *Smith actually argued that the work to be done at Staffing Logistics client still existed.*

The arbitrator held the following views:

- *That the written contractual terms between Smith and Staffing Logistics will be questioned and evaluated by rather considering the Labour Relations Act's fairness provisions.*
- *As per Smith's contract, one of the circumstances in which his contract could be terminated occurs "when the client, for any reason whatsoever, advises Staffing Logistics that it no longer wishes to make use of Smith.*
- *In the absence of any evidence supporting any wrongdoing on Smith's part, the arbitrator concluded that his employment was terminated simply because Staffing Logistics' client advised them they no longer needed him and that they should remove Smith from their premises.*
- *This is a common occurrence in the temporary employment scene. It is often also used as a marketing tool. Where an employee, such as Smith, is removed and effectively dismissed, the LRA's fairness requirements, insofar as conduct or non-performance, still need to be met.*

The arbitrator determined that a company cannot "extend an employment agreement to cover the period during which an employee is enrolled in a standby pool, due to the fact that during this time none of the usual characteristics of an employment relationship are present. For example, during that period an employee's skills are not being utilised in exchange for remuneration as well as the employee neither enjoying any statutory or other employment benefits.

55 Medical certificates – status as evidence

MGOBHOZI v NAIDOO NO & OTHERS [2006] 3 BLLR 242(LAC)

Medical certificates without supporting evidence from doctors' mere hearsay and courts must be especially vigilant to prevent abuse. Medical certificates annexed to founding affidavit in condonation application constituting inadmissible hearsay evidence in absence of supporting affidavits by doctors. The court held that the absence of affidavits from the doctors led to the inference that they were not willing to defend the certificates under oath. The respondent employer had been prejudiced because it had been denied the opportunity of having its own medical practitioners examine the appellant.

56 Public Holidays Act

Randfontein Estates Ltd v National Union of Mineworkers [2006] 27 ILJ 1200; [2006] 7 BLLR 683 (LC)

The Court held that a public holiday does not change its character just because it falls on a Sunday, and that the following Monday is an additional holiday.

57 Demotion

VAN WYK v ALBANY BAKERIES LTD & OTHERS [2003] 12 BLLR 1274 (LC)
Although the applicant's salary had not been reduced, his status had been downgraded. This constituted a demotion and a unilateral variation of the applicant's conditions of service. The applicant should have been consulted before the change was effected.

57 Promotion of Administrative Justice Act 3 of 2000

RUSTENBURG PLATINUM MINES LTD (RUSTENBURG SECTION) v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (2006) 27 ILJ 2076 (SCA); (2006) 11 BLLR 1021 (SCA)
The Supreme Court of Appeal has confirmed that a CCMA commissioner's arbitral decisions do constitute administrative action for the purpose of that Act.

58 Arbitration Awards- Enforcement

Muthwa & others v Allifa Spices; Ntanzi & others v Affirmative Blasting [2006] 12 BLLR 1182 (LC)
Arbitration awards – Enforcement – Conviction for contempt for disregard of award not possible unless respondent employer clearly identified – applicant must provide name and address of employer if natural person, or must name person cited in representative capacity if employer is juristic entity.

59 Private Arbitration Agreement Clause - Contract of Employment

SA Clothing & Textile Workers Union on behalf of Stinise v Dakbor Clothing (Pty) Ltd & others [2007] 28 ILJ 1318 (LC): [2007] 7 BLLR 659
*The court was satisfied that the employer, a non party to the main agreement **(of a Bargaining Council)** was bound by the agreement which provided a procedure for the settlement of disputes. It was apparent that the private arbitration clause in the contract of employment sought to exclude or waive the provisions of the main agreement relating to dispute resolution. This was prohibited by s 199(1)(c), and the private arbitration clause was consequently invalid in terms of s 199(2)*
Carlbank Mining Contracts (Pty) LTD v NBCRFI [2010] 11 BLLR 1142 (LC): (2010) 33 ILJ 2076 (LC) (Important case)
Bargaining Council – Dispute resolution – Employers falling within scope of councils permitted to conclude contracts of employment providing that disputes with employees be referred for private arbitration – Such clauses not in breach of bargaining council agreement if employer undertakes to pay arbitration costs and if appointed arbitrator competent and reputable.
Giddings v Bridge Holdings Ltd (2010)31 ILJ 2096 (LC)
The Labour Court ordered that an agreement to refer an unfair dismissal dispute to private arbitration should not be effective where the dispute involved determining which of the two entities was the true employer of the employees. The court found that this could result in the dispute proceeding in two independent forums, with the risk of conflicting outcomes.

60 Private Arbitration

CARLBANK MINING CONTRACTS (PTY) LTD v NBCRFI [2010] 11 BLLR 1142 (LC)

Arbitration – Arbitration agreement – Provision in contract of employment that disputes between employee and employer be referred for private arbitration not in breach of bargaining council main agreement – Employee bound by private arbitration provision if employers undertakes to pay arbitration costs and if appointed arbitrator competent and reputable

61 Constitutional Court

SIDUMO & OTHERS v RUSTENBURG PLATINUM MINES LTD & OTHERS (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC)

The Constitutional Court held that arbitration constitutes administration action but was not subject to the provisions of PAJA and reviews are subject to s 145 of the LRA. The Court further held that the standard of review must be in line with standard of reasonableness provided for in s 33 of the Constitution 1996 – ***Whether the decision reached by the commissioner is one that a reasonable decision maker could not reach****. The commissioner to determine whether dismissal fair – commissioner not empowered to consider afresh and not required to defer to decision of employer. Commissioner must simply decide whether what the employer did was fair and is required to consider all relevant circumstances in arriving at the decision.*

EQUITY AVIATION SERVICES (PTY) LTD v CCMA & OTHERS [2008] 12 BLLR 1129 (CC)

The Court held that it is competent for the Labour Court and arbitrators to order reinstatement with retrospective effect for a period exceeding 12 months.The Court noted that one of the objects of the LRA and the international norms on which it is based is to deprive employers of the power to terminate contracts of employment at will.

62 Plea of *res judicata*

Score Supermarket Kwa Thema v CCMA & Others [2008] 10 BLLR 1004 (LC)

After his dismissal, the respondent employee referred a dispute to the CCMA. Neither the applicant nor his union attended the "con-arb" hearing. The matter was dismissed by the Commissioner H. The union the referred the case again, and it was allocated a new case number. This time the applicant failed to attend. An awrd was issued in favour of the employee by Commissioner M.The applicant applied for rescission of the award. Initially the application was refused by Commissioner T, who nonetheless subsequently granted it. However, yet another Commissioner R, later decided to ignore Commissioner T's first ruling and directed that the matter be arbitrated. The applicant sought review of that ruling on the basis that the issue was ***res judicata*** *and because it had not received notice of the hearing.*

The Court noted that Commissioner R has effectively reviewed Commissioner T's order that Commissioner M's award be rescinded. While commissioners are empowered to rescind awards, they are not entitled to review awards by their colleagues. Commissioner R's ruling was therefore irregular. Turning to the plea of ***res judicata*** *the Court noted that the initial award of Commissioner H dismissing the matter had never been rescinded or reviewed. Had the union submitted the identical referral forms, the plea of re judicata had to be sustained. However, if the forms had been sent, respectively by the employee and the union, it would be unfair to uphold the plea. In labour law a plea of res judicata will be upheld only if is fair to do so.*

63 Electronic Communications

Jafta v Ezemvelo KZN Wildlife [2008] 10 BLLR 954 (LC)
The Court noted that the Electronic Communications and Transactions Act 25 of 2002 provides that data messages are regarded as sent when they enter communications systems outside the control of the originators in a form capable of being retrieved, and as received when the complete message enters a system designated for use by the addressee. The Act also provides that in legal proceedings, courts should not deny the admissibility of data messages because they are not original and unsigned. The critical moment in electronic communication is when the message enters a system outside the control of the sender. Although the Act deems a message sent when it happens, it does not create a presumption; an addressee may deny receipt, but must then adduce sufficient evidence to shift to the addressor the burden of proving that the message was transmitted, and that it could be retrieved
.

64 Deregistration – Pending appeal

CCMA v REGISTRA OF LABOUR RELATIONS [2010] 11 BLLR 1151 (LC)
Trade unions – Deregistration – Registrar's decision to de-register union not suspended pending appeal to Labour Court or further appeal to Labour Appeal Court

65 Duties and powers of Commissioners

In **INZUZU IT Consulting (Pty) LTD v Commission for Conciliation, Mediation and Arbitration & others 2010 (ILJ) 2638 (LC)** *the Court in a detailed analysis of rule 17 of the CCMA held as follows:- "The provisions of CCMA rule 17makes it clear that a commissioner is not empowered to proceed with arbitration in circumstances where one of the parties fails to appear at con-arb proceedings. Where a party is in default of appearance, the commissioner concerned may deal with the conciliation proceedings, but, not the arbitration. The arbitration must be scheduled for a later date. In the instant case, the commissioner was either unaware of the provisions of rule 17(4), or he disregarded or failed to apply his mind to such provisions. As a result, he acted outside the ambit of his powers and/or authority".*
MOHLAKOANA v COMMISSIONER, CCMA & another [2010] 10 BLLR 1061 (LC)
Commissioner's failure to provide reasons for the relief, in this instance, also amounts to misconduct in the performance of his duties as an arbitrator under section 145(2)(a) of the LRA – simply stated the award of two months' compensation would be just and equitable.

66 Procedural fairness – allowed to state a case

Tshongweni v Ekurhuleni Metropolitan Municipality [2010] 10 BLLR 1105 (LC)
Disciplinary procedure – Fair hearing – Employer conducting lengthy and complex disciplinary inquiry chaired by advocate – No need for arbitrator to assess technical points, because sole issue is whether employee had opportunity to state case
Practice and procedure – hearsay evidence – Record of disciplinary proceedings – Record of disciplinary inquiry admissible to prove that dismissal was fair

67 Reluctance of witness to testify – Intimidation

FAWU OBO KAPESI v PREMIER FOOD LTD [2010] 9 BLLR 903 (LC)

Disciplinary procedure – Evidence – Employer unable to persuade employees to testify against colleagues suspected of criminal conduct during strike and resorting to retrenchment procedure – Circumvention of disciplinary procedure impermissible because employer could in circumstances have relied on statements. Hearsay evidence – Witness statements permissible as evidence in disciplinary hearings in circumstances where deponents may be harmed if they testify.