

The Concept of Managerial Prerogative in South African Labour Law

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Abstract

Managerial prerogative has two components: the power to manage industrial capital and the power to command labour. An employer owns the capital and has the power to decide how to perform or control his or her affairs. An employee works in order to survive. The employer allocates tasks to the employees that must be done adequately. Since 1994, the managerial prerogative has been severely restricted by the legislature to protect both employers and employees. The employer has the right to appoint or recruit employees in the workplace. The Employment Equity Act compiles the designated employer to elaborate employment policy that implements affirmative action to benefit persons in previously disadvantaged groups. The right to dismiss employees has been severely affected. Every dismissal of an employee is subject to substantive and procedural fairness requirements. The commissioners and labour courts usually review the employer's decision to dismiss employees. If they found the dismissal to be substantively unfair, they can award reinstatement, re-employment or compensation. Employers have the absolute right to organise their affairs and even dismiss employees for operational requirements. When implementing dismissal for operation requirements, the employers have to consult the employees. The employees can strike in order to dissuade the employers from implementing dismissal based on operational requirements. The employer has right to dismiss employees for poor work performance. However, they must be given a reasonable time to improve their performance standard. Collective bargaining has severely diminished the managerial prerogative. There is no duty to bargain. However, the Labour Relations Act creates a framework whereby all parties have to promote collective bargaining. Employees have organisational rights to form or join a trade union and office-bearers are entitled to take reasonable time off to perform their union activities. In the light of the above, the concept of managerial prerogative has been severely affected.

Keywords: Managerial prerogative, employers, employees, dismissal, operational requirement, trade union, organisational rights

1. Introduction

"Managerial prerogative, or 'the right to manage', has two components: the one concerns the power to manage industrial capital and is founded on the employer's position as owner or controller of 'industrial capital', the other concerns the power to command labour or human resources, which derives from contract."¹ An employer owns the capital and has the power to decide how to perform or control his or her affairs. "The employer commands capital, information and access to legal advice, whereas an employee works in order that he or she may survive."² Employment contract establishes unequal bargaining relationship between employers and employees. The former allocates tasks to the employees that must be done adequately. However, "individual employment rights constitute the most far-reaching limitation on the right to manage."³

Since the beginning of a new South Africa in 1994, the concept of managerial prerogative has been severely restricted. In this regard, "the scope of that prerogative is limited by statute, collective bargaining, considerations of public policy and, of course, the interest of employees."⁴ The legislature has interfered in employment relationships in order to maintain the balance of power and protect both the interests of employers and employees. This research deals with the meaning and justification of managerial prerogative, appointment of employees, affirmative action, changing terms and conditions of employment, dismissal for substantive and procedural fairness, operational requirements, unfair labour practice, dismissal for poor work performance, corporate retrenchment and restructuring and effect of collective bargaining on the employer.

¹ B Jordaan. "Managerial prerogative and industrial democracy" (1991) 11 *Industrial Relations Journal of South Africa* 1 at 1 – 2.

² EML Strydom "The origin, nature and ambit of employer prerogative (part 2)" (1999) 11 *SA Merc LJ* 311 at 311 – 312. See also Paul Pretorius "Status quo relief and the industrial court: the sacred cow tethered" (1983) 4 *ILJ* 167 at 170.

³ Jordaan (note 1 above) 3.

⁴ *Ibid* 7.

2. The Meaning of and Justification for Managerial Prerogative

The term prerogative denotes “something which some people are able or allowed to do or have, but which is not possible or allowed for everyone.”⁵ In the sphere of labour and employment, ‘prerogative’ is usually taken to refer to the right to manage an organisation.⁶ This concept “refers to the right to make decisions regarding the aims of the organisation and the way in which it will achieve these aims.”⁷ Managerial prerogative “is linked to the ability of the employer to control the activities of the employees in the workplace.”⁸ The employer decides the number of employees needed, when and how to do the work, when to start and finish the work, the standard of work and so on.

The employer has capital and owns or controls the means of production. “The power to order production can probably be explained in terms of the fact that the employer either owns, or in some manner controls, industrial capital, that is the material assets employed in the production process.”⁹ This power provides the employer with unlimited rights to structure his or her affairs to increase profits. As a result, he or she engages employees to perform the work and achieve great productivity. “However, by regarding the employer’s right to manage employees as an automatic consequence of every contract of employment, it was possible for the law of contract to secure and to legitimise that control as having been consented to by the employee.”¹⁰ In South Africa, a contract today still serves as the theoretical justification for the employer’s right to manage human resources, but all the law has to rely on in this regard is the somewhat contrived construction of an implied duty upon the employee to obey the employer’s lawful commands.¹¹ However, the employer does not have absolute rights over the employees. The employer only has those rights over his or her employees which the relevant contract of employment explicitly or impliedly affords.¹² This is necessary in order to achieve and maintain good relationships between employer and employees.

The only thing that seems relatively certain is the fact that the right to manage is fundamentally restricted, both in the interest of employees and society at large.¹³ “Potentially, individual employment rights constitute the most far-reaching limitation in the right to manage.”¹⁴ Statutes, such as the Labour Relations Act (LRA),¹⁵ Employment Equity Act (EEA)¹⁶ and the Basic Condition of Employment Act (BCEA)¹⁷ have severely affected the right of the employer to manage. Case law has also contributed to the limitation of managerial prerogative and provides fairness to both employers and employees. The next topic deals with some of managerial prerogatives and how they have been restricted.

3. Appointment of Employees

The right to decide on the appointment of employees vests in the employer.¹⁸ This employer’s right is not absolute. For instance, the employer cannot employ a child who is under 15 years of age¹⁹ or appoint any person to perform any forced labour.²⁰ The employment of such person as employees constitutes an offence.²¹ This protects the interests of society and the individuals concerned.

In making appointments for employment, “the state may not unfairly discriminate directly or indirectly against anyone on any one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”²² The employer is prohibited from unfairly discriminating in his or her activities.

In *Hoffmann v South African Airways*,²³ the applicant applied for a position as a cabin attendant in the respondent company. He fulfilled all the requirements but he was not appointed to the position due to his HIV/AIDS status. The

⁵ Cambridge Advanced Learner’s Dictionary. Cambridge: University Press, 2003.

⁶ EML Strydom “The origin, nature and ambit of employer prerogative (part 1)” (1999) 11 SA Merc LJ 40 at 42.

⁷ Ibid.

⁸ Ibid.

⁹ Jordaan op cit (n. 1) 1.

¹⁰ Ibid 2.

¹¹ Ibid 4.

¹² Ibid.

¹³ Ibid 6.

¹⁴ Ibid 3.

¹⁵ Labour Relations Act 66 of 1995 (LRA).

¹⁶ Employment Equity Act 55 of 1998 (EEA).

¹⁷ Basic Conditions of Employment Act 75 of 1997.

¹⁸ Port Elizabeth Municipality v Minister of Labour and Another 1975 4 SA 278 (E) at 282 G, see also A Rycroft & B Jordaan. A guide to South African labour law 2ed 1992 at p. 65.

¹⁹ Basic Conditions of Employment Act (note 17 above) s. 43 (prohibition of employment of children).

²⁰ Ibid s. 48 (prohibition of forced labour).

²¹ Ibid s. 43 (3) and 48 (3).

²² Constitution of the Republic of South Africa Act, 1996 s. 9 (3); EEA (note 16 above) s. 6 (1).

²³ Hoffmann v South Africa Airways 2001 1 SA 1 (CC).

respondent tried to justify its decision on commercial grounds. The Constitutional Court (CC) found that the respondent's conduct constituted unfair discrimination against the applicant and was an infringement of his right to dignity. The CC ordered the respondent to employ the appellant as a cabin attendant with effect from the date of the judgment.²⁴ This judgment warns employers that refusal to appoint a person on the ground of his or her HIV/AIDS status will never be tolerated.

Sometimes an appointment may prove to be bad before the employee has commenced his or her job. In this case, the employer may probably wish to reverse the appointment and get rid of the employee. "However, a new employee, even if he has not yet commenced with his duty, does have certain rights in terms of the Labour Relations Act 66 of 1995."²⁵ This was the issue in the arbitration of *Van Deventer and Venture SA Ltd*.²⁶ Van Deventer was appointed as a new employee at Venture SA Ltd and his old employer accused him of stealing during his notice period. After discovering this information, the new employer decided to dismiss him, even if he had not yet commenced his employment. Van Deventer approached the Commissioner for Conciliation, Mediation and Arbitration (CCMA) and claimed that he was unfairly dismissed. In *Wyeth (Pty) Ltd v Manqele and Others*,²⁷ the Labour Appeal Court (LAC) held that "the definition of employee in section 213 of the LRA can be read to include a person or persons who has or have concluded a contract or contracts of employment the commencement of which is or are deferred to a future date or dates." Thus, an employee is indeed someone who has accepted an offer of employment even if he or she has not started working. This case deviated from the earlier decision in *Woolworths v Whitehead (Pty) Ltd*,²⁸ which held that "a person qualified as an employee only once he became entitled to remuneration." This meant that the LRA applied only to an employee who had started working. The arbitrator found that the dismissal of van Deventer was substantively and procedurally unfair and therefore he was awarded compensation. The new employer would have escaped liability if it had held a proper disciplinary inquiry to find out whether or not dismissal was the appropriate sanction. "Employees should indeed enter the workplace with clean hands."²⁹ To achieve this objective, employers must use a proper procedure in making a disciplinary inquiry in the alleged misconduct of new employees, or else they will have to pay compensation for unfair dismissal.

The employer may also take measures to fulfil the purpose of the EEA. In recruiting persons, the employer may take steps "to achieve equity in the workplace by promoting equal opportunity and fair treatment through the elimination of unfair discrimination."³⁰ He or she may also implement 'affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.'³¹ An employer is furthermore not at liberty to arbitrarily select employees for re-employment where they had been dismissed en masse, e.g. for participating in a strike.³² The Promotion of Administrative Justice Act (PAJA) provides that "an administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."³³ This requires employers to take decisions that are procedurally fair in their activities. In spite of certain limitations, "employers retain their right to decide whom to employ provided they are not either statutorily prohibited or required to employ certain applicants."³⁴ Although the right of the employer to appoint employees is limited in certain circumstances, he or she still enjoys this prerogative. The implementation of affirmative action is a crucial issue in the workplace.

4. Affirmative Action

The EEA provides that "every employer must take steps to promote equal opportunity in workplace by eliminating unfair discrimination in any employment policy or practice."³⁵ The employer may include affirmative action measures in his or her employment strategy, for the purpose of benefiting previously disadvantaged people. In *Stoman v Minister of Safety*

²⁴ Ibid 27E – F, para 61.

²⁵ A H Dekker "When good appointments go bad: a discussion of van Deventer and Venture SA Ltd" (2007) 19 SA Merc LJ 372.

²⁶ Van Deventer and Venture SA Ltd (2007) 28 ILJ 268 (CCMA).

²⁷ Wyeth (Pty) Ltd v Manqele and Others (2005) 26 ILJ 749 (LAC) 765 B, para 52.

²⁸ Woolworths v Whitehead (Pty) Ltd (2000) 21 ILJ 571 (LAC). Despite the decision in this case, the Labour Court (*Jack v Director-General Department of Environmental Affairs* [2003] 1 BLLR 28 (LC)) and the CCMA have on occasions found that the contract of employment commenced once the offer of employment had been accepted. See also Greyvenstein and Iiso Consulting Engineers (2004) 24 ILJ 613 (CCMA), Mills and Drake International SA (Pty) Ltd (2004) 25 ILJ 1519 (CCMA).

²⁹ Dekker (note 25 above) 378.

³⁰ Employment Equity Act (note 16 above) s. 2 (a).

³¹ Ibid s. 2 (b).

³² Rycroft & Jordaan (note 18 above) 66, see also Borgwamer (SA) (Pty) Ltd v NAAWU/NAMSA (1991) 12 ILJ 549 (LAC).

³³ Promotion of Administrative Justice Act (PAJA) 3 of 2000, s. 3 (1).

³⁴ Strydom (note 2 above) 313 – 314; the National automobile & Allied Workers Union (now known as National Union of Metalworkers of SA) v Borgwamer (Pty) Ltd (1994) 15 ILJ 509 (A). In s. 186 (d) of LRA 1995, the selective non-re-employment of an ex-employee may be regarded as a dismissal. Where an employer refuses to renew a fixed-term contract, he or she may be guilty of an unfair dismissal if the employee had reasonable ground to expect that it would be renewed (s. 186 (b) of LRA 1995).

³⁵ Employment Equity Act (note 16 above), s. 5.

and Security and Others,³⁶ a black policeman was appointed to a post in the South African Police Service (SAPS) instead of the applicant employee, a white policeman. The applicant wanted to set aside such appointment. The court held that, in appointing the black policeman, the aim was not to reward him as an individual, but to advance the category of persons to which he belonged and to achieve substantive equality in the SAPS as an important component of South African society.³⁷ The court refused the relief sought by the applicant.

In *Harmse v City of Cape Town*,³⁸ the court held that "if an employer fails to promote the achievement of equality through taking affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within one of the designated groups not to be unfairly discriminated against."³⁹ According to this case, affirmative action can be used as both a shield and a sword.⁴⁰ Therefore, there is a right to affirmative action. Nevertheless, this case has not been followed in a subsequent judgment.

In *Dudley v City of Cape Town*,⁴¹ the court held that there is no right to affirmative action. The court stressed that the underlying policy of EEA was that affirmative action was to be collective in nature, participative, programmatic and essentially self-regulatory.⁴² "Affirmative action is not a right but a means to achieve the equality end as set out by the EEA."⁴³ An individual cannot sue the employer on the basis that it did not implement affirmative action. However, the employer may use it as a shield to justify its decision to employ a person from a group previously disadvantaged by unfair discrimination.

The EEA imposes an obligation on a designated employer to "prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workplace."⁴⁴ During recruitment, the employer needs to determine whether or not a person is suitably qualified for the job and, in so doing, "an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience."⁴⁵ If the employer fails to appoint a person solely on the grounds that he or she lacks experience, its decision may be set aside.

In *George v Liberty Life Association of Africa Ltd*,⁴⁶ the applicant was an employee of the respondent and applied for appointment to a position that was advertised within the company, according to its recruitment policy. Although the applicant was a suitable candidate for the position, an affirmative action candidate from outside the respondent was appointed to the post. The court held that: "in exercising its managerial prerogative to recruit and appoint an employer has not only to take its own internal values, such as efficiency, economic realities and employee loyalty, into account, but, because it is part of the large society and because of economic reasons, concern about being socially responsive and probably simply being a good corporate citizen, it may validly look at external values."⁴⁷ Affirmative action was one of the values that an employer may fairly consider. The court found that the procedure for appointment was flawed, as recruiting internally and externally was done at the same time. As a result, the court awarded costs to the applicant. "Affirmative action is substantively fair, as long as the employer abides by the (procedural) rules."⁴⁸ This means that an employer must use a fair procedure in applying affirmative action. At the workplace, the employer has a prerogative to vary the manner in which employment is done.

5. Changing Terms and Conditions of Employment

The employer may change terms and conditions of employment in order to keep its business competitive in a globally challenging world. "Whether to improve efficiency, increase profitability or keep abreast of technological developments, employers may need to introduce changes to the manner in which the work is done in the enterprises."⁴⁹ In *Mauchle (Pty) Ltd t/a Precision Tools v NUMSA and Others*,⁵⁰ the court held that "employees do not have a vested interest to preserve their working obligation completely unchanged from the moment when they first begin work."⁵¹ In this case, the

³⁶ *Stoman v Minister of Safety and Security and Others* (2002) 23 ILJ 1020 (T).

³⁷ *Ibid* 1035 H.

³⁸ *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC)

³⁹ *Ibid* 1146B – C.

⁴⁰ *Ibid* 1145B – C, para 44.

⁴¹ *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC). See also M McGregor "No right to affirmative action" (2006) 14 (1) *Juta's Business Law* 16 – 19; D Thompson and A Van der Walt "Affirmative action: only a shield? Or also a sword? *Harmse v City of Cape Town* (2003) 24 ILJ 1130 and *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC)" (2008) *Obiter* 636, 646.

⁴² *Dudley v City of Cape Town* (note 41 above) 329.

⁴³ McGregor (note 41 above) 19.

⁴⁴ *Employment Equity Act* (note 16 above) s. 20 (1).

⁴⁵ *Ibid* s. 20 (5).

⁴⁶ *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC).

⁴⁷ *Ibid* 572 – 573.

⁴⁸ C Mischke "The industrial court looks at affirmative action" (1996) 14(3) *Juta's Business Law* 118, 120.

⁴⁹ T Cohen "Dismissals to enforce changes to terms and conditions of employment – automatically unfair or operationally justifiable?" (2004) 25 ILJ 1883 at 1883.

⁵⁰ *Mauchle (Pty) Ltd t/a Precision Tools v NUMSA and Others* (1995) 16 ILJ 349 (LAC).

⁵¹ *Ibid* 357G – H.

employees were required to operate two machines each instead of one. Myburgh J held that "it is only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner."⁵² The employer has a duty to assist employees to acquire necessary skills and knowledge required in the workplace. In *Cresswell v Board of Inland Revenue*,⁵³ Walton J held that "an employee was expected to adapt to new methods and techniques introduced in the course of his employment, provided the employer organised for him to acquire the necessary training or retraining in the new skills and the nature of work did not alter so radically that it was outside the contractual obligations of the employees."⁵⁴ This case was approved in *NUMSA and Others v Lumex Clipsal (Pty) Ltd*,⁵⁵ in which the Labour Court held that the employer's rationalization programme, which introduced a three-shift system and a combination of duties which entailed machine operators attending to more than one machine at a time, did not alter the nature of their work to such a degree that it was no longer the work that the employees had agreed to perform under the terms of their contracts.

The employer's unilateral implementation of changes to terms and conditions of employment undermines the collective bargaining mechanism.⁵⁶ Section 64 (4) of the LRA provides a right to strike to employees or trade unions in order to require the employer not to implement unilaterally the change to terms and conditions of employment, or, if it has already been implemented, to restore the *status quo* that applied before the changes, within 30 days. The employers also have a right to use the lock-out mechanism to avoid unilateral changes by their workers to terms and conditions of employment.

The LRA provides that a dismissal is automatically unfair if the reason for the dismissal is "to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee."⁵⁷ In *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA and Others*,⁵⁸ the appellant wanted to introduce changes from a three to a two shift system in order to improve efficiency and increase profitability. The employees who refused to adhere to these changes were dismissed. It was found that the purpose of the dismissal was not to compel employees to agree to their matter of mutual interest with the employer.⁵⁹ Zondo, JP held that:

*A dismissal that is final cannot serve the purpose of compelling the dismissed employee to accept a demand in respect of a matter of mutual interest between employer and employee because, after he has been dismissed finally, no employment relationship remains between the two. An employee's acceptance of an employer's demand in respect of a matter of mutual interest can only be useful or worth anything if the employee is going to continue in the employer's employ.*⁶⁰

The court also found that the LRA recognises "an employer's right to dismiss for a reason based on its operational requirements, without making any distinction between operational requirements in the context of a business the survival of which is under threat and a business which is making profit and wants to make more money."⁶¹ The court finally ruled that the right to dismiss for operational requirements and the prohibition to dismiss to compel employees to agree to a demand on a matter of mutual interest do not conflict.⁶² The appeal succeeded, as the employer dismissed the employees for operational reasons.

In *CWIU and Others v Algorax (Pty) Ltd*,⁶³ the respondent introduced a change from a straight day shift from Mondays to Fridays to a rotating shift system which required employees to work some nights and on alternate weekends. The individual appellants were dismissed after they refused to accept the new change. "A week later, the respondent offered to reinstate the employees without backpay if they accepted the new shift system."⁶⁴ This was confirmed in its statement of defence in court. The Labour Appeal Court held that:

an employer may dismiss those employees who do not satisfy the operational needs of the business if its purpose is to get rid of them permanently and replace them with others prepared to work in accordance with employer's operational requirements. However, where an employer wished to retain workers who decline to satisfy its operational

⁵² *Ibid* 357H.

⁵³ *Cresswell v Board of Inland Revenue* 1984 2 All ER 713 (ChD).

⁵⁴ *Ibid* 721 (cf *North Riding Garages Ltd v Butterwick* [1967] 1 All ER 644 (QBD)).

⁵⁵ *NUMSA and others v Lumex Clipsal (Pty) Ltd* (2001) 22 ILJ 714 (LC) at 720. See also *T Cohen* (note 49 above) 188A.

⁵⁶ *Cohen* (note 49 above) 188S.

⁵⁷ *LRA* (note 49 above) s. 187 (1) (c).

⁵⁸ *Fry's Metals (Pty) Ltd v national Union of Metalworkers of SA & Others* (2003) 24 ILJ 133 (LAC).

⁵⁹ *Ibid* 146A.

⁶⁰ *Ibid* 146D – E, para 28.

⁶¹ *Ibid* 135D – E.

⁶² *Labour Relations Act* (note 15 above) s. 188 (1) (ii) and s. 187 (1) (c).

⁶³ *CWIU & Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC).

⁶⁴ *Ibid* 1081I.

requirements, and then dismisses them in the hope that they will be thus induced to comply with its needs, the dismissal is for the purpose of compelling the workers to comply with a demand, and is therefore automatically unfair. The critical question is the purpose of the dismissal.⁶⁵

The court (Hlope AJA dissenting) found that the dismissal was automatically unfair and ordered the respondent to reinstate employees from the date of the order of the court *quo*.⁶⁶ The employer could not threaten its employees with dismissal in order to secure their submission to its demand. In fact, the dismissal was to compel employees to comply with the new shift system that was a matter of mutual interest. "In the absence of demonstrated operational requirements, no case for dismissal can be made should employees resist change."⁶⁷ The employer should permanently dismiss employees who refuse to comply with the new change if it wants to avoid liability.

As far as terms and conditions of employment are concerned, labour legislation goes some way towards addressing the unequal bargaining power between employers and employees by prescribing minimum terms and conditions of employment.⁶⁸ For instance, the BCEA regulates ordinary working hours,⁶⁹ overtime,⁷⁰ meal interval,⁷¹ pay for work on Sundays,⁷² night work,⁷³ public holidays,⁷⁴ annual leave,⁷⁵ annual leave pay,⁷⁶ sick leave,⁷⁷ proof of incapacity,⁷⁸ maternity leave,⁷⁹ protection of employees before and after birth of a child,⁸⁰ and family responsibility leave.⁸¹

Section 6 (1) of the EEA limits the managerial prerogative with regard to employment benefits, terms and conditions of employment, in that the employer must ensure that its employment policy or practice does not unfairly discriminate against an employee on arbitrary grounds.⁸² With regard to benefits, the employer needs to ensure that it does not commit an unfair labour practice when formulating the conditions on which it is prepared to give to employees.⁸³ The next section deals with the power to dismiss employees for substantive and procedural fairness.

6. Dismissal for Substantive and Procedural Fairness

The employer enjoys a right to dismiss⁸⁴ an employee, but the right has to be exercised using a fair and reasonable procedure. The right to dismiss employees is regulated by legislation. "The legislature's direct statutory interference with the employer's right to dismiss undoubtedly represents one of the most far-reaching erosions of the employer's decision-making power."⁸⁵ The requirements for a fair reason and a fair procedure must be satisfied when the employer decides to dismiss employees. If these requirements are not satisfied, the dismissal may be set aside.

6.1 Substantive fairness in dismissal

The LRA provides that the employer can fairly dismiss the employee if the employer proves that the reason for the dismissal is a fair reason, related to the employee's conduct or capacity.⁸⁶ Schedule 8 Code of Good Conduct: Dismissal provides guidelines that the employer may consider in cases of dismissal for misconduct.⁸⁷ A person who determines "whether the dismissal for misconduct is unfair should consider whether or not the employee contravened a rule or standard regulating conduct in, or relevant to, the workplace; and if a rule or standard was contravened, whether or not

⁶⁵ *Ibid* 1082B.

⁶⁶ *Ibid* 1106C-D.

⁶⁷ C Thompson "Bargaining over business imperatives: the music of the spheres after Fry's Metals" (2006) 27 ILJ 704 at 705.

⁶⁸ Strydom (note 2 above) 315.

⁶⁹ Basic Conditions of Employment Act (note 17 above) s. 9.

⁷⁰ *Ibid* s. 10.

⁷¹ *Ibid* s. 14.

⁷² *Ibid* s. 16.

⁷³ *Ibid* s. 17.

⁷⁴ *Ibid* s. 18.

⁷⁵ *Ibid* s. 20.

⁷⁶ *Ibid* s. 21.

⁷⁷ *Ibid* s. 22.

⁷⁸ *Ibid* s. 23.

⁷⁹ *Ibid* s. 25.

⁸⁰ *Ibid* s. 26.

⁸¹ *Ibid* s. 27.

⁸² Employment Equity Act (note 16 above) s. 6 (1) where it outlines the prohibited grounds of discrimination such as gender, sex, marital status, HIV status, etc.

⁸³ Labour Relations Act (note 15 above) schedule 7 item 2 (1) (b).

⁸⁴ *Ibid* s. 186 (1).

⁸⁵ Strydom (note 2 above) 315.

⁸⁶ Labour Relations Act (note 15 above) s. 188 (1) (a) (i).

⁸⁷ *Ibid* Schedule 8: Code of Good Practice Dismissal provides guidelines in the case of dismissal for misconduct (7), poor work performance (9), incapacity (10) and ill health or injury (11).

the rule was a valid or reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware of the rule or standard; the rule or standard has been consistently applied by the employer; and dismissal was an appropriate sanction for the contravention of the rule or standard.⁸⁸ As a general rule, it is not appropriate to dismiss the employee for a first-time misconduct.

In *Sidumo and Another v Rustenburg Platinum Mines Ltd & Others*,⁸⁹ the applicant was caught on camera and evidence demonstrated that he was not performing his work properly. The applicant was not properly searching employees when they left the premises and the respondent experienced loss due to theft. As a result, the applicant was dismissed in spite of his 15 years clean record of service in the respondent's company. The Constitutional Court (CC) rejected the reasonable employer test adopted by the Supreme Court of Appeals in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others*.⁹⁰ The CC found that "there was nothing in the constitutional or statutory schemes that suggested that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether or not what the employer did was fair. In arriving at a decision, the commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."⁹¹ This decision amounts to fairness between employees and employers.

The rejection of the reasonable employer test in dismissal cases is fair, as "in dismissal disputes, employers and employees inevitably hold different views on the fairness of the dismissal at issue."⁹² This means that a third party charged with resolving the dispute cannot defer to the views of one or the other party. The Constitutional Court's decision warns the employers that they must have a fair substantive reason when exercising their right to dismiss employees. The Code of Good Practice: Dismissal stipulates that "when considering whether or not to impose the penalty of dismissal, the employer should, in addition to the gravity of the misconduct, consider factors such as the employee's circumstances (including the length of the service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement."⁹³ Certain dismissals are automatically unfair and the employer does not have any defence in these matters.⁹⁴ If the employers do not exercise their right to dismiss properly, their decisions will be set aside and the employees will be reinstated or re-employed. Apart from being substantively fair, the dismissal must also be procedurally fair.

6.2 Procedural fairness in dismissal

The dismissal must be "effected in accordance with a fair procedure."⁹⁵ This right is not recognised under the common law, "which is concerned only with whether a dismissal was lawful – that is whether the required notice was given in the case of an indefinite-period of contract, or whether there was a lawful case of dispensing with notice."⁹⁶ Procedural fairness is significant, as "a dismissal is unfair if the employer failed to follow a fair procedure, no matter how compelling the reason for the dismissal may have been."⁹⁷ The LRA does not permit reinstatement or re-employment in cases when the dismissal is found to be only procedurally unfair.⁹⁸ The employer will have to compensate the employee for procedural unfairness in his or her dismissal. This constitutes an infringement in the employer's right to dismiss employees.

In *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others*,⁹⁹ the employee was caught on videotape talking to a colleague who was stealing goods. The videotape was sufficient to prove, on the balance of probabilities, that the employee was an accomplice to theft. The employee was dismissed, but the commissioner used a criminal model test and reinstated her. The Labour Court found that the LRA in Schedule 8 specifically states that the investigation preceding a dismissal need not be a formal inquiry. The code requires that, before dismissing an employee, the employer should

⁸⁸ *Ibid* Schedule 8 (7).

⁸⁹ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 28 ILJ 2405 (CC).

⁹⁰ *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others* [2006] 11 BLLR 1021 (SCA). The decision in this case in adopting a reasonable employer test was criticized by the LAC in *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC). See J Grogan "Locking horns whose idea of fairness counts?" (2007) 23 (5) *Employment Law* 3.

⁹¹ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* *op cit* (n. 89) 2046B – C.

⁹² Grogan (note 83 above) 5.

⁹³ *Labour Relations Act* (note 15 above) Schedule 8 (3) (5).

⁹⁴ *Ibid* s. 187.

⁹⁵ *Ibid* s. 188 (1) (a) (ii). See also E Manamela "Consult your employees fairly" (2006) 14(1) *Juta's Business Law* 27 – 29.

⁹⁶ J Grogan. *Workplace Law* 9ed. (2007) 106.

⁹⁷ *Ibid* 122.

⁹⁸ *Labour Relations Act* (note 15 above) s. 193 (2) (d). See also Mzoku & Others v Volkswagen SA (Pty) Ltd & Others (2001) 22 ILJ 1575 (LAC).

⁹⁹ *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* [2006] 9 BLLR 833 (LC).

conduct an investigation, give the employee or his/her representative an opportunity to respond to the allegation after a reasonable period, take a decision and give the employee notice of that decision.¹⁰⁰ The court held that “the rules introduced by the code are based on the idea that true justice for workers lies in a procedure for expeditious and independent review of the employer’s decision, with reinstatement stipulated as the primary remedy if the employer cannot defend its decision to dismiss the employee.”¹⁰¹

Informal disciplinary procedure in the workplace also balances the interest of employees and employers, as required by the Constitution and the applicable International Labour Organisation (ILO) Convention.¹⁰² The court ruled that the commissioners should apply this standard when they judge procedural fairness of dismissal. It set aside the award and the matter was remitted to the CCMA to be heard by another commissioner. The significance of this case is that the decision to dismiss must be procedurally fair, since it may be reviewed and set aside by the commissioners or courts.

In *Semenya & Others v CCMA & Others*,¹⁰³ the employee was called to the meeting and informed that her contract of employment was going to be concealed. However, the appellants offered to appoint an independent third party of the employee’s choice to chair a disciplinary hearing. The employee spurned this offer, as she thought it could not compensate for the absence of a pre-dismissal hearing. The court held that the law does not always require a hearing before an adverse decision is taken and that a hearing may be done after the dismissal, especially when it is chaired by a third party independent to the initial decision-makers.¹⁰⁴ This decision recognises that the employer must comply with procedural fairness in dismissing employees for any reason. J Grogan states that “the requirement that dismissal must be in accordance with a fair procedure has led to the disciplinary hearing being unduly protracted, or to undeserving employees being rewarded by arbitrators for some slight procedural lapse by their employers.”¹⁰⁵ If employers do not comply with procedural fairness, they will be required to pay compensation to dismissed employees.

In *NEHAWU & Others v University of Pretoria*,¹⁰⁶ the LAC held that “the LRA does not prevent an employer from coming to the table with a favoured proposal.”¹⁰⁷ The management should form a view on how operational problems should be resolved before the commencement of the consultation required by legislation. “All the Act requires is that the employer gives employees and their representatives a fair opportunity to express their views and that it keeps an open mind during the consultation process.”¹⁰⁸ The employer is expected to be objective and change his or her mind when the employees present or discover a convincing alternative. Consultation has restricted the power of the employer to manage its business because it must engage in a fair consultation with employees and consider their arguments. The employer should not come to consultation and present a dismissal as a *fait accompli*.¹⁰⁹ When this occurs, the dismissal will be substantively and procedurally unfair and the employees may be reinstated. In *SACCAWU & Others v Gallo Africa*,¹¹⁰ the employer offered employees alternative positions after extensive consultations and dismissed them when they declined the offers. The court held that the dismissals were fair. The employer should consult fairly with employees and be able to change its mind to the views of the employees. The most important prerogative that employers still have is to dismiss employees for operational requirements.

7. Dismissal for Operational Requirements

The employer enjoys the prerogative to dismiss employees for operational requirements.¹¹¹ The notion of operational requirements means “requirements based on the economic, technological, structural or similar needs of an employer.”¹¹² In *Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA & Others*,¹¹³ the LAC held that LRA recognises “an employer’s right to dismiss for a reason based on its operational requirements without making any distinction between operational requirements in the context of a business the survival of which is under threat and a business which is making

¹⁰⁰ Labour Relations Act (note 15 above) Schedule 8 (4) (1).

¹⁰¹ *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* (note 99 above) 834D – E.

¹⁰² *Ibid* 839.

¹⁰³ *Semenya & Others v CCMA & Others* [2006] 6 BLLR 521 (LAC).

¹⁰⁴ *Ibid* 521H – I.

¹⁰⁵ J Grogan “Watered down – eroding procedural unfairness” (2007) 23(1) *Employment Law* 12.

¹⁰⁶ *NEHAWU & Others v University of Pretoria* [2006] 5 BLLR 437 (LAC).

¹⁰⁷ *Ibid* 438D.

¹⁰⁸ *Ibid* 438. See also J Grogan “The right to consult preserving the pecking order” (2006) 22 *Employment Law* 17 – 21.

¹⁰⁹ *Robinson & Others v Price Waterhouse Coopers* [2006] 5 BLLR 504 (LC).

¹¹⁰ *SACCAWU & Others v Gallo Africa* [2006] 1 BLLR 36 (LC).

¹¹¹ Labour Relations Act (note 15 above) s. 189; see also M A Mtembu “Dismissal for operational requirements” (2003) 15 SA Merc LJ 346 – 353; M E Manamela “Selection criteria: the dismissal of employees based on operational requirements” (2007) 19 SA Merc LJ 103 – 108; C Thompson “Bargaining, business restructuring and the operational requirements dismissal” (1999) 20 ILJ 754 – 771; A Rycroft “Corporate restructuring and applying for your own job” 2002 ILJ 678 – 682; J Grogan *Workplace aw* (2007) 223 – 246.

¹¹² Labour Relations (note 15 above) s. 213.

¹¹³ *Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA & Others* (2003) 24 ILJ 133 (LAC) 135D.

profit and wants to make more profit." The employers may dismiss for operational requirements, even if it only wants to increase profitability. In *Kotze v Robel Liquor Group (Pty) Ltd*,¹¹⁴ the LAC stressed that its functions was not to "second-guess the commercial and business efficacy of the employer's ultimate decision, but to pass judgment on whether such decision was genuine and not merely a sham." Similarly, in *Hendry v Adcock Ingram*,¹¹⁵ the court said that:

*If the employer can show that a good profit is to be made in accordance with a sound economic rationale and it follows a fair process to retrench an employee as a result thereof it is entitled to retrench. When judging and evaluating an employer's decision to retrench an employee this court must be cautious not to interfere in the legitimate business decisions taken by employers who are entitled to make a profit and who, in doing so, are entitled to retrench their business.*¹¹⁶

As dismissal for operational requirements is a non-fault dismissal, the LRA imposes an obligation on the employer to initiate consultation before retrenchment.

The employer must consult any person whom it is required to consult in terms of a collective agreement; a workplace forum; a registered trade union; the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.¹¹⁷ The employer and other consulting parties must engage consultation in a meaningful joint consensus-seeking process and attempt to reach consensus on appropriate measure to avoid the dismissals, to minimise the number of dismissals, to change the timing of the dismissals, and to mitigate the adverse effects of the dismissals.¹¹⁸ In *SA Chemical Workers Union v Afrox Ltd*,¹¹⁹ the court held that retrenching employers are not required to formally consult affected employees or their representatives. They must take substantive steps on their own initiative to adopt appropriate measures to avoid the dismissals and minimise their effect.

The consulting parties must attempt to reach a consensus on the method for selecting the employees to be dismissed.¹²⁰ This issue was considered in *General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU & Others*.¹²¹ In this case the appellant experienced losses in its bakeries due to competition from small bakeries, whose bread was sold at a lower price and paid their workers lower wages. The company retrenched its employees at the Mobeeni bakery, but it did not follow a fair and objective procedure. The appellant did not use the method of last-in first-out, coupled with bumping. Bumping entails the retention of longer-serving employees at the expense of shorter-serving employees in the case where the former are able to perform the work done by the latter.¹²² At the same time of the retrenchment at Mobeeni, it was recruiting new employees at another branch instead of filling the vacant positions with retrenched employees. The LAC confirmed the decision of the Labour Court that retrenchment was substantively and procedurally unfair and reinstated the respondents. Thus, in selecting employees to dismiss for operational requirements, the employer must have a fair reason and use a fair procedure, or else its decision may be set aside.

In *Buthlezi v Municipal Demarcation Board*,¹²³ the LAC held that an employer may not, in any circumstances, dismiss an employee on a fixed-term contract without being held responsible for breach of contract. According to this case, the employer may only retrench employees on an indefinite contract. "Genuine operational requirements cannot be relied upon to render the dismissal of an employee employed in terms of a fixed-term contract lawful or fair."¹²⁴ If this case is followed by the courts, a retrenchment of a fixed-term employee will amount to a unilateral breach of contract. It is submitted that this case rigorously infringes the rights of employers to retrench employees on fixed-term contracts and unfairly differentiate between employees on fixed-term contracts and those on indefinite contracts.

Section 189A of the LRA deals with dismissals based on operational requirements by employers with more than 50 employees. It imposes duties on employers who wish to dismiss a great number of employees at the same or different times. In *NUMSA v Continental Tyre*,¹²⁵ the Labour Court held that "in the circumstances where the need to retrench arises at different periods of time and while the consultation is in process a need arises to retrench more employees bringing the number of employees to be retrenched within the ambit of section 189A, the process under section 189A supersedes the process under section 189. It followed that the process under section 189 should be stopped and the

¹¹⁴ *Kotze v Reble Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) 133.

¹¹⁵ *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC).

¹¹⁶ *Ibid* 92B – C.

¹¹⁷ *Labour Relations* (note 15 above) s. 189 (1) (a) – (d).

¹¹⁸ *Ibid* s. 189 (2) (a).

¹¹⁹ *SA Chemicals Workers Union v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) 1720A.

¹²⁰ *Labour Relations Act* (note 15 above) s. 189 (2) (b).

¹²¹ *General food Industries Ltd t/a Blue Ribbon Bakeries v FAWU & Others* (2004) 25 ILJ 1655 (LAC).

¹²² *M E Manamela* (note 111 above) 106. See also *Porter Motor Group v Karachi* (2002) 23 ILJ 348 (LAC) at 353 – 4; J Grogan "Jobs that go 'bump': Fair Selection for retrenchment" 2002 Employment LJ 10.

¹²³ *Buthlezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC).

¹²⁴ T Cohen "When common law and labour law collide – some problems arising out of the termination of fixed-term contracts" (2007) 19 SA Merc LJ 26, 32.

¹²⁵ *NUMSA v Continental Tyre* 2005 (LC).

process under section 189A takes over.¹²⁶ Section 189A enables employees to act collectively when they are faced with mass dismissals in order to dissuade the employer from implementing its retrenchment initiative.

Registered trade unions or employees who have received notice of termination may give notice of their intention to strike, or refer a dispute about whether or not there is a fair reason for the dismissal, to the Labour Court.¹²⁷ The employees may embark on a strike and compel the employer to abandon its plan to dismiss them. The strike must comply with the provision of the LRA, including section 67 (5). This means that employers retain the right to dismiss workers who strike in terms of section 189A for reasons based on operational requirements.¹²⁸ A consulting party is prohibited to strike in respect of a dismissal if he or she has referred a dispute to the Labour Court, and *vice-versa*.¹²⁹ The employees must elect one of the two choices to try to avoid the dismissal by the employer. In its activities, the employer must avoid committing an unfair labour practice.

8. Unfair Labour Practice

The prerogative of the employer is restricted by the Constitution, which provides that "everyone has the right to fair labour practice."¹³⁰ This means that the employer should not commit unfair labour practice against its employees. In *NAWA & Another v Department of Trade and Industry*,¹³¹ the respondent restructured and decentralized its power, which affected some reporting lines and chains of command. Some employees lost their jobs and claimed victimisation. The court held that the employer's activities fell within its managerial prerogative and did not amount to unfair labour practice. The employee who alleges unfair labour practice must show that it falls within the terms of its residual definition or must rely on the Constitution.

In *Erasmus & Others v SENWES & Others*,¹³² the applicants were pensioners. On retirement, the respondents continued to pay subsidies for their medical schemes. The respondents sought to reduce the amount of subsidies without their consent and they made an urgent application to restrain them from implementing the decision. The court considered the general conditions of employment and was satisfied that the respondents had always regarded their obligation towards pensioners as a legally binding one and not only a moral one. The pensioners had already performed their duties under the contract. The court observed that when interpreting the contract of employment it had to be borne in mind that parties have certain protected constitutional rights, including a right to a fair labour practice. Since the applicants had fully performed under the contract, their "constitutional right to fair labour practice added impetus to the general rule that the court should endeavour to enforce rather than invalidate the contract."¹³³ The court granted the interim interdict. The next section highlights the employer's power to dismiss employees for poor work performance.

9. Dismissal for Poor Work Performance

The employer has a prerogative to assess its employees and dismiss those who fail to perform at the required standard. However, there are conditions imposed on the employer in this regard. It must ensure that the employee did not meet the performance standard, whether he or she was aware, or could reasonably be expected to be aware, of the performance standard.¹³⁴ The employee must be given a fair opportunity to meet the required standard and dismissal needs to be an appropriate sanction for not meeting the required standard.¹³⁵ If all these requirements are satisfied, the employer can fairly dismiss the employee for poor work performance.

In *Buthlezi v Amalgamated Beverage Industries*,¹³⁶ the applicant was employed by the respondent for 16 years and she was promoted from telesales clerk to public relations officer. At the time of her promotion, she lacked key competencies for the job, but her employer believed that she had key attributes and could perform adequately, with training. Unfortunately she could not perform at the required standard, in spite of having completed a course that costed the employer R10 000. The employer relieved her from her duties and offered her an alternative position, which she rejected as demotion. The company subsequently dismissed her. The court held that when the employer appointed or

¹²⁶ *Ibid*. See also *A Van der Walt & G Van der Walt "Retrenching employees in stages to circumvent section 189A of the LRA NUMSA v Continental Tyre (as yet unreported – Labour Appeal Court 2005)" 2005 Obitor 791, 793.*

¹²⁷ Labour Relations Act (note 15 above) s. 189A (8) (b) (ii).

¹²⁸ Grogan (note 89 above) 245.

¹²⁹ Labour Relations Act (note 15 above) s. 189A (10) (a).

¹³⁰ Constitution of the Republic of South Africa, 1996, s. 23 (1); LRA (note 15 above) s. 186 (2).

¹³¹ *NEWU & Others v Department of Trade and Industry (1998) 7 BLLR 701 (LC).*

¹³² *Erasmus & Others v SENWES & Others [2006] 27 ILJ 259 (T).*

¹³³ *Ibid* 259f.

¹³⁴ Labour Relations Act (note 15 above) Schedule 8 (9) (a) and (b) (i).

¹³⁵ *Ibid* Schedule 8 (9) (b) (ii) and (iii).

¹³⁶ *Buthlezi v Amalgamated Beverage Industries (1999) 20 ILJ 2316 (LC).*

promoted an employee, knowing that he or she did not have the necessary skills and experience, it was "required to do something more than it would for an employee who had the necessary skills and experience to perform effectively from the beginning."¹³⁷ According to the fact, the employer assisted the employee to acquire the necessary skills and her dismissal for poor work performance was substantively fair.

There are two categories in which the normal requirement to appraise, warn and allow an employee an opportunity to improve performance may not apply. In *New Forest Farming CC v Cachalia & Others*,¹³⁸ the court identified that the first category was "where the employee involved was a manager or senior employee whose knowledge and experience qualified him to judge for himself whether he was meeting the standard set by the employer." The second and distinct category was that of employees whose jobs required of them a degree of professional skill of an extremely high standard and where the potential consequences of the smallest departure from that standard would be catastrophic.¹³⁹ The employer may dismiss a manager and/ or a senior employee without complying with the normal procedure to terminate employment for poor work performance.

In *Eskom v Makoena*,¹⁴⁰ the LAC stipulated that an employer was entitled to set the standard it required its employees to meet and the court would not interfere unless the assessment was grossly unreasonable. If the employer sets standards that are grossly unfair, the court may intervene and set them aside. What is fair depends on the individual circumstances of each case. It follows that the employer does not enjoy an unfettered prerogative to set out the performance standards at the workplace. Conversely, a corporate employer has the power to restructure its business and declare all posts redundant.

10. Corporate Restructuring and Retrenchment

The employer has right to restructure its business and even retrench employees when needs arise. In certain circumstances, restructuring means loss of jobs. The employer may declare all posts in the company redundant and invite employees to apply for the new jobs. As a result, the surplus employees are dismissed because they cannot be accommodated in the new company. In *Wolfaardt & Another v Industrial Development Corporation of SA Ltd*,¹⁴¹ the court held that "the employer must not use the restructuring as an exercise to dismiss employees on no-fault basis where the employer cannot dismiss them by reason of misconduct or incapacity and it should not be easier to retrench an employee where restructuring is involved."¹⁴² Furthermore, "a retrenchment following a process of restructuring whereby an employee applies for his or her own job must be closely scrutinized because it ignores, sometimes unconsciously, that an existing employee enjoys job security which will be protected, especially against no-fault terminations."¹⁴³ The employee becomes an applicant for his or her own job in the new company.

The employer who declares all jobs redundant and invites employees to apply for the new jobs must fulfil certain requirements. He or she has to show that "a reasonable and commercial rationale for the decision to retrench exists; the decision to restructure must be taken in a manner which is fair to the employees to be retrenched; the retrenchment of the employees is essential to achieve the purpose of the restructuring; the criteria for appointment to the new positions is fair and justifiable; and the eventual selections for appointment are objectively justifiable."¹⁴⁴ If the employer satisfies these requirements, it has a prerogative to structure its business and even dismiss employees whose positions have become redundant. Conversely, the employer may engage in collective bargaining with the employees.

11. Effect of Collective Bargaining on the Employer

Collective bargaining is another aspect that restricts the employer in managing its business. "Collective bargaining is the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation."¹⁴⁵ The employer cannot attempt to solve its disagreement within the workplace, as it sees fit, to the detriment of employees. "Unlike mere consultation, therefore, collective bargaining assumes a willingness on each side not only to listen to and consider the representation of the other but also to abandon fixed positions, where possible, in

¹³⁷ *Ibid* 2317A – B.

¹³⁸ *New Forest Farming CC v Cachalia & Others* (2003) 24 ILJ 1995 (LC) 1996 D.

¹³⁹ *Ibid*. See also *Somyo v Ross Poultry Breeders (Pty) Ltd* [1997] 7 BLLR 862 (LAC).

¹⁴⁰ *Eskom v Makoena* [1997] 8 BLLR 965 (LAC) 979E – F; see also *Sun Carriers (Pty) Ltd v CCMA & Others* (2002) 23 ILJ 189 (LC) 194, para 16.

¹⁴¹ *Wolfaardt & Another v Industrial Development Corporation of SA Ltd* (2002) 23 ILJ 1610 (LC).

¹⁴² *Ibid* 1611H.

¹⁴³ *Ibid* 1611I.

¹⁴⁴ *Ibid* 1617G – I. See also *SA Mutual Life Assurance Society v Insurance & Banking Staffing Association C 132/ 98 (LAC) (unreported)*; *A Rycroft "Corporate Restructuring and Applying for Your Own Job"* (2002) 23 ILJ 678 – 682.

¹⁴⁵ *Grogan* (note 111 above) 353).

order to find a common ground.¹⁴⁶ Long ago, it was unthinkable for employees to negotiate with an employer on a matter of mutual interest.

The LRA regulates collective bargaining, but “does not make provision for a statutory duty to bargain.”¹⁴⁷ Its success depends on the bargaining strength of each party. The Act has extended significant rights to trade unions, thereby increasing their bargaining power. One of the purposes of the Act is “to provide a framework within which employees and their trade unions, employers and employers’ organisation can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest.”¹⁴⁸ The employees can form or join a trade union and acquire organisational rights. For instance, trade union representatives are allowed to take reasonable leave during working hours for the purpose of performing their functions as office-bearers.¹⁴⁹ The employer has a duty to disclose all information that allows office-bearers to perform their duties to the trade union and even increase their ability to bargain effectively.¹⁵⁰ The employees may strike to compel the employer to agree to their demands. To avoid conflict in the workplace, employers should bargain with trade unions or employees if they want to introduce changes to terms and conditions of employment.

12. Conclusion

The concept of managerial prerogative has been severely restricted. The employer still has the right to appoint or recruit employees to work at his or her workplace. The EEA compiles the designated employer to elaborate employment policy that implements affirmative action in order to benefit persons in previously disadvantaged groups. The employer may not refuse to appoint an individual on grounds based solely on his or her lack of experience. Furthermore, the employer may change employment practice, in order to keep a business competitive and efficient, without the consent of employees, who cannot refuse these changes and may be fairly dismissed if they try to do so. However, if the employer needs to change terms and conditions of the employment contract, it must negotiate with the employees.

The prerogative of employers that has been most affected is the right to dismiss employees. Every dismissal of an employee is subject to substantive and procedural fairness requirements. As a general rule, it is not appropriate to dismiss an employee for a first-time misconduct. All relevant and personal circumstances of the employee must be considered before the employer decides to dismiss. The employer has to adhere to procedural fairness and respect the dignity of the employee in dismissal. Most employers have an internal procedure in terms of which an aggrieved employee may challenge his or her dismissal. In addition, the commissioners and Labour Courts usually review employers’ decisions to dismiss employees. If they find the dismissals to be substantively unfair, they can award reinstatement, re-employment or compensation. Compensation is awarded if the dismissal is unfair only for procedural reasons.

Employers have the absolute right to organise their affairs and even dismiss employees for operational requirements. They may dismiss employees for operational requirements in order to save or rescue a business which is just surviving, or to increase profitability for a business that is already producing benefits. The courts are reluctant to interfere with policy decisions of employers. They may set aside the operational requirement of the employers when it amounts to a sham. As long as there is a genuine operational requirement, the employers enjoy the right to dismiss employees and restructure their business as they please.

The employer has the right to dismiss employees for poor work performance. However, they must be given a reasonable time to improve their performance standard. When the employer appoints an employee, knowing that he or she lacks key competencies to perform the job properly, it has a duty to assist such employee to acquire the necessary knowledge before it dismisses him or her. If the employee still underperforms despite the assistance that he or she has received, then the employer can fairly dismiss him or her for poor work performance.

Collective bargaining has severely diminished the managerial prerogative to organise business activities. The employers and employees bargain on different matters concerning employment and reach a common consensus. Although there is no duty to bargain, the LRA creates a framework whereby all parties have to promote collective bargaining. Employees have organisational rights to form or join a trade union and office-bearers are entitled to take reasonable time off to perform their union activities. In light of the above, the concept of managerial prerogative has been

¹⁴⁶ *Ibid* 353. See also *Metal & Allied Workers Union v Hart Ltd (1985) 6 ILJ 378 (IC) 493 H – I*. There is a distinct and substantial difference between consultation and bargaining. To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas ‘to bargain’ means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term negotiate is akin to bargain and means to confer with a view to compromise and agreement.

¹⁴⁷ *Strydom* (note 2 above) 317.

¹⁴⁸ *Labour Relations Act* (note 15 above) s. 1 (c) (i).

¹⁴⁹ *Ibid* s. 15.

¹⁵⁰ *Ibid* s. 16 (2) and (3).

severely affected, but one cannot affirm that is now dead.

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