

**Regulated Flexibility and Small Business:  
Revisiting the LRA and the BCEA**

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## Glossary

BCEA	–	Basic Conditions of Employment Act 75 of 1997
CCMA	–	Commission for Conciliation, Mediation and Arbitration
EEA	–	Employment Equity Act 55 of 1998
ILO	–	International Labour Organisation
LRA	–	Labour Relations Act 66 of 1995
NEDLAC	–	National Economic Development and Labour Council
PAJA	–	Promotion of Administrative Justice Act 3 of 2000

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## **Abstract**

The object of the paper is to identify the conceptual underpinnings of the labour law reforms of the 1990s, particularly the concept of regulated flexibility, and the changes to the labour market since then in order to review the performance of those reforms and to propose changes to more appropriately regulate that market.

The main argument made in this paper is that the concept of regulated flexibility may be put to good use in extending protection to those who most need it and limiting intervention, particularly judicial intervention, where there is no appreciable gain in protection. The paper reviews the regulation each of the standard incidents of the employment relationship, from recruitment to termination, and finds that much of this regulation (in the form of an unfair labour practice remedy) escaped careful scrutiny in the reform process in the 1990s. The unfair labour practice remedy has, for the most part, become a charter of rights for middle and senior management while the most vulnerable workers are left without protection. Rather than intensifying regulation, labour law reform should be setting its sights on the extension of protection to those who most need it, namely employees in atypical employment.

The paper makes various proposals to fine-tune the legal regulation of the labour market, in particular removing unnecessary regulation in the form of judicial interference in the employment relation and extending legislative protection to the most vulnerable employees.

## **1. Introduction**

### **1.1 Purpose and Structure of the Paper**

The objective of this paper is to reflect on three things. It seeks to identify the conceptual underpinnings of the labour law reforms in the 1990s, particularly the concept of regulated flexibility, with a view to measuring the performance of those reforms today. It also reflects on those aspects of the reforms that were intended but improperly realised in practice. It also considers the effect of the changes to the labour market since then and whether the conceptual structure is capable of accommodating those changes. All of which are important for any new phase of labour market reform involving a bridge between what the President has called the first and second economies.

The structure of the paper is to set the context briefly and then to give a general overview of the underlying thinking on regulated flexibility. After that there will be a specific analysis of each of the incidents associated with the individual employment relation – from hiring to dismissal – to determine the need for, and effect of, regulation. And finally there will be a consideration of possible changes and mechanisms for accommodating the concerns of small business and the need for job creation without undermining the main purpose of labour laws namely the protection of workers, particularly the most vulnerable workers.

The main argument made in this paper is that the concept of regulated flexibility may be put to good use in extending protection to those who most need it and limiting intervention, particularly judicial intervention, where there is no appreciable gain in protection. Because the remedies for unfair labour practices in the Labour Relations Act (LRA) have never been subject to any careful scrutiny, the need for, and effect of, providing these remedies need to be thoroughly reviewed – not just for small employers but for all employers. The unfair labour practice has become a charter of rights for middle and senior management while the most vulnerable workers are left without protection. Rather than intensifying regulation, labour law reform should be setting its sights on the extension of protection.

Before commencing with the conceptual analysis of the labour law reforms, it is important to make a few general statements concerning the whole project of labour market reform.

## 1.2 General Statements

The first general statement is that we live in a constitutional state that has entrenched a bill of rights and, in particular, a suite of labour rights. These rights, together with other constitutional rights, commit the State to a social democracy. This means that the labour market policy choices are constrained and the justification for any limitation of these rights is not simply a matter of economic choice.

The second is that the traditional model of employment (permanent full time employment with one employer until retirement) is steadily giving way to less stable (and often more vulnerable) forms of employment. This has two consequences for labour market regulation. The first is that much of the regulation based on the traditional model is not suited to these new forms of employment. The second is that the modern labour market is dynamic and labour market regulation is always a step behind. As Paul Benjamin puts it: 'Labour law is playing a perpetual game of catch-up. New forms of work are continually emerging and the law has to respond'.<sup>1</sup> But it is not just the new forms of work that are changing – the nature and structure of the workplace, the organisation of work, the demands of the global market, the structures of ownership are all in flux, not as a transitional feature but as an end-state.

The third is that any systematic process of labour law reform requires proper information and research. There is insufficient information and research to properly understand what is taking place in the labour market in order to properly extend protection and adapt regulation to the changes in the labour market.

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1 Paul Benjamin, 'Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa' Paper presented at The Scope of Labour Law: Redrawing the Boundaries of Protection, in Bellagio, Italy (May 2005).



### **1.3 The Background to the Labour Law Reform Process in 1994-1998**

Minister Mboweni<sup>2</sup> initiated a complete overhaul of the regulation of the South African labour market soon after the 1994 elections. That overhaul was outlined in the Department's Five Year Plan and commenced with the review of the Labour Relations Act<sup>3</sup> ('the 1956 Act') and the appointment of the Presidential Commission into the Labour Market.

The political imperatives for demonstrating results led Minister Mboweni to initiate the process of reforming the Labour Relations Act<sup>4</sup> ('the LRA') even before the Presidential Commission had been appointed. Those same imperatives drove the conclusion of the Basic Conditions of Employment Act ('the BCEA') before the Commission had completed its work. There are two aspects of this history that need to be stressed.

Firstly, the policy underlying the LRA was never properly considered by the Commission, either on its own terms or as part of the labour law reform process as a whole. The reform of the LRA and the BCEA accordingly operated without a thorough labour market evaluation – either in respect of their particular subject matter or in respect of the linkages to other aspects of the labour market, such as skills development, social security etc.

Secondly, the phased nature of the negotiations prevented the presentation and negotiation of a single and coherent package of reforms. To some extent this can be attributed to high expectation of a broad social accord at the time and that the government's introduction of meaningful reforms quickly would prove its commitment to protecting workers in any social accord. There had been a positive history of social dialogue and there was a real expectation of a broader social accord to stabilise and drive the post-apartheid economy. Negotiations between the social partners and government had preceded the start of the new democracy. The NEDLAC Act<sup>5</sup> with its ambitious agenda for social dialogue was one of the first new order laws to fill the post 1994 statute book and it specifically contemplated 'consensus' and 'agreements' on 'social and economic policy'.

The accord never happened. Accordingly the different aspects of the labour law reform process, albeit always tripartite in composition, were separately introduced and negotiated. Many of the recommendations of the Presidential Commission never saw the light of day.

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2 Minister of Labour 1994 –1998; Governor of the South African Reserve Bank 1999 to present.

3 28 of 1956

4 66 of 1995

5 National Economic Development and Labour Council Act 35 of 1994.

And those that were introduced (such as the amendment to give the Minister of Labour the discretion whether or not to extend sectoral collective agreements) were withdrawn in response to the fierce opposition from the trade unions.

The effect therefore was that the labour law reform process degenerated into piecemeal negotiations. The danger of the present initiative to reform the labour laws is that it may become heir to this fragmented process unless a serious attempt is made to put together a whole package of reforms, protections and programmes.

## **2. Legal and Institutional Context**

### **2.1 International Context**

The legal context within which the policies underlying the LRA and the BCEA were formulated is not very different from the context that prevails now. The first context is international law. South Africa is a member of the International Labour Organisation and has ratified a number of ILO Conventions. This means that domestic policy and practice must comply with the ILO Constitution and the ratified Conventions. The core Conventions relate to freedom of association, collective bargaining, discrimination, and child labour and forced labour. The provisions giving effect to these Conventions are not implicated in the current review although much can still be done on a programmatic basis to eliminate discrimination and child labour, and promote collective bargaining.

### **2.2 Constitutional Context**

The Final Constitution<sup>6</sup> provides the next level of legal context. The Bill of Rights entrenches various rights that impact on the formulation of labour market policy and labour law reform. Those rights include the rights to equality, freedom of assembly, labour rights, access to courts and administrative justice.<sup>7</sup> These rights are capable of being limited by a law of general application if they are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.<sup>8</sup> Accordingly it is possible to limit a constitutional right provided that it meets the constitutional standard of justification. The limitations on the right to strike provide a good example. Section 23 guarantees workers an unqualified right to strike. The LRA, however, limits the right to

6 Constitution of the Republic of South Africa Act 108 of 1996.

7 Sections 9(1), 17, 23, 34 and 33 of the Constitution.

8 Section 36 of the Constitution.

strike in a range of ways: strikes are limited to matters of mutual interest, in essential services and in respect of disputes of right.<sup>9</sup> Those limitations are generally considered to be justifiable in open and democratic societies. Such limitations are accepted by the supervisory machinery of the ILO and exist in one form or another in most democracies.

At the time the policies underlying the LRA were being formulated, the final Constitution had not been finalised and the interim Constitution<sup>10</sup> was in place. Although there are differences in the manner in which the labour rights were cast in the two Constitutions, the differences are not material for the purposes of policy formulation then or now, except in so far as the structure and the jurisdiction of courts is concerned.

It was constitutionally possible to have specialist appeal courts with equivalent status of the Supreme Court of Appeals under the interim Constitution. That became no longer possible under the 1996 Constitution, which explicitly provides that the Supreme Court of Appeals is the highest court of appeal except in constitutional matters.<sup>11</sup> In a recent decision of the Supreme Court of Appeal, the Court held that it had jurisdiction to hear appeals from the Labour Appeal Court.<sup>12</sup> This has introduced an additional (and non-specialist) tier of appeals in labour disputes.

### **2.3 Institutional Context**

Under the 1956 Act, the labour market institutions were the Department of Labour, National Manpower Commission (replaced by NEDLAC), the industrial councils (now called bargaining councils), conciliation boards (ad hoc boards convened by the Department of Labour) the industrial court and the Labour Appeal Court (a high court judge with two assessors). Although the institutional landscape remained similar in so far as collective bargaining is concerned, the real changes effected by the 1995 LRA was its introduction of new dispute resolution machinery – the CCMA and the Labour Courts and a new role for bargaining councils. Although the change of name looks superficial, a new kind of collective bargaining institution was intended.

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9 Section 65(1) read with the definition of 'strike' in section 213 of the LRA.

10 Constitution of the Republic of South Africa Act 200 of 1993.

11 Section 168(3) of the Constitution.

12 *National Union of Metalworkers of South Africa v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA).

### 3. Regulated Flexibility

#### 3.1 The Concept of Regulated Flexibility

The concept of regulated flexibility was developed by Paul Benjamin and based on the *ILO Country Review*.<sup>13</sup> It informed the recommendations of the Labour Market Commission and the Minister of Labour's approach to labour law reform. As the Review and the Commission noted, there are three kinds of flexibility: employment flexibility (the freedom to change employment levels quickly and cheaply), wage flexibility (the freedom to determine wage levels without restraint) and functional flexibility (the freedom to alter work processes, terms and conditions of employment etc quickly and cheaply).<sup>14</sup> Security on the other hand is also made up of different forms. These were identified as labour market security (opportunities for employment), employment security (protection against arbitrary loss of employment) job security (protection against arbitrary loss of or alteration to the job), work security (health and safety in the workplace) and representation security (representation in the workplace).<sup>15</sup> The concept of regulated flexibility is not simply a balance between the two sets of interests but a framework within which an appropriate balance is struck. It accordingly concerns both limits and mechanisms. The limits should constitute the boundaries within which the mechanism determines the balance.

Central to this concept of regulated flexibility is the recognition that the labour market is both diverse and dynamic – one shoe does not fit all and that a shoe that fits now does not fit for all time. It is accordingly necessary in any framework to allow space within which employers and workers can adapt standards to suit the needs of any particular sector, sub-sector or workplace over time. There are several mechanisms that characterise regulated flexibility and this conception of space within which choice can be exercised:

- The first is 'voice regulation' – namely social dialogue (at national or regional level), collective bargaining (at sectoral or workplace level), workers' participation (at the level of the enterprise) and employee consultation (at the level of the workplace). The balance is struck by accommodating the interests that each party brings to bear in these dialogues.

13 G. Standing, J. Sender and J. Weeks *Restructuring the Labour Market: the South African Challenge: an ILO Country Review* (Geneva: ILO, 1996).

14 *ILO Country Review* p 6-7.

15 *ILO Country Review* p 8-9.

- The second is administrative discretion bounded by clear guidelines on how the discretion is to be used. An example is the independent body to hear exemptions from sectoral collective agreements in accordance with established criteria based on fairness and the objects of the LRA.<sup>16</sup>
- The third is administrative determinations made by the Minister in the form of ministerial determinations in respect of any category of employees or employers or any particular employee or employer on application by the parties<sup>17</sup> and sectoral determinations for any sector or area.<sup>18</sup>
- The fourth is what is called 'soft law'. The LRA authorises the publication of Codes of Good Practice. Codes do not impose duties but set standards of behaviour. Deviation from those standards does not give rise to any penalty but may lead to an adverse finding in the CCMA or the Labour Court unless the deviation can be justified. The primary mechanism is voluntary compliance and the secondary mechanism depends on the exercise of a discretion by the CCMA or the Labour Court in applying the code in assessing fairness, for example in respect of a dismissal.
- The fifth mechanism is to set floors and ceilings within which the operational requirements of different enterprises can be accommodated. Averaging hours of work in the BCEA is one example.<sup>19</sup> The framework nature of sectoral collective agreements envisaged for bargaining councils would be another.
- The sixth mechanism is the selective application of legislative standards or requirements. The exclusion of employers with less than 50 employees from the affirmative action provisions of the Employment Equity Act<sup>20</sup> ('the EEA') is one example.<sup>21</sup> The exclusion of upper echelon employees from some of

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16 Section 32(3)(e) of the LRA.

17 Section 50 of the BCEA. Ministerial determinations have been made in respect of the small business sector; welfare sector; special public works program and the hotel trade (February 2003). See [http://www.labour.gov.za/legislation/sectoral\\_index.jsp](http://www.labour.gov.za/legislation/sectoral_index.jsp).

18 Section 51 of the BCEA. Sectoral Determinations have been made in respect of the contract cleaning sector ; civil engineering sector; clothing and knitting; learnerships; private security sector; domestic workers; farm workers; retail and wholesale sector; children in the performance of advertising artistic and cultural activities; taxi sector. See [http://www.labour.gov.za/legislation/sectoral\\_index.jsp](http://www.labour.gov.za/legislation/sectoral_index.jsp).

19 Section 12 of the BCEA.

20 Act 55 of 1998.

21 Section 1 definition of 'designated employer' read with section 20.

the provisions of the BCEA is another.<sup>22</sup> It is this mechanism that is being proposed in respect of small business.

The legislation that sought to give effect to the concept of regulated flexibility was itself subject to intense negotiation between the representatives of business and labour. In the legislation dealing with labour relations, the principle was given effect to by the promotion of collective bargaining, the choice of sectoral bargaining as the preferred but not compulsory level of bargaining, the enforceability of collective agreements, promotion of workplace forums and codes of good practice. In the legislation dealing with individual employment relations, the principle was given effect to by permitting a variation of employment standards through collective agreement, sectoral determination, the Minister and on occasion by the employees themselves, and codes of practice. That legislation also provided a set of default standards and an equitable remedy for individual unfair labour practices supported by codes of good conduct to guide workers, employers, arbitrators and courts. Accordingly, much of the debate concerning the appropriate level of collective bargaining and the continuance of sectoral bargaining in particular has a direct impact on the individual employment relation.

Although the concept of regulated flexibility was given effect to, its effect was blunted because of the limits on the scope of variation introduced during the negotiations over the BCEA. Its effect has been further held back by the failure of the social partners to recognise the new role for collective bargaining and sectoral bargaining in particular, namely its role as the principal mechanism for striking a balance between the long term security needs of workers and the operational needs of the sector, sub-sectors and the individual employer. The detailed and prescriptive nature of current sectoral agreements is the antithesis of what was intended. This is one of the reasons for employer opposition to bargaining councils and since bargaining councils are necessarily voluntary in character, this opposition needs to be taken seriously.

The CCMA and the Labour Court have also played their part in blunting the effect of the concept of regulated flexibility. As I discuss below, the CCMA and the courts have not followed the Codes of Good Practice (a feature of regulated flexibility) and, for example, have over-proceduralised pre-dismissal hearings.

The failure to review the residue of unfair labour practices inherited from the application of the 1956 LRA and their incorporation into the LRA without change and without codes of

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<sup>22</sup> For instance, section 6 provides that Chapter 2 which regulates working time does not apply to senior management.

good practice to guide workers, employers, their organisations, arbitrators and courts is a serious failing and has led to an unwarranted juridification of the employment relation.

## 4. The Individual Employment Relation

### 4.1 Introduction

The individual employment relation is made up of a range of different incidents – some of which were traditionally regulated and others not. The standard form of the individual employment relation is the contract of employment and the standard regulation was directed to the terms of the contract – both legislatively and through collective bargaining. It was only with the introduction of a remedy for unfair labour practices in 1979 that the other incidents of the individual employment relation became subject to judicial scrutiny. Both the original motivation for the remedy and the several definitions of the unfair labour practice demonstrate that it was not a carefully considered intervention.

It was, however, seized upon by trade unions representing black workers to craft a range of remedies: in collective labour relations (the right to strike and the duty to bargain) and in individual employment relations (the remedy for unfair discrimination, unfair exercise of managerial power and unfair dismissal). Indeed, the unfair labour practice jurisprudence developed by the courts under the previous Act was preserved in the 1995 LRA – but only as a holding operation. It was intended that this mixed bag of unfair labour practices gleaned from the jurisprudence would be considered fully and incorporated into the new individual employment law. But this did not occur and the transitional formulation of the individual unfair labour practice was simply imported into the unfair dismissal chapter with little change.

The concept of the unfair labour practice has had a charmed life. It started out for the flimsiest of reasons.<sup>23</sup> It spawned an ad hoc jurisprudence providing remedies for anything that could fit within the loose language of its formulation. It took a constitutional form to protect the apartheid appointed public service. It was preserved as a transitional provision pending the review of the law regulating individual employment relations. And finally it was moved from its temporary shelter in the transitional provisions into the main

<sup>23</sup> It was introduced as part of the Wiehahn reforms brought about by the Labour Relations Act Amendment Act of 1979. These reforms abolished the job reservation for white workers. There were fears that this left them vulnerable to 'irregular actions' and dismissal for 'all kinds of petty and unjustifiable reasons' by 'unscrupulous employers' wanting to replace them with black workers. The unfair labour practice was introduced as a necessary protective mechanism for white workers. See A. Van Niekerk 'In Search of Justification: The Origins of the Statutory Protection of Security of Employment in South Africa' (2004) 25 *ILJ* 853-861.



body of the LRA. All this without ever any serious review of the need and scope for such regulation.

It is accordingly critical that one of the tasks of labour law reform should be to properly analyse the concept and its impact on the individual employment relation. Before doing this it is necessary to understand the importance of constitutionalising the unfair labour practice.

#### **4.2 The Constitutional Right to Fair Labour Practices**

The most difficult of the labour rights for the purposes of policy formulation is the right to fair labour practices in section 23(1) of the final Constitution. It is an odd right to have in a constitution and not found in any other constitution other than the Malawian Constitution, which took the wording from ours.

The right to fair labour practices has three components: scope of the right holders, the concept of the labour practice and the concept of fairness. Each must be separately considered. All three are important to understand both the constraints under which the LRA and the BCEA were formulated and for current purposes.

Although 'everyone' has the right to fair labour practices, conceptually the scope of the right holders include only those involved in the employment and labour relationship namely employers, employees, trade unions and employer organisations. It is to be noted that the Constitutional Court has after the commencement of the LRA extended the meaning of worker to include those engaged in work relationships 'akin to an employment relationship'.<sup>24</sup> This has profound implications for both the scope of the current law and any labour law reform.

The concept of labour practice, as developed by the Industrial Court, includes, at the collective level, practices concerning trade union organisation, collective bargaining and industrial action. At the individual employment level, it includes practices concerning, appointment, terms and conditions, benefits, training, transfer, promotion, demotion, discipline and dismissal. This listing of practices constitutes a delineation of the scope of the concept. Although the courts and the academic writing on the subject have taken for granted that the right to fair labour practices in section 23 is extensive in scope, the scope needs to be reconsidered.

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<sup>24</sup> *South African National Defence Union v Minister of Defence and Another* (1999) 20 ILJ 2265 (CC) at para 21-30.

The operational principle in the concept of fair labour practices is fairness and that, the Constitutional Court has held, is a balance between the interests of workers on the one hand and employers on the other.<sup>25</sup> Fairness, however, should not be limited to these two interests only – fairness should also take account of societal interests such as health and safety, the environment, community interests etc.

There are four approaches to the determination of fair labour practices:

- if there is no legislative provision giving effect to the right, the courts may be required to develop the common law to do so;
- the legislation may give specialist bodies (the CCMA and the Labour Courts) the power to determine the fairness of employer or employee conduct;
- the legislation gives effect to the right by expressing the fairness in the legislation itself; and
- the legislation permits a variety of mechanisms such as collective bargaining or minimum wage fixing to determine fairness.

The *first* approach is limited to those labour rights not given effect to by the LRA and the BCEA. So for example, the labour practice of transferring an employee from one job to another or from one place to another is not one of the labour practices listed in the definition of unfair labour practices in section 186(2) of the LRA. Section 8(3) of the Constitution requires a court to develop the common law to give effect to a right 'to the extent that legislation does not give effect to that right'. Accordingly, it is open to an employee who claims that a transfer is procedurally or substantively unfair to approach the courts for relief. And if a court holds that a transfer is a labour practice requiring constitutional protection, the fairness enquiry would be a balancing of the respective interests much in the same way as the courts did under the 1956 LRA. What is important to realise is that section 8(3) means that if the legislature decides to lift certain protections in respect of a certain category of employees, the protections may be resurrected under section 8(3) as a common law right. Take for example the proposal that bargaining council agreements and the BCEA do not apply to small business, whether completely or in part. The removal of those legislatively supported protections, quite apart from the equality

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<sup>25</sup> *National Education Health and Allied Workers' Union v University of Cape Town* [2003] BCLR 154 (CC) (2003) 24 ILJ 95 (CC) at para 38-40.

challenges that may be raised, will not, itself, necessarily remove the constitutional right to those protections. Any proposal to segment labour market regulation will require a careful constitutional analysis and justification for it.

The *second* approach is legislation that establishes specialist courts and tribunals to determine fairness. The LRA establishes the CCMA and the Labour Court to do just that in respect of dismissal and the labour practices specified in section 186. But, because of the constitutional nature of the unfair labour practice, the Constitutional Court has held that it has the constitutional obligation to monitor the operations of these bodies and to hear appeals arising from the interpretation or application of the provisions giving effect to the right to fair labour practices.<sup>26</sup> The constitutional nature of the right to fair labour practices accordingly means that even if specialist tribunals are set up to determine fairness, they always remain subject to an appeal to the Constitutional Court, which has, of course, profound implications for dispute resolution.

The *third* approach is legislation that seeks to strike the balance itself. Section 197 of the LRA, which deals with the transfer of employees arising from the transfer of a business (or part of it) as a going concern, is a good example. The Constitutional Court has held that the provisions of section 197 seek to strike a balance between the interests of employers and employees in the transfer of businesses.<sup>27</sup>

The *fourth* approach is the use of legislatively created mechanisms and processes, rather than courts or tribunals, to determine the fairness of a labour practice. While the traditional way in which fundamental rights are vindicated is to institute legal proceedings, our Bill of Rights contains rights that are either not immediately realizable (the socio-economic rights) or not effectively realised by the provision of a court remedy alone (the more programmatic rights such as those relating to security of the person, affirmative action, the environment, housing, health, children and education). Salaries and wages, for example, are labour practices. But, there is no judicial or administrative remedy for an unfair wage or salary as there is for unfair dismissal, for example. Instead, the legal regime for the determination of fairness begins with the common law principle that a contract is a product of consent. The weaknesses generally associated with that consent are remedied by the legislative promotion of collective bargaining and, where there is no collective bargaining, by minimum standards legislation in statutes such as the BCEA and the Occupational Health and Safety Act, 1993. The constitutional guarantee of fair labour

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26 *NEHAWU v UCT*.

27 *NEHAWU v UCT* at para 53.

practices is accordingly secured by individual bargaining, supplemented by collective bargaining and underwritten by minimum employment standards legislation.

### 4.3 The Nature of the Individual Unfair Labour Practice

Under the 1956 Act, the courts' unfair labour practice jurisprudence applied to both collective labour and individual employment relations. Under the 1995 Act, those aspects of the jurisprudence relating to collective labour relations that were retained were codified and fleshed out – such as organisational rights and the right to strike. The jurisprudence relating to the individual employment relation was fully codified in respect of dismissal but only roughly codified in respect of the residue. The residue included the following unfair labour practices: unfair discrimination (later exported to the Employment Equity Act), unfair conduct relating to promotion, demotion, training, suspension, disciplinary action and the failure to reinstate or re-employ a former employee in terms of an agreement. The last practice highlights just how rough and ready the codification was – it was unnecessary given the provisions relating to the enforceability of agreements and the jurisdiction of the CCMA and the Labour Courts to enforce them.

The jurisprudence and the codification reveal two things. Firstly, whatever the reach of the residual unfair labour practice may be, it does not intrude into the substantive fairness of a term and condition of employment – that is left to collective bargaining and minimum standards legislation. Secondly, what is principally at stake in the concept of the unfair labour practice as it is encapsulated in the LRA is the judicial regulation of the exercise of employer power: the power to train, promote, demote, discipline and dismiss.

There are two practices codified in the residual provision that do not readily fit into this categorisation: the unfair conduct relating to the provision of benefits and the failure to reinstate in terms of an agreement. The latter should be disregarded because it was not necessary in the first place and was simply a product of a haphazard jurisprudence developed by the industrial court. The unfair conduct relating to the provision of benefits, however, appears to reach into the substantive fairness of a term and condition of employment rather than the exercise of a power. The courts, however, have given the provision a restrictive interpretation by holding that benefit means one that is conferred by contract or law – to hold the line between rights and interest disputes.<sup>28</sup> But in so doing, the courts have vitiated the provision. It is not necessary to have an unfair labour

28 *HOSPERSA v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC); *Eskom v Marshall & Others* (2002) 23 ILJ 2251 (LC). See also *Protekon v CCMA and Others* (2005) 26 ILJ 1105 (LC).

practice remedy if a remedy already exists under contract or the law. This brief excursion underlines an earlier point: the need for regulating these incidents of the employment relationship has never been properly scrutinised and is in need of review.

But not all incidents of employer power have been enumerated in the definition – such as the employer’s power to hire, to transfer and, within the confines of the contract, to direct what, how and when work is to be done.<sup>29</sup> Not that these powers should be subject to judicial review – only that the policy considerations for including some and not others should be thought through and made clear.

I argue below that there is no need for the judicial regulation of the selection decisions (hiring, training, promotion) and those aspects of discipline short of dismissal (suspension, demotion and other disciplinary measures). It is not that I believe that employers should not act fairly but that the mechanism for ensuring fairness should not be judicial review<sup>30</sup> but collective bargaining and structured worker participation. In other words the constitutional imperative for fair labour practices is sometimes set as standards and other times achieved through structures of social dialogue.

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29 See for example the more extensive list of employment practices in the Employment Equity Act.

30 Except for unfair discrimination, victimisation, and, in the public service, for corrupt and inept selection.

## 5. Selection Decisions

### 5.1 Recruitment and Hiring Practices

This incident of the individual employment relation is not listed as one of the practices covered by the definition of the unfair labour practice. Accordingly, there is no judicial scrutiny of an employer's recruitment or hiring decisions. There are three<sup>31</sup> exceptions:

- the two kinds of review, one judicial and the other administrative, contemplated under the Employment Equity Act;
- the judicial review of employer decisions for victimisation; and
- the judicial review under administrative law if the recruitment and hiring in the public service.

Outside these exceptions, there is no need to regulate this incident of the individual relation. There is no social or economic harm to employees that would justify a limitation of the employer's right to direct its business as it sees fit. In any event, the employer, whether public or private, is best placed to make the decision. The employer has an intimate knowledge of its short term and long term needs, its plans (whether equity, skills or operational), the job profile and the competencies needed to match the profile, which may include soft competencies such as personality traits and 'corporate fit'.

The policy considerations for the three exceptions are well founded. They give expression to four constitutional obligations – the prohibition against unfair discrimination, the duty to take positive measures to end unfair discrimination, the right to freedom of association and the right to organise, and the State's duty to comply with the basic values and principles governing public administration.<sup>32</sup> However, the remedies for breaches of two of these duties need to be reviewed.

31 The judicial scrutiny of hiring of new employees in the context of a retrenchment does not constitute an exception because it is not the hiring that is attacked but the fairness of the retrenchment.

32 Sections 9(4), 7(2) read with 9(1) and (2), and 195. For the reasons set out later, I do not regard the right to administrative justice in section 33 as a constitutional basis for the judicial scrutiny of the State's hiring decisions.

The mechanism in the Employment Equity Act for ensuring compliance with an affirmative action plan is carefully crafted to ensure that there is minimal interference with an employer's individual choices. It does this by measuring compliance over a period of time involving a number of hiring decisions. The breach of the duty to comply with an affirmative action plan gives rise to an administrative procedure resulting in an administrative fine.<sup>33</sup> But the Act does not give an unsuccessful applicant the right to sue for breach. The aim of the Act is to ensure that the South African workplace is broadly representative not to confer rights on unsuccessful applicants.

The right not to be victimised for one's trade union affiliation and activities<sup>34</sup> is at once both a right not be discriminated against on grounds of one's beliefs and a protection of the collective interests of the trade union. It follows that a decision not to hire a worker because of her trade union affiliation or activities is not solved simply by the payment of compensation. The remedy of requiring an employer to hire a victimised employee should be available to a court to prevent an employer frustrating the right to organise by simply paying compensation when caught. Each remedy is dependent on the policy considerations that informed the regulation in the first place.

The remedy in respect of unfair discrimination is different again. Precisely because an act of unfair discrimination violates a person's dignity, the remedy is rights based. And, because it is rights based, the remedy should be restricted to damages. This means that the applicant can sue an employer if the decision to not to hire her was unfairly discriminatory. But the remedy should not go to undoing the appointment or appointing her to the post. The object of conferring a claim was to redress the dignity violation not to review the operational correctness of the hiring decision. It may be necessary to make this clear in an amendment to the Employment Equity Act.

The remedy in respect of the State's duty to comply with the basic values and principles governing public administration should be comprehensively reviewed. At present challenges to hiring decisions in the public service are being made under administrative law. Because a hiring decision is considered to be administrative action, an unsuccessful applicant can challenge the decision on the grounds that it was not substantively or procedurally fair. In administrative law the normal remedy is to undo the unfair administrative action. Damages are only awarded in exceptional circumstances. The problem arises because in our law the state's employment decisions are subject to administrative review.

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33 Sections 42-45 read with section 50(1)(g) and Schedule 1 to the Employment Equity Act.

34 See section 5 of the LRA.

Our courts extended the reach of administrative law to ensure fairness in the dismissal of public service employees at a time when the 1956 LRA did not apply to them.<sup>35</sup> There is no longer any need to confer an administrative law remedy for unfair employment decisions because the LRA now applies to the public service. Moreover, the provision of two very similar remedies based on different policy considerations and determined in different courts will lead to forum shopping and an inconsistent jurisprudence. But more importantly, the policy issues that should inform the granting of a remedy in employment law become lost in a general right to test administrative action. This is particularly so in respect of hiring decisions. The object of providing a review of hiring decisions in the public service is to give effect to the constitutional values and principles governing public administration – in particular to prevent corrupt and inept appointments. Accordingly it is not the fairness of the decision that is at stake but whether the appointment was corrupt, inept or in breach of the public service rules aimed at preventing corrupt and inept appointments. The remedy ought to be to nullify the decision but never to countenance giving an unsuccessful applicant a claim to be appointed instead or for damages.

To bring the law into line with this approach<sup>36</sup> will require an amendment to the Public Service Act<sup>37</sup> and possibly to PAJA.<sup>38</sup>

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35 *Langeni and Others v Minister of Health and Welfare and Others* (1988) 9 ILJ 389 (W); *Mokoena and Others v Administrator for the Transvaal* 1988 9 ILJ 398 (W). See also *Administrator Transvaal v Zenzile and Others* (1991) 12 ILJ 259 (A) where the Appellate Division held that the employees were entitled to the benefit of the application of the principles of natural justice before they could be dismissed for misconduct.

36 In English law 'employment by a public authority does not per se inject any element of public law'. Thus, obligations under an ordinary employment relationship are enforceable by ordinary actions and not by judicial review. This may be different where the employment has a statutory 'underpinning' such as statutory restrictions on dismissal. See H W R Wade and C F Forsyth *Administrative Law* (8<sup>th</sup> ed) (New York: Oxford University Press, 2000).

37 Constitution of the Republic of South Africa Act 193 of 1994.

38 Promotion of Administrative Justice Act 3 of 2000.



## **5.2 Probation**

Probation is a vexed issue. Employers need it in order to assess the suitability of the employee in the work situation. If an employer is unable to dismiss an employee that proves to be unsuitable with relative ease during probation, the purpose of probation is undermined and may become a barrier to employment.<sup>39</sup> On the other hand, there is the concern that unscrupulous employers will use the reduced level of protection during probation to dismiss employees at the end of the probationary period and to replace them with new employees.

Nothing was initially said about probation in the Code of Good Practice: Dismissal except the general injunction that the Code was 'intentionally general' and that 'departures from the norm may be justified in proper circumstances'. Probation is such a circumstance and the CCMA should have developed less stringent standards for the fair termination of a probationary employee, but it did not. As a result the Code was amended in 2002 to set norms for the CCMA. Those norms include a thicket of evaluation, instruction, training, guidance and counselling requirements but a less stringent test for dismissal for poor work performance. Part of that package was to make unfair conduct (but not dismissal) relating to probation an unfair labour practice by including it in the definition of unfair labour practice.

Before engaging in a critique of this approach to probation, it is necessary to point out that had the CCMA commissioners understood the manner in which Codes of Good Practice worked – that they guide rather than prescribe and that departures from the norm can and should be countenanced – the problems with probation would not have arisen.

There are several difficulties with the approach adopted in the amendments to the Code and the LRA. The first is that the less compelling standard for assessing the fairness of the dismissal of a probationary employee applies only to performance.<sup>40</sup> But probation is also about testing the employee's suitability in the workplace, which is a more difficult discretion to effectively review. This is why the lower standard is restricted to performance – an example of a policy driven by concerns related to the efficacy of enforcement

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39 Article 2(2)(b) of the ILO Convention 158 on Termination of Employment of 1982 and Article 2(2)(b) of the ILO Recommendation 166 on Termination of Employment of 1982 provide that probation is a permissible exception to the unfair dismissal protections.

40 Item 8(1)(j) of the Code.

rather than the efficacy of the selection process. The trade off arises because the wrong regulatory mechanism is chosen.

The second problem is the inclusion of unfair conduct relating to probation (other than dismissal) as an unfair labour practice.<sup>41</sup> The amendment was driven by the fear that the introduction of a less stringent standard would lead employers to repeatedly extend the probationary period. It is hard to conceive of any other reason that would justify extending judicial oversight to probation. If that is correct, there is much easier and more efficacious way to address the problem.

The third problem is that the whole construct of regulation is easily avoided. The employer simply eschews a probationary period of employment and simply enters into a fixed term contract of a few weeks or months to determine whether the employee is suitable. If the employee is not suitable, the contract terminates automatically at the end of the period. If the employee is suitable, the employee remains in employment.

The solution to probation lies in the approach taken in other jurisdictions, namely that the ordinary unfair dismissal protections (ie other than automatically unfair dismissals) do not apply to employees with less than a stipulated period of service.<sup>42</sup> An example is the UK where the qualification period is one year.<sup>43</sup> In order to prevent the abuse of terminating and re-employing just before the expiry of the stipulated period of employment in order to avoid the onset of the protections, the period of service should include all previous service with the employer or a related employer.<sup>44</sup> Provision should be made to shorten or lengthen the qualification period through sectoral collective agreements, sectoral determination or Ministerial discretion – to cater for the special needs of institutions such as universities, banks, doctors etc. This may be supplemented with providing a judicial review of stratagems to avoid the onset of the protections.

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41 Section 186(1)(a) of the LRA.

42 This is known as the 'qualification period'.

43 See the Department of Trade and Industry website at <http://www.dti.gov.uk/er/individual/unfair-pl712a.htm>

44 This is in line with the Article 3 of the ILO Convention 158 on Termination of Employment of 1982 and Article 3 of the ILO Recommendation 166 on Termination of Employment of 1982 which require signatories to provide adequate safeguards to prevent the circumvention of the protections.

### 5.3 Training

Unfair conduct in relation to training was a 'preserved provision' awaiting detailed scrutiny when the legislation dealing with the individual employment relation was under consideration. Apart from discrimination or victimisation concerns,<sup>45</sup> there is no need for judicial regulation of employer conduct in respect of training, particularly given the Department's extensive programmes to train, re-skill and educate employees in terms of the Skills Development Act.<sup>46</sup>

### 5.4 Promotion

The 1995 LRA provides a remedy for unfair conduct relating to promotion. The policy considerations justifying the judicial review of the employer decision to promote have never been aired. A promotion is an appointment of an employee to a higher post. There is little to distinguish between a decision to hire and a decision to promote. They are both appointments. In the one, the candidate is external and in the other internal. The very considerations that apply to hiring decisions should apply to promotion decisions. The decision to appoint or not to appoint a person is an operational decision like the decision to hire. There is no compelling policy reason to intervene in that decision except on the grounds referred to under the previous heading: unfair discrimination and proper public administration. To the extent that the employer has agreed to criteria for promotion and a promotion procedure, any review of a promotion decision is based on the breach of that agreement. But absent such a procedure, there is no good reason to interfere with the decision to promote.

There is one aspect, though, that needs further analysis. Because an employment decision in the public service is regarded as administrative action and accordingly judicially reviewable, the administrative law doctrine of legitimate expectation has been applied in disputes concerning promotion.<sup>47</sup> That doctrine permits a person who has a legitimate interest in the outcome of an administrative decision to challenge the fairness,

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45 In *Transnet Ltd v CCMA and Others* [2001] 6 BLLR 684 LC, the Labour Court held that a dispute relating to training will only be covered by the unfair labour practice provision if it relates to inconsistency, arbitrariness or lack of due process which infringes the rights of the workers. In *MITUSA and Others v Transnet and Others* [2002] 11 BLLR 1023 (LAC) the Court held that a legitimate expectation cannot create a contractual right to training. In the absence of a contractual right, an unfair labour practice cannot be proved.

46 Act 97 of 1998.

47 *Administrator Transvaal and Others v Traub and Others* (1989) 10 ILJ 823 (A); *IMATU v Stad Tygerberg* (1999) 20 ILJ 971 (CCMA).

both procedural and substantive, of that decision. This public sector doctrine has now jumped species and, without proper consideration of the policy origins and implications of the doctrine, been extended by the courts to private sector employment.<sup>48</sup> Accordingly, if an employer has by word or deed led an employee to expect that she will be promoted, the failure to promote that employee may ground a case challenging the employer's decision. The importation of the doctrine into employment law has never been subject to any proper consideration of the labour market implications. Once every candidate is treated equally, the decision is not corrupt or inept, and any agreement or procedure relating to promotion has been followed, there is no justification for interfering with the employer's decision to promote or not to promote an employee.

It is recommended that the reference to promotion in the definition of the unfair labour practice be deleted, that PAJA be amended to exclude the State's employment decisions judicial review under that Act, and the Public Service Act be amended to provide a judicial or administrative remedy for corrupt and inept appointments.

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48 *February and Another v Nestle (Pty) Ltd* (2000) 5 LLD 182.

## 6. Demotion

The 1995 LRA provided a remedy for unfair conduct relating to demotion in its transitional provisions, but the policy considerations justifying the provision of this remedy have never been the subject of any serious review.

Demotion arises in three contexts: as a disciplinary measure, as an alternative to dismissal for incapacity and as an alternative to retrenchment. Demotion is not normally contractually possible unless the employee agrees to demotion.<sup>49</sup> In each case the issue will be whether the employee's refusal of the demotion was reasonable. If reasonable, the dismissal, for refusing to accept demotion, will be unfair.

A demotion without consent is a repudiation of the contract, which entitles the employee to sue for breach of contract or to sue for unfair constructive dismissal.<sup>50</sup> There is accordingly no need to protect employees from any unfair conduct relating to demotion. The rights and remedies are all in place under the law of contract and unfair dismissal to protect the employee from unfair or unlawful demotion.

The courts and the CCMA have held that demotion must be preceded by consultation and counselling and the failure to do so is an unfair labour practice.<sup>51</sup> But if the demotion is unilateral, it is a breach of contract entitling the employee to the same relief under specific performance. This line of reasoning, however, is particularly dangerous because, followed to its logical conclusion, it means that an employer can demote an employee without that employee's consent. All that is required is prior and proper consultation. The point is not consultation but consent. But this illustrates the dangers of providing remedies when there are already sufficient remedies to secure the protection from the unfair exercise of employer power – the courts take pains to find some reason for the existence of the unfair labour practice remedy.

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49 *Piki v Development Action Group Inc* (2002) 23 ILJ 609 (CCMA); *Egerton v Mangosuthu Technikon* [2002] 10 BALR 1047 (CCMA).

50 *Van Wyk v Albany Bakeries Ltd & Others* [2003] 12 BLLR 1274 (LC).

51 *Van Niekerk v Medicross Health Care Group (Pty) Ltd* [1998] 8 BALR 1038 (CCMA); *Van Der Reit v Leisurenet t/a Health and Racquet Clubs* [1997] 7 BLLR 721 (LAC); *SALSTAFF obo Vrey v Datavia* [1999] 6 BALR 757 (IMSSA).

## 7. Discipline (short of dismissal)

Unfair conduct short of dismissal was inserted into the definition of the residual unfair labour practice as a holding operation pending the finalisation of the BCEA. The policies underlying the need to subject the employer's power to discipline, outside of dismissal, to judicial scrutiny have never been properly considered or articulated. There is no good reason to subject this power to regulation once the power to dismiss as a disciplinary measure is regulated. The employer cannot fine. It cannot suspend without pay unless there is an agreement to do so.<sup>52</sup> It cannot demote without consent. All it can do is to issue warnings. And warnings under a progressive system of discipline have a limited shelf life. In any event, if the employer relies on an earlier warning to justify a dismissal, the fairness of the warning and the disciplinary hearing can be raised then. There is just no good reason why the legislature should create a remedy for something that is sufficiently regulated already. Far better to issue a Code of Good Practice and model disciplinary procedures as a guide to employers and trade unions as Namibia, Lesotho and Botswana have done.

The phrase 'unfair disciplinary action short of dismissal' is wide enough to form the basis for a claim for legal representation at the disciplinary hearing, even if this does not lead to dismissal.<sup>53</sup>

It is accordingly unnecessary if not dangerous to retain this unfair labour practice on the statute books.

### 7.1 Suspension

A remedy for unfair conduct relating to suspension is also one that has not been subject to any policy review. Unlike the other incidents discussed above, there is evidence of employees, particularly in the public sector, being suspended, sometimes arbitrarily, or placed on suspension for months, if not years, pending a disciplinary enquiry. So suspension accordingly merits serious review. In any such review, it is important to distinguish between different forms of suspension. There is suspension pending a

52 There is only one exception – a limited statutory power in the public service.

53 See discussion on legal representation at disciplinary hearings below.

disciplinary enquiry and there is suspension without pay as an alternative penalty to dismissal.

Suspension as a penalty does not require an independent process of review because it may only be employed as a penalty if it is agreed. If the suspension without pay is unreasonable, the employee can refuse to consent and any subsequent dismissal is subject to judicial scrutiny. If suspension without pay is sanctioned in a collective agreement, the agreement itself provides remedies for non-compliance.

It is suspension pending disciplinary action that requires considered review. There are two abuses: arbitrary decisions and the inordinate periods of suspension. Suspension is the employment equivalent of arrest. The only rationale for suspension is the reasonable apprehension that the employee will interfere with the investigation or repeat the misconduct. It follows that it is only in exceptional circumstances that an employee should be suspended pending a disciplinary enquiry. The employee suffers palpable prejudice to reputation, advancement and fulfilment. These limited reasons for suspension and this prejudice make a compelling case for regulation. And because any such regulation will have a minimal interference with operational decisions, there is no efficiency trade off. But the regulation must be carefully crafted to target the abuse.

It is not appropriate to regulate this issue by simply giving a court an unfettered jurisdiction to remedy unfair suspensions on an ad hoc basis. The proper approach is to address the mischief by identifying the basis for, and the form of, regulation. I have identified two grounds. The first is best regulated by judicial scrutiny of the decision supplemented by a Code of Good Practice. The second ground requires two forms of intervention: (a) the creation of a statutory obligation to conduct and conclude disciplinary hearings within a reasonable time and a power to strike down tardy disciplinary proceedings; and (b) institutional reform in the public service, namely an expedited process and independent institution to conduct disciplinary hearings.

## 8. Dismissal

Unlike the residual unfair labour practice, the policies underlying the need for protection against unfair dismissal were thoroughly ventilated in the negotiations over the new LRA. The approach was to codify the jurisprudence that had developed under the unfair labour practice jurisdiction of the Industrial Court since 1979. The object of the codification was to make it clear what was expected of employers and workers. This was done in statute and in codes. The statute identified the reasons on which an employer could never dismiss (the automatically unfair grounds)<sup>54</sup> and the reasons on which an employer could dismiss (misconduct, incapacity and operational requirements).<sup>55</sup> In the latter category – the dismissal had to be substantively and procedurally fair.<sup>56</sup>

The standards of fairness were to be set out in codes of good practice updated from time to time in order for the codes to capture the emerging jurisprudence from the CCMA and the courts. The codes were to provide a legitimate, coherent, accessible and flexible jurisprudence to guide employer policy and practice, collective agreements and dispute resolution. This is what the Code of Good Practice: Dismissal promulgated together with the 1995 LRA sought to do.

The legitimacy dividend is achieved by the participation of social partners in the formulation of the code. A system of codes is an important process – it permits the social partners and the executive to enter into a dialogue with the arbitrators and the courts. Although the courts and arbitrators may have the final word on the interpretation of a statute and a particular dispute, they do not have the final word on the norms that should inform fairness decisions. Arbitrators and courts are required to take them into account. Codes are a form of employer and union participation in decision making – an attenuated form of employer and union assessors – a standard but expensive feature of dispute resolution elsewhere.

Coherence was achieved through codification. But it was meant to be a living codification and updated from time to time to keep up with decisions made in the CCMA and the Labour Courts. One of the objects of the Code was to move away from the system of court precedents and ad hoc development of jurisprudence – a system only easily accessible

54 Section 187 of the LRA.

55 Section 188(1)(a) of the LRA.

56 Section 188(1) of the LRA.



by consultants and lawyers – and move towards a system based on policy – which is directly accessible to users. Flexibility is inherent in the very concept of a code. As the opening line of the Code makes clear: the Code is ‘intentionally general’ and ‘departures from the norms established by this Code may be justified in proper circumstances’.

But this has not come to pass. The Code is not systematically updated to keep up with the evolving jurisprudence of the CCMA or the Labour Court. This means that the Code becomes less relevant and must be supplemented or substituted by a system of precedent. Arbitrators write judgements when the object was that they should only give a brief summary of reasons. They seek to have their awards published and the legal publishers, keen to expand any market for their publications, publish the awards. Indeed one publisher publishes a separate law report on labour arbitration awards. The increasing number of published awards feeds an anxiety of an impenetrable set of rules that cannot be cut through without lawyers and consultants. It is an anxiety that lawyers and consultants deliberately feed.

The following should be done to recover lost ground. Firstly, the Code needs to be updated. It should not be a once off process but a set procedure. It may be best to have proposals developed by the Department or the CCMA and have those submitted to NEDLAC for consideration once a year. Secondly, the Governing Body should issue guidelines requiring explicit reference to the codes in their decisions and explicit justifications for any departure from the codes. Thirdly, the failure to take a code into account should be a ground for review or appeal. Finally, although the Code specifically refers to the size of the employer as a potential justification for departure from its norms,<sup>57</sup> there is no jurisprudence on the subject. The arbitrators and the courts just do not take size into account. And yet the characteristic features of a small business, particularly a start up, such as the limits on internal expertise, the limits on resources, the lack of systems and the close nature of working relationships, call for departure from the norms. Procedural requirements for fairness must be simplified – all that must be required is that the employee has been given an opportunity to be heard before dismissal. The personal nature of working in a small workplace must be factored into account in a similar way that

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57 Item 1(1) of the Code.

he courts have developed more flexible tests for substantive fairness in respect of senior management employees<sup>58</sup>.

For the reasons set out below, it may be best to produce a code for small business in which the special nature of small business is taken into account and make it obligatory for arbitrators to take the code into account if the employer is a small business.

## 8.1 Dismissal (procedural fairness)

The LRA requires there to be procedural fairness before an employee is dismissed. In respect of misconduct and incapacity, the fairness procedures are set out in the Code of Good Practice: Dismissal. In the case of operational requirements dismissals, the procedure is set out in the LRA<sup>59</sup> and supplemented by the Code of Good Practice on Dismissals based on Operational Requirements.

### **Misconduct and Incapacity**

Quite apart from the general policy that hearing the other side is a fundamental tenet of fairness, the policies informing fair pre-dismissal procedures are: (a) procedural unfairness triggers industrial action; (b) it is consonant with good management practice and accordingly not invasive; and (c) the employee may put facts forward that demonstrate that dismissal is not justified and accordingly prevent unnecessary disputes entering the system.

But what those policies do not require is a formal hearing. The Code says there is no need for a formal inquiry, simply that there should be an investigation, proper notification of the allegations, reasonable time for the employee to prepare a response, the right to be represented by a fellow employee or shop steward, an opportunity to respond to the allegations, and communication of the decision, preferably in writing.<sup>60</sup>

58 Serious consideration should also be given to excluding senior management and professional employees from unfair dismissal protection (except dismissal on grounds of discrimination, victimisation, association etc) because they are able to protect themselves contractually and because interference with termination decisions in respect of these employees is more invasive and greater consequences for the efficient governance.

59 Sections 197 and 197A of the LRA.

60 Item 4(1) of the Code of Good Practice: Dismissals.

Despite the clear direction given in the Code, employers, consultants, lawyers, arbitrators and judges have continued to over-emphasise pre-dismissal procedures and in so doing have imposed an unnecessary burden on employers without advancing the protection of workers. There are various reasons for this. Firstly, the Industrial Court had developed a jurisprudence that imposed strict procedural requirements on pre-dismissal hearings. Secondly, employers had established complex disciplinary procedures under the old LRA but did not alter those procedures with the introduction of the 1995 Act. Thirdly, the arbitrators and judges, schooled under the old LRA, continued to apply the technical and exacting jurisprudence developed under that tradition. It is not surprising that faced with these arbitrators' and judges' decisions that the lawyers and consultants gave advice that protected the interests of their clients, which happily happened to coincide with their own. Finally, the model of disciplinary hearings developed under the 1956 Act, premised as it was on an analogy with criminal proceedings, did not die and give way to the model advanced under the 1995 Act, which is more analogous to procedures under administrative law that are more flexible and based on the Code of Good Practice.

Until the courts and the arbitrators change their approach to the procedural fairness, the employers will continue to engage in costly formal hearings or pay dearly for not doing so – and without any advance in justifiable employment security. It is accordingly necessary to strengthen the Code to make its objective clear and to train and require commissioners to apply the Code.

### **Legal Representation at Disciplinary Hearings**

In spite of a collective agreement that did not permit legal representation in disciplinary hearings, the Supreme Court of Appeal has held that the agreement cannot exclude the common law and administrative law rule that legal representation should not as a matter of course be excluded and that in the appropriate circumstances legal representation should be permitted.<sup>61</sup> The decision is based on administrative law principles that are not necessarily applicable to labour law. It is again an illustration of the need to properly review the application of administrative law principles to employment disputes.

More problematic is the extension of that logic to disciplinary proceedings in the private sector and, in particular to small employers. The existence of a remedy for unfair conduct

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<sup>61</sup> *MEC Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani* (2004) 25 ILJ 2311 (SCA).

in relation to discipline (short of dismissal) and procedural unfairness in pre-dismissal hearings provides fertile ground for developing the same rule in the private sector.

It is critical that this issue be properly reviewed and that the necessary amendments to the LRA, PAJA and the Codes dealing with dismissal are amended. I believe that any limitation on the broad constitutional rights to fair labour practices and fair administrative action can be constitutionally justified.

### **Operational Requirements**

The procedure for operational requirements is set out in statute. There is little room for procedural variation. In large scale retrenchments, the need for a clear pre-dismissal procedure is self-evident. But these procedures are not suitable for small businesses – they do not typically have the internal resources nor can they afford the external resources to advise them to follow the complex set of obligations and consultations before dismissal for operational requirements. It may be less onerous but without any loss of protection to exclude small business from the detailed retrenchment provisions in the LRA and to supplement the general duty in section to follow a fair procedure under section 188 with provisions in a code setting out a simplified procedure based on the principles that informed the more rigorous statutory procedures.

## **8.2 Substantive Fairness**

It is not readily appreciated that to a large extent, the courts and the arbitrators have recognised the principle that it is for the employer to determine workplace rules and that the fairness enquiry seldom interferes with the proper exercise of that determination. That is a demonstration of regulated flexibility at work and properly applied for the most part by arbitrators and the courts.

Although highly controversial, the Labour Appeal Court has decided that an employer can fairly retrench its employees if they do not accept changes to terms and conditions of employment.<sup>62</sup> Although, I do not agree with the decision because of its impact on collective bargaining, it is an illustration that the courts are a lot more sensitive to employer operational needs than is generally projected.

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<sup>62</sup> *Fry's Metal v NUMSA* [2003] 2 BLLR 140 (LAC). This decision was confirmed by the Supreme Court of Appeal and indirectly by the Constitutional Court when it refused leave to appeal.

## 9. Terms and Conditions of Service

The definition of the unfair labour practice includes only one kind of term of service – benefits. It does not include unfair conduct in relation to other terms and conditions of employment. Although the setting of terms and conditions of employment is self evidently a labour practice, it is not one that the fairness of which is scrutinised by the courts. The legislature fulfils this constitutional obligation by providing a framework within which fair standards are set through contract, collective bargaining and legislation. Collective bargaining, however, is the primary mechanism. It is accordingly necessary to review the collective bargaining framework promoted by the LRA. But before commencing with this review it is best to briefly deal with the unfair labour practice and benefits.

### 9.1 Benefits

The remedy for unfair conduct relating to benefits was preserved in the transitional provisions of the LRA. On reflection, it is difficult to explain its inclusion in the definition of the residual unfair labour practice because there appears to be no prior jurisprudence on the issue justifying its inclusion. All the more reason why its continued inclusion should be reviewed. Like so many other of the listed kinds of unfair conduct it does not appear to have any independent reason for inclusion.

The courts have had some difficulty understanding what was intended by the inclusion of this remedy. They had difficulties with distinguishing benefits from other forms of remuneration. They then had difficulties with determining the ambit of unfair conduct and whether it included employer conduct in interest disputes (demands for new benefits or changes in existing benefits). The resolution of that conundrum in favour of restricting unfair conduct relating to benefits to a contractual or a statutory right to benefits<sup>63</sup> means that there is no need for an unfair labour practice remedy because remedies under the law of contract or delict already exist. Recently, the court recognising this redundancy started seeking some other intention underlying the inclusion of the ‘benefits’ in the definition. It sought to do so by importing the administrative law principle of ‘legitimate expectation’

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<sup>63</sup> *HOSPERSA v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC).

into unfair labour practice jurisprudence and thereby applying the principle to employers in the private sector with no proper analysis of the implications of doing so.<sup>64</sup>

Outside of discrimination and victimisation, there appears to be no mischief that requires judicial review. The real mischief is its inclusion in the definition of unfair labour practice – it blurs the line between a dispute of right and a dispute of interest with all the implications that has for the right to strike.

## 9.2 Collective Bargaining

Since the major mechanism for achieving regulated flexibility was collective bargaining, it is necessary to briefly deal with the thinking underlying the policy choice for a voluntary bargaining system and retaining but reforming sector level bargaining rather than establishing a compulsory system of bargaining at the level of the workplace.

I will argue that the changes in the labour market that have occurred since 1995 in particular, the growth in atypical employment, have made the retention and extension of sectoral bargaining even more imperative if current labour market policy is to remain true to some of its main policy objectives namely the promotion of collective bargaining and the protection of the marginalised.

### Bargaining Levels

The first and central issue was the choice of bargaining levels. There were two traditions. For over 70 years, the statutory system of collective bargaining was structured at the level of the sector – 50 years of which took place without the direct participation of trade unions organising African workers. The other tradition was at the level of the workplace. Excluded from the statutory system, trade unions that organised African workers sought recognition as collective bargaining agents at the level of the workplace and made use of the unfair labour practice remedy under the 1956 Act to compel reluctant employers to bargain with them. But by 1995 most successful trade unions were engaged in some form of collective bargaining at sector level.

<sup>64</sup> *Eskom v Marshall & Others* (2002) 23 ILJ 2251 (LC). The Labour Court found support for the application of the doctrine of legitimate expectation but found that it was bound by the decision of the LAC in *HOSPERSA*.

The policy choice was to continue with, strengthen and expand the coverage of sector level collective bargaining and to give bargaining councils the role of regulating bargaining at the level of the workplace. The policy reasons for the retention of sector level bargaining were:

- sector level bargaining is lower on transactional costs for employers and trade unions. The negotiations are conducted by representative organisations in respect of a sector or part of a sector as opposed to at every workplace by representatives of the employees and the employer;
- sector level bargaining shifts negotiations on the major issues out of the workplace with the intended effect of permitting more co-operative forms of engagement at the level of the workplace – more particularly workplace forums;
- bargaining outcomes at sector level set a competitive floor allowing for different or improved terms and conditions at the level of the workplace. By setting reasonable standards applicable to all employers in a local market, competition between those employers should be based on productivity rather than the socially undesirable reduction of wages or the extension of working hours;
- strikes and lockouts occur less often in a sector level system of collective bargaining and are less damaging to individual employers as between each other;
- sector level bargaining benefit schemes are more cost effective and foster labour mobility within the sector.

The decision to leave the regulation of collective bargaining at the level of the workplace to the bargaining council or, where there was no bargaining council, to the parties was informed by the following considerations:

- a system of compulsory bargaining at the level of the workplace had and would continue to undermine sectoral bargaining;
- where there were no sectoral councils, there would be no incentive to form a bargaining council if employers were already compelled to bargain at the level of the workplace;

- there is a history of more than one trade union in the workplace. A compulsory bargaining system will raise serious difficulties in accommodating a historical and structural diversity but limiting a proliferation of compulsory bargaining partners. Indeed one of the concerns raised by both trade unions and employers was the Industrial Court's unsettling jurisprudence extension of the duty to bargain to new unions in units smaller than the workplace;
- a system of compulsory bargaining at the level of the workplace requires a regulatory regime that provides for the determination of threshold representativeness, bargaining units, bargaining subjects, and bargaining conduct. This determination is normally done by courts or tribunals and accordingly tends to be adversarial, invasive and rigid;
- all the benefits of a system of compulsory bargaining at the level of the workplace can be achieved through the guarantee of organisational rights at the workplace, a compulsory dispute resolution process and a right to strike. This aspect is discussed more fully below because it is a concern that continues to be raised by trade unions;
- it would give legislative support for a system of dual bargaining – a position strongly opposed by employers;
- the employers' organisations were strongly opposed to compulsory bargaining and most trade unions were opposed to it because of its debilitating effect on collective bargaining generally and sectoral bargaining in particular.



Most of these considerations were captured in the Explanatory Memorandum that accompanied the Bill in 1995:

‘[T]he fundamental danger in the imposition of a legally enforced duty to bargain and the consequent determination by the judiciary of levels of bargaining, bargaining partners, and bargaining topics is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment. The ability of the South African economy to adapt to the changing requirements of a competitive international market is ensured only where the bargaining parties are able to determine the nature and the structure of bargaining institutions and the economic outcomes that should bind them, and, where necessary, to renegotiate both the structures within which agreements are reached and the terms of these agreements...While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing a series of organisational rights for unions and by fully protecting the right to strike.’<sup>65</sup>

It is also important to note that this choice of voluntary collective bargaining is also consistent with the ILO Conventions 87 and 98,<sup>66</sup> which stress the voluntary nature of collective bargaining. It is also consistent with decisions of the European Court of Human Rights to the effect that although the right to associate includes the right of a trade union to represent its members, the failure to provide a compulsory obligation to bargain does not offend the right to freedom of association if there is a concomitant right to strike.<sup>67</sup>

There is an argument that the constitutional right to fair labour practices and the right to engage in collective bargaining constitute a constitutional mandate for compulsory collective bargaining. However, the wording of the constitutional right was itself drafted to ensure that the guarantee was a freedom to bargain rather than a right to bargain (the corollary to the duty to bargain). But even if section 23 does grant a right to bargain, the grant of a right does not of itself mean that it has to be vindicated by a court or tribunal. The import of this proposition will be made clearer below when I deal with the constitutional implications for further labour market reform.

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65 GN 97 “Draft Negotiating Document in the form of a Labour Relations Bill” in GG 16259 of 10 February 1995.

66 ILO Convention on Freedom of Association and Protection of the Right to Organise 87 of 1948 and ILO Convention on The Application of Principles of the Right to Organise and to Bargain Collectively 98 of 1949.

67 *Wilson v UK* [2002] IRLR 568 at para 45.

Because some trade unions have continued to voice concerns over the voluntary nature of collective bargaining and the policy not to grant a system of compulsory bargaining at the level of the workplace, it may be important to deal with these concerns in a little more depth. The model<sup>68</sup> of compulsory bargaining at the level of the workplace is one in which a trade union is granted the right to bargain if it has majority support in an appropriate bargaining unit. The right to bargain means that the employer has the concomitant duty to bargain and a breach of that duty is an unfair labour practice. Under the model, no organisational rights are conferred and, unless those rights are agreed, a trade union will have to strike to secure those rights. Even if an employer enters into a recognition agreement, the duty to negotiate on wages and working conditions does not amount to a duty to agree and if an employer refuses to accept the trade union's demands, workers will have to strike to secure an agreement. It must also be understood that under the US version of this model there is no compulsory statutory system of dispute resolution in terms of which an interest dispute must be referred to conciliation before proceeding on a strike.

If one compares the model of compulsory bargaining at the level of the workplace with the model endorsed by the LRA, the following is evident:

- the compulsory dispute resolution system in the LRA establishes a compulsory forum for deliberations over recognition disputes;
- that compulsory system also to some extent supplants the need to have a judicially enforceable duty to bargain because the system establishes a compulsory forum for the resolution of interest disputes even for minority trade unions;
- the LRA confers organisational rights on trade unions that meet the thresholds of representativeness, some of which are less than a majority;
- that, under both models, the resolution of interest disputes is secured ultimately by the exercise of the right to strike.

Accordingly, even if trade unions have lost recognition since the introduction of the 1995 Act they may not have been entitled to recognition under a compulsory collective

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68 The model has its origins in the 1935 US National Labour Relations Act Title 29 USC 158.

bargaining regime. At least under the 1995 LRA, they may retain basic organisational rights even if they no longer command majority support in the workplace.<sup>69</sup>

### **9.3 Overhaul of Sector Level Bargaining**

The retention of the sector collective bargaining system did not mean that the system was not in need of a serious overhaul. But the policy of deepening and expanding the coverage of bargaining councils is not achieved by legislative fiat – it required the social partners and particularly the State to drive the implementation of the policy. The sorry state of sectoral bargaining eight years after the commencement of the LRA is testimony to the failure to do so.

The first problem that required attention was the fragmentary coverage of bargaining councils with most workplaces not covered by sectoral bargaining. Most councils were not truly sectoral – some covered parts of a sector, some were not national in scope and others overlapped. The Department had a critical role in the consolidation process and the establishment of new bargaining councils. For example the National Industrial Council for the Engineering Industry was established in 1940s after the Minister of Labour had convened a meeting of the trade unions and employer organisations in the industry and encouraged the parties to create a national industrial council. A similar role was envisaged for the Department post 1996 but it has failed to convene meetings of employer organisations and trade unions operating in the same sector to commence and facilitate a process for the establishment or consolidation of councils.

The second and related problem is the lack of a broad demarcation of sectors. Although the Department developed proposals for a broad demarcation of sectors and submitted those proposals to NEDLAC for consideration, no agreement was ever reached. Moreover there is no correlation between the sectors contemplated in the LRA and the use of the concept for sectoral determinations under the BCEA or sectoral training and education authorities under the Skills Development Act.

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<sup>69</sup> A union need only be 'sufficiently representative' of a workplace to claim right of access to the workplace and to the deduction of subscriptions in terms of sections 12 and 13 of the Act.

It was envisaged that the bargaining councils would perform new and enlarged functions. Legislative effect was given to do this. The legislative changes effected in 1996 were as follows:

- the council's role was expanded to regulate collective relations in the sector: organisational rights, workplace forums, bargaining at the level of the workplace (through its power to determine on what matters workers can strike or employers can lock out at the workplace), enforcement of collective agreements and dispute resolution;
- the council's role was extended to include the development of sectoral policy for submission to NEDLAC or other appropriate forum.

This role was further extended in 2002 when the 1995 LRA was amended to include two further functions:

- to provide industrial support services within the sector; and
- to extend the services and functions of bargaining councils to workers in the informal sector and home workers.

But it is not sufficient to simply legislate. It is critical for the social partners and State to drive the policy. There is continuing failure to provide the subsidies that would assist councils to perform their dispute resolution functions effectively. There is little evidence of the councils giving effect to many of their roles and it falls to the Department to develop programmes to assist councils in implementing the new policies.

The third problem was the role that bargaining councils were to play in the setting of terms and conditions of employment within their respective sectors. In the context of labour market regulation, bargaining councils give effect to an important principle and important regulatory functions.<sup>70</sup> The *principle* is that of self-governance or voice regulation. Under this principle, terms and conditions, particularly wages, are not set by government but by employer and worker organisations in the sector. The *regulatory functions* of bargaining councils are to establish terms and conditions that fit the needs of the sector and, through extension, to set minimum standards for the sector.

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<sup>70</sup> Of course, sector level bargaining also performs other labour market functions but these are its *regulatory functions*.

Although the standard form of regulating employment protection is to legislate basic standards and to establish wage-fixing machinery to set minimum wages, the model adopted in the Industrial Conciliation Act<sup>71</sup> and the Wage Act<sup>72</sup> was to harness sector level bargaining as the mechanism for fixing wages and employment standards in those sectors in which industrial councils were registered. In the sectors without sectoral collective bargaining, the Minister set minimum wages and standards on the recommendation of a Wage Board. That model was adapted and retained in the new LRA and BCEA and the reasons for doing so are dealt with separately.

In order to remain true to the principle of self-governance, the new LRA should have retained the articulation between sectoral collective agreements and the minimum standards legislation that had been the case under the 1983 BCEA.<sup>73</sup> Under that Act, sectoral agreements (then called industrial agreements) could set terms different from those contained in the BCEA even if those terms were less favourable. The retention of this articulation in the new BCEA was strongly resisted by the trade unions because they feared that it would lead to concession bargaining and the gutting of the basic protections. The fears were largely unfounded because there had been little evidence of concession bargaining during the 13 years that the 1984 BCEA had been in existence. Concession bargaining was generally a feature of workplace level bargaining. And finally concession bargaining is normally conducted in a context in which there was no default statutory floor of protections.<sup>74</sup> What was lost was an effective and dynamic mechanism for varying the basic statutory standards to suit the special features of the sector or sub-sectors and the loss of a powerful inducement on the part of employers to establish, consolidate and join bargaining councils. Not every adaptation of a basic standard constitutes a concession or a diminution of the standard.

The regulatory function of sectoral collective bargaining to establish terms and conditions that fit the needs of the sector or sub-sector has been curtailed. The regulatory model of fixing minimum standards, wages in particular, through the extension of the sectoral collective agreements to non-party employers and employees within the sector has recently become controversial despite it having been the model for standard setting

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71 11 of 1924

72 27 of 1925

73 Act 3 of 1983

74 In other words, if no collective agreement is concluded, the basic standards apply. It is only when there is a collective agreement on the standard that the statutory standard gives way to the agreed one.

for over 70 years. Part of that controversy arises from the form and nature of sectoral agreements.

The regulatory function of sectoral collective bargaining dictates that the sectoral agreements set minimum wages and working conditions and that actuals are determined at the level of the workplace. The intention was that bargaining councils would set framework agreements and that any supplementary bargaining would be done at the level of the enterprise or the workplace. The Labour Market Commission captures this intention in its Report:

‘The council should set the rules of the game, dealing with some items centrally and channelling others to enterprise or company level negotiations. It might, for example, set minimum conditions and outline the parameters within which supplementary bargaining could take place. This approach would allow a bargaining council to determine the minimum hourly rate and percentage increase but enable supplementary increases, linked, say to a productivity or profit sharing arrangement. This could promote enterprise efficiency, grant workers a share in the fruits of such gains, and set realistic minima for the less profitable enterprises, while at the same time moderating undue wage drift between enterprises within one sector.’<sup>75</sup>

The failure to understand the regulatory functions of the bargaining council agreement has led to parties agreeing to actuals and accordingly setting no framework for variation at the level of the enterprise or workplace to accommodate differences between employers. A cursory look at the bargaining council agreements concluded since 1996 will reveal that very little has changed – most have retained the content and in some instances the wording of agreements concluded twenty and thirty years ago. Instead of setting a minimum entry-level wage, the agreements set wages for every level of job regardless of whether the job or level is appropriate to an individual workplace. At a time when job profiles, work organisation, technology and processes were similar across an industry or a service, it made sense to set minima for each category of job. But the new imperatives require a different form of agreement. Because employers were required to respond quickly to changing markets and technology, it was critical that the bargaining council decentralise bargaining in a structured way and that the sectoral agreement provide a framework for such bargaining.

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<sup>75</sup> *Restructuring the South African Labour Market: Report of the Commission to Investigate the Development of a Comprehensive Labour Market Policy* (Pretoria: Department of Labour, 1996) at para 173.

This is a programmatic failure and requires a determined Department of Labour to develop a programme which must include a draft policy on the nature and content of sector level agreements for submission to NEDLAC for its consideration and agreement.

#### **9.4 Extension of Collective Agreements**

The ongoing controversy<sup>76</sup> over the extension of bargaining council agreements to all employers and employees in a sector, regardless of whether they are parties to the agreement or not is partly shaped by the failure to craft framework agreements at sector level. But it is also shaped by the automatic nature of the extension if the parties to the agreement are representative or the semi-automatic nature of the extension if the parties to the agreement are only sufficiently representative.

This approach to the extension of sector level agreements arose from the abuse of the Ministerial discretion under the 1956 Act.<sup>77</sup> But there was no need for an automatic or semi-automatic extension mechanism to prevent such abuse – the constitutional right to fair administrative action provides adequate protection.

Whatever the reasons motivating the automatic and semi-automatic extension of sector agreements, the mechanism is at odds with the regulatory function of sector level agreements. They constitute a form of minimum standard setting. And as such the Minister should have a greater discretion – one that places less emphasis on the representativeness of the parties and more on the agreement's alignment with the government's labour market policy. The discretion will have a disciplining effect on the kinds of agreements that bargaining councils submit for extension.

A few cautionary remarks: firstly, what is being proposed is controversial but not new – it is a recommendation of the Labour Market Commission; secondly, the discretion is not an open discretion but one based on a published labour market policy after being negotiated at NEDLAC; and thirdly, the implementation of a discretionary extension mechanism should be carefully introduced and complemented by guidelines and codes of good practice.

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76 That controversy has given rise to a challenge to the constitutionality of the extension mechanism in section 32 of the LRA.

77 For example the refusal to publish industrial agreements because they included 'revolutionary holidays' such as 1 May and 16 June.

## 9.5 A New Role for Sector Level Bargaining

The growth of atypical labour has been so steep that some have questioned whether these forms of labour should continue to be called atypical. While some of this growth is attributable to the knowledge economy, the real growth is due to the externalisation, casualisation and informalisation of labour. These employees fall outside the regulatory net of traditional labour law. There are various reasons for this regulatory hole.

The model of employment on which our labour law is based, namely a model of full-time life-time employment with one employer, is not appropriate for these forms of employment. Even in the formal sector, the traditional model is not the norm – modern formal employment is characterised by many important transitions in and out of full time employment.

The various contractual and institutional forms of these kinds of employment mean that many workers do not fall within the common law conception of the contract of employment and accordingly are not subject to protective reach of labour legislation. Some fall within the definition but their employment is so precarious, indirect or informal that they become invisible for recruitment into trade unions or for protection through law enforcement.

One of the implications of this process of marginalisation is the segmentation of the workplace: there is a polarity between those in full time employment with the employer and those in casual employment; and there is a polarity between those employed by the employer (both full time and casual) and those employed by other employers (contractors and labour brokers).

Collective bargaining at the level of the workplace will result in only some of the employees who work at the workplace being given a collective voice. This result is partly because of the difficulty in organising casual workers and to a large extent because many of the workers will be employees of other employers (contractors and labour brokers). While collective bargaining is notionally possible between a labour broker and its employees, the nature and form of employment militates against it. The employees work on a fragmented basis and their terms are determined by the contract between the broker and the employer. The only form of collective bargaining that will give those workers a voice and will provide a level of protection is sector level bargaining. To some extent that was already envisaged in respect of the current provisions dealing with labour brokers and inter-bargaining council agreements. But in order to effectively regulate casual and externalised employment it is



important for the bargaining councils to conclude agreements that are appropriate for this form of employment.

Collective agreements should apply to all forms of dependent work and this may need an amendment to the LRA although it is possible to enforce any agreement relating to casual and externalised labour through the employer. The extension of these agreements must however be subject to the Minister's discretion set within an agreed policy framework.

The extension of collective bargaining to all forms of dependent work is not only constitutionally possible but it may even be mandated. The Constitutional Court has held that the labour rights in section 23 apply to workers both employees and those who are 'akin to employees'.<sup>78</sup>

But the real possibilities for adapting labour law to these new forms of labour require a serious overhaul of the bargaining councils including the development of policies and guidelines on the nature of these agreements.

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78 *South African National Defence Union v Minister of Defence and Another* (1999) 20 ILJ 2265 (CC) Par 21-30.

## 10. Conclusion

As important as the bridge is between the first and second economies and the role that small business is to play in providing that bridge, there are also important elements of labour market regulation in the first economy that require attention – not just for its own sake but also to abate employer and investor perceptions of rigidities in the South African labour market. The proposals arising from this paper are described below.

Any adaptation of the law to meet the needs of small business raises the difficulty of the definition of small business. Although the simplest mechanism is to define small by reference to numbers, the use of this mechanism falls prey to giving primacy to the concerns of implementation and enforcement over the motivating purpose for the policy of differentiation. The more nuanced definition by turnover is on the face of it more difficult to implement and enforce. But this may be simply resolved by arranging with the South African Revenue Services that businesses under a certain turnover be issued with an annual certificate to that effect. Employers with that certificate then become entitled to the special regulatory environment provided for small business within the framework of existing labour law protections. Those small employers who do not register for tax and obtain the certificate are not entitled to the difference in treatment and the full force of the labour legislation applies.

Any differences in treatment for small business needs to withstand constitutional scrutiny and accordingly the possibility of blanket exclusion from the provisions of labour legislation is not a possibility – any limitation of rights or difference in treatment must not only be justified but carefully targeted.

## **10.1 Unfair Labour Practices and Small Business**

I have argued that there is no need to provide a remedy for the unfair labour practices listed in the definition in section 186. That argument is made irrespective of the size of the employer.<sup>79</sup> But whatever the force of those arguments may be, there is just no reason for them to apply to a small business. They are by their very nature incidents associated with larger employers.

## **10.2 Law of Dismissal and Small Business**

It is not constitutionally possible to exclude small employers from dismissal protection<sup>80</sup>. The Constitutional Court has held that protection against unfair dismissal is at the core of the concept of the unfair labour practice. The common law does not provide effective protection against unfair dismissal and in this it is different from the other of the unfair labour practices listed in the LRA. The employees of small employers are a more vulnerable class of employee and their need for protection will weigh heavily in any court evaluation of the limitation of the right in respect of small business. And the economic evidence that dismissal protection negatively affects employment growth is tenuous and equivocal. Small business should be excluded though from the statutorily entrenched procedure in section 189 but subject to a code of good practice that will provide for a simpler procedure based on the same principles that informed the procedure in section 189.

There should be a separate code of good practice published for small business, which incorporates the principles of a fair dismissal under section 188 but adapts them to the exigencies of small business. As a separate document, it will be more easily accessible and distributable through the outreach services to small businesses provided by the Department of Trade & Industry.

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79 The protection against victimising an employee for making protected disclosures under the Protected Disclosures Act should be retained but not as an unfair labour practice but under the victimisation provisions in Chapter 2 of the LRA.

80 Ironically it may be constitutionally possible to exclude senior management from dismissal protection or unfair labour practice protection precisely because senior management can (and very often do) protect themselves contractually from unfair employer practices.

### 10.3 Terms and Conditions of Service and Small Business

The BCEA already provides for a difference of treatment between different classes of employee. In principle, there is no reason in principle why certain provisions of the BCEA could not accommodate a difference in treatment in respect of small business. But in practice it is going to prove very difficult to identify the provisions. It requires a separate and targeted instrument to properly balance the interests of the small employer and the interests of those who work for the small employer. It is for this reason that I advocate the use of sector level agreements and sectoral determinations as the instruments to achieve this. But reliance on these mechanisms requires changes to both law and practice. In summary those are:

- amendments to the LRA relaxing the representativeness requirements for bargaining councils and granting the Minister the discretion to extend sector agreements (or parts of them) to non-parties in accordance with the published labour market policy of the government;
- the development of labour market policy, code of good practice or guidelines on the nature and content of sectoral agreements, in particular the kinds of agreements or provisions that are to be extended;
- amendments to the BCEA to permit greater variation of employment standards (not those relating to forced labour and child labour) by sector level agreements and determinations and an amendment to permit a determination in respect of small business across sectors subject to the existence of sector level agreements.

### 10.4 Other Reforms that Require Attention

The growth in atypical labour requires urgent attention. It is not a question of whether to include or exclude them from the protective net of labour legislation. They are subject to the constitutional guarantee of fair labour practices. The question is how best to protect them while taking the other objectives of labour market policy into account. The most effective mechanisms remain sectoral agreements or in their absence sectoral determinations. The LRA and the BCEA ought to be amended to permit sectoral agreements and determinations to reach beyond the contract of employment and apply to all forms of

dependent labour. Labour market policy should be formulated to guide bargaining councils and the Employment Standards Commission in regulating these forms of employment.

The provision of remedies for the kinds of labour practices listed in the definition of the unfair labour practice (other than victimisation for making protected disclosures) ought to be removed for the reasons outlined above.

There should not be two systems of law in the public service. Employment decisions should not constitute administrative action for the purposes of the Promotion of Administrative Justice Act. Special remedies for corrupt or inept employment decisions should be provided for in the Public Service Act.

The future of sectoral collective bargaining depends on a concerted effort and vision to strengthen and deepen sector level bargaining. It is accordingly critical to agree to demarcate the sectors and for the Department to develop a strategy to consolidate existing bargaining councils and facilitate the establishment of bargaining councils in sectors where there are no councils. The process of making a sectoral determination should include facilitating negotiations between employer organisations and trade unions in the sector along the lines proposed in recent Tanzanian labour legislation.

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