

EMPLOYER PREROGATIVE FROM A LABOUR LAW PERSPECTIVE

by

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To my mother and brother, Michel

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SUMMARY

In the sphere of labour and employment, "prerogative" is usually taken to refer to the "right to manage" an organisation. The right can be divided into those decisions which relate to the utilisation of the human resources of the organisation and decisions of an "economic" or "business" nature. This thesis focuses on the first category of decision-making.

It is generally accepted by employers and trade unions that employers have the right to manage employees. The legal basis for this right is to be found in the contract of employment which has as one of its elements the subordination of the employee to the authority of the employer. This element affords the employer the legal right to give instructions and creates the legal duty for the employee to obey these instructions.

Employers' right to manage is, however, neither fixed nor static. The main purpose of this thesis is to determine the *extent* of employers' right to manage employees. This is done by examining the restrictions imposed by the law (ie common law and legislation) and collective bargaining. The examination is accordingly focussed on what is *left* of employer prerogative.

A number of conclusions are drawn from the examination. One of the most important conclusions reached is that, although most of an employer's common law decision-making powers have been statutorily regulated, none have been *rescinded*. The employer has accordingly *retained* its decision-making power, albeit in a more restricted or limited form. This makes further restriction of its decision-making power through contractual or statutory provisions or collective bargaining possible. It, however, also makes the lessening or even the total removal of these restrictions through future statutory provisions or collective bargaining possible.

Key Terms:

Decision-making power; Duty to obey instructions; Employer prerogative; Managerial prerogative; Prerogative; Right to give instructions; Right to manage; Subordination

PREFACE

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CHAPTER 1

THE ORIGIN, NATURE AND EXTENT OF EMPLOYER PREROGATIVE

1.1 INTRODUCTION

The terms "employer prerogative" and "managerial prerogative" are freely used by employers and trade unions.¹ The management of an enterprise may, for instance, refuse to bargain about a particular matter with a trade union on the ground that it forms part of "management's prerogative". A trade union may demand that management bargains with it over a particular matter as, according to the union, it does not form part of "management's prerogative".

These terms are also used by writers on industrial relations² and labour law,³ arbitrators in labour law disputes,⁴ judges of the supreme court⁵ and the labour appeal court⁶ as

¹ See par 1.5 below where the reasons why the two terms are used as synonyms are discussed.

² See, for example, Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 12; Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* Phd thesis University of Port Elizabeth (1997) 381; Mark Anstey (ed) *Worker Participation: South African Options and Experiences: Proceedings of the 1989 Conference on Worker Participation* (1990) 101; Michael Salamon *Industrial Relations: Theory and Practice* 2 ed (1992) 31; Martin M Perline and David J Poynter "Union and Management Perceptions of Managerial Prerogatives: Some Insight into the Future of Co-operative Bargaining in the USA" (1990) 28 *British Journal of Industrial Relations* 179; Robin Smith "The Maximisation of Control in Industrial Relations Systems" in John Purcell and Robin Smith (eds) *The Control of Work* (1979) 5 and 6; John Purcell "A Strategy for Management Control in Industrial Relations" in John Purcell and Robin Smith (eds) *The Control of Work* (1979) at 27; Richard Hyman *Industrial Relations: A Marxist Introduction* (1975) 152; Neil W Chamberlain "The Union Challenge to Management Control" (1962-63) 16 *Industrial and Labor Relations Review* 184 at 185 and Neil W Chamberlain and James W Kuhn *Collective Bargaining* 3 ed (1986) 112.

³ See, for instance, Maas van den Berg "The Rights of the Employer" (2 December 1983) *Financial Mail* 52; Paul Pretorius "Status Quo Relief and the Industrial Court: The Sacred Cow Tethered" (1983) 4 *ILJ* 167 at 168 and 173-174; Barney Jordaan "Managerial Prerogative and Industrial Democracy" (1991) 11(3) *IRJSA* 1; Darcy du Toit "Democratising the Employment Relationship" (1993) 3 *Stell LR* 325 at 326; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 179; MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 310; D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 8; Philip Selznick *Law, Society, and Industrial Justice* (1980) 178 and 182; MR Feedland *The Contract of Employment* (1976) 46-47 and 50 and Harold B Bergen "Management Prerogatives" (1940) 18 *Havard Business Review* 275.

⁴ See *University of the Western Cape and University of the Western Cape United Workers Union* (1992) 13 *ILJ* 699 (ARB) at 701B-C and 705D-E as well as *Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers* (1990) 11 *ILJ* 1352 (ARB) at 1364H.

⁵ See, for example, *Atlantis Diesel Engines (Pty) Ltd v Roux NO & Another* (1988) 9 *ILJ* 45 (C) at 50H.

⁶ See *Kellogg SA (Pty) Ltd v Food & Allied Workers Union & Others* (1994) 15 *ILJ* 83 (LAC) at 87A and *Changula v Bell Equipment* (1992) 13 *ILJ* 101 (LAC) at 111A.

well as presiding officers of the industrial court.⁷

The terms are generally used as though their meaning is self-evident or universally known and understood. The fact remains, however, that they are not defined in any labour legislation nor have they been afforded a specific meaning in terms of the common law.⁸

1.2 WHAT IS "PREROGATIVE"?

The term "prerogative" denotes a right or privilege which belongs to a particular institution, group, or person.⁹ The term is commonly used in labour law¹⁰ and constitutional law.¹¹

In constitutional law, "prerogative" means the theoretically unlimited discretionary powers or rights of an executive authority such as a sovereign.¹² The discretion or right is only unlimited in theory as it is both created and limited by the common law.¹³ An executive authority can therefore claim no prerogatives except such as the law allows or as are not

⁷See, for example, *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) at 582E-F; *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1992) 13 ILJ 405 (IC) at 407F-H; *BTR Dunlop Ltd v National Union of Metalworkers of SA (2)* (1989) 10 ILJ 701 (IC) at 705C; *Metal & Allied Workers Union v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd* (1988) 9 ILJ 696 (IC) at 701G-H; *Black Allied Workers Union & Others v Palm Beach Hotel* (1988) 9 ILJ 1016 at 1022J; *Fihla & Others v Pest Control Tvl (Pty) Ltd* (1984) 3 ILJ 165 (IC) at 169G-H and *National Union of Mineworkers & Others v Driefontein Consolidated Ltd* (1984) 5 ILJ 101 (IC) at 143 D-E.

⁸The term "common law" is used here as denoting the whole of the law of South Africa that does not originate from legislation. It refers, in other words, to the Roman-Dutch Law (see HR Hahlo and Ellison Kahn *The South African Legal System and its Background* (1973) 132).

⁹See Joyce M Hawkins *The Oxford Paperback Dictionary* 3 ed (1988).

¹⁰See notes 3-7 above.

¹¹See FG Fowler and HW Fowler *The Pocket Oxford Dictionary of Current English* 5 ed (1969); John B Saunders (ed) *Words and Phrases Legally Defined Vol 3:K-Q* 3 ed (1989) 418; IJL Sisson QC *The South African Judicial Dictionary: Being a Dictionary of Words and Phrases as Interpreted by the Superior Courts in the Union, Southern Rhodesia and South West Africa* (1960) 609 and FF Odendaal (ed) PC Schoonees, SJ du Toit and CM Booysen *Verklarende Handwoordeboek van die Afrikaanse Taal* 2 ed (1987) 856.

¹²See Hercules Booysen *Volkereg en sy Verhouding tot die Suid-Afrikaanse Reg* 2 ed (1989) 372; M Wiechers *Verloren van Themaat: Staatsreg* 3 ed (1981) 58-64, 244 and 342; Laurence Boule, Bede Harris and Cora Hoexter *Constitutional and Administrative Law: Basic Principles* (1989) 70 as well as *Sachs v Dongs, NO* 1950 (2) SA 265 (A) and the authorities referred to therein.

¹³See Laurence Boule, Bede Harris and Cora Hoexter *Constitutional and Administrative Law: Basic Principles* (1989) 70 and Dion A Basson and Henning P Viljoen *South African Constitutional Law* (1988) 42.

contrary to any statute.¹⁴ Within the sphere of the prerogative, however, the executive authority has an absolute discretion.

The definition which best defines an executive authority's prerogative is that of Dicey¹⁵

The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown [ie the executive authority]....The prerogative is the name for the remaining portion of the Crown's [ie the executive authority's] original authority, and is therefore,...the name for the residue of discretionary power left at any moment in the hands of the Crown, [ie the executive authority] whether such power be in fact exercised by the Queen [ie the executive authority] herself or by her Ministers.

In the sphere of labour and employment, "prerogative" is usually taken to refer to the "right to manage" an organisation.¹⁶ It refers to the right to make decisions regarding the aims of the organisation and the ways in which it will achieve these aims.¹⁷

Any organisation must have a mechanism for making such decisions. Some person or body of persons must decide what the aims of the organisation are and what resources (human and physical) are needed to achieve these aims. This person or body must also co-ordinate and direct these resources to achieve the aims of the organisation. This is the case whether the organisation has a commercial or any other purpose.

For the purpose of this thesis, the decisions referred to above can be divided into two broad categories. The first relates to decisions about the human resources utilised by the organisation.¹⁸ Typically, but not necessarily,¹⁹ organisations will make use of employees²⁰ to achieve their aims.²¹ Decisions will have to be taken as to the number

¹⁴Ibid.

¹⁵AV Dicey *Introduction to the Study of the Law of the Constitution* 10 ed (1959) 424-425.

¹⁶See *BTR Dunlop Ltd v National Union of Metalworkers of SA (2)* (1989) 10 ILJ 705 (IC) at 705C where the court stated that "the right to trade includes the right to manage that business, often referred to as the managerial prerogative".

¹⁷See *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) at 582 where the court describes the prerogative of an employer as "the totality of the capacity of the employer".

¹⁸See Barney Jordaan "Managerial Prerogative and Industrial Democracy" (1991) 11(3) IRJSA 1 at 2.

¹⁹An organisation may also make use of independent contractors or labour brokers.

²⁰An employee is defined in s 213 of the Labour Relations Act, 66 of 1995 (hereafter the Labour Relations Act, 1995) as "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer".

²¹The legal nature of the employment relationship and contract of employment is discussed in par 2.3 of chapter 2.

and types of employees needed, their terms and conditions of employment, the termination of their employment, where, when and how they do their work and the supervision of their work.

The other category of decisions can be described as decisions of an "economic" or "business" nature.²² These include decisions relating to the acquisition and/or use of physical assets needed by the organisation and decisions regarding the aims of the organisation, the products it produces or the services it provides.

The concept "managerial prerogative" is usually seen as being of special importance when dealing with the first category of decisions. It is linked to the ability of the employer to control the activities of employees in the workplace. In this thesis, the emphasis will be on this type of decision-making. However, the distinction is not a watertight one and many decisions falling within the second category will influence the other category of decision-making.²³ The objectives of the organisation will, for example, influence decisions as to the number and type of employees to be employed by the organisation as well as the terms and conditions of employment that they are offered. A decision to relocate a factory or to make a new investment may affect the job security of employees.²⁴ Where necessary, therefore, attention will also be given to this facet of decision-making.

²²In *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1992) 13 ILJ 405 (IC) at 407F the court referred to this category of decisions as "economic". Barney Jordaan "Managerial Prerogative and Industrial Democracy" (1991) 11(3) IRJSA 1 refers to this category of decision-making as the "power to manage industrial capital".

²³See Bruno Stein "Management Rights and Productivity" (December 1977) *The Arbitration Journal* 270 at 271. See also par 1.7 below.

²⁴See also the facts of *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1992) 13 ILJ 405 (IC) where a decision to mechanise led to retrenchments and *Young & Another v Lifegro Assurance* (1990) 11 ILJ 1127 (IC) where a merger of two businesses resulted in retrenchments. Trade unions are aware of this overlap and in some countries are becoming more assertive in their demands to have some say in the decision-making in the business or economic sphere of enterprises where such decisions impact upon their members (see Bruno Stein "Management Rights and Productivity" (December 1977) *The Arbitration Journal* 270 at 271 as well as par 1.7.3 below where this matter is also discussed). The legislature has come to the assistance of trade unions by providing in s 189 of the Labour Relations Act, 1995 that an employer contemplating the dismissal of employees for operational reasons such as the economic, technological or structural needs of the business, must first consult with the trade union (see par 3.4.3.3.4.2 of chapter 3 in this regard). It has also listed matters which relate to the business sphere of the business such as the restructuring of the workplace, partial or total closures, mergers and transfers of ownership, the dismissal of employees for reasons based on operational requirements, product development plans and export promotion as matters about which the employer must consult with the workplace forum (see s 84 of the Labour Relations Act, 1995 as well as par 4.3.3.1 of chapter 4 where this matter is discussed).

The reference to "economic" or "business" decisions may imply that these decisions are only of relevance to organisations with commercial aims. In this sense the description may be misleading as most organisations,²⁵ whatever their purpose, will have to make this type of decision. Similarly, organisations such as charities and government departments may have to make decisions falling within the first category mentioned above. The legal principles concerning managerial prerogative will normally be just as relevant to such organisations, although their application may differ to some extent, especially as far as employees of the State are concerned.²⁶ This thesis, however, will concentrate on the topic of managerial prerogative in the private sector and in context of commercial undertakings.²⁷

1.3 WHAT IS THE PURPOSE OF MANAGERIAL PREROGATIVE?

The need for some form of managerial prerogative is based on the fact that in any organisation or enterprise a mechanism must exist to co-ordinate the skills, effort and activities of its members so as to attain the goals of the organisation or enterprise.²⁸

Some person or body of persons within the organisation or enterprise must have the power to decide which methods are going to be utilised to achieve its purpose, to allocate functions and duties to members of the organisation and to supervise their activities. Where such powers have been afforded to more than one person, this body of persons will usually exercise its powers within the limits imposed by the hierarchical structure of the organisation.²⁹

²⁵Angus Stewart "The Characteristics of the State as Employer: Implications for Labour Law" (1995) 14 *ILJ* 15 at 17 points out that the rationale for decisions by the State will, however, usually be political rather than economic or profit induced.

²⁶For a discussion of the nature of the employment relationship between the State as employer and its employees, see SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 302 as well as Angus Stewart "The Characteristics of the State as Employer: Implications for Labour Law" (1995) 14 *ILJ* 15 at 16-21.

²⁷In this context, terms such as "business", "enterprise" or "organisation" will be used as synonyms, unless the context indicates otherwise.

²⁸See Paul Davies and Mark Freedland *Kahn-Freund's Labour and the Law* 3 ed (1983) 18 who accept that someone must have the decision-making power in a business or enterprise. See also Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 88; Orme W Phelps *Discipline and Discharge In the Unionized Firm* (1959) at 95; Neil W Chamberlain and James W Kuhn *Collective Bargaining* 3 ed (1986) 66 and P Drucker *The New Society* (1951) 27.

²⁹See Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 88 and Peter Drucker *The New Society* (1951) 27.

Davies and Freedland³⁰ summarise the need for decision-makers in an undertaking as follows

Except in a one man undertaking, economic purposes cannot be achieved without a hierarchical order within the economic unit.

1.4 WHO EXERCISES MANAGERIAL PREROGATIVE?

1.4.1 Introduction

Reference is often made to "employer prerogative" or to "managerial prerogative". This implies that the "right to manage" rests with the employer (who will normally be the owner of the business) or managers appointed by the owner who will act on the owner's behalf.

This view can be seen as the generally accepted view. Jordaan states that amongst South African management, there is "a strong sense of managerial prerogative, that is, 'the right to manage'".³¹ Many³² trade unions also accept this view.³³ Well-known labour law and industrial relations authorities also accept that the right to manage employees vests with employers. Brassey³⁴ states, for example, that "[t]he law gives the employer the right to manage the enterprise".³⁵ Flanders³⁶ expresses employers' right to manage employees in the following terms

³⁰Paul Davies and Mark Freedland *Kahn-Freund's Labour and the Law* 3 ed (1983) 18.

³¹In his article entitled "Managerial Prerogative and Industrial Democracy" (1991) 11(3) *IRJSA* 1.

³²It must be mentioned that not all trade unions share this view; particularly those that hold a radical view of industrial relations (see par 1.7.3 below where this perspective of industrial relations is discussed).

³³See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 603. This view is also generally accepted by trade unions in the United States. Bruno Stein "Management Rights and Productivity" (December 1977) *The Arbitration Journal* 270 at 271 describes their view in the following words, "It is noteworthy, however, that the union does not seek to manage. This task remains in the hands of management. The union may seek to restrict certain managerial actions, but it does not...see its role as co-partner in the managerial function. Thus the employer's right to manage is implicitly acknowledged by the union...".

³⁴Martin Brassey in MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 74. See also Theodorus Poolman *Principles of Unfair Labour Practice* (1985) 101 and *Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union* (1990) 11 *ILJ* 1352 (ARB) at 136H-1365A.

³⁵Martin M Perlman and David J Poynter "Union and Management Perceptions of Managerial Prerogatives: Some Insight into the Future of Co-operative Bargaining in the USA" (1990) 28 *British Journal of Industrial Relations* 179 at 180 talk about "the traditional authority of the employer". See also John Storey *The Challenge to Management Control* (1980) 32 and Daniel Quinn Mills *Labor-Management Relations* 2 ed (1982) 105-106 and 137.

³⁶Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 135.

...the decisions that they [ie employees] have to obey...are taken by management. The management of a business enterprise,...represents its government; on behalf of the enterprise it rules the lives of all employed in it during their working hours.

As appears from the above excerpts, the terms "employer" and "management" are used indiscriminately when employers' right to manage employees is discussed. This is understandable as employers' decision-making powers are mostly exercised by managers who act as the employers' agents.³⁷

1.4.2 The Legal Basis for the Employer's Prerogative

The fact that it is the owner of the business who has the right to manage may seem self evident in the context of our present economic system. The question may of course be asked why this is the case. Why should the owner of the business have the power to manage, as opposed for example, to a "workers' committee" or a body that represents the interests of the other stake holders in the business? The consideration of this question could form the subject of a separate dissertation. Some of the facts relevant to this question will be referred to below.³⁸ This dissertation will proceed from the premise that control does lie with the owners of the business. It will deal with the legal basis of this premise.

Writers such as Poolman³⁹ and Perline⁴⁰ argue that the prerogative is derived from the real right of ownership in the property which comprises the enterprise. Other writers such as Stanley Young⁴¹ and Barney Jordaan⁴² criticise this argument. They point out that the employer's property rights do not extend to employees and that one can therefore not argue that these rights also afford the employer the right to manage its employ-

³⁷See John Storey *The Challenge to Management Control* (1980) 32-33 and 36 as well as Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 135. See further par 1.5 below.

³⁸See par 1.5 below.

³⁹Theodorus Poolman *Principles of Unfair Labour Practice* (1985) 91. See also John Storey *The Challenge to Management Control* (1980) 44-45.

⁴⁰Martin M Perline "Organized Labor and Management Prerogatives" (1971) xiv *California Management Review* 46.

⁴¹In his article entitled "The Question of Managerial Prerogatives" (1962-63) 16 *Industrial Labor Relations Review* 240 at 242. See also Neil W Chamberlain and James W Kuhn *Collective Bargaining* 3 ed (1986) 114.

⁴²In his article entitled "Managerial Prerogative and Industrial Democracy" (1991) 11(3) *IRJSA* 1 at 2.

ees. Property rights give the employer the right to make decisions regarding the economic or business component of the business;⁴³ they do not per se afford the employer the right to manage its employees.

Allan Flanders⁴⁴ argues that the employer's prerogative is based on the fact that only its managers have the necessary skill and expertise to manage present-day undertakings with their large work-forces and advanced technology. It is submitted that, although this argument explains why the employer, or its managers, should in practice manage the employees, it does not provide a legal basis for their prerogative. In addition, this view does not explain why the employer in a relatively small enterprise, where no or little expertise is required to operate machinery, has the power to manage its employees.

Hugh Collins⁴⁵ states that the sources of employers' right to manage, and the employees' obligation to follow instructions, are twofold. The right to manage is firstly based on the market power of the employer. Collins argues that no equality of bargaining power in the labour market exists between the employer and the employee as the former commands capital, information, and access to legal advice. Although there is merit in this viewpoint and it goes a long way to explain the practical realities of the subordinate position of an employee in an employment relationship, these social and economic realities do not confer upon the employer a legal right to manage its employees.

The second ground which Collins advances for employers' prerogative is the bureaucratic organisation of an enterprise.⁴⁶ He states⁴⁷ that when the employee joins an enterprise, he becomes part of a bureaucratic organisation in which he is subordinate to those above him in the system of ranks.⁴⁸ It is submitted that this ground must also be rejected as bureaucratic organisation does not confer a legal duty on the employee to

⁴³See par 1.2 above where this sphere of the business is referred to.

⁴⁴*Management and Unions: The Theory and Reform of Industrial Relations* (1970) at 135. See also John Storey *The Challenge to Management Control* (1980) at 45 and 48-49.

⁴⁵"Market Power, Bureaucratic Power, and the Contract of Employment" (1986) 15 *ILJ(UK)* 1.

⁴⁶At 1.

⁴⁷At 1-2.

⁴⁸At 1-2, "This bureaucratic aspect of subordination arises from the organisational structure rather than from any initial inequality of bargaining power in the market, for it persists even when the employee, either individually or collectively, enjoys strong leverage".

obey instructions from his superiors. It is merely a decision-making structure devised by the employer to exercise the maximum amount of control over its employees.⁴⁹

It is submitted that all of these arguments touch on the economic and social realities of the employment relationship. The relationship is, in most instances, between a bearer of power and someone with little or no bargaining power. These social and economic considerations do not, however, provide a legal basis for the employer's right to manage its employees and, conversely, for the employees to obey its instructions.

For it to be legally enforceable, employer prerogative must have its origin in the law.⁵⁰ Lawyers find its origin in the contract of employment which has as one of its elements the *subordination*⁵¹ of the employee to the authority of the employer.⁵² This element creates the legal right for an employer to manage the employee as well as the legal duty on the employee to adhere to the employer's instructions.⁵³

But the contract of employment cannot be separated from the economic and social realities within which it comes into being. The contract provides the legal foundation for the employer's decision-making power, but this right is buttressed by the employer's greater economic power and social position. The employer will normally be able to negotiate a contract which entrenches and extends its decision-making power to all the activities in the workplace.

⁴⁹See par 1.6 below where the various techniques employed by employers to enforce their prerogative are discussed.

⁵⁰See MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 74; Roger Blanpain "The Influence of Labour Law on Management Decision Making: A Comparative Legal Survey" (1974) 4 *ILJ(UK)* 5 at 6-7; John Storey *The Challenge to Management Control* (1980) 46 and Barney Jordaan "Managerial Prerogative and Industrial Democracy" (1991) 11(3) *IRJSA* 1 at 2.

⁵¹See par 2.3.1 of chapter 2 where subordination, as an element of the contract of employment, is discussed.

⁵²See JC de Wet and AH van Wyk *De Wet en Van Wyk: Die Suid-Afrikaanse Kontraktereg en Handelsreg Vol 1* 5 ed (1992) 383-384; SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 60-63; *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) at 456G-H and *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 60-61. See also Lord Wedderburn *The Worker and the Law* 3 ed (1986) 5 and Dr R Blanpain *Handboek van het Belgisch Arbeidsrecht: I Collectief Arbeidsrecht* 2 ed (1968) 11.

⁵³See pars 2.3.1 as well as 2.4.2 of chapter 2 where subordination as an element of the contract of employment and as the origin of the employer's right to give instructions, is discussed.

Davies and Freedland⁵⁴ explain the structuring, in legal terms, of the social and economic realities of an employment relationship as follows

But the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment".

1.5 MANAGEMENT AS THE AGENT OF THE EMPLOYER

As was mentioned earlier,⁵⁵ the terms "employer prerogative" and "management prerogative" are used as synonyms when employers' right to manage employees is discussed. This is because an employer's decision-making power is usually exercised by managers who act as its agents.⁵⁶

In formal legal terms, the composition and structure of an organisation's management depends primarily on the nature of the particular undertaking. In addition, managers are usually not all afforded the same measure of authority. The management usually consists of managers who collectively form a hierarchical structure of decision-making power.⁵⁷

The relationship between management and the employer or owner of the business usually depends on the legal form of the particular enterprise and generally on the rights attached to ownership by law or custom.⁵⁸

⁵⁴Paul Davies and Mark Freedland *Kahn-Freund's Labour and the Law* 3 ed (1983) at 18.

⁵⁵See par 1.4.1 above.

⁵⁶See John Storey *The Challenge to Management Control* (1980) 32-33 and 36 as well as Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 135. Where the employer's prerogative has been delegated to a manager or managers who are not owners, a separation between ownership and control occurs. Nevertheless, the employer retains control and the manager or managers merely act as its agent or agents. See the discussion later in this paragraph on the separation between ownership and control.

⁵⁷See Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 136 where he states that "...all business organisations of any scale have a hierarchical structure...". See also Hugh Collins "Market Power, Bureaucratic Power, and the Contract of Employment" (1986) 15 *ILJ(UK)* 1 where he states that "[a]n employee normally joins a bureaucratic organisation". See further Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) viii.

⁵⁸See Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 135.

The most important types of enterprises to be found in the *private sector* are one man businesses, partnerships, close corporations and companies.⁵⁹

In a one man business matters such as "prerogative" and "management" do not arise unless the sole proprietor employs people to work for him.⁶⁰ In such circumstances he may delegate some of his decision-making powers to one or more of his employees who will then also form part of management.

In the case of a partnership, the partners constitute the undertaking and they are therefore the employers. They may elect to exercise their prerogative personally,⁶¹ or they may appoint someone else as manager.⁶² When they appoint a manager, the partners delegate their prerogative to that person.

A close corporation is a jurist person⁶³ consisting of between one to ten members⁶⁴ who must all be natural persons.⁶⁵ The members have equal rights in regard to the management of the business⁶⁶ but they can agree that only some of them will have managerial powers.⁶⁷ The managerial power of members is original in nature⁶⁸ and they can therefore delegate some or all of their powers to one or more of the close corporation's employees. Management can therefore consist of members as well as employees.

⁵⁹See JT Pretorius, PA Delpont, Michele Havenga and Maria Vermaas *Hahlo's South African Company Law Through the Cases: A Source Book* 5 ed (1991) 3-4 and 42-43; Cilliers and Benade *Maatskappyereg* 4 ed (1982) 3 and Tom Hadden *Company Law and Capitalism* 2 ed (1977) 47-58 and 95-124.

⁶⁰See Tom Hadden *Company Law and Capitalism* 2 ed (1977) at 97.

⁶¹See JC de Wet and AH van Wyk *De Wet en Yeats: Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5 ed (1992) 393-395 and 400-405. It is possible for the partners to exclude some of them, by agreement, from the management (see JC de Wet and AH van Wyk *De Wet en Yeats: Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5 ed (1992) 385 and 393 in this regard). This will result in only some of the owners having managerial powers.

⁶²See JC de Wet and AH van Wyk *De Wet en Yeats: Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5 ed (1992) 393 as well as *Forder, Ritch & Eriksson v Engar's Heirs* 1973 (1) SA 719 (N) in this regard.

⁶³See s 2 of the Close Corporations Act 69 of 1984 (hereafter the Close Corporations Act).

⁶⁴See s 28 of the Close Corporations Act.

⁶⁵There are exceptions in this regard (see s 29(2)(b) and (c) of the Close Corporations Act).

⁶⁶See s 46(b) of the Close Corporations Act. There are, however, certain members who are disqualified from managing the business of the corporation (see s 47 of the Close Corporations Act).

⁶⁷See s 46 of the Close Corporations Act.

⁶⁸It is afforded to them by the Close Corporations Act (see s 46(a)).

A company is also a juristic person and can only act through its organs.⁶⁹ Usually, a company's decision-making powers are exercised by its board of directors.⁷⁰ The directorate's right to manage the affairs of the company, including its decision-making power regarding employees, is contained in the company's articles of association⁷¹ and is original in nature.⁷² It is therefore possible for the directorate to delegate some or all of its powers to someone else in the company, such as an individual director,⁷³ a managing director,⁷⁴ or even an ordinary employee. Where the directorate has delegated some of its powers, the management of the company will consist of the directorate as well as the persons to whom it has delegated its powers.

Employers in the *public sector* such as the State, also appoint managers who have to manage their employees.⁷⁵ As in the case of private sector enterprises, management in the public sector is usually comprised of managers who collectively form a hierarchical

⁶⁹See Robert R Pennington *Company Law* 6 ed (1990) 32; HS Cilliers and ML Benade *Maatskappyereg* 4 ed (1982) 4 and 261; JC de Wet and AH van Wyk *De Wet en Yeats: Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4 ed (1978) 528-531 and Colin Jack Cohen "The Distribution of Powers in a Company as a Matter of Law" (1973) 90 SALJ 262 at 264.

⁷⁰See JT Pretorius, PA Delpont, Michele Havenga and Maria Vermaas *Hahlo's South African Company Law Through the Cases: A Source Book* 5 ed (1991) 446; RR Pennington *Company Law* 6 ed (1990) 531-614; HS Cilliers and ML Benade *Maatskappyereg* 4 ed (1982) 261, 264 and 298-302 and JC de Wet and AH van Wyk *De Wet en Yeats: Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4 ed (1978) 637 for a general discussion in regard to the directorate. Where a managing director is given specific managerial functions in the articles, he will have exclusive jurisdiction over those functions and will bind the company in regard to any acts by him in this regard. Under these circumstances, he is also an organ of the company and will be regarded as part of management. In this regard, see RR Pennington *Company Law* 6 ed (1990) 583 as well as HS Cilliers and ML Benade *Maatskappyereg* 4 ed (1982) at 263.

⁷¹This is the document in which the internal affairs, such as the mutual rights, duties and capabilities of the directorate and the members in general meeting, as well as the manner in which and by whom the management of the company will be exercised, are set out. See JT Pretorius, PA Delpont, Michele Havenga and Maria Vermaas *Hahlo's South African Company Law Through the Cases: A Source Book* 5 ed (1991) 113-128; RR Pennington *Company Law* 6 ed (1990) 23-26 and HS Cilliers and ML Benade *Maatskappyereg* 4 ed (1982) 113-117 for a general discussion on the articles of association.

⁷²See in this regard *Louw v WP Koöperasie BPK* 1991 (3) SA 583 (A) where the appellate division regarded the fact that the rule *delegatus delegare non potest* is not applicable to the directorate's powers as proof of this. See also HS Cilliers and ML Benade *Maatskappyereg* 4 ed (1982) at 299. Contra, however, LCB Gower, DD Prentice and BG Pettet *Gower's Principles of Modern Company Law* 5 ed (1992) 160. The court in the *Louw*-case was, however, not convinced that Gower was actually expressing the opinion that the directorate's powers are delegated powers (see at 602C-G).

⁷³See pars 62 of table A and 63 of table B of schedule 1 to the Companies Act 61 of 1973 (hereafter the Companies Act).

⁷⁴*Ibid.*

⁷⁵See Theodorus Poolman *Principles of Unfair Labour Practice* (1985) 25.

structure of decision-making power.⁷⁶ In the case of State departments, for instance, the State exercises its prerogative through natural persons such as the heads of these departments⁷⁷ and their subordinate officials.⁷⁸ Their managerial or administrative powers are set out mainly in the Public Service Act 111 of 1984 (hereafter the Public Service Act)⁷⁹ and the regulations issued in terms of this Act.

The delegation by the owner of a one man business of his decision-making power to an employee brings about a separation of ownership and control in the business. This also occurs when the partners of a partnership or the members of a close corporation delegate their decision-making power to manager-employees.

In the case of companies, ownership is vested in the shareholders and control in the directorate.⁸⁰ Where the shareholders are also the directors, as is often the case in small companies, ownership and control are not separated. But where the directorate consists of people who are not all shareholders, a separation of ownership and control occurs.

Even though there is a separation of ownership and control, the owner usually retains the right to withdraw the delegated decision-making power if he is dissatisfied with the manner in which management exercises it.⁸¹ The only possible exception would be where the owner has lost his right to appoint the managers.⁸² This may occur in companies whose shareholders have lost the right to appoint the directorate due to the fact

⁷⁶See Angus Stewart "The Characteristics of the State as Employer: Implications for Labour Law" (1995) 14 *ILJ* 15 at 16 and JNN Cloete *Public Administration and Management* 7 ed (1992) 205.

⁷⁷See JNN Cloete *Public Administration and Management* 7 ed (1992) 129 as well as 202-219. See also SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 303.

⁷⁸Such as, for example, deputy directors-general (heading branches of the particular department), chief directors (heading divisions of the branches) and directors (heading subdivisions of the divisions). See JNN Cloete *Public Administration and Management* 7 ed (1992) 122 and JNN Cloete *Sentrale, Regionale en Plaaslike Owerheidsinstellings van Suid-Afrika* 7 ed (1986) 148 and 151.

⁷⁹See also SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 303-308 for a discussion of those aspects of the Act dealing with terms and conditions of employment in the public sector.

⁸⁰See the discussion on the directorate of a company and its functions earlier in this paragraph.

⁸¹The employer will retain control as long as it can elect the managers (see Adolph A Berle and Gardiner C Means *The Modern Corporation and Private Property* (1991) 66-67 as well as RR Pennington *Company Law* 6 ed (1990) 751).

⁸²See Adolf A Berle and Gardiner C Means *The Modern Corporation and Private Property* (1968) 68 and RR Pennington *Company Law* 6 ed (1990) 751.

that ownership is so widely distributed between them that no group of shareholders is large enough to control the affairs of the company. Under these circumstances, the role of the owners is usually nothing more than that of passive investors whose only recourse is to sell their shares if the dividends are not satisfactory or if they are dissatisfied with the directorate.

Under such circumstances, the directorate no longer merely acts as the agent of the shareholders but de facto controls the enterprise.⁸³ There is, in other words, a complete separation of ownership and control. Atiyah⁸⁴ describes the practical consequences of such a separation as follows

The role of the owner of the business has been converted into that of mere investor, and although at least his property remains readily marketable, his rights of control over the business have, in practice, been almost entirely eroded.

However, Berle and Means⁸⁵ are of the opinion that even under these circumstances, the shareholders can regain control by campaigning amongst themselves for the removal of the directorate. Should they muster sufficient support, the directorate may decide rather to work with the shareholders. Control would then be in the hands of both the directorate and the shareholders.⁸⁶

It is submitted that a complete separation of ownership and control will not necessarily cause the employees to be managed differently.⁸⁷ The managers' interests will usually be similar to those of the owners.⁸⁸ Palmer⁸⁹ explains that in a capitalist society managers have

⁸³See RR Pennington *Company Law* 6 ed (1990) 751; John Storey *The Challenge to Management Control* (1980) 32; Philip Selznick *Law, Society, and Industrial Justice* (1980) 43-52 and 66-67 and Adolf Berle and Gardiner C Means *The Modern Corporation and Private Property* (1968) at 68 and 78-111.

⁸⁴PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 729.

⁸⁵See Adolf Berle and Gardiner C Means *The Modern Corporation and Private Property* (1991) 82.

⁸⁶See Adolf Berle and Gardiner C Means *The Modern Corporation and Private Property* (1991) 83 and 111 where they refer to this scenario as "joint control".

⁸⁷See HA Jordaan *Employment Relationship: Contract or Membership?* unpublished LLD thesis, University of Cape Town (1991) 123. The Marxists and neo-Marxists also argue that, although large companies are no longer controlled by the owner or owners, this does not result in the managers pursuing goals which are fundamentally different from those of the owners. (see Gill Palmer *Economics and Society Series: British Industrial Relations* (1983) 35-36).

⁸⁸See, however, JK Galbraith *The New Industrial State* 3 ed (1978) 52 who expresses the view that, in practice, the interests of the owners are placed secondary to those of management and that large corporations are operated in the interests of management. He nevertheless accepts that management regards corporate growth as the best means to reach their personal goals. It is suggested therefore, that management's interests are, in practice, essentially the same as those of the shareholders.

...the same concern with labour as a cost, and the same need to maximize the effort and flexibility of labour, and to subordinate labour to managerial authority in order to pursue more dominant objectives of efficiency, low costs and reasonable returns on investment.

Managers will also be constrained by their need for capital support from the owners which may be refused if it appears that their objectives are different from those of the owners'.⁹⁰

1.6 EMPLOYER STRATEGIES TO ENFORCE, MAINTAIN AND PROTECT ITS PREROGATIVE

An employer's interest in the employment relationship is motivated primarily by its wish to achieve its ultimate objective. In the private sector, employers' principal aim is the making of profit.⁹¹ With this objective in mind, employers endeavour to exercise their decision-making power in respect of employees in such a way as to ensure the most beneficial conversion of their labour potential into actual labour.⁹² Two broad categories of techniques to enforce their decision-making power can be distinguished, namely those implemented by employers as individual bodies⁹³ and the techniques implemented by employers acting collectively.⁹⁴

1.6.1 Individual Employer Techniques

1.6.1.1 The Enforcement of Employer Prerogative

There are a number of techniques which an employer can employ to enforce its right to manage its employees. One of the principal techniques is to structure decision-making

⁸⁹Gill Palmer *Economics and Society Series: British Industrial Relations* (1983) 35. He further states that nationalisation does not necessarily result therein that the "non-proprietary managers" objectives are different from those of managers in private enterprises.

⁹⁰See Gill Palmer *British Industrial Relations* (1983) 33-35.

⁹¹See Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 12 and Richard Hyman *Industrial Relations: A Marxist Introduction* (1975) 19. There are, however, exceptions such as charitable organisations. The making of profit is also not the main aim of employers in the public sector.

⁹²See Gill Palmer *British Industrial Relations* (1983) 35; Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 12 as well as Richard Hyman *Industrial Relations: A Marxist Introduction* (1975) 19-20.

⁹³See par 1.6.1 below.

⁹⁴See par 1.6.2 below.

or control in the enterprise in such a way as to ensure maximum control over the employees. The type of managerial control which an employer elects, depends on a number of factors such as the size of the enterprise, the type of industry in which the enterprise operates, the personality of the chief executive, the historical background and tradition of the enterprise,⁹⁵ the extent of trade union organisation, the impact of governmental policies, the technology involved⁹⁶ and the speed of technological change.⁹⁷

According to the Marxist economist, Edwards,⁹⁸ three types of managerial control can be distinguished, namely personal,⁹⁹ technological,¹⁰⁰ and bureaucratic control.¹⁰¹

Personal control entails that the employer personally allocates work, issues instructions, checks on the methods used by the employees and monitors the standard of results. This type of supervision would normally be found in small businesses.¹⁰² In large organisations, control is delegated to managers and a pyramidal hierarchy of "line management" ensures that employees receive their instructions from the top.¹⁰³

There appears to be some difference of opinion as to the continued relevance of this form of control. Palmer¹⁰⁴ is of the view that it is no longer widely used whereas both

⁹⁵See Joan Woodward *Industrial Organization: Theory and Practice* 2 ed (1980) 31-32.

⁹⁶See Joan Woodward *Industrial Organization: Theory and Practice* 2 ed (1980) 50.

⁹⁷See Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 15.

⁹⁸Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 18-20.

⁹⁹Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 18-19.

¹⁰⁰Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 20.

¹⁰¹Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 20.

¹⁰²See Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 18-19 as well as 23.

¹⁰³See Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 30-34. Gill Palmer *British Industrial Relations* (1983) 36 refers to this type of organisation as "line organisation".

¹⁰⁴Gill Palmer *British Industrial Relations* (1983) 36.

Edwards¹⁰⁵ and Woodward¹⁰⁶ state that a fairly substantial number of present day employers have implemented this form of control in their businesses.

*Technological control*¹⁰⁷ is achieved through the programming of automated machines or plants which minimise the problem of converting labour potential into actual labour. The assembly line came to be the classic example of this form of control. Technological control reduces workers to mere attendants of prepaced machinery. Workers, however, can cause substantial losses if they refuse to work as all their labour is linked to this one technical apparatus. This form of control actually emphasises workers' homogeneity and has promoted trade unionism.¹⁰⁸ Today, this form of control is seldom implemented on its own by employers. It is usually combined with elements of another structural system of control namely the bureaucratic control system.¹⁰⁹

According to Edwards¹¹⁰ and Palmer¹¹¹ *bureaucratic control*¹¹² is the type of control most often employed by employers.¹¹³ It rests on the principle of embedding control in the social and organisational structure of the workplace.¹¹⁴ It is built into job categories,

¹⁰⁵Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 34 states that this form of control is fairly widely used in the United States.

¹⁰⁶During a survey done by Woodward in 1980 in the United Kingdom it appeared that out of 100 companies whose organisational structures were investigated, 35 had predominantly line organisation type decision-making structures (see Joan Woodward *Industrial Organisation: Theory and Practice* 2 ed (1980) 17-18).

¹⁰⁷Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 20 and 111-129.

¹⁰⁸Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 128 and 130.

¹⁰⁹Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) at 129 and 130.

¹¹⁰Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 21; 131-132 and 146.

¹¹¹Gill Palmer *British Industrial Relations* (1983) 37. He also refers to this form of control as "administrative control".

¹¹²See Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 21.

¹¹³This type of control was first discussed and analysed by Max Weber in *The Theory of Social and Economic Organisation* (1947). See also Craig Littler "Deskilling and Changing Structures of Control" in Stephen Wood (ed) *The Degradation of Work?: Skill, Deskilling and the Labour Process* (1982) 133-145.

¹¹⁴Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 21 and 131.

work rules,¹¹⁵ promotion procedures, discipline, wage scales and definitions of responsibilities. Bureaucratic control establishes the impersonal force of "company rules" or "company policy" as the basis of control.¹¹⁶

This form of control can be divided into two categories namely *control over personnel* and *control over task performance*.¹¹⁷

*Control over personnel*¹¹⁸ relates to the employer's personnel policy and covers provisions regarding the appointment, promotion, rewarding, and disciplining of its employees. The content of each job is formalised and made explicit. Edwards points out that formalising job descriptions does not remove these matters from the realm of workplace conflict. What it does, however, is to ensure that bargaining focuses on the application of the rules and procedures and not on employer prerogative as a whole.¹¹⁹

*Control over task performance*¹²⁰ essentially entails the monitoring and evaluation of work. It is built on two elements. Firstly, the principle that workers should be evaluated on the basis of what is contained in their job descriptions and secondly, hierarchical control in that those who are formally charged with the responsibility of evaluating are themselves subject to bureaucratic control.¹²¹ Weber¹²² argues that this form of control enables management to plan work and thereafter to allocate tasks throughout the organisation while specifying the criteria on which any decisions should be based.

¹¹⁵Rules render complex work situations predictable. Workers accordingly know what is expected of them and managers know what they can expect from their workers. For a discussion of the different reasons for the usage of rules in the control of workers, see Lee Taylor *Occupational Sociology* (1968) 326-328.

¹¹⁶Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 145 states that "Above all else, bureaucratic control institutionalized the exercise of capitalist power, making power appear to emanate from the formal organization itself".

¹¹⁷See Gill Palmer *British Industrial Relations* (1983) 37.

¹¹⁸See Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 136-139.

¹¹⁹See Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 139.

¹²⁰Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 139-142.

¹²¹Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 131 states that "[i]n its most fundamental aspect, bureaucratic control institutionalized the exercise of hierarchical power within the firm".

¹²²Max Weber *The Theory of Social and Economic Organisation* (1947) 52.

According to Palmer¹²³ and Edwards¹²⁴ two managerial strategies, used by employers to promote bureaucratic control, can be distinguished, namely *Taylorism* and *bureaucratic paternalism*.

*Taylorism*¹²⁵ has as its object the deskilling of jobs. It essentially entails that several persons are employed to do various small portions of a particular job with the result that they are largely unskilled and can easily be replaced by the employer. This strategy enables employers to control task performance of employees.¹²⁶ According to Peter Drucker¹²⁷ *Taylorism* largely ignores the human component of labour. He states¹²⁸ that

Scientific Management [ie Taylorism] purports to organize human work. But it assumes - without any attempt to test or to verify the assumption - that the human being is a machine tool...

Employers in both the United States¹²⁹ and the United Kingdom¹³⁰ endeavoured to cure this shortcoming of Taylorism by introducing a form of *paternalism*¹³¹ aimed at

¹²³Gill Palmer *British Industrial Relations* (1983) 39-45.

¹²⁴Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 136-152.

¹²⁵For a detailed discussion on Taylorism as a strategy by management to organise labour, see Harry Braverman *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* (1975) 85-121. See also Craig Littler "Deskilling and Changing Structures of Control" in S Wood (ed) *The Degradation of Work?: Skill, Deskilling and the Labour Process* (1982) 138-143 and Stephen Wood and John Kelly "Taylorism, Responsible Autonomy and Management Strategy" in *The Degradation of Work?: Skill, Deskilling and the Labour Process* (1982) 74 at 75-76.

¹²⁶See also Alan Fox *Man Mismanagement* 2 ed (1985) at 72-73 and Richard Hyman *Industrial Relations: A Marxist Introduction* (1975) 20.

¹²⁷Peter F Drucker *The Practice of Management* (1961) 277.

¹²⁸*ibid* at 277.

¹²⁹In the United States bureaucratic paternalism is inter alia found within the Ford company (see Gill Palmer *British Industrial Relations* (1983) 44-45).

¹³⁰Bureaucratic paternalism is found in the British civil service (see Gill Palmer *British Industrial Relations* (1983) 44). It is also to be found in large German companies such as Siemens and Krupp (see Gill Palmer *British Industrial Relations* (1983) 44).

¹³¹This form of paternalism is based, to a certain extent, upon Japanese paternalism (see Gill Palmer *British Industrial Relations* (1983) 41). The distinguishing features of Japanese paternalism are threefold namely lifetime commitment by employees to a particular employer, group responsibility for tasks, and the existence of reward systems, salary scales, and career progression (see Gill Palmer *British Industrial Relations* (1983) 41-45 and Craig R Littler "A Comparative Analysis of Managerial Structures and Strategies" in F Howard, Gospel and Craig R Littler (eds) *Managerial Strategies and Industrial Relations: An Historical and Comparative Study* (1983) 171 at 186-190). For an informative and detailed discussion of Japanese paternalism, see Ronald Dore *British Factory Japanese Factory: The Origins of National Diversity in Industrial Relations* (1973).

making employees feel part of the enterprise and encouraging them to co-operate with the employer.¹³² This was done through the introduction of employee incentive schemes such as the systematic dispensation of higher pay, promotion, more responsibility,¹³³ access to better or cleaner or less dangerous working conditions, better health benefits, longer vacations and assignment to work stations with more status or comfort.¹³⁴

These incentives increased employees' co-operation thereby affording employers greater control over personnel.¹³⁵ According to Edwards,¹³⁶ these incentives also pushed employees to pursue their self-interests as individuals and worked against trade unionism and the impulse to struggle collectively for those same self-interests.

Although the view is held by some¹³⁷ that bureaucratic control is wasteful, slow and ineffective, others like Edwards,¹³⁸ regard it as the most effective form of control. He states¹³⁹

The core corporations survive and prosper on their ability to organize the routine, normal efforts of workers, not on their ability to elicit peak performances...Bureaucratic control made workers' behaviour more predictable, and predictability brought with it greater control for the corporation.

¹³²See Peter F Drucker *The Practice of Management* (1961) 259 where he states, "We [ie managers] must create a positive motivation...This is one of the central, one of the most urgent tasks facing management".

¹³³See Peter F Drucker *The Practice of Management* (1961) 260 who regards greater worker participation in the planning of work and production (see also 283-295) as extremely important for the maximum utilisation of workers' labour potential. He regards the deskilling of jobs and the exclusion of the worker from the planning of work as the two main weaknesses of Taylorism. According to him, these two aspects present the principle obstacles in the optimum conversion of labour potential into labour (at 275-279). It appears that the South African legislature also shares Drucker's view. In the Labour Relations Act, 1995 it has listed matters such as the introduction of new technology and new work methods, changes in the organisation of work and job grading as matters about which employers must consult with workplace forums (see s 84 as well as par 4.3.3.1 of chapter 4 where this section is discussed).

¹³⁴See Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 142-143.

¹³⁵Edwards refers to these incentives as "...an elaborate system of bribes..." (see Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) at 145).

¹³⁶Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 145.

¹³⁷See, for example, Alvin Gouldner *Patterns of Industrial Bureaucracy* (1954) 174-5.

¹³⁸Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979).

¹³⁹*Ibid* at 146.

Although it is by far the most effective form of control, this system also has faults and weaknesses which, instead of promoting employer prerogative, could actually restrict it. Job security and seniority,¹⁴⁰ for example, often provide precisely those conditions which are most likely to foster demands among workers for more say in establishing rules by which the enterprise is run.¹⁴¹ This form of control also causes rigidity in that the company's emphasis is on long term employment and the training of its workers according to its job descriptions.¹⁴²

1.6.1.2 The Maintenance and Furtherance of Employer Prerogative

Employers' decision-making power regarding their employees is neither fixed nor static.¹⁴³ There is a constant struggle in the workplace between employers and employees. This is because the objectives of the two parties are in conflict. Employers strive to exercise maximum control over their employees to ensure that their labour potential is converted as effectively as possible into actual productive labour.¹⁴⁴ Edwards¹⁴⁵ explains the employer's situation as follows

But the capacity to do work is useful to the capitalist only if the work actually gets done...If labor power remains merely a potentiality or capacity, no goods get produced and the capitalist has no products to sell for profit. Once the wages-for-time exchange has been made, the capitalist cannot rest content. He has purchased a given quantity of labor power, but he must now "stride ahead" and strive to extract actual labor from the labor power he now legally owns...It is this discrepancy between what the capitalist can buy in the market and what he needs for production that makes it imperative for him to control the labor process and the workers' activities.

¹⁴⁰See Lee Taylor *Occupational Sociology* (1968) at 329 where he states that "developing norms of seniority has constituted one of the most powerful elements in the limitation of managerial authority and the protecting of rights of occupational workers".

¹⁴¹Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 153 explains this consequence of the system as follows, "Thus, in establishing those conditions most favorable for bureaucratic control, capitalists inadvertently have also established the conditions under which demands for workplace democracy flourish".

¹⁴²Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 157.

¹⁴³See Richard Hyman *Industrial Relations: A Marxist Introduction* (1975) 26 where he states that "[a]n unceasing power struggle is therefore a central feature of industrial relations". (author's emphasis). See also Barney Jordaan "Managerial Prerogative and Industrial Democracy" (1991) 11(3) *IRJSA* 1 at 4 and 5.

¹⁴⁴See par 1.6.1 in this regard.

¹⁴⁵Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 12.

Employees' main aim is to earn as much as possible to support themselves and their families. They generally have no interest in the profit aims of the business as they have no direct stake therein.¹⁴⁶ Accordingly, employees have little incentive to work as productively as possible and they necessarily resist their employers' efforts in this regard. In Edwards's¹⁴⁷ words

The workplace becomes a battleground, as employers attempt to extract the maximum effort from workers and workers necessarily resist their bosses' impositions.

In addition, employees continuously strive to improve their terms and conditions of employment with the result that constant pressure is exerted by employees, through their trade unions, on employers to bargain about workplace-related matters such as increases, hours of work, leave and health and safety.¹⁴⁸

In view of this ongoing resistance and attacks on their decision-making power, employers have had to develop strategies to *maintain* or *protect* their power.

The strategy or strategies which they adopt depend on a number of factors such as the prevailing economic climate, government policy as reflected in legislation¹⁴⁹ and, of course, the bargaining strength of trade unions and how well they are organised.

Where, for example, the economy is stable or in an upward phase and the trade union's bargaining strength is substantial, an employer may elect to *bargain* with the trade union about the latter's demands.¹⁵⁰ Through its preparedness to bargain, the employer may influence the union positively and succeed in maintaining those aspects of its decision-

¹⁴⁶Some employers have endeavoured to overcome this obstacle by creating schemes in terms of which their employees can share in the profits (see par 5.3.2.17 of chapter 5 where productivity agreements are discussed).

¹⁴⁷Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 13.

¹⁴⁸See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 13; Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 14-15 and Richard Hyman *Industrial Relations: A Marxist Introduction* (1975) 17-18 and 27. See chapter 4 where the restriction of employer prerogative through collective bargaining is discussed. See also chapter 5 where the scope and content of collective bargaining is discussed. See further chapter 6 where the economic pressure which trade unions and employees may exert against employers in order to force them to accede to their demands, is discussed.

¹⁴⁹See chapters 3-4 and 6-7 where the influence of legislation on employer prerogative is discussed.

¹⁵⁰See Howard Gospel "Managerial Structure and Strategies: An Introduction" in Howard F Gospel and Craig R Littler *Managerial Strategies and Industrial Relations: An Historical and Comparative Study* (1983) 1 at 17-18.

making power which it regards as important.¹⁵¹ Should this "co-operation" fail to provide a satisfactory outcome, the employer may decide to use *economic pressure*, such as an (offensive) lock-out or dismissal to protect its prerogative.¹⁵²

Apart from enforcing and maintaining its prerogative, circumstances may also arise where the employer actually wants to *enhance* or *further* its prerogative. Once more, the technique which it would use depends on a number of factors. If the trade union's bargaining power is substantial and the economy fairly healthy, the employer may elect to obtain the co-operation of the trade union through a preparedness to *bargain* with it. Or, the employer may go even further by allowing so-called *participative management*. Tannenbaum¹⁵³ explains that participative management may actually promote employer prerogative. He states¹⁵⁴ that

...participation is often thought to imply taking power from managers and giving it to subordinates, but in fact managers need not exercise less control where there is participation. A reduction in managerial power may occur but it need not, and there is evidence to suggest that participation may be a means through which managers actually increase their own control along with that of the workers.

Others hold the view that although participative management could actually increase employer prerogative, it nevertheless "humanises" it as it ensures greater accountability by management to the employee-directors.¹⁵⁵

Where an employer cannot further its prerogative through collective bargaining or participative management, it may endeavour to achieve this by *unilaterally changing the terms and conditions of employment*¹⁵⁶ of its employees in accordance with its aims or by

¹⁵¹See John Purcell and Robin Smith "Introduction" in John Purcell and Robin Smith (eds) *The Control of Work* (1979) ix at xi as well as Robin Smith "The Maximisation of Control in Industrial Relations Systems" in John Purcell and Robin Smith (eds) *The Control of Work* (1979) 1 at 7.

¹⁵²See chapter 7 where the exercising of economic pressure by employers in order to maintain and further their decision-making power is discussed. See par 3.4.3.3.4 of chapter 3 where the statutory requirements for the fair dismissal of employees for operational reasons are discussed.

¹⁵³AS Tannenbaum "Systems of Formal Participation" in *Organisational Behaviour: Research and Issues* (1974) 78.

¹⁵⁴*ibid* at 78.

¹⁵⁵See Robin Smith "The Maximisation of Control in Industrial Relations Systems" in John Purcell and Robin Smith (eds) *The Control of Work* (1979) 1 at 19-20.

¹⁵⁶The employer will nevertheless have to go about this very carefully. Should it dismiss employees in order to force them to agree to changes in their terms and conditions of employment, their dismissal may be branded as automatically unfair in terms of s 187(1)(c) of the Labour Relations Act, 1995 (see par 3.4.3.2 of chapter 3 in this regard). But, if it could prove that it had to change the employees' terms and conditions for economic reasons and their refusal to accept the new terms and conditions made them redundant, the employer may be able to dismiss them fairly for operational reasons (see par 3.4.3.3.4.1 of chapter 3 where this matter is discussed).

implementing *economic pressure* such as an (offensive) lock-out or even the dismissal of its employees.¹⁵⁷

1.6.2 Collective Employer Techniques

Although employers normally act on their own¹⁵⁸ when endeavouring to either enforce, maintain or further their prerogative, circumstances may prompt employers to act collectively. They may establish or join employers' organisations¹⁵⁹ or bodies for a number of reasons. Where, for example, employers' organisations bargain at central and regional level with trade unions, the latter are largely kept out of the work-places.¹⁶⁰ Employers may also endeavour to influence Government and its legislation-making functions through these organisations.¹⁶¹

The fact that employers' organisations are made up of a number of employers, each with their own employment policies and interests, makes it difficult for these bodies to act as

¹⁵⁷See chapter 7 where the exercising of economic power by the employer against the trade union and employees is discussed. See also par 3.4.3.3.4 of chapter 3 where the statutory requirements for a fair dismissal for operational reasons are examined.

¹⁵⁸See Paul Davies and Mark Freedland *Kahn-Freud's Labour and the Law* 3 ed (1983) at 17 where they point out that an individual employer is a collective entity, "The individual employer represents an accumulation of material and human resources, socially speaking the enterprise is itself in this sense a 'collective power.' If a collection of workers (whether it bears the name of a trade union or some other name) negotiate with an employer, this is thus a negotiation between collective entities, both of which are, or may at least be, bearers of power".

¹⁵⁹In regard to South African employers' organisations, a distinction can be made between those which are registered in terms of the Labour Relations Act, 1995 and those which are not so registered. The Labour Relations Act, 1995 has a number of provisions relating to registered employers' organisations (see chapter VI thereof). For more information on South African employers' organisations, see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 190-193 and 237-328; MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 23-27, 325-326 and 349 as well as SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 233-234. See Gill Palmer *British Industrial Relations* (1983) 52-59 for a historical account of the development and functions of employers' organisations in Britain and at 62-66 for a discussion on the structure of these organisations.

¹⁶⁰The Labour Relations Act, 1995 specifically promotes collective bargaining by employers' organisations with trade unions at sectoral level (see s 1 and s 27(1) as well as par 4:2.6 of chapter 4 in this regard). See also Howard Gospel "Managerial Structure and Strategies: An Introduction in Howard F Gospel and Craig R Littler (eds) *Managerial Strategies and Industrial Relations: An Historical and Comparative Study* (1983) 18.

¹⁶¹In South Africa, employers often establish so-called chambers of commerce or industry for this purpose (see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 190). See further Gill Palmer *British Industrial Relations* (1983) 62 who states that the influencing of government through employer organisations is particularly prevalent in Germany and Sweden.

collective entities and to present a united front against trade unions and Government. There are, however, certain factors which may induce employers to act collectively. Gennard¹⁶² points out that small enterprises realise that they can present a more dynamic and effective front against trade unions and Government if they act collectively. He also states that companies, which have a low level of bureaucratic management control,¹⁶³ and those who make use of casual labour,¹⁶⁴ tend to act collectively.

Palmer¹⁶⁵ states that in Britain the importance of employers' organisations has declined as a result of two employers' policies namely the *strategic independence policy* and the *policy of federalism*. The *strategic independence policy* is prevalent in large companies which have adopted a bureaucratic personnel policy¹⁶⁶ and prefer to negotiate independently with unions through their specialist staff departments. The *policy of federalism* entails the decentralisation of control in an enterprise with the result that lower, local levels of management bargain with the unions.

In South Africa, employers' organisations play a fairly important rôle in the collective bargaining process, particularly at sectoral¹⁶⁷ or industry level where they counter-balance the bargaining strength of the bigger trade unions which usually bargain at these levels.¹⁶⁸ These bodies' primary function is to ensure uniformity in wages and other conditions of employment.¹⁶⁹ Bendix¹⁷⁰ points out that in negotiating uniform

¹⁶²J Gennard *Multinationals-Industrial Relations and Trade Union Response* (Occasional Paper: Universities of Leeds and Nottingham (1976)).

¹⁶³Employers who have bureaucratised their personnel policy (see par 1.6.1.1 above), by offering internal careers to their employees, are less likely to need to act collectively with other employers as they do not share a labour market with them. See Gill Palmer *British Industrial Relations* (1983) 69.

¹⁶⁴Casual labour tends to move constantly between employers and the use of standard, industry-wide rates of pay does away with the need to negotiate terms with the union every time such labourers are employed (see par 5.3.2.28 of chapter 5 where the terms and conditions of casual workers which have been determined through collective bargaining, are discussed). It also prevents the poaching of labourers by employers which can offer higher rates and enables employers to predict labour costs.

¹⁶⁵Gill Palmer *British Industrial Relations* (1983) 60-62.

¹⁶⁶See par 1.6.1.1 above in this regard.

¹⁶⁷The Labour Relations Act, 1995 subscribes to collective bargaining at sectoral level (see ss 1 and 27(1) as well as par 4.2.6 of chapter 4 in this regard).

¹⁶⁸Examples of such collective employer bodies are the Chamber of Mines and the Steel and Engineering Industries Federation of South Africa.

¹⁶⁹See par 4.2.6 of chapter 4 where this matter is discussed more fully.

¹⁷⁰Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 192-193.

wage structures at sectoral level, employers' organisations try to prevent unions from using an agreement about wages with one employer as a starting point for its negotiations with the next employer.¹⁷¹

In industrial disputes, employers' organisations may implement the same sanctions as those implemented by individual employers to maintain or further their prerogative such as lock-outs, unilateral amendment of terms and conditions of employment, threats of closure, suspensions and dismissals.¹⁷² These organisations may co-ordinate employers' usage of such sanctions and provide moral or financial support on a formal or an ad hoc basis for members engaged in industrial action.

1.7 THE EXTENT OF EMPLOYER PREROGATIVE

As was indicated above,¹⁷³ most employers, trade unions,¹⁷⁴ industrial relations and labour law writers accept that employers have the right to manage their employees. However, it is one thing to accept that employers have this "right to manage". It is another to determine the *extent* of this right. This is the purpose of this thesis. In the remaining paragraphs of this chapter as well as the chapters that follow, the extent of and limitations on employer prerogative will be discussed and analysed.

In this paragraph, the views of the various role players on the *extent* of employers' prerogative are examined.

1.7.1 An Industrial Relations Perspective on The Extent of Employer Prerogative

It appears that most¹⁷⁵ industrial relations writers¹⁷⁶ hold a pluralist view¹⁷⁷ of industrial relations. They regard the undertaking as a coalition of diverse interest groups such

¹⁷¹Bargaining at sectoral level by the bigger trade unions is also beneficial for employees as it ensures the best minimum wages in the industry and protects workers who belong to smaller unions and those who are not unionised against exploitation. See par 4.2.6 of chapter 4 where this matter is discussed more fully.

¹⁷²See par 1.6.1 above as well as chapter 7 below.

¹⁷³See par 1.4.1 above.

¹⁷⁴There are, however, certain trade unions which hold the view that employees should have a say in respect of all aspects of the business, including its economic sector (see pars 1.2 and 1.4.1 above as well as par 1.7.3 below in this regard).

¹⁷⁵However, there are those who hold the so-called radical or marxist view of society and, by implication, of industrial relations. For a discussion of this view and its proponents, see Alan Fox *Beyond Contract: Work, Power and Trust Relations* (1974) 274-296.

¹⁷⁶See, for instance, Alan Fox "Industrial Sociology and Industrial Relations: An Assessment of the Contribution which Industrial Sociology can make towards Understanding and Resolving some of the Problems

as the employees and their trade unions, shareholders and consumers, presided over by a top management which serves the long-term needs of the organisation by paying due concern to all these different interests.

Most of these industrial relations writers distinguish between the two components of an enterprise namely its business or economic component and its labour or human resources component.¹⁷⁸ They accept that the employer has exclusive decision-making power in regard to the economic or business component of the business. It therefore has the right to make decisions about economic matters such as profit reinvestment, the goodwill of the business, and managers' salaries.¹⁷⁹ These writers also accept that the employer's prerogative regarding the employees must be restricted. In their view, the employer should be obliged to negotiate or bargain with the trade union about matters which fall within the so-called job territory or immediate work environment of employees.¹⁸⁰

The pluralist view that an employer's prerogative regarding its employees can be limited through collective bargaining is apparent from Mars and Evans's¹⁸¹ definition of employer prerogative. According to them, employer prerogative entails

the rights or functions which managements assert to be exclusively theirs and hence not subject to collective bargaining with trade unions, nor to joint regulation with unions or employees.

now being considered by the Royal Commission" in *Royal Commission on Trade Unions and Employers' Associations: Research Papers 3: Industrial Sociology and Industrial Relations* (1966) 1 as well as David Farnham and John Pimlott *Understanding Industrial Relations* (1979) 58 and 65-66.

¹⁷⁷In regard to pluralism, see Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 119-125; Michael Salamon *Industrial Relations: Theory and Practice* 2 ed (1992) at 33-36; HA Clegg "Pluralism in Industrial Relations" (1975) 13 *British Journal of Industrial Relations* 309-316. See also Richard Hyman "Pluralism, Procedural Consensus and Collective Bargaining" (1978) 16 *British Journal of Industrial Relations* 16-40. Hyman points out that there are significant variations in the form and derivation of industrial relations pluralists' pluralism.

¹⁷⁸See par 1.2 above where this distinction is also made.

¹⁷⁹See Martin M Perlman and David J Poynter "Union and Management Perceptions of Managerial Prerogatives: Some Insight into the Future of Co-operative Bargaining in the USA" (1990) 28 *British Journal of Industrial Relations* 179 at 182 and 186.

¹⁸⁰*Ibid.*

¹⁸¹Al Mars and EO Evans *The Dictionary of Industrial Relations* (1973). See also Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 123 where they state that "[f]or the pluralist, collective bargaining is 'the right way' of dealing with industrial conflict". See further Jay M Shafritz *The Facts on File: Dictionary of Personnel Management and Labor Relations* 2 ed (1985) 252; Robin Smith "The Maximisation of Control in Industrial Relations Systems" in John Purcell and Robin Smith (eds) *The Control of Work* (1979) 6 and Roux van der Merwe "Focus on Employers' Rights" (6 January 1984) *Financial Mail* 34.

Although the majority of industrial relations writers mention only collective bargaining as a factor which must limit or restrict the employer's prerogative, there are some writers who also regard the law as such a factor. Storey,¹⁸² for instance, defines employer prerogative as

...the residue of discretionary powers of decision left to management when the regulative impacts of law and collective agreements have been subtracted.

Flanders¹⁸³ identifies not only collective bargaining and the law as factors which restrict the employer's prerogative, but also control by the market and accountability. Market control relates to the availability of work which, in turn, depends mainly on the economy. Employer prerogative is at its strongest when the economy is at its weakest, as a weak economy results in jobs scarcity and a large potential work-force for employers to choose from. Flanders¹⁸⁴ argues that employers should be accountable for their actions to employees. Worker participation¹⁸⁵ in management decision-making has been suggested¹⁸⁶ as a way in which this can be achieved, but Flanders¹⁸⁷ expresses some reservations about its effectiveness.¹⁸⁸

¹⁸²John Storey *The Challenge to Management Control* (1980) 41.

¹⁸³Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 136-139.

¹⁸⁴Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 138-139.

¹⁸⁵See Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) where he distinguishes between direct employee participation (at 474-486) and indirect participation (at 486-498). For an in depth discussion of the diverse streams in employee participation, see Mark Anstey's thesis 471-527.

¹⁸⁶See the suggestions made by George Goyder *The Responsible Company* (1961) 81.

¹⁸⁷Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 139. See also the reservations expressed by, for example, Roy Lewis and John Clark "Reports of Committees" (1977) 40 *Modern Law Review* 323-338 in regard to the *Report of the Committee of Inquiry on Industrial Democracy* CMND 6706 (1977), (the so-called Bullock Report) which propagated some form of worker participation in the United Kingdom.

¹⁸⁸However, in Germany, the Netherlands as well as in Sweden, some form of worker participation is to be found. See in this regard Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 474, 487-498; Catherine O'Regan "Possibilities for Worker Participation in Corporate Decision-making" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D van Zyl Smit (eds) *Labour Law* (1991) 125-126 and J Schregle "Workers' Participation in the Federal Republic of Germany in an International Perspective" (1987) 126 *International Labour Review* 317-327.

1.7.2 Employers' Perspective on the Extent of their Prerogative

Most employers, when first confronted with trade unions and their demands, were of the view that their prerogative should not be restricted in any way.¹⁸⁹ In justifying their view, employers often adopted a unitary¹⁹⁰ perspective of industrial relations. They argued that every enterprise was an integrated and harmonious entity which existed for a common purpose. The proponents of this view assumed that every employee identified with the aims of the business. According to this view, there could be no conflict between the interests of the employer and the employees. The employer and employees were complementary partners committed to the common aims of production, profits and pay in which everyone in the organisation had a stake. Managers and employees alike were merely parts of the same team.

Today, a unitary perspective of industrial relations may still be found in relatively small businesses with strong-willed or charismatic persons in the top management positions, in old family businesses and in businesses in relatively isolated areas where alternative jobs are few and trade unions not well organised.¹⁹¹

¹⁸⁹See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 603. This was also the original view of most employers in the United States during the first quarter of this century (see Martin M Perline and David J Poynter "Union and Management Perceptions of Managerial Prerogatives: Some Insight into the Future of Co-operative Bargaining in the USA" (1990) 28 *British Journal of Industrial Relations* 179 at 180-181; Neil W Chamberlain "The Union Challenge to Management Control" (1962-63) 16 *Industrial and Labour Relations Review* 184 at 185-186 and Neil W Chamberlain and James W Kuhn *Collective Bargaining* 3 ed (1986) 8-16). The United States' National Metal Trade Association's declaration of principles (see Reinhard Bendix *Work and Authority in Industry: Ideologies of Management in the Course of Industrialization* (1956) 269 as well as Neil W Chamberlain and James W Kuhn *Collective Bargaining* 3 ed (1986) 109-110) at the end of the First World War included the following passage, "Since we, as employers, are responsible for the work turned out by our workmen, we must have full discretion to designate the men we consider competent to perform the work and to determine the conditions under which that work shall be prosecuted, the question of the competency of the men being determined solely by us. While disavowing any intention to interfere with the proper functions of labor organizations, we will not admit any interference with the management of our business".

¹⁹⁰In regard to the unitary perspective of industrial relations, see Allen Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 118-119 and Mark Anstey *Managerial Strategy in Industrial Relations: A Theoretical Review and Survey of Trends in the Port Elizabeth Uitenhage Area* (1989) 14-17. See also Michael Salamon *Industrial Relations: Theory and Practice* 2 ed (1992) 31-33; David Farnham and John Pimlott *Understanding Industrial Relations* (1979) 51-55; Alan Fox *Man Mismanagement* 2 ed (1985) at 31 and 146-148; Alan Aldrige *Power, Authority and Restrictive Practices: A Sociological Essay on Industrial Relations* (1976) 109-110 and Alan Fox *Beyond Contract: Work, Power and Trust Relations* (1974) 249-250.

¹⁹¹See Mark Anstey *Managerial Strategy in industrial Relations: A theoretical Review and Survey of Trends in the Port Elizabeth Uitenhage Area* (1989) at 15. See also Alan Fox *Beyond Contract : Work, Power and Trust Relations* (1974) 250.

Employers, however, have come to realise that a unitarist approach may harm the business, particularly where well organised trade unions represent their employees.¹⁹² They have found that such an approach may lead to friction with the trade unions and work force.¹⁹³ Most¹⁹⁴ of them have consequently adopted a pluralist view¹⁹⁵ in terms of which they have accepted that certain aspects of the business are of importance to the trade unions and the employees and should therefore be made subject to collective bargaining. Labour legislation, which affords employees the right to associate in trade unions¹⁹⁶ and promotes collective bargaining¹⁹⁷ has also played an important role in the employers' adoption of a pluralist view of industrial relations.¹⁹⁸

In determining which matters must be made subject to collective bargaining, most employers clearly distinguish between the economic and labour spheres of the business. They are not prepared to bargain about matters related to the former sphere as they consider them to be within their exclusive prerogative. Employers, however, are prepared to bargain about labour related issues.¹⁹⁹

¹⁹²See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 603. Employers in the United States have also come to this conclusion (see Martin M Perline "Organized Labor and Managerial Prerogatives" (1971) xiv *California Management Review* 46 and Philip Selznick *Law, Society, and Industrial Justice* (1980) 181).

¹⁹³See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 603.

¹⁹⁴See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 576 and Brian Smith "Volkswagen's Holistic Approach to Worker Participation" in Mark Anstey (ed) *Worker Participation: South African Options and Experiences: Proceedings of the 1989 Conference on Worker Participation* (1990) 225 at 230-231. This is also the case in most Western societies (see Alan Fox *Man Mismanagement* 2 ed (1985) 26).

¹⁹⁵For a discussion on the pluralist view, see Mark Anstey *Managerial Strategy in Industrial Relations: A Theoretical Review and Survey of Trends in the Port Elizabeth Uitenhage Area* (1989) 17-19. See also Michael Salamon *Industrial Relations: Theory and Practice* 2 ed (1992) 33-36; Alan Fox *Man Mismanagement* 2 ed (1985) 26-32; Alan Aldrige *Power, Authority and Restrictive Practices: A Sociological Essay on Industrial Relations* (1976) 110; HA Clegg "Pluralism in Industrial Relations" (1975) 13 *British Journal of Industrial Relations* 309-316 and David Farnham and John Pimlott *Understanding Industrial Relations* (1979) 57-58.

¹⁹⁶See s 4 of the Labour Relations Act, 1995. See also s 5 of the Act which affords employees and applicants for positions protection when exercising their right to freedom of association (see also par 4.2.2 of chapter 4 where these two sections are discussed in detail).

¹⁹⁷See par 4.2 of chapter 4 where the statutory promotion of collective bargaining is discussed more fully.

¹⁹⁸See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 603. This has also been the case in other countries such as the United Kingdom (see Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) 138).

¹⁹⁹See Catherine O'Regan "Possibilities for Worker Participation in Corporate Decision-making" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D Van Zyl Smit (eds) *Labour Law* (1991) 113 at 132. See also chapter 5 in which the matters about which South African employers and trade unions have bargained collectively, are set out.

A number of employers are even prepared to involve their employees, as opposed to the trade unions, for example, directly at shop floor level in labour related matters.²⁰⁰ The word "involve" is used as opposed to the word "bargain" as worker participation often does not entail more than the making available of information or the providing of training or the creation of opportunities for employees to get to know management²⁰¹ or to air their views or complaints about their jobs.²⁰² Recently, however, employers have been prepared to consider and/or introduce forms of worker participation that are more extensive such as negotiation, consultation and joint decision-making and the topics for such participation include ones that fall within the business sphere of the enterprise.²⁰³ One of the reasons given for this preparedness is the changes in the country's labour law; particularly the provisions regarding workplace forums²⁰⁴ in the Labour Relations Act, 1995.²⁰⁵

1.7.3 Trade Unions' Perspective on the Extent of Employer Prerogative

Trade unions' views on the extent or scope of employer prerogative differ from those of employers as they have other interests to protect and advance. A trade union's primary

²⁰⁰See, for example, worker participation at Volkswagen which is discussed by Brian Smith "Volkswagen's Holistic Approach to Worker Participation" in Mark Anstey (ed) *Worker Participation: South African Options and Experiences: Proceedings of the 1989 Conference on Worker Participation* (1990) 225. See also Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 544-546 and 550-556.

²⁰¹See Brian Smith "Volkswagen's Holistic Approach to Worker Participation" in Mark Anstey (ed) *Worker Participation: South African Options and Experiences: Proceedings of the 1989 Conference on Worker Participation* (1990) 225 at 235-238.

²⁰²See Steve Dewar "Total Worker Involvement at Toyota" in Mark Anstey (ed) *Worker Participation: South African Options and Experiences: Proceedings of the 1989 Conference on Worker Participation* (1990) 241 at 253-255.

²⁰³See Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 544-546, 551-554.

²⁰⁴A workplace forum is defined in s 213 of the Labour Relations Act, 1995 as "a workplace forum established in terms of chapter V". For a detailed discussion of workplace forums, their statutory functions and impact on employer prerogative, see par 4.3 of chapter 4.

²⁰⁵See Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 552. In terms of the Labour Relations Act, 1995 employers are obliged to consult workplace forums about a list of matters (see s 84 as well as par 4.3.3.1 of chapter 4 where this section, and its effect on employer prerogative, are discussed). The Act also lists a number of matters about which employers and workplace forums must jointly decide (see s 86 as well as par 4.3.3.2 of chapter 4 where this section, and its effect on employer prerogative, are discussed).

function is to protect and further the interests of its members, the employees,²⁰⁶ whereas an employer seeks to promote the enterprise's and owners' interests.²⁰⁷

It appears that most trade unions hold a pluralist view of industrial relations and that they regard collective bargaining as the factor which restricts employer prerogative.²⁰⁸ They seem to accept that the business or economic sphere of the business should be left to management but insist that matters which concern the employment relationship such as wages, job security, job safety and health, scheduling of shifts, job content and the transfer of workers must be subject to collective bargaining.²⁰⁹

The major difficulty which employers and trade unions experience during negotiations is to reach agreement on the scope or range of matters which form part of the employment

²⁰⁶See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 165-166 and 171-175. In *University of the Western Cape and University of the Western Cape United Workers Union* (1992) 13 ILJ 699 (ARB) the arbitrator set out the main aim of a trade union as follows, "[t]he union on the other hand is primarily although not exclusively concerned with the protection and improvement of the interests of its members with specific regard to their working conditions". See also Alan Fox *Man Mismanagement* 2 ed (1985) 262; Neil W Chamberlain "The Union Challenge to Management Control" (1962-63) 16 *Industrial and Labour Relations Review* 184 at 186 and Martin M Perline "Organized Labor and Managerial Prerogatives" (1971) xiv *California Management Review* 46 at 47.

²⁰⁷See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 5.

²⁰⁸See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 576. There are, however, trade unions that hold other views such as, for example, the so-called radical view of industrial relations (see the discussion on this view later in this paragraph). Most trade unions in the Western world also hold a pluralist view. This is apparent from the following excerpt from Arthur Goldberg's speech (see "Management's Reserved Rights: A Labor View" in Jean T McKelvey (ed) *Management Rights and the Arbitration Process, Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators* (1956) 125-126), "...the practices which grow up during decades of a collective bargaining relationship cannot be swept aside...[they] inevitably represent the set of circumstances which formed the backdrop of the negotiation of the current agreement....To the extent that present conditions and methods for change are not revised, they are accepted. Therefore, each party has the right to assume that changes in wages, hours or working conditions not provided for by contract can be made only by mutual agreement or by following practices for making changes which have existed during the collective bargaining relationship ... To suggest that management can make changes at will unless the contract specifically bars it is unfair and can lead to placing so many bars in the contract as to make successful negotiation increasingly difficult and operation less and less flexible, with detailed consideration of the facts and merits of each case replaced by precise rules and regulations".

²⁰⁹In a survey done by Perline and Poynter in the United States, (see Martin M Perline and David J Poynter "Union and Management Perceptions of Managerial Prerogatives: Some Insight into the Future of Co-operative Bargaining in the USA" (1990) 28 *British Journal of Industrial Relations* 179 at 185) trade unions indicated that they accepted that aspects such as the pricing of goods and services, promotions to supervisory positions, the distribution of products, financial policies, customer relations, decisions regarding the products to be manufactured, control of plant property and services to be rendered, remained the prerogative of the employer. See further Martin M Perline "Organized Labor and Managerial Prerogatives" (1971) xiv *California Management Review* 46 at 49 and Alan Fox *Man Mismanagement* 2 ed (1985) 35 and Harold W Davey, Mario F Bognanno and David L Estenson *Contemporary Collective Bargaining* 4 ed (1982) at 155.

relationship and consequently should be subject to collective bargaining. Some trade unions have insisted that certain aspects which are generally regarded as part of the business sphere of an enterprise should be subject to collective bargaining where they impact on employees and the employment relationship.²¹⁰

Although most trade unions hold a pluralist view of industrial relations, there are a substantial number²¹¹ which hold a so-called radical view.²¹² From a radical perspective, pluralist values are seen as reflecting merely a more sophisticated mode of maintaining an unacceptable system which witnesses wealth and ownership increasingly concentrated in the hands of employers at the expense of the employees who do not receive wages commensurate with the wealth they produce.²¹³ Unions which subscribe to the radical view, demand to bargain in respect of both spheres of an enterprise.²¹⁴ They argue that the imbalance in power will not be restored as long as they are prevented from bargaining collectively over issues which belong to the economic or business sphere of the business.

²¹⁰For a discussion of some of the business aspects which trade unions have demanded should be subject to collective bargaining, see Ebrahim Patel "The Role of Organised Labour in a Democratic South Africa" in Ebrahim Patel (ed) *Worker Rights: From Apartheid to Democracy - What Role for Organised Labour?* 1 (1994) at 8 where Patel suggests that new technology and work organisation should be matters of compulsory negotiation.

²¹¹See Charles Nupen "Collective Bargaining Realities in South Africa: Problems and Potentials" in Mark Anstey (ed) *Worker Participation: South African Options and Experiences: Proceedings of the 1989 Conference on Worker Participation* (1990) 35 at 37.

²¹²For a discussion of this view, see Mark Anstey *Managerial Strategy in Industrial Relations: A Theoretical Review and Survey of Trends in the Port Elizabeth Uitenhage Area* (1989) 20-21. See also Michael Salomon *Industrial Relations: Theory and Practice* 2 ed (1992) 36-39; Alan Fox *Man Mismanagement* 2 ed (1985) 32-36 and 149-150 and David Farnham and John Pimlot *Understanding Industrial Relations* (1979) 62-64.

²¹³See Mark Anstey *Managerial Strategy in Industrial Relations: A theoretical Review and Survey of Trends in the Port Elizabeth Uitenhage Area* (1989) at 20.

²¹⁴David Farnham and John Pimlot *Understanding Industrial Relations* (1979) 63 state that "[t]hey [ie the radical trade unions] are challenging all the prerogatives which go with the ownership of the means of production, not simply the exercise of control over labour power in industry". Elements of the so-called radical view can be found in the comments made by the chairperson of the Western Cape United Workers Union whilst testifying during the arbitration proceedings of *University of the Western Cape and University of the Western Cape United Workers Union* (1992) 13 ILJ 699 (ARB) at 703G-J.

1.7.4 A Labour Law Perspective on the Extent of Employer Prerogative

Most labour law writers and lawyers make the distinction between the economic and labour components of an enterprise.²¹⁵

In regard to the economic sphere, the majority are of the view that management has a decisive say over the conduct of the enterprise and over all business and commercial decisions.²¹⁶ Jordaan, however, argues that employees have "a very real stake" in the enterprise and that they should be allowed a say therein through some or other form of worker participation or co-determination, particularly where business decisions could affect their security of tenure.²¹⁷ He states²¹⁸

but even if one accepts that there must be some decisions which fall exclusively within management's discretion, ... there is no reason, either in logic or in law, why the employees should not at least be 'consulted' about decisions which concern the economic position or future direction of the undertaking and, ultimately, their security of tenure....In any event, the dividing line between the interests of the employer and those of the employee is notoriously difficult to draw. Every decision by management is potentially of consequence to the employee. The mere fact that the decision concerns the future direction of the undertaking does not make the employee's interest in the decision any less real or acute - quite the contrary, in fact.

The presiding officers of the industrial court acting in terms of the Labour Relations Act 28 of 1956 (hereafter the Labour Relations Act, 1956) held different views about the question whether or not employees should have a say in business decisions which could impact on their employment security such as decisions to temporarily²¹⁹ or permanently close a business or a division²²⁰ thereof, to merge,²²¹ or to mechanise.²²²

²¹⁵See Cameron's comments in *Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union* (1990) 11 ILJ 1352 (ARB) at 1365. See also Barney Jordaan "Managerial Prerogative and Industrial Democracy" (1991) 11(3) IRJSA 1 at 3.

²¹⁶See, for instance, Cameron in *Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union* (1990) 11 ILJ 1352 (ARB) at 1365D-E.

²¹⁷Barney Jordaan "Managerial Prerogative and Industrial Democracy" (1991) 11(3) IRJSA 1 at 3. See also B Jordaan "Transfer, Closure and Insolvency of Undertakings" (1991) 12 ILJ 935 at 958.

²¹⁸In an article entitled "Transfer, Closure and Insolvency of Undertakings" (1991) 12 ILJ 935 at 958.

²¹⁹See the facts of *Amalgamated Clothing & Textile Workers Union of SA v SBH Cotton Mills (Pty) Ltd* (1988) 9 ILJ 1026 (IC) at 1031.

²²⁰See, for example, *Transport & General Workers Union & Others v Putco* (1987) 8 ILJ 801 (IC) at 806-807.

²²¹See the facts of *Young & Another v Lifegro Assurance* (1990) 11 ILJ 1127 (IC).

²²²See, for instance, the facts of *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1992) 13 ILJ 405 (IC).

In view of the appellate division's decision in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA*²²³ and ss 84²²⁴ and 189²²⁵ of the Labour Relations Act, 1995, it could be argued that the labour court will require employers to at least *consult* with workplace forums or trade unions before implementing business decisions which may impact upon employees' employment security. Consultation, however, does not mean that the assent or co-operation of the workplace forum or trade union must be obtained before the employer can implement its decision. It only means that they must be afforded an opportunity to state their views and to make suggestions and recommendations.²²⁶ Strictly speaking therefore the employer's prerogative is limited only to a certain extent in that it retains the last say over these business issues.²²⁷

The courts and arbitrators, acting in terms of the Labour Relations Act, 1956 were of the view that business decisions which did not impact on employees' security of tenure, or in respect of which a linkage with job security was fairly difficult to determine, remained the prerogative of the employer. It has, for example, been held that investment decisions²²⁸ remained the prerogative of the employer.

But, in terms of s 84 of the Labour Relations Act, 1995, employers will be expected to consult with workplace forums about certain matters which do not impact directly on

²²³(1994) 15 ILJ 1247 (A).

²²⁴See par 4.3.3.1 of chapter 4 where the impact of this section on employer prerogative is discussed.

²²⁵See par 3.4.3.3.4 of chapter 3 where this section and its impact on employers' decision-making power, is discussed.

²²⁶Section 85 of the Labour Relations Act, 1995 requires that the employer must consult in good faith with the workplace forum. It must afford the workplace forum an opportunity to make representations; it must consider and respond to these representations and, if it does not agree with them, it must state the reasons for disagreeing. In addition, s 89 requires that the employer must disclose all relevant information to ensure effective consultation. See par 4.3.3.1 of chapter 4 where these sections and their impact on the employer's decision-making power are discussed. Section 189(5) and (6) of the Act contain similar requirements where the employer must consult with the trade union about possible dismissals for operational reasons. These requirements are similar to those contained in s 85. The section (see subsecs (3) and (4) read with s 16) also contains requirements regarding the disclosure of information to the trade union during consultation. See par 3.4.3.3.4.2 of chapter 3 where these sections and their impact on employer prerogative is discussed.

²²⁷For a detailed discussion of the matters about which the employer must consult with workplace forums, see par 4.3.3.1 of chapter 4 and, for a detailed discussion of the nature and extent of operational requirements as reason for dismissal, see par 3.4.3.3.4.1 of chapter 3.

²²⁸See *University of the Western Cape and University of the Western Cape United Workers Union* (1992) 13 ILJ 699 (ARB).

employees' job security. The section requires, for instance, that the employer must consult about product development plans and export promotion.²²⁹

As far as the human resources component of the business is concerned, most labour law writers and lawyers seem to accept that employers' decision-making power is restricted. This is apparent from Brassey's description of employer prerogative. He states that²³⁰

[t]he law gives the employer the right to manage the enterprise. He can tell the employees what they must and must not do, and he can say what will happen to them if they disobey. He must, of course, keep within the contract, the collective agreement and the legal rules that govern him...But, even given these constraints, he still has a wide managerial discretion. He can decide which production line the employees should work on; whether they should take their tea break at ten or ten fifteen; when they may go on leave; and countless other matters besides. He can also decide what will happen to the employees if they do not work properly, if they go to tea early and so on. In short, it is he who, within the limits referred to, lays down the norms and standards of the enterprise. This - at least as far as the law is concerned - is what 'managerial prerogative' entails, no more and no less.

Brassey accepts that employer prerogative is not unlimited and considers it to be subject to legal constraints such as the contract of employment, collective bargaining, legislation and the unfair labour practice concept.²³¹

Poolman²³² accepts that the employer's right to manage its employees is restricted by the common law, labour legislation²³³ and collective bargaining.

Cameron²³⁴ identifies three limitations on employer prerogative namely collective

²²⁹See par 4.3.3.1 of chapter 4 where this is discussed in greater detail.

²³⁰In MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 74.

²³¹Brassey expressed his views when the Labour Relations Act, 1956 was still in operation. In terms of Schedule 7: Transitional Arrangements (hereafter Schedule 7) annexed to the Labour Relations Act, 1995, the labour court or a commissioner of the Commission for Conciliation, Mediation and Arbitration (hereafter the Commission) may be required to determine an alleged unfair labour practice as defined in Schedule 7.

²³²Theodorus Poolman *Principles of Unfair Labour Practice* (1985) 101.

²³³See also Paul Pretorius "Status Quo Relief and the Industrial Court: The Sacred Cow Tethered" (1983) 4 *ILJ* 167 at 183-184.

²³⁴See his comments in *Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union* (1990) 11 *ILJ* 1352 (ARB).

bargaining,²³⁵ the unfair labour practice concept²³⁶ and the rules of the contract of employment.²³⁷

Jordaan²³⁸ also identifies the contract of employment,²³⁹ statute,²⁴⁰ collective bargaining²⁴¹ and the unfair labour practice concept²⁴² as factors which restrict or limit employer prerogative. In addition to these factors, he identifies considerations of public policy²⁴³ and economic factors²⁴⁴ as factors which may limit employer prerogative.

²³⁵*Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union* (1990) 11 ILJ 1352 (ARB) at 1365E-F. See also *SA Chemical Workers Workers Union & Others v Cape Lime Ltd* (1988) 9 ILJ 441 (IC) at 445F-G and 446B and *Metal & Allied Workers Union v Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd* supra note 5 at 7011-J.

²³⁶*Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union* (1990) 11 ILJ 1352 (ARB) at 1365F-G. See also *Ntuli & Others v Litemaster Products Ltd* (1985) 6 ILJ 508 (IC) at 518E-G and *Building Construction & Allied Workers Union & Another v E Rogers & C Buchel CC & Another* (1987) 8 ILJ 169 (IC) at 172I-173C.

²³⁷*Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union* (1990) 11 ILJ 1352 (ARB) at 1365H-J.

²³⁸Barney Jordaan "Managerial Prerogative and Industrial Democracy" (1991) 11(3) 1.

²³⁹He points out (at 4) that the employee is not obliged to obey orders falling outside the scope and agreed duties contained in the contract of employment. Furthermore, the employer cannot change the terms and conditions of a contract unilaterally. In terms of s 187(1)(c) of the Labour Relations Act, 1995, the dismissal of an employee in order to force him to agree to such a unilateral change, will constitute an automatically unfair dismissal (see par 3.4.3.2 of chapter 3 where automatically unfair dismissals are discussed). It is, however, possible for an employer to dismiss an employee fairly where he refuses to accept such changes and the employer can prove that the changes are necessary for economic reasons and the employee's refusal to agree to these changes has made him redundant (see par 3.4.3.3.4.1 of chapter 3 in this regard).

²⁴⁰At 5 and 6.

²⁴¹At 3 and 5.

²⁴²At 3 and 7. He points out that the industrial court has been prepared to interfere in dismissal for misconduct and incapacity (see, for example, *Taylor v Edgars Retail Trading* (1992) 13 ILJ 1239 (IC) at 1243E-F). It has, however, not interfered to the same extent in dismissal for the operational requirements of the business. In the latter instance, its interference has largely been restricted to the procedural aspects. Jordaan's comments were made when the Labour Relations Act, 1956 was still in operation. The legislature has restricted the employer's right to dismiss in chapter VIII of the Labour Relations Act, 1995. The statutory provisions are mostly based on the guidelines developed by the industrial court in terms of the Labour Relations Act, 1956. For a detailed discussion on the statutory provisions regarding dismissal and how these provisions impact on the employer's right to dismiss, see pars 3.4.1 and 3.4.3 of chapter 3.

²⁴³At 7.

²⁴⁴At 6.

1.8 CONCLUSION

The majority of industrial relations writers,²⁴⁵ employers²⁴⁶ and trade unions²⁴⁷ regard collective bargaining as the most important factor which restricts employers' prerogative although there are exceptions like Allan Flanders²⁴⁸ who also regard the law as an important restricting factor. The labour law exponents,²⁴⁹ however, consider both collective bargaining and the law as important restricting factors of employers' prerogative.

Collective bargaining undoubtedly plays an extremely important role in the restriction of employers' prerogative, particularly where trade unions and employers hold a pluralist view of industrial relations. But inextricably linked to collective bargaining and its effectiveness in the restriction of employers' prerogative, is economic power.²⁵⁰ The stronger the economy, the stronger trade unions' bargaining power, the greater the impact on employer prerogative.

The law also plays an extremely important role. Although the legal basis for employer prerogative is the contract of employment,²⁵¹ the contract itself may also restrict prerogative.²⁵² This will occur where the parties agree to terms which effectively restrict the employer's prerogative. In addition, the common law also restricts the employer's prerogative in a number of ways. The employer may not, for example, unilaterally alter the terms and conditions of employment stipulated in the contract of employment.²⁵³

Certain statutes also restrict employers' prerogative regarding their employees.²⁵⁴ The Basic Conditions of Employment Act 3 of 1983 (hereafter the Basic Conditions of

²⁴⁵See par 1.7.1 above.

²⁴⁶See par 1.7.2 above.

²⁴⁷See par 1.7.3 above.

²⁴⁸See par 1.7.1 above.

²⁴⁹See par 1.7.4 above.

²⁵⁰See the comments made by both Alan Flanders (in par 1.7.1 above) and Barney Jordaan (in par 1.7.4 above) in this regard.

²⁵¹See par 1.4.2 above as well as chapter 2 in this regard.

²⁵²See chapter 2 where this matter is discussed in greater detail.

²⁵³*Ibid.*

²⁵⁴See chapter 3 where the role of labour legislation in the individual employment relationship is discussed.

Employment Act), for example, prescribes minimum terms and conditions of employment. The Occupational Health and Safety Act 85 of 1993 (hereafter the Occupational Health and Safety Act) compels employers to provide healthy and safe work places for their employees. The Labour Relations Act, 1995 requires that employees' dismissal must not only be lawful but also fair. Statutes like these are indicative of the legislature's concern for the plight of employees who are generally in a much weaker bargaining position than their employers; they reflect the legislature's social awareness and conscience, which, in turn, is largely shaped by public policy.²⁵⁵

There are also statutes which restrict employer prerogative in a more indirect manner.²⁵⁶ The Labour Relations Act, 1995, for instance, curtails employers' prerogative indirectly through its provisions which promote collective bargaining and employee participation in decision-making in the workplace.²⁵⁷ The Act, for example, provides a right to freedom of association²⁵⁸ and protection when employees exercise this right.²⁵⁹ It affords trade unions and employees organisational rights²⁶⁰ and structures for collective bargaining.²⁶¹ These provisions are indicative of the fact that the legislature also holds a pluralist view of industrial relations.

From the foregoing discussion, it is apparent that employers' prerogative is made up of those decisions which the law allows them to make about their businesses and which trade unions are content to leave to the employers' sole discretion or have been unable to subject to collective bargaining.²⁶²

John Storey defines employers' prerogative succinctly as follows²⁶³

²⁵⁵See par 3.1 of chapter 3 where this matter is discussed in greater detail.

²⁵⁶See chapter 3 where these statutes are discussed in greater detail.

²⁵⁷See chapter 4 where these matters are discussed in detail.

²⁵⁸See s 4 of the Labour Relations Act, 1995 as well as par 4.2.2 of chapter 4.

²⁵⁹See s 5 of the Labour Relations Act, 1995 as well as par 4.2.2 of chapter 4.

²⁶⁰See ss 12-16 of the Labour Relations Act, 1995 as well as par 4.2.3 of chapter 4.

²⁶¹Such as bargaining councils (see s 27(1) of the Labour Relations Act, 1995) and statutory boards (see s 39 of the Labour Relations Act, 1995). See par 4.2.5 of chapter 4 where these structures are discussed.

²⁶²Paul Prasow and Edward Peters "New Perspectives on Management's Reserved Rights" (1967) 18(1) *Labor Law Journal* 3 at 5 describe this as the theory of management's reserved rights. According to them, this theory holds that management's authority is supreme in all matters except those it has expressly conceded in the collective agreement, or in those areas where its authority is restricted by law.

²⁶³*The Challenge to Management Control* (1980) 41.

As a working definition we...consider managerial prerogatives to be the residue of discretionary powers of decision left to management when the regulative impacts of law and collective agreements have been subtracted.

In the chapters that follow, the role of the law and collective bargaining with regard to employers' prerogative is examined in greater detail. Although the main emphasis of the law, particularly legislation, is on the limitation of employers' prerogative, it also protects and even promotes it in certain instances. This is particularly true of the common law.²⁶⁴ There are, however, also a number of statutory provisions which protect employers' prerogative.²⁶⁵

In view of the fact that the emphasis of the law is on the restriction of employers' prerogative, this thesis's focus is also on its restriction. Nevertheless, the protection afforded by the law is highlighted and discussed where appropriate.

Chapter two deals with the common law. This has been considered a good starting point as it covers the contract of employment which is the source of an employer's decision-making power. Furthermore, the common law favours the employer in a number of ways and it is deemed appropriate to first discuss that source of the law which not only provides the foundation but also enhances (to a certain extent) employers' prerogative. Nevertheless, the common law also restricts employers' prerogative and this aspect is also discussed in chapter two.

Chapter three deals with the various statutes which impact on employers' (common law) decision-making power regarding their employees. In chapter four, the role of the law in collective bargaining and the extent to which it encourages or promotes the use of collective bargaining as a method to limit employer prerogative is considered. The role of the law in the democratising of the workplace through workplace forums, is also discussed in this chapter.

²⁶⁴See chapter 2.

²⁶⁵Consider, for instance, the fact that the Labour Relations Act, 1995 requires the employer to *consult* and not to *jointly decide* about dismissals for operational reasons (see a 189 as well as par 3.4.3.3.4.2 of chapter 3). See also s 84 of the Act which requires the employer to *consult* and not to *jointly decide* about the matters listed in the section with the workplace forum (see par 4.3.3.1 of chapter 4). See also s 86(4) of the Act which enables the employer to maintain the status quo ante where it cannot reach consensus with the workplace forum about the matters listed in s 86 (see par 4.3.3.2 of chapter 4). Consider also the fact that the Act affords the employer recourse to a lock-out to force its employees to accede to its demands (see s 64 as well as par 7.3 of chapter 7).

In chapter five, the extent to which collective bargaining does, in practice, limit the scope of employer prerogative is examined. This is done through the examination of various collective agreements.

Chapter six deals with the way in which the law regulates the use of economic power as a method to enforce employees' demands and to limit employers' prerogative. The exertion of economic pressure as a means to enforce demands is not restricted to employees and their trade union. An employer may also resort to economic pressure to maintain or even further its prerogative. In chapter seven, the manner in which the law regulates the use of economic power by an employer to achieve these aims is discussed.

Chapter eight is headed "Summary and Conclusions". In this chapter, the restriction of employer prerogative by the law and collective bargaining is summarised and certain conclusions are drawn.

CHAPTER 2

THE INFLUENCE OF THE COMMON LAW ON TERMS AND CONDITIONS OF EMPLOYMENT

2.1 INTRODUCTION

An investigation of the influence of the various sources of law and collective bargaining on the employer's decision-making power must commence with the common law.¹ Not only does the contract of employment constitute the foundation of the employment relationship² but it also provides the legal basis for the employer's right to manage an employee.³ In addition, the employer's decision-making power is strengthened by some of the essential⁴ and residual⁵ terms of the contract. The common law is furthermore based on the assumption of contractual freedom which increases the employer's bargaining power vis-a-vis the employee.⁶ This enables the employer virtually to dictate those terms and conditions of employment which are not covered by the essential and residual terms of the contract. The common law, however, not only creates and promotes the employer's right to manage; it also limits or restricts this power in a number of ways.⁷

The following discussion of the employer's decision-making power in terms of the common law has been divided into two parts. In the first part, the employer's decision-making power vis-a-vis an applicant for a job is investigated.⁸ In the second part, the

¹Common law entails the Roman-Dutch law as interpreted, developed and extended by our courts (see also note 8 of chapter 1).

²See par 2.3 below where this fact is discussed in more detail.

³See par 1.4.2 of chapter 1 as well as par 2.3 below where this fact is discussed in greater detail.

⁴Essential terms are those terms which are required by law whether the parties desire to have them or not. AJ Kerr *The Principles of the Law of Contract* 4 ed (1989) at 255 refers to these terms as "invariable provisions". See also RH Christie *The Law of Contract in South Africa* 3 ed (1996) 177.

⁵Residual terms are those provisions which the law adds to the contract in the absence of agreement of the parties (see AJ Kerr *The Principles of the Law of Contract* 4 ed (1989) 257). These terms are also referred to as the "naturalia" of the contract (see AJ Kerr *The Principles of the Law of Contract* 4 ed (1989) 256). RH Christie *The Law of Contract in South Africa* 3 ed (1996) 177 describes naturalia or residual terms as the terms implied by law in every contract of a particular type unless expressly excluded.

⁶See par 2.2 below in this regard.

⁷This is particularly true in respect of the employer's right to give the employee instructions regarding his labour potential (see par 2.4.2 below).

⁸See par 2.2 below.

legal nature of the contract of employment⁹ and the employer's rights and duties in terms thereof¹⁰ are considered.

2.2 THE EMPLOYER'S DECISION-MAKING POWER PRIOR TO THE CONCLUSION OF THE CONTRACT OF EMPLOYMENT

Based on the common law principle of freedom of contract,¹¹ the employer can decide *whom* to employ. In terms of this principle, therefore, an employer may base its decision to employ or not to employ somebody on factors which may generally be regarded as improper or discriminatory, such as race, gender, sex, age, marital status et cetera.

The common law principle of freedom of contract operates on the premise that the employer and the person seeking employment are on an equal footing when negotiating the terms and conditions of employment.¹² In practice, however, this is seldom¹³ the case. The employer commands capital, information and access to legal advice.¹⁴ An employee works in order that he and his family may survive.¹⁵ In addition, there is fierce

⁹See par 2.3 below.

¹⁰See par 2.4 below.

¹¹For a discussion of this principle, see Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 33; RH Christie *The Law of Contract in South Africa* 3 ed (1996) 14-15; AJ Kerr *The Principles of the Law of Contract* 4 ed (1989) 8 and 107; GTS Eiselen "Kontrakteervryheid, Kontraktuele Geregtigheid en die Ekonomiese Liberalisme" (1989) 52 *THRHR* 516 at 518; MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 160-161; Nicholas Haysom and Clive Thompson "Labouring under the Law: South Africa's Farmworkers" (1986) 7 *ILJ* 218 at 221-222; Steven D Anderman *The Law of Unfair Dismissal* 2 ed (1985) 3; David M Beatty "Labour is not a Commodity" in Barry J Reiter and John Swan (eds) *Studies in Contract Law* (1980) 340-341; PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 403, 406 and 417 and JSA Fourie "Status en Kontrak in die Suid-Afrikaanse Arbeidsreg" (1979) 42 *THRHR* 79 at 84.

¹²David M Beatty "Labour is not a Commodity" in Barry J Reiter and John Swan (eds) *Studies in Contract Law* (1980) 334 points out that in terms of the principle of freedom of contract "[i]n its pristine form, even children were said to have an equal opportunity to utilize the institution to develop their skills and make their contributions".

¹³Where a job is of a very specialised nature and demands a highly qualified person, the applicant for employment may be in a much stronger bargaining position (see Richard Hyman *Industrial Relations: A Marxist Introduction* (1975) 23 as well as MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 5-6).

¹⁴See RH Christie *The Law of Contract in South Africa* 3 ed (1996) 14-15; AJ Kerr *The Principles of the Law of Contract* 4 ed (1989) 6-8 and Hugh Collins "Market Power, Bureaucratic Power, and the Contract of Employment" (1986) 15 *ILJ(UK)* 1.

¹⁵See par 1.6.1.2 of chapter 1. See also Paul Pretorius "Status Quo Relief and the Industrial Court: The Sacred Cow Tethered" (1983) 4 *ILJ* 167 at 170.

competition amongst persons seeking employment. Many jobs require little or no skill¹⁶ and consequently the majority of job seekers are able to do these jobs.¹⁷ Competition is also particularly fierce when the economy is in a downward phase and unemployment is rife.

As a result of the above, the employer may also stipulate certain preconditions to the conclusion of a contract of employment. It may, for instance, demand that the person seeking employment terminates his trade union membership or his membership of any other employee organisation. It may also require the person to undergo a medical examination and tests for certain diseases. The employer may furthermore require the person to take certain tests such as a literacy test or a test to determine whether the person has the necessary skills to do the work.¹⁸

Finally, the fact that the employer is in a much stronger bargaining position enables it to virtually dictate the terms and conditions of the contract of employment.¹⁹ Beatty²⁰ explains the position of a person seeking employment as follows

The material and psychological constraints facing these persons [job applicants] make them so dependent on the particular employment relationships which are made available to them as to preclude their serious participation in the distribution of rights and benefits within any of those relationships.

¹⁶See par 1.6.1.1 of chapter 1 where the de-skilling of jobs is discussed.

¹⁷See Paul Pretorius "Status Quo Relief and the Industrial Court: The Sacred Cow Tethered" (1983) 4 *ILJ* 167 at 170.

¹⁸The person seeking employment will be bound by any representations he makes regarding his competence. He may also be bound by representations made in testimonials and references which he submitted. See John Grogan *Rieker's Basic Employment Law* 2 ed (1993) 37 as well as *Ndamase v Fyfe-King* NO 1939 EDL 259 at 262.

¹⁹See HA Jordaan *The Employment Relationship: Contract or Membership?* LLD thesis, University of Cape Town (1991) 50 as well as 60-62 and the authorities therein referred to.

²⁰David M Beatty "Labour is not a Commodity" in Barry J Reiter and John Swan (eds) *Studies in Contract Law* (1980) 334. Richard Hyman *Industrial Relations: A Marxist Introduction* (1975) describes (at 23) the realities during the conclusion of a contract of employment as follows, "But the notion of a free contract between equals has little relevance in the real world. In practice, the ownership of capital represents concentrated economic power, a legal entitlement to dominate; hence the employer can virtually dictate the broad outlines of the employment contract". See also HA Jordaan *The Employment Relationship: Contract or Membership?* LLD thesis University of Cape Town (1991) 60 and the authorities therein referred to.

2.3 THE LEGAL NATURE OF THE CONTRACT OF EMPLOYMENT

The contract of employment constitutes the foundation upon which the employment relationship is founded.²¹

The common law²² treats the contract of employment as a species of the contract of letting and hiring.²³ More particularly, it is treated as a contract of letting, by an employee, of his labour potential to the employer.²⁴

Judges²⁵ and writers²⁶ on labour law have found it extremely difficult to define a contract of employment. This is understandable as that which needs to be defined in legal terms is a social relationship. Brassey²⁷ explains the complex nature of the employment

²¹ See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 2-3 where he states that "[t]he common-law contract of employment remains the basis of the employment relationship in the sense that the legal relationship between the employer and the employee is created by it". See also SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 52; JV du Plessis, MA Fouché, B Jordaan and MW van Wyk *A Practical Guide to Labour Law* 2 ed (1996) 8; JC de Wet and AH van Wyk *De Wet en Van Wyk: Die Suid-Afrikaanse Kontrakereg en Handelsreg Vol 1* 5 ed (1992) 384; Paul Davies and Mark Freedland *Kahn-Freund's Labour and the Law* 3 ed (1983) 18 and 25; GC Kachelhoffer "Arbeidsreg: Die Wiehahn- en die Riekert-Verslag" (1979) 1 (2) *MB* 83; James Stephen Andrew Fourie *Die Dienskontrak in die Suid-Afrikaanse Arbeidsreg* LLD thesis University of South Africa (1977) 41 and Otto Kahn-Freund "Blackstone's Neglected Child: The Contract of Employment" (1977) 93 *LQR* 508 at 525. Contra, however, Barney Jordaan "The Law of Contract and the Individual Employment Relationship" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D van Zyl Smit (eds) *Labour Law* (1991) 73 at 88 where he states that "[a]t some stage in the history of its development the contract of employment probably reflected reality with a reasonable measure of accuracy. It no longer does so and its continued survival can only be explained in terms of its being 'a figment of the legal mind'".

²² See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 7-9; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 33; HA Jordaan *The Employment Relationship: Contract or Membership?* LLD thesis University of Cape Town (1991) 51-53 and *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 56D-61H, as well as the sources therein referred to for a historical overview of the contract of employment. See also James Stephen Andrew Fourie *Die Dienskontrak in die Suid-Afrikaanse Arbeidsreg* LLD thesis University of South Africa (1977) 40.

²³ Also known as the *locatio conductio* contracts. See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 32; JC de Wet and AH van Wyk *De Wet en Van Wyk: Die Suid-Afrikaanse Kontrakereg en Handelsreg Vol 1* 5 ed (1992) 383 and *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 61A.

²⁴ Also known as *locatio conductio operarum*. See *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 61A-B.

²⁵ See Martin Brassey "The Nature of Employment" (1990) 11 *ILJ* 889 at 893 and the cases therein referred to.

²⁶ See Martin Brassey "The Nature of Employment" (1990) 11 *ILJ* 889 at 894 and the authors therein referred to.

²⁷ Martin Brassey "The Nature of Employment" (1990) 11 *ILJ* 889 at 920.

relationship and the problems experienced in determining the existence of such a relationship as follows

Employment is a complex and multifaceted social relationship; its forms are protean, and its existence must be divined by a process whose application goes unremarked in most other branches of the law, the process of assessing all the relevant facts.

The following definition by Jordaan²⁸ is in accordance with the views held by most South African writers²⁹ on what constitutes a contract of employment

[a] contract of employment ...[is] an agreement in terms of which one party (the employee) agrees to make his personal services available to the other party (the employer) under the latter's supervision and authority³⁰ in return for remuneration.³¹

2.3.1 Subordination as an Element of the Contract of Employment

Today,³² most writers³³ as well as the courts³⁴ accept that subordination by the employee to the employer must be one of the elements of the contract of employment.

²⁸In JV du Plessis, MA Fouché, B Jordaan and MW van Wyk *A Practical Guide to Labour Law* 2 ed (1996) 7.

²⁹See further SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 56; John Grogan *Rieker's Basic Employment Law* 2 ed (1993) 17; JC de Wet and AH van Wyk *De Wet en Van Wyk: Die Suid-Afrikaanse Kontrakreg en Handelsreg Vol 1* 5 ed (1992) 384 and James Stephen Andrew Fourie *Die Dienskontrak in die Suid-Afrikaanse Arbeidsreg* LLD thesis, University of South Africa (1977) 41.

³⁰It is submitted that the words "under the latter's supervision and authority" are indicative of the subordination element.

³¹In the Roman Law, remuneration was considered to be an essential element (see *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 56F although it appears that this was not the case in Roman-Dutch Law (see the *Smit*-case at 60G-61). See also C Norman-Scoble *Law of Master and Servant in South Africa* (1956) 2 who regards remuneration as an essential element of the contract of employment. Contra, however, Etienne Mureinik "The Contract of Service: An Easy Test for Hard Cases" (1980) 97 *SALJ* 246 at 249 note 16 where he states that remuneration itself is not an essential element of the contract of service. He states that the explicit statutory mention of the requirement of remuneration in the definitions of "employer" and "employee" in s 1 of the Industrial Conciliation Act 28 of 1956 may be taken as implicit authority for its absence at common law. (Note that the definition of "employee" in s 214 of the Labour Relations Act, 1995 also stipulates remuneration as a requirement.) See also *Rodrigues & Others v Alves & Others* 1978 (4) SA 834 (A) at 841D-E.

³²There appears to be some debate as to whether or not subordination constituted an element of the common law contract of employment. Some writers are of the view that this was not the case and that it was an element adopted from the English law (see Albert Beylveveld *Die Essensiële Vereistes vir die Ontstaan van die Kontraksvorme Mandatum, Locatio Conductio Operis en Locatio Conductio Operarum; 'n Prinsipiële Onderskeid* LLD thesis University of Pretoria (1978) 112).

³³See Dr R Blanpain *Handboek van het Belgisch Arbeidsrecht: I Collectief Arbeidsrecht* 2 ed (1968) 11 where he states that, "Het sleutelement bij het afbakenen van het arbeidsrecht ligt, zoals gezegd, in het ondergeschikt verband". See also SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 33, 54 and 60-63; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 35 and 62-63; JC de Wet and AH van Wyk *De Wet en Van Wyk: Die Suid-Afrikaanse Kontrakreg en Handelsreg Vol 1* 5 ed (1992) 384; Martin Brassey "The Nature of Employment"

Davies and Freedland³⁵ explain the fact that subordination is an element of the contract in the following terms

But the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment".

Although there appears to be general consensus that subordination constitutes an essential element of the contract of employment, the reason or reasons for this have been subject to debate.

Some writers argue that the element of subordination is a relic of the status relationship which existed between the master and his servant.³⁶ The relationship was fixed by law and based on the status of the parties in society. One of the attributes of this relationship was that the status of master carried with it the right to command and discipline the servant.³⁷

(1990) 11 *ILJ* 889 at 902; Lord Wedderburn *The Worker and the Law* 3 ed (1986) 5; Etienne Mureinik "The Contract of Service: An Easy Tests for Hard Cases" 1980 97 *SALJ* 246 at 263 and 266; GC Kachelhoffer "Arbeidsreg: Die Wiehahn- en die Riekert-Verslag" (1979) 1 (2) *MB* 83 and James Stephen Andrew Fourie *Die Dienskontrak in die Suid-Afrikaanse Arbeidsreg* LLD thesis University of South Africa (1977) 41.

³⁴See, for example, *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC) at 681J-682A and 682E-F; *Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 60-61; *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) at 456G-H and *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 432-435.

³⁵Paul Davies and Freedland *Kahn-Freund's Labour and the Law* 3 ed (1983) 18.

³⁶ See Lord Wedderburn *The Worker and the Law* 3 ed (1986) where he states (at 111) that, "[t]he judges carried over the earlier concept of service, built from the fourteenth century upon the status and legal imagery of pre-industrial society with agricultural and domestic labourers featuring prominently,...giving to the masters powers to demand obedience that derive from the earlier relationships". See also Alan Fox *Beyond Contract: Work, Power and Trust Relations* (1974) 183-186 and Philip Selznick *Law, Society, and Industrial Justice* (1980) 122-130.

³⁷Philip Selznick *Law, Society, and Industrial Justice* (1980) explains this (at 124) as follows, "He [ie the master] could issue orders on any matter touching the conduct of the enterprise and expect to be obeyed." At 125 he notes that, "[w]ith respect to the authority of the master, two points should be noted: (1) The master's right to command, and the servant's duty to obey, were incidents of status and not terms of an agreement. (2) The master's authority was limited, at least in contemplation of law. He could administer 'moderate' correction. His commands must be lawful. He was answerable to the local court for cruel and oppressive conduct". It is submitted that this is indicative of the fact that the legislature realised that the servant was in a subordinate position to the master and unable to protect himself against unreasonable behaviour of the master.

Selznick³⁸ argues that the contract of employment which developed in the first quarter of the nineteenth century, was a specific type of contract which, by the end of that century, protected and enhanced the decision-making powers of the employer. He refers to this contract as the *prerogative contract*.³⁹ According to him, the *prerogative contract* relied on two assumptions, namely that the parties entered into the contract voluntarily⁴⁰ and that the ownership of property by the employer automatically gave it the decision-making power over the employee.⁴¹

Both these assumptions may be criticised. Although a person is not forced by an employer to accept a job offer, social and economic considerations do play an important role in his decision to accept.⁴² Furthermore, property rights afford the employer rights over its business premises and machinery - not over the people employed by it.⁴³

Collins⁴⁴ states that the source of the subordination element is twofold. It is firstly based on the market power of the employer. Collins argues that no equality of bargaining power in the labour market exists between the employer and the employee. The second source of the subordination element suggested by Collins is the bureaucratic organisation of an enterprise.⁴⁵ He⁴⁶ argues that when the employee joins an enterprise, he joins a bureaucratic organisation where he finds himself in a relation of subordination

³⁸Philip Selznick *Law, Society, and Industrial Justice* (1980) 130-137.

³⁹Philip Selznick *Law, Society, and Industrial Justice* (1980) 135, "The main economic significance of the contract at will was the contribution it made to easy layoff of employees in response to business fluctuations. But it also strengthened managerial authority. By the end of the nineteenth century the employment contract had become a very special sort of contract-in large part a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion. For this reason we call it the *prerogative contract*" (author's emphasis).

⁴⁰*Ibid* at 135. This resulted therein that the legislature saw no reason to interfere in the relationship.

⁴¹ *Ibid*. This was based on the old master-servant relationship, or status relationship, in terms of which the master, who owned the farm, or the machinery et cetera. had the decision-making power in the relationship. Selznick (at 136), also points out that, "...the old master-servant model was only *partially* incorporated into the new law of employment. The traditional association of 'master' and 'authority' was welcomed, but in its modern dress authority was impersonalised, stripped of the sense of personal duty, commitment, and responsibility that once accompanied it, at least in theory". (author's emphasis).

⁴²See par 2.2 above where this matter is discussed in greater detail.

⁴³See par 1.4.2 of chapter 1 in this regard.

⁴⁴Hugh Collins "Market Power, Bureaucratic Power, and the Contract of Employment" (1986) 15 *ILJ(UK)* 1.

⁴⁵ *Ibid* at 1.

⁴⁶ *Ibid* at 1-2.

with those above him in the system of ranks.⁴⁷ However, it is suggested that the second ground advanced by Collins may be rejected. The bureaucratic organisation of an enterprise is not the reason for the employee's subordination. It is merely a structure devised by the employer to exercise maximum authority over its employees.⁴⁸

Pauw⁴⁹ argues that subordination became an essential element of a contract of employment as a result of the role which vicarious liability plays in labour law. When liability by an employer for torts committed by its employee developed in England, it seemed unjust to hold the employer liable for torts committed by the employee at a time when the employer had no control over him.⁵⁰ According to Pauw, subordination as an element of the contract of employment was adopted by South African law from English law.⁵¹

Brassey⁵² criticizes Pauw's explanation for subordination as an element of the contract of employment. He states that it is possible for one party to have sufficient control over another for purposes of vicarious liability without an employment relationship existing between the parties.⁵³ He also argues that subordination was an essential element of the contract of employment in both Roman and Roman-Dutch law, and that it is accordingly unnecessary to turn to English law in this regard.⁵⁴

Jordaan suggests that the subordination element has its origin in both the status relationship that existed between the master and his servant⁵⁵ and legislation such as the

⁴⁷ Ibid. He states (at 1-2) that, "[t]his bureaucratic aspect of subordination arises from the organisational structure rather than from any initial inequality of bargaining power in the market, for it persists even when the employee, either individually or collectively, enjoys strong leverage".

⁴⁸ See also par 1.4.2 of chapter 1 where Collins's views are discussed.

⁴⁹ P Pauw "Aspects of the Contract of Service" (1979) 1 *MB* 138.

⁵⁰ See also Etienne Mureinik "The Contract of Service: An Easy Test for Hard Cases" (1980) 97 *SALJ* 246 at 247.

⁵¹ At 138. See also A Beyleveld *Die Essensiële Vereistes vir die Ontstaan van die Kontraksvorme Mandatum, Locatio Conductio Operis en Locatio Conductio Operarum: 'n Prinsipiële Onderskeid* LLD thesis University of Pretoria (1978) 158.

⁵² Martin Brassey "The Nature of Employment" (1990) 11 *ILJ* 889 at 892.

⁵³ Ibid at 892 and 903 and see the cases referred to by him in notes 12-18 of his article.

⁵⁴ Ibid at 898-899. Contra, however, Albert Beyleveld *Die Essensiële Vereistes vir die Ontstaan van die Kontraksvorme Mandatum, Locatio Conductio Operis en Locatio Conductio Operarum; 'n Prinsipiële Onderskeid* LLD thesis University of Pretoria (1978) 112.

⁵⁵ See Allan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 62.

Master and Servant laws,⁵⁶ introduced to confirm and ensure the employee's subordination to his employer.⁵⁷

All the aforementioned writers search for the reason for subordination as an essential element of the contract *outside* the parameters of the contract. It is submitted that status, the unequal bargaining relationship between the parties and the economic superiority of the employer, constitute nothing more than reasons for an employee's preparedness to conclude a contract in terms of which he will be subordinate to the employer.⁵⁸ Also, legislation is not the originating cause of the subordination element. Although some of the Master and Servant Acts⁵⁹ subscribed to the subordination element by, for example, branding an employee's refusal to adhere to the employer's demands as criminal offences, these statutes did nothing more than promote subordination in that they served as an incentive for the employee to be subordinate to the employer.

It is submitted that the reason why subordination constitutes an element of the contract of employment is to be found in the contract itself.⁶⁰ More particularly, it is to be found in that which the employee "hires out" to the employer, namely his labour potential. Labour potential is not separable from the employee and, as a rational being, he has full control over it.⁶¹ In order to ensure that the employee applies his labour potential in accordance

⁵⁶For an historical account of these laws, see Elizabeth Delpont *The Legal Position of Domestic Workers in South Africa* LLM dissertation University of South Africa (1995) 88-98 and John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 3-4.

⁵⁷Jordaan states in Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 62-63 that, "...contractual regulation of the relationship was simply not sufficient to ensure the employee's subordination. Statutory intervention was required to do so. It came in the form of masters and servants legislation of the 17th and later centuries. It was the draconian penal sanctions of the legislation which succeeded in finally securing the employee's subordination as an incident of the contract of employment".

⁵⁸The parties may expressly agree that the employee will be subordinate to the employer. However, should they not expressly include such a term, the employee still has this duty as subordination is an essential term of the contract of employment.

⁵⁹See, for example, the Natal Master and Servant Ordinance of 1850. In terms of this ordinance, it was a criminal offence for a servant to refuse or neglect to perform his stipulated duty or to perform work in a negligent or improper fashion.

⁶⁰See also *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC) at 686E.

⁶¹JC de Wet and AH van Wyk *De Wet en Van Wyk: Die Suid-Afrikaanse Kontraktereg en Handelsreg* Vol 1 5 ed (1992) 383 state that what is leased is not an irrational object, such as property, but the worker's labour, which is "edeler materiaal". See also Richard Edwards *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (1979) 12 where he states that, "...unlike the other commodities involved in the production, labor power is always embodied in people, who have their own interests and needs and who retain their power to resist being treated like a commodity". See further Harry Braverman *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* (1974) 54 and Peter F Drucker *The Practice of Management* (1961) 258-259.

with their agreement, it is essential that the employee is subordinate to the employer.⁶² If subordination is not an element of the contract of employment, an employer will have no legal basis to demand that the employee applies his labour potential for the purpose the employer intended it to be applied.

2.4 THE EMPLOYER'S DECISION-MAKING POWER AFTER CONCLUSION OF THE CONTRACT OF EMPLOYMENT

2.4.1 Introduction

The contract of employment is often described as a "two-tiered" structure.⁶³ It has a mercantile component in terms of which the employer undertakes to remunerate the employee for his labour.⁶⁴ But, in the second instance, it also has a "relational"⁶⁵ component in terms of which the employment relationship between the employer and employee is established and maintained. The employer undertakes to continue providing work whereas the employee undertakes to do the work allocated to him.

The relationship has certain features which distinguish it from other contractual relationships. The employee's labour potential cannot be separated from him and, with his own personality and character traits, he forms an integral part of the relationship. Accordingly, there must be constant interaction between the employee and his employer or manager.⁶⁶ Furthermore, unlike many other contractual relationships, the parties usually⁶⁷ intend it to continue indefinitely.

⁶²See also *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC) at 682E where the court stated, "Nevertheless, once it is accepted, as I think it must be, that what is essential to the relationship of employment is that one person's capacity to work has been placed at the disposal of another, it seems to me most unlikely that this will be found to have occurred in practice without the recipient at the same time having assumed some measure of control over the manner in which that capacity is to be developed, for that is the very thing for which he contracted...".

⁶³See Bob Hepple "Restructuring Employment Rights" (1986) ILJ(UK) 69 at 71 and MR Freedland *The Contract of Employment* (1976) 20-21.

⁶⁴See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 176 where Jordaan states that "[it] also involves more than a mere 'transactional' exchange, where particular goods are exchanged for a fixed sum of money, and where the obligations of the parties are more or less clearly defined." See also MR Freedland *The Contract of Employment* (1976) 20.

⁶⁵See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 22 and MR Freedland *The Contract of Employment* (1976) 20.

⁶⁶See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 176.

⁶⁷There are, however, exceptions such as fixed term contracts.

In the paragraphs that follow, the rights and duties of the employer in terms of the contract of employment will be examined. Apart from the rights and duties flowing from the essential terms of the contract, attention will also be paid to the residual terms which have been read into the contract by the law and the extent to which they have either enhanced or restricted the employer's right to manage. In addition, the terms which the parties may include of their own accord, either expressly⁶⁸ or impliedly,⁶⁹ and the extent to which these terms affect the employer's right to manage, will be considered.

2.4.2 The Employer's Decision-making Power in respect of the Employee's Labour Potential

2.4.2.1 Introduction

It is submitted that the employee's contractual duty to be subordinate to the employer constitutes the legal basis of the employer's right to manage the employee.⁷⁰ The element of subordination constitutes an *obligation* on the part of the employee to place his labour potential under the supervision and control of the employer. In *Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union*⁷¹ the arbitrator explained it as follows

...it is true that the parties agree not only to a specified ambit of responsibility, but also to an inevitable degree of subordination. This entails that, within the limits of the employee's degree of subordination, he or she is required to submit to the employer's instructions.

The converse of this duty is the *right* of an employer to give orders or instructions to an employee regarding his labour potential.⁷² Fourie⁷³ explains this right of the employer

⁶⁸Express terms are those terms which the parties have put in words (see AJ Kerr *The Principles of the Law of Contract* 4 ed (1989) 255).

⁶⁹Implied terms are those terms which the parties had in mind but did not express (see AJ Kerr *The Principles of the Law of Contract* 4 ed (1989) 257).

⁷⁰The employer's right to make decisions regarding the economic or business component of its business is not embedded in the employee's contractual duty to be subordinate. This right is essentially founded on the employer's property rights (see pars 1.2 and 1.4.2 of chapter 1 where this component of the business and the origin of the employer's decision-making power in this regard is discussed).

⁷¹(1990) 11 *ILJ* 1352 (ARB) at 1365f. See also Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 64 where Jordaan states that "[t]he employee's subordinate status [entails that]...the employee is obliged to obey the employer's lawful commands".

⁷²See Etienne Mureinik "The Contract of Service: An Easy Test for Hard Cases" (1980) 97 *SALJ* 246 at 265 where he states that, "[i]t follows that it is an *essentiale* of the contract that the servant owes a duty to be subordinate and the master disposes of a correlative right to demand subordination" (author's emphasis).

⁷³James Stephen Andrew Fourie *Die Dienskontrak in die Suid-Afrikaanse Arbeidsreg* LLD thesis University of South Africa (1977) 44. See further SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 62.

as follows

As gevolg van die feit dat die werkgever in 'n gesagsposisie teenoor die werknemer verkeer is die werkgever geregtig om instruksies aan die werknemer te gee met betrekking tot dienste wat deur laasgenoemde verskuldig is.

As will appear from the discussion below, this right of the employer has a number of facets and is accordingly fairly wide. Like all rights, however, it is subject to certain restrictions. Not only does the common law itself restrict it in a number of ways, but the contracting parties may also restrict it.

2.4.2.2 The Right to Instruct the Employee What Work to do

The employer's right to give instructions regarding the employee's labour potential entails that it can instruct the employee *what work* to do.⁷⁴ It may also tell the employee what work he may not do. This right may even cover a period after termination of their contract.⁷⁵

The common law itself restricts the employer's right to tell the employee what to do and what not to do by requiring that the employer's instructions must be *lawful*.⁷⁶ The employer cannot, for instance, instruct the employee to do work other than that which the employee has contractually agreed to perform.⁷⁷ The employer may also not degrade the status of the employee by instructing him to do work which should normally

⁷⁴See *Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 60H where the appellate division stated, "It [the duty to be subordinate] includes *inter alia* the right of an employer to decide what work is to be done by the employee...". See further *Leask v French & Others* 1949 (4) SA 887 (C) at 891 as well as *Moonian v Balmoral Hotel* 1925 NPD 215 at 217. In addition, see SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 61 and 128-129; MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 74 and JSA Fourie *Die Dienskontrak in die Suid-Afrikaanse Arbeidsreg* LLD thesis University of South Africa (1977) 44.

⁷⁵This may happen where the contract includes a restraint of trade clause.

⁷⁶See Allan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) at 64 and the cases referred to in note 399 thereof.

⁷⁷See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 53 and MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 74. Should the employer try to do this, it would be breaching their contract of employment. The question of whether or not a particular instruction falls within the job description of the employee is a factual one.

be done by someone in a lower job category or with a lower ranking in the hierarchy.⁷⁸ Furthermore, the employer and employee cannot agree that the employee will do work which is illegal or contrary to good morals⁷⁹ or public policy.⁸⁰

On occasion, the courts have further restricted this right of the employer by requiring that its instructions must also be *reasonable*.⁸¹

It is submitted that this right is further restricted by the employer's common law duty to take reasonable care for the health and safety of its employees. In terms of this duty, the employer may not instruct the employee to do work or to work with machinery which presents a safety or health hazard. Or, where the employee must do such work or work with dangerous machinery in terms of his contract, the employer must provide the employee with the requisite materials and facilities for his protection.⁸²

Lastly, as the common law affords only certain categories of employees a right to work⁸³ there is nothing which prevents an employer from prohibiting an employee from

⁷⁸Such degradation of an employee would constitute a breach of contract on the part of the employer. See C Norman-Scoble *Law of Master and Servant in South Africa* (1956) 176. See also *Smith v Cycle and Motor Trade Supply Co* 1922 TPD 324 at 325-326 and *Groenewald v Cradock Munisipaliteit* 1980 (4) SA 217 (E); (1980) 1 ILJ 269 (E) at 272-3. In *Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union* (1990) 11 ILJ 1352 (ARB) 1357 at 1366C-F and *Taylor v Edgars Retail Trading* (1992) 13 ILJ 1239 (IC) at 1241F-1243D an arbitrator and presiding officer of the industrial court also confirmed this common law principle.

⁷⁹An employer cannot, for example, engage a person to commit a crime.

⁸⁰See PJ Pretorius and DJM Pitman "Good Cause for Dismissal: The Unprotected Employee and Unfair Dismissal" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D Van Zyl Smit (eds) *Labour Law* (1991) 133 at 136 as well as *Magna Alloys and Research (SA) (Pty) Ltd v Eills* 1984 (4) SA 874 (A) at 891G. The question of whether or not an instruction is against public policy is a factual one.

⁸¹See, for instance, *Frankfort Munisipaliteit v Minister van Arbeid en 'n Ander* 1970 (2) SA 49 (O) at 56H-57B and *Cape Town Municipality v Minister of Labour & Another* 1965 (4) SA 770 (C) at 779H. See also *Building Construction & Allied Workers Union & Another v E Rogers & C Buchel CC & Another* (1987) 8 ILJ 169 (IC) at 172I where the court stated, "It has been said that under the common law the contract of employment contains an implied term [that is a residual term] (over and above express terms agreed upon) that an employee undertakes to obey all *reasonable* orders given to him by his employer in the normal course of his employment" (presiding officer's emphasis). See also MR Freedland *The Contract of Employment* (1976) 189 where it is stated that, "[t]here are suggestions that the orders must be 'reasonable' in order for disobedience to them to justify dismissal". See further Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 64 note 403.

⁸²See C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 179.

⁸³See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 61 and C Norman-Scoble *Law of Master and Servant in South Africa* (1956) 171-172. This will, for example, be the case where an employee works on a commission basis and his salary therefore depends on work being provided by the employer (see *Faberlan v McKay & Fraser* 1920 WLD 23 at 27). Employees who require the work in order to maintain or develop their skills or to maintain publicity also have a right to work (see *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 951G-H). An employer's refusal to provide such an employee with work may constitute a breach of contract (see C Norman-Scoble *Law of Master and Servant in South Africa* (1956)

doing the work which they have contractually agreed the employee will do. All that is required is for the employer to pay the employee the agreed wages.⁸⁴ This entitles the employer to suspend⁸⁵ an employee with pay for an indefinite period without providing him with a reason for such suspension.⁸⁶

2.4.2.3 The Right to Instruct the Employee as to the Manner in which the Work must be done

The employer's right to give instructions regarding the employee's labour potential also entails that it can tell the employee *how* he must do the work.⁸⁷ The employer may therefore give the employee detailed instructions as to the *manner* in which the work must be done.⁸⁸

An employer will often be in a position to exercise this right in respect of the majority of its employees as most of them will be doing work which is not very technical or special-

172 as well as *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 951).

⁸⁴See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 61; James Stephen Andrew Fourie *Die Dienskontrak in die Suid-Afrikaanse Arbeidsreg* LLD thesis University of South Africa (1977) 46-47 and C Norman-Scoble *Law of Master and Servant in South Africa* (1956) 171.

⁸⁵For a discussion of suspension on full pay, see Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 100 and the authorities therein referred to.

⁸⁶Normally the employer will suspend an employee while it is investigating suspected misconduct by the employee.

⁸⁷See *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 at 432. See also *Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union* (1990) 11 ILJ 1352 (ARB) 1357 at 1365I where the arbitrator, while considering the nature of the contractual element of subordination by an employee, stated that "[t]his entails that, within the limits of the employee's degree of subordination, he or she is required to submit to the employer's instructions. These may relate to what exactly the employee is required to do or *how* he or she is required to do it" (my emphasis). See further SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 62 and 64 and James Stephen Andrew Fourie *Die Dienskontrak in die Suid-Afrikaanse Arbeidsreg* LLD thesis University of South Africa (1977) 44.

⁸⁸See *Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 60H where the appellate division stated, "It [the duty to be subordinate] includes *inter alia* the right of an employer to decide what work is to be done by the employee, the manner in which it is to be done by him, the means to be employed by him in doing it...". See also *R v AMCA Services Ltd and Another* 1959 (4) SA 207 (A) at 212H where it was held that, "...the employer...has the right to control, not only the end to be achieved by the other's labour and the general lines to be followed, but the detailed manner in which the work is to be performed". See further *Goldberg v Durban City Council* 1970 (3) SA 325 (N) at 330D-331H. Note that an independent contractor cannot be instructed as to the *manner* in which he must do the work (see SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 71).

ised.⁸⁹ Where, however, the employee's job is of a specialised nature, the employer may often find it extremely difficult to exercise this right.⁹⁰

The right to supervise how the work is to be done is also restricted by the common law in a number of ways. It is required that the employer's instructions must be *lawful*. The instructions may therefore not conflict with the employee's agreed contractual duties.⁹¹

The right is also restricted, to a certain extent, by the employer's common-law duty to take reasonable care of the health and safety of its employees.⁹² The limitation is contained in two facets of this duty. In the first instance, the employer must ensure that the work is done in such a *manner* that the possibility of injuries and work-related illnesses are minimised.⁹³ The employer must therefore organise the methods and procedures used in the production process in such a way that employees are not unnecessarily exposed to unreasonable risks.⁹⁴ It also means that, where necessary, the employer must train its employees *how* to use machinery and tools and *how* to do their work.

In the second instance, the employer must ensure that the machinery or plant is safe to work on or in.⁹⁵ This entails that the employer must provide and maintain proper

⁸⁹This is largely as a result of the deskilling of jobs (see par 1.6.1.1 of chapter 1 where this matter is discussed in greater detail).

⁹⁰See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 63. Consider, for example the position of a surgeon or a pilot or a computer expert.

⁹¹See *Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering & Allied Workers Union* (1990) 11 *ILJ* 1352 (ARB) at 1365I-1366A where the arbitrator considered the common law contractual principles regarding duties agreed to in a contract of employment.

⁹²See Carl Mischke and Christoph Garbers *Safety at Work: A Guide to Occupational Health, Safety and Accident Compensation Legislation* (1994) 2.

⁹³In *MacDonald v General Motors South Africa (Pty) Ltd* 1973 (1) SA 232 (E) at 237E-238A, for example, the court took into account that it was the general practice of the maintenance staff to climb onto machinery. This factor lent weight to the proposition that harm could not have been reasonably foreseeable on the part of the employer. In *Lahrs v SA Railways and Harbours* 1923 EDL 329 at 333-334 the court took into account that the usual method of taking hold of a crane cable was to hold it just beneath the hook. It held that the employer could not reasonably have foreseen that the particular employee would take hold of the hook itself, thereby incurring his injuries.

⁹⁴See Adrienne Scott "Safety and the Standard of Care" (1980) 1 *ILJ* 161 at 180 as well as the facts of *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) SA 28 (T) at 31E-F; *South African Railways and Harbours v Cruywagen* 1938 CPD 219 at 226 and *Barker v Union Government* 1930 TPD 120 at 128.

⁹⁵See C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 179.

machinery⁹⁶ and must ensure that the necessary protective measures⁹⁷ are taken to avoid injuries to employees.⁹⁸ It may also entail that employees be provided with protective clothing and equipment⁹⁹ and that experienced and properly qualified machine operators and supervisors be appointed.¹⁰⁰

2.4.2.4 The Right to Instruct the Employee Where the Work must be done

The employer's right to give instructions regarding the employee's labour potential also means that the employer can tell the employee *where* he must work¹⁰¹ and where he may *not* work.¹⁰²

The employer's instructions, however, must be *lawful*. Most importantly, it may not give instructions which are in breach of the provisions of the parties' contract of employment.

The employer's right is also restricted, to a certain extent, by the employer's common-law duty to take reasonable care of the health and safety of its employees. In terms of this duty, it must provide them with safe work premises.¹⁰³

⁹⁶See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 79; Adrienne Scott "Safety and the Standard of Care" (1980) 1 *ILJ* 161 at 165 and 183 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 179. The employer, however, is not compelled to provide the very best or the very latest patent devices (see *Lahrs v SA Railways and Harbours* 1923 EDL 329).

⁹⁷Such as notices warning employees of the danger of machinery and barriers around dangerous machinery.

⁹⁸C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 180 states that the test whether the employer has provided an efficient guard to parts of any machinery or not depends upon whether a reasonable person, who had given proper consideration to the habits of workmen would have considered it sufficient, and not whether it would be effective under any circumstances whatsoever (see also *Barker v Union Government* 1930 TPD 120 at 128-129).

⁹⁹Such as ear muffs, goggles and safety belts.

¹⁰⁰See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 79; Adrienne Scott "Safety and the Standard of Care" (1980) 1 *ILJ* 161 at 181-182 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 179.

¹⁰¹See *Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 60H where the appellate division held that, "[i]t [the right to give instructions] includes the right of an employer to decide...where it [the work] is to be done...". See also SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 62.

¹⁰²An employer may, for example, refuse to allow a female employee to work underground.

¹⁰³See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 79 and Adrienne Scott "Safety and the Standard of Care" (1980) 1 *ILJ* 161 at 165 and 182-183.

2.4.2.5 The Right to Instruct the Employee When the Work must be done

The employer's right to give the employee instructions regarding his labour potential also entails that it can instruct the employee *when* to work.¹⁰⁴ This right, however, is also limited by the common law as it stipulates that it is for the parties to either expressly or impliedly regulate the employee's working hours.¹⁰⁵ The employer's instructions must therefore be in accordance with the agreed terms.

If the parties have not reached agreement on the hours of work, the matter may be regulated by custom. If a custom exists in that particular trade or industry, it may be read into the contract of employment as an implied term. According to Norman-Scoble,¹⁰⁶ however, this can only happen if the custom is necessary and not merely reasonable, the evidence of the custom is clear and consistent, and both the employer and employee had knowledge of the custom or else it was universal in the area of occupation.¹⁰⁷

The parties may also agree, either expressly or impliedly, or there may be a custom in the trade, that the employee will work overtime. They may furthermore regulate work on Sundays and/or public holidays.

Although the parties may agree on these matters, in practice the employer can virtually dictate the terms because of its greater bargaining strength.¹⁰⁸

2.4.3 The Right to Control and Inspect the Work of the Employee

Flowing from the employer's right to give an employee instructions regarding his labour potential, is an implied right to control and inspect the work of the employee.¹⁰⁹

¹⁰⁴See *Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 60H where the appellate division held that the right to give instructions to the employee includes "the time when" the work must be done.

¹⁰⁵See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 64 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 194.

¹⁰⁶C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 193.

¹⁰⁷See also RH Christie *The Law of Contract in South Africa* 3 ed (1996) 180-187 for a detailed discussion on the requirements for a term to be regarded as implied by trade usage.

¹⁰⁸See par 2.2 above where this matter is discussed in detail.

¹⁰⁹See *Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 61H-61A where the appellate division held that the right to give instructions also implied "the right of the employer to inspect and direct the work being done by the employee". See also *R v Feun* 1954 (1) SA 58 (T) at 60-61 and SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 62.

In terms of this right, an employer can check whether an employee has followed its instructions as to the *work* that must be done¹¹⁰ and the *manner* in which it must be done.¹¹¹ In practice, this is usually done by supervisors and managers who have been vested with the necessary authority to inspect the work of employees. They may demand verbal or written reports from employees about their work. This may, for example, entail the completion of production sheets. They may also check the various phases or steps involved in the production process as well as the end product. This may be done through an established quality control system or through sporadic quality control tests.

The employer's right to tell an employee *when*¹¹² to work, also implies that the employer has the right to keep record of the hours worked by the employee. In practice, employers often expect their employees to keep record of their time spent on a particular job.¹¹³ Employees are also frequently required to clock in and out for work.¹¹⁴

2.4.4 The Employee must be Respectful towards the Employer and his Superiors

The courts have held that the employee's duty to be subordinate¹¹⁵ goes wider than contractual terms regarding where and when the work is to be done.¹¹⁶ They have held

¹¹⁰See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 64. See par 2.4.2.2 above where the right to give instructions regarding the *work* that must be done, is discussed.

¹¹¹See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 64. See par 2.4.2.3 above where the right to give instructions regarding the *manner* in which work must be done, is discussed.

¹¹²See par 2.4.2.5 above where this right is discussed.

¹¹³It is submitted that another reason for this is to enable the employer to determine what it must charge the customer for the end product.

¹¹⁴It is, however, submitted that time keeping also serves to enable the employer to calculate employees' wages.

¹¹⁵See par 2.3.1 above where the nature and rationale for this duty is discussed.

¹¹⁶See also Philip Selznick *Law, Society, and Industrial Justice* (1980) 136 where he states, "...the law imported into the employment contract a set of implied terms reserving full authority of direction and control to the employer. Once the contract was defined as an *employment* contract, the master-servant model was brought into play. The natural and inevitable authority of the master could then be invoked, for that authority had already been established as the defining characteristic of the master-servant relation. In this way, the continuing master-servant imagery lent a legal foundation to managerial prerogative...The prerogative contract gave the employer an open-ended, sovereign power".

that this duty also requires the employee to behave in a respectful manner towards the employer, his superiors¹¹⁷ and the employer's customers.¹¹⁸

By giving such a wide interpretation to this duty of the employee, the courts have taken cognizance of the special features of the employment relationship.¹¹⁹ It serves to promote harmonious co-existence and co-operation between the employee and management. It also takes account of the business aspect of the employer's enterprise¹²⁰ as it serves to ensure that good relations between the employer and its customers are maintained.

The duty to act in a "respectful manner" is an all-encompassing one because of the vagueness of the concepts "respect" and "respectful manner" and the fact that compliance therewith is determined on the facts of the matter. The broad ambit of this duty actually serves to enhance the employer's prerogative as it will be extremely difficult for an employee to challenge the employer's views as to what constitutes this duty.

2.4.5 The Employee must act in Good Faith towards the Employer

The courts appreciated the special features of the employment relationship¹²¹ and "infused it with a moral content"¹²² by reading a residual term into the contract of employment that the employee must act in good faith towards the employer.¹²³

This duty is fairly comprehensive and can be divided into three broad sections. The employee is firstly required not to use or divulge confidential information for his own

¹¹⁷See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 64 where Jordaan states that, "[t]he employee's subordinate status is generally said to [entail that]...the employee is obliged to...behave in a respectful manner towards the employer and superiors". See also SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidreg* 2 ed (1996) 62 and 129-130 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 148-149.

¹¹⁸See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 64 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 148.

¹¹⁹See par 2.4.1 above where the nature of the employment relationship is discussed.

¹²⁰See par 1.2 of chapter 1 where this aspect of an enterprise is discussed.

¹²¹See par 2.4.1 above where these features are discussed.

¹²²See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 59.

¹²³See *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26D-G and *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler & Another* 1971 (3) SA 866 (W) at 867H. See further Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 59-60.

benefit.¹²⁴ Secondly, the employee is required to further the employer's business.¹²⁵ This duty entails that the employee must devote his working hours exclusively to his employer's business¹²⁶ and may not compete with it.¹²⁷ Thirdly, the duty requires that the employee must be honest with regard to the employer's affairs.¹²⁸

The fact that the duty is so all-encompassing enhances the employer's prerogative.¹²⁹ It allows the employer a broad discretion as to what constitutes this duty¹³⁰ and makes the challenging of its interpretation thereof extremely difficult.

2.4.6 The Employee's Duty to Do his Work in a Competent Manner

It is a residual term of the contract of employment that the employee warrants that he is able to do the work which he has contracted to do.¹³¹ In terms of this warranty, the

¹²⁴See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 60-61; *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg & Another* 1967 (1) SA 686 (W) at 689-90 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 153. This duty may remain operative after the contract has been terminated.

¹²⁵See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 61.

¹²⁶He may not therefore work simultaneously for another employer if its business is the same as that of the first employer (see *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Others* 1981 (2) SA 173 (T) and *Mine Workers' Union v Brodrick* 1948 (4) SA 959 (A) at 979). See also C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 152.

¹²⁷See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 61 note 381; C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 152; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Others* 1981 (2) SA 173 (T) at 198-199 as well as *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler & Another* 1971 (3) SA 866 (W) at 868A.

¹²⁸The employee will be breaching his duty to act in good faith where he steals from the employer or commits fraud (see C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 155-156) or obtains secret commissions (see *Uni-erections v Continental Engineering Co Ltd* 1981 (1) SA 240 (W) at 252; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 61 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 153-154).

¹²⁹See Philip Selznick's observations quoted in note 116 above.

¹³⁰In *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 25H-I, for instance, the actions of the employee were held not to amount to a repudiation of the contract in the "narrow sense" of the word. The appellate division nevertheless found that the employee's actions amounted to "repudiation" in the wide sense" in that they constituted a breach of his duty to act in good faith.

¹³¹See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 126-127; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 58-59 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 141. See also *Wallace v Rand Daily Mail Ltd* 1917 AD 479 at 482.

employee also guarantees that there are no factors, such as previous misconduct, which may make him unsuitable for certain types of work.¹³²

On the ground of this implied warranty, there is no duty or obligation on the part of the employer to *train* the employee for the job which he has contracted to do. The employer will nevertheless be entitled to give the employee instructions regarding the *manner* in which the work must be done and the machinery to be operated.¹³³

2.4.7 The Employer's Duty to Remunerate the Employee

Remuneration by the employer for work done by the employee is one of the essential elements of a contract of employment.¹³⁴

The common law does not contain any provisions regarding minimum wages or salary. Consequently, the *amount* of wages or salary must be arranged contractually. As the employer is usually in a stronger bargaining position,¹³⁵ it will be able to virtually dictate what the amount will be.

Furthermore, the common law does not prohibit an employer from paying employees who are essentially doing the same work different wages or salaries.¹³⁶

The general rule is that, as in the case of other contracts of letting and hiring,¹³⁷ the employee will only be entitled to his wages or salary if he has performed his services.¹³⁸

¹³²See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 128 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 59.

¹³³See par 2.4.2.3 above where this right of the employer is discussed.

¹³⁴See par 2.3 above where the elements of a contract of employment are discussed. See also SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) note 61 on page 64; John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 62; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 67 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 202.

¹³⁵See par 2.2 above where this matter is discussed.

¹³⁶See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 68.

¹³⁷See par 2.3 above where it was stated that the contract of employment is treated as a species of the contract of letting and hiring.

¹³⁸See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 64 and 85; JC de Wet and AH van Wyk *De Wet en Van Wyk: Die Suid-Afrikaanse Kontraktereg en Handelsreg Vol 1* 5 ed (1992) 384 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 203.

An employee, however, is entitled to his wages or salary where he is willing and able to work,¹³⁹ but is prevented by vis major from working¹⁴⁰ or the employer is either unable¹⁴¹ or unwilling¹⁴² to provide him with work.

An employee who is dismissed summarily¹⁴³ for justifiable reasons¹⁴⁴ is not entitled to his wages or salary for the unexpired period of his contract. He is nevertheless entitled to be remunerated for the period that he worked.¹⁴⁵ There is some uncertainty as to whether or not an employee who has deserted an employer is entitled to payment of his wages or salary for the period that he actually worked. According to Norman-Scoble,¹⁴⁶ a deserter is not entitled to such payment. However, in view of the appellate division's decision in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*,¹⁴⁷ it could possibly be argued that the deserter may be entitled to such payment.¹⁴⁸

¹³⁹Usually, where an employee is employed on a fixed salary, a mere tender to perform will be sufficient to entitle him to his remuneration (see MSM Brassey "The Contractual Right to Work" (1982) 3 *ILJ* 247 at 262).

¹⁴⁰See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 63; MSM Brassey "The Contractual Right to Work" (1982) 3 *ILJ* 247 at 262 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 203.

¹⁴¹Consider, for instance, *Johannesburg Municipality v O'Sullivan* 1923 AD 201 where the employer was unable to provide the employees with work due to a strike by other workers.

¹⁴²An example where the employer may be unwilling to provide the employee with work is where it suspects that the employee is guilty of misconduct. Under such circumstances, it may prefer to suspend the employee on full pay pending a disciplinary enquiry (see Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 100; MSM Brassey "The Contractual Right to Work" (1982) 3 *ILJ* 247 at 262 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 204-205).

¹⁴³Summary dismissal entails dismissal without notice or payment in lieu of notice. See par 2.4.10.2 below where summary dismissal for a serious breach is discussed in greater detail.

¹⁴⁴Usually an employer does not have to provide a reason for the dismissal of an employee (see par 2.4.10.3 below where dismissal by giving notice is discussed). Where, however, it wants to dismiss an employee summarily, it must do so for a justifiable reason; usually gross misconduct (see par 2.4.10.2 below where dismissal for breach of contract is discussed).

¹⁴⁵See C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 205-207.

¹⁴⁶C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 207.

¹⁴⁷1979 (1) SA 391 (A).

¹⁴⁸See *Valasek v Consolidated Frame Cotton Corporation Ltd* 1983 (1) SA 694 (N) where the supreme court actually ordered the deserter to be paid for the month that he had worked. See also John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 62; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 71 and Paul Benjamin "An End to Desertion" 1981 (2) *ILJ* 231 at 242-244.

At common law there is nothing which precludes an employer from setting off a *liquidated debt* owed to it by its employee against the wages or salary of the employee.¹⁴⁹ The law, however, only allows deductions in respect of *illiquid claims* by consent or by way of set-off.¹⁵⁰

2.4.8 The Rights and Duties to which the Parties have Specifically Agreed

There are a number of employment matters which are not regulated by the common law. Accordingly, should the parties want these matters to form part of their contract, they must be expressly or impliedly included.

Matters which may be included in this manner are increments and bonuses,¹⁵¹ vacation leave,¹⁵² sick leave,¹⁵³ study leave, maternity leave, paternity leave, compassionate leave, accommodation and food,¹⁵⁴ medical aid and pension fund membership.

As the employer is usually in a stronger bargaining position, it will be able to virtually dictate the terms of these matters.¹⁵⁵ This is on the assumption that it is prepared to include these terms in the contract. Where the employer is not so amenable, there is usually little that the employee can do to convince the employer that these terms must be included.

¹⁴⁹See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 92 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 208. See also *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 at 292 where the court held that the Union Government was entitled to set off taxed costs due by the employee against his wages. See further *Keulder v Minister of Finance* 1953 (2) SA 101 (N) at 104.

¹⁵⁰See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 76.

¹⁵¹See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 92.

¹⁵²See C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 190 where he states that, "...his [the employee's] right to holidays being dependant entirely upon his covenant with his master, express or implied". See also SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 99; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 82 and *East London Municipality v Thomson* 1944 AD 56 at 59.

¹⁵³See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 101; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 82 and 84 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 184.

¹⁵⁴See C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 182.

¹⁵⁵See par 2.2 above where the unequal bargaining power of the parties is discussed.

2.4.9 The Employer's Right to Discipline

In terms of the common law, the employer has the right to discipline an employee who is guilty of misconduct. The right to discipline is a residual term of the contract of employment. It is inextricably linked to the employer's right to give instructions. Anderman¹⁵⁶ explains this in the following words

Employers' disciplinary powers,...are well developed in the terms implied in employment contracts. Even if nothing is put into express terms of employment contracts, the employer's disciplinary control is carefully preserved in the employee's duty to obey as an implied fundamental term of the contract.

The employer's right to discipline is regulated by the common law principles of contract. It may summarily dismiss an employee if the latter's misconduct is of a serious nature¹⁵⁷ or it may dismiss him by merely giving the required notice.¹⁵⁸

The employer, however, may not always want to rid itself of an employee guilty of misconduct but may prefer to impose a less severe penalty.¹⁵⁹ In such a case, common law contract principles determine that the penalty may not constitute breach of contract. The employer will thus be unable, without the employee's consent, to suspend the employee without pay¹⁶⁰ or to demote¹⁶¹ or transfer him¹⁶² or order forfeiture of an

¹⁵⁶Steven D Anderman *Labour Law: Management Decisions and Workers' Rights* (1992) 62. See also John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 86 where he states that this right forms "an integral part of the broader 'right to manage'" and that it "flows from the contract...". See further PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) note 6 on 99 where they state that, "From a narrower legal perspective, the power of the employer to regulate the conduct of an employee and to issue codes of conduct is primarily to be found in the implied common law duties of employees".

¹⁵⁷See par 2.4.10.2 below where summary dismissal is discussed.

¹⁵⁸See par 2.4.10.3 below where dismissal by notice is discussed.

¹⁵⁹The employer always has a choice between dismissal or a lesser form of penalty. The concept of progressive discipline where dismissal may only be considered for a first occurrence in the case of serious misconduct or as the ultimate penalty for repeated offences, was essentially developed by the industrial court when it had to determine the fairness of a dismissal in terms of its unfair labour practice definition jurisdiction in the Labour Relations Act, 1956. This concept now essentially forms the basis of the approach of the Labour Relations Act, 1995 to discipline (see schedule 8 to the Labour Relations Act, 1995 entitled Code of Good Practice: Dismissal (hereafter referred to as the Code). See par 3.4.1 of chapter 3 where the concept of progressive discipline is discussed.

¹⁶⁰See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 99-100 where they indicate that such a penalty would be treated as wrongful repudiation of the contract by the employer (see also 186).

¹⁶¹See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 99-100 where they indicate that such a penalty would be treated as wrongful repudiation of the contract by the employer (see also 187).

¹⁶²If the contract does not make provision for transfers.

agreed bonus¹⁶³ or part of his wages or salary.¹⁶⁴

The employer will nevertheless be able to suspend the employee on full pay¹⁶⁵ and to give him warnings, be they verbal or written.¹⁶⁶ However, the effectiveness of these penalties are debatable. Suspension on full pay will in all likelihood have limited value as a deterrent. Warnings are also not that effective, unless they are linked to a more serious penalty, such as dismissal, for a future commitment of the offence.

In practice, however, an employer's range of penalties will usually not be limited to those that fall within the ambit of the contract. Through its superior bargaining power¹⁶⁷ as well as its right to dismiss by merely giving the required notice,¹⁶⁸ the employer will probably be able to convince the employee to agree to a more serious penalty which would otherwise amount to a breach of contract. John Grogan¹⁶⁹ explains this as follows

[t]here can be no doubt that the employer's unfettered legal right to dismiss forms the basis of his disciplinary power. His answer to the employee who contests his disciplinary rules can always be: "If you don't like it here, go and find another employer."

2.4.10 The Employer's Right to Terminate the Contract of Employment

2.4.10.1 Introduction

The contract of employment can be terminated in a number of ways. It can be terminated in terms of the contract itself where, for instance, it provides that it will

¹⁶³See par 2.4.8 above.

¹⁶⁴See par 2.4.7 above.

¹⁶⁵See par 2.4.2.2 as well as note 83 above. See also Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 186.

¹⁶⁶For a discussion on warnings, see Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 183-185. Contra John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 87 who is of the view that the employer's punitive powers in terms of the common law are limited to dismissal.

¹⁶⁷See par 2.2 above.

¹⁶⁸See par 2.4.10.3 below.

¹⁶⁹*Riekert's Basic Employment Law* 2 ed (1993) 88.

terminate upon the completion of a specific project¹⁷⁰ or after the expiry of a stipulated period.¹⁷¹ The contract may also be terminated by consent¹⁷² or by the operation of law¹⁷³ or impossibility of performance.¹⁷⁴ Both the employer and employee are furthermore entitled, in terms of common law contract principles, to cancel the contract on the ground of a serious breach thereof by the other party.¹⁷⁵ In addition, both the employer and the employee can terminate the contract by giving notice as stipulated in the contract or, where the contract does not contain any provisions in this regard, by giving reasonable notice.¹⁷⁶

The right to terminate a contract for a serious breach or to terminate it by simply giving the required notice, undoubtedly strengthens the employer's decision-making power regarding its employees. These rights, and the manner and extent to which they strengthen the employer's prerogative, are discussed in the paragraphs hereunder.

¹⁷⁰See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 155; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 90 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 318.

¹⁷¹See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 155 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 313.

¹⁷²See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 155; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 90 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 317-318.

¹⁷³A contract is automatically terminated by the sequestration of the employer's estate (see s 38 of the Insolvency Act 24 of 1936 as well as s 339 of the Companies Act). See also SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 160-161; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 90-91 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 320 for a discussion of the termination of the contract by the employer's insolvency.

¹⁷⁴Due to, for instance, the illness or disability or death of one of the parties. See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 158-159; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 91-94; Martin Brassey "The Effect of Supervening Impossibility of Performance on a Contract of Employment" (1990) *AJ* 22 at 36-43 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 319 and 321-323.

¹⁷⁵See the discussion in par 2.4.10.2 below.

¹⁷⁶See par 2.4.10.3 below for a detailed discussion of this method of termination of a contract.

2.4.10.2 Dismissal for Breach of Contract

Should an employee fail to comply with any of his contractual duties, he would be in breach of the contract. In terms of the law of contract,¹⁷⁷ a breach which is serious and deliberate entitles the other party to cancel the contract¹⁷⁸ or, in labour law terms, it entitles the employer to dismiss the employee.¹⁷⁹

Under such circumstances, the employer will be entitled to dismiss the employee summarily.¹⁸⁰ In addition, it may claim damages.¹⁸¹

The question of whether or not a breach is serious enough to warrant dismissal, is a factual one.¹⁸² The supreme court has held that gross insubordination,¹⁸³ persistent and serious insolence towards the employer¹⁸⁴ or customers,¹⁸⁵ assault of an employer or

¹⁷⁷See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 95-96 where Jordaan points out that the courts have always been prepared to apply the principles of the law of contract to contracts of employment.

¹⁷⁸See JC de Wet and AH van Wyk *De Wet en Van Wyk: Die Suid-Afrikaanse Kontraktereg en Handelsreg Vol 1* 5 ed (1992) 214-222; RH Christie *The Law of Contract in South Africa* 3 ed (1996) 596-601 and AJ Kerr *The Principles of the Law of Contract* 4 ed (1989) 445 and 549.

¹⁷⁹See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 162; John Grogan *Rieker's Basic Employment Law* 2 ed (1993) 88; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 97-98 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 158.

¹⁸⁰See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 147; JC de Wet and AH van Wyk *De Wet en Van Wyk: Die Suid-Afrikaanse Kontraktereg en Handelsreg Vol 1* 5 ed (1992) 285; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 97 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 158.

¹⁸¹See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 147 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 158 and 163-164 and. For a discussion of this contractual principle, see JC de Wet and AH van Wyk *De Wet en Van Wyk: Die Suid-Afrikaanse Kontraktereg en Handelsreg Vol 1* 5 ed (1992) 195, 214 and 222-234; RH Christie *The Law of Contract in South Africa* 3 ed (1996) 577 and 597 and AJ Kerr *The Principles of the Law of Contract* 4 ed (1989) 446 and 573.

¹⁸²See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 97; *Wallace v Rand Daily Mail Limited* 1917 A 479 at 491; *Schneier and London v Bennett* 1927 TPD 346 at 349 as well as *Moonian v Balmoral Hotel* 1925 NPD 215 at 219.

¹⁸³See *Zieve v National Meat Suppliers Ltd* 1937 AD 177 at 187 and *Moonian v Balmoral Hotel* 1925 NPD 215 at 219 where the court stated that it must be "a serious and deliberate refusal" to obey a lawful order.

¹⁸⁴See *Zieve v National Meat Suppliers* 1937 AD 192 at 188 and *Strachan v Prinsloo* 1925 TPD 709 at 718.

¹⁸⁵See *Gogi v Wilson & Collins* 1927 NLR 21 at 22.

a superior, dishonesty,¹⁸⁶ gross or habitual negligence,¹⁸⁷ gross incompetence,¹⁸⁸ competing with the employer,¹⁸⁹ willful or repeated absence from work,¹⁹⁰ participation in a strike,¹⁹¹ and drunkenness on duty¹⁹² constituted such serious offences.

The fact that the ordinary principles of the law of contract are applicable where the employer elects to dismiss the employee, places it in a very strong position. All that is required is for it to prove, on a balance of probabilities,¹⁹³ that there has been a serious breach. It does not have to give warnings.¹⁹⁴ Nor does it have to hold a disciplinary enquiry before deciding to dismiss the employee.¹⁹⁵ It furthermore does not have to grant the employee an opportunity to improve his conduct.¹⁹⁶ In addition, the employer

¹⁸⁶Such as theft of the employer's property; fraud (see *Federal Cold Storage Co Ltd v Angehrn and Piel* 1910 TPD 1347 at 1354) and taking secret commissions or lending himself to corruption.

¹⁸⁷See *Wallace v Rand Daily Mail Limited* 1917 AD 479 at 485 and 491-492.

¹⁸⁸See *Negro v Continental Spinning and Knitting Mills (Pty) Ltd* 1954 (2) SA 203 (W) at 214B-H.

¹⁸⁹This is one of the three broad sections of the employee's general duty to act in good faith towards the employer (see par 2.4.5 above). See *Nierner v Hahn* 1895 (16) NLR 84 at 88.

¹⁹⁰See *Negro v Continental Spinning & Knitting Mills (Pty) Ltd* 1954 (2) SA 203 (W) at 210-211. However, an isolated incidence of absence without leave will not justify summary dismissal (see *Schneier and London Ltd v Bennett* 1927 TPD 346 at 351).

¹⁹¹See *Marievale Consolidated Mines Ltd v National Union of Mineworkers & Others* (1986) 7 ILJ 108 (W) at 115E-I; 117H-118A and 120C-D; *Egbep Ltd v Black Allied Mining & Construction Workers' Union & Others* 1985 (2) SA 402 (T); *Ngewu & Others v Union Co-Operative Bark & Sugar Co* 1982 (2) SA 390 (N) at 405E-F and *R v Smit* 1955 (1) SA 239 (C) at 241H-142C. See further par 6.2 of chapter 6 where this matter is discussed in detail.

¹⁹²The question of whether or not such an offence warrants summary dismissal depends on circumstances such as the type of business that the employer conducts (see *Schneier and London v Bennett* 1927 TPD 346 at 355).

¹⁹³See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 97 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 158.

¹⁹⁴See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 96.

¹⁹⁵See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 95-95; MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 4-5 as well as *Gründling v Beyers* 1967 (2) SA 131 (W) at 141. (See, however, Martin Brassey's argument in "The Common Law Right to a Hearing before Dismissal" (1993) 9 SAJHR 177.) A public servant is nevertheless entitled to rely on the maxim audi alteram partem when his employer wants to dismiss him in terms of a statutory provision (see *Administrator of the Transvaal & Others v Traub & Others* (1989) 10 ILJ 823 (A) at 827D-E). In *Administrator, Transvaal & Others v Zenzile & Others* (1991) 12 ILJ 259 (A) at 270G-I the appellate division held that a public servant would also be entitled to an enquiry where he is dismissed in terms of his contract and not in terms of a statutory authority.

¹⁹⁶See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 96.

does not have to consider alternatives to dismissal.¹⁹⁷ It also does not have to provide reasons for dismissal.¹⁹⁸ The common law also allows the employer to justify a dismissal by facts which only became known after the dismissal.¹⁹⁹

2.4.10.3 Termination of the Contract by Giving Notice

In terms of common law contract principles,²⁰⁰ contracts of employment which have been entered into for indefinite periods²⁰¹ may be terminated by either party giving notice of such termination²⁰² or by making payment in lieu of notice.²⁰³

The employer and employee may either expressly or impliedly provide for termination by way of notice in their contract.²⁰⁴ They may also agree on the notice period as well as when and how notice must be given. Where they have not agreed on the notice period,

¹⁹⁷Ibid.

¹⁹⁸See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 97 as well as *Nchobaleng v Director of Education (Tvl) & Another* 1954 (1) SA 432 (T) at 438.

¹⁹⁹C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 159 explains this as follows, "A master may justify his dismissal of an employee by proof of conduct justifying dismissal without notice, although he was ignorant of such conduct at the time of the dismissal, since the right to dismiss does not depend on the master's knowledge or ignorance, but on the conduct of the servant". See also Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 97.

²⁰⁰See RH Christie *The Law of Contract in South Africa* 3 ed (1996) 483-485 as well as AJ Kerr *The Principles of the Law of Contract* 4 ed (1989) 398 for a discussion on the general principles of the law of contract in this regard.

²⁰¹There are, however, writers who have argued that the implied duty of good faith could be used to extend to employers a duty not to terminate a contract of indefinite duration without a good reason (see John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 53-54 as well as PJ Pretorius and DJM Pitman "Good Cause for Dismissal: The Unprotected Employee and Unfair Dismissal" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D Van Zyl Smit (eds) *Labour Law* (1991) 133 at 139). Fixed term contracts may normally not be terminated on notice before the expiry of the term, unless otherwise provided for by the contract (see John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 54; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 87 as well as C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 314).

²⁰²It is considered to be a residual term of the contract of employment. See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 52; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 86 and 88; PJ Pretorius and DJM Pitman "Good Cause for Dismissal: The Unprotected Employee and Unfair Dismissal" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D Van Zyl Smit (eds) *Labour Law* (1991) 133 at 138 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 169.

²⁰³See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 88 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 89-90.

²⁰⁴See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 156 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 88.

the courts have held that it must be a period which is reasonable under the circumstances.²⁰⁵ Usually, the periodicity of payment is considered to be the most important factor.²⁰⁶

In practice, the fact that both parties can terminate the contract by giving notice, is of little value to the employee as he is usually²⁰⁷ intent on keeping his job.²⁰⁸ But for the employer this right has important implications regarding the amount of control which it can exercise over the employee. Grogan²⁰⁹ states that

The employer's unfettered power to terminate on notice is generally regarded as the central instrument which ensures the preservation of his power over his employees.

Beatty²¹⁰ explains the implications of the right to dismiss on notice as follows

Far from a means of self-actualization, the social control of what the individual does that is implicit in this power of termination, carries with it the potential for the complete manipulation of that person.

This right is far more important than its right to dismiss an employee for serious misconduct.²¹¹ In the latter instance, the employer must have a *reason* for the employee's dismissal, namely a serious breach of the contract. Accordingly, the reason may come

²⁰⁵See *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 326. See also SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 157 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 88.

²⁰⁶See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 157 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 88.

²⁰⁷There are exceptions where the employee has the greater bargaining power (see MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 5-6).

²⁰⁸See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 87 note 561 where they state that, "From the employee's point of view, his or her own right to terminate on notice is cold comfort in the absence of opportunities for suitable alternative employment". See also MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 6.

²⁰⁹John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 53.

²¹⁰David M Beatty "Labour is not a Commodity" in Barry J Reiter and John Swan (eds) *Studies in Contract Law* (1980) 328.

²¹¹See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 86.

under the scrutiny of the courts where the employee questions the lawfulness of his dismissal.²¹²

But where the employer dismisses an employee by giving him the required notice, the reason for dismissal plays no role.²¹³ All that is required is that the employer must have given the relevant notice and that it has done so in accordance with the agreed provisions or the common law.²¹⁴ Thus, the employer does not have to have a reason for dismissal.²¹⁵ Where it does have a reason, it may be a completely arbitrary one and the employer is under no obligation to inform the employee thereof.²¹⁶ Should it elect to tell the employee the reason, the latter will be unable to question either the lawfulness or the fairness thereof.²¹⁷ The courts will also not be able to scrutinise the given reason.²¹⁸

²¹²See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 88 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 87. See also *Sigwebela v Hulett's Refineries Ltd* (1980) 11 ILJ 51 (N) at 51H-52A. The court's investigation will nevertheless be restricted to the lawfulness of the reason. The fairness thereof will not be considered (see the *Sigwebela*-case at 54G-H).

²¹³See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 53 where he states that, "...neither the employer nor the employee is required to show any good cause for terminating the contract, or to inform the other of such reasons as there may be, or to follow any special procedure before termination". See also Grogan at 88. See further PJ Pretorius and DJM Pitman "Good Cause for Dismissal: The Unprotected Employee and Unfair Dismissal" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D Van Zyl Smit (eds) *Labour Law* (1991) 133 at 134 and MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 3. In addition, see *Embling v Headmaster, St Andrews College (Grahamstown) and Another* 1991 (4) SA 458 (E) at 467-468C.

²¹⁴See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 88 and MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 3.

²¹⁵See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 53; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 86-87 and C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 169.

²¹⁶See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 53. Implied in this is the fact that there is no obligation on the employer to afford the employee an enquiry.

²¹⁷See John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 53 as well as Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 87. The employee is not entitled to an enquiry during which he can ask for the reason or, where it has been given, to question its lawfulness or fairness. But Alan Rycroft and Barney Jordaan point out (at 107-108) that, in terms of the decision in *Sibiya & Another v Administrator, Natal & Another* (1991) 12 ILJ 530 (D) at 532E-G public servants may be entitled to a hearing on the ground of the audi alteram partem principle. They nevertheless point out (in note 704) that the matter is far from settled. See also John Grogan "Unfair Dismissal of 'Contractual' Public Sector Employees" (1990) 11 ILJ 655 at 664 and PJ Pretorius and DJM Pitman "Good Cause for Dismissal: The Unprotected Employee and Unfair Dismissal" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D Van Zyl Smit (eds) *Labour Law* (1991) 133 at 142. See also *Embling v Headmaster, St Andrews College (Grahamstown) and Another* 1991 (4) SA 458 (E) at 467 where the court held that, "[t]he rules of natural justice - succinctly expressed in the maxim *audi alteram partem* - have no application in the field of contract. Contractual rights and obligations are governed by the law of contract...As the applicant's employment was terminated in accordance with the terms of contract he was not entitled to a hearing prior to the termination of the agreements. Neither respondent was obliged to give the applicant reasons for his dismissal".

The right furthermore increases the employer's bargaining power vis-a-vis the employee. Prior to the conclusion of the contract of employment, the applicant's weak social position forces him to agree to the employer's terms and conditions.²¹⁹ But during the employment relationship, the fear of losing his job through notice will also play an important role in the employee's preparedness to agree to new or additional terms and conditions or to agree to changes to the original terms and conditions of employment. Brassey²²⁰ summarises the practical effect for the employee of the right to dismiss by giving notice as follows

The common law, in short, offers little protection against arbitrariness. It allows the party with the greater bargaining power to extract any bargain he wants, however oppressive, perverse or absurd it may be, provided that it is not illegal or immoral. It allows him to change it when it no longer suits him, by threatening to terminate the relationship unless the other party submits to the change. It allows him to flout the bargain whenever he likes...

It is submitted in conclusion that the employer's right to terminate the contract in this manner negates the relational aspect of the contract of employment²²¹ and works against any notion of a right to a job or job security. In the words of Norman-Scoble²²²

The mere fact that one person has employed another gives neither party a vested right to a continuance of such legal relationship for an indefinite period, consequently it is competent for either party to terminate the contractual relationship...provided he gives the other adequate notice thereof.

2.5 CONCLUSION

The common law clearly favours the employer. It allows the employer to impose the terms of the contract of employment as it essentially gives no effect to the social and economic realities surrounding the employment relationship.²²³

Upon conclusion of the contract of employment, it not only provides the legal basis for the employer's right to manage the employee, but also strengthens and promotes this

²¹⁸See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 87.

²¹⁹See par 2.2 above.

²²⁰In MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 5.

²²¹See par 2.4.1 above.

²²²C Norman-Scoble *The Law of Master and Servant in South Africa* (1956) 169.

²²³See par 2.2 above.

right in a number of ways. Through the subordination element of the contract of employment, the employer acquires the right to give instructions to the employee.²²⁴ Through residual terms such as the duty to be respectful,²²⁵ to work in a competent manner²²⁶ and to act in good faith,²²⁷ this right of the employer is strengthened. Furthermore, the fact that these residual terms are phrased in such wide terms²²⁸ enhances the employer's prerogative as it affords the employer a wide interpretation of these duties.

However, in view of the recent appellate division's decision in *Council for Scientific & Industrial Research v Fijen*²²⁹ that the residual term to act in good faith is reciprocal in nature,²³⁰ the employee's position vis-a-vis the employer may be strengthened. The reciprocal nature of this duty entitles the employee to question the employer's conduct regarding him and the scope of this duty allows him to give a broad interpretation to it.

The right to dismiss by giving the required notice undoubtedly plays the most important role in enforcing and strengthening the employer's right to manage.²³¹ The fear of losing his job through notice and with no consideration to the concept of fairness, plays a pivotal role in the employee's preparedness to follow instructions and to comply with his other contractual duties. It also plays a crucial role in the employee's preparedness to agree to changes to the original terms and conditions of employment.

The common law is also antagonistic towards a system of collective bargaining. At most, it permits freedom of association in the sense that nothing prevents employees from

²²⁴See par 2.3.1 above.

²²⁵See par 2.4.4 above.

²²⁶See par 2.4.6 above.

²²⁷See par 2.4.5 above.

²²⁸See the comments made in this regard in pars 2.4.4-2.4.6 above.

²²⁹(1996) 17 ILJ 18 (A).

²³⁰The court held (at 26D-F) that, "[i]t is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the 'innocent party' to cancel the agreement...". See also *Angehm & Piel v Federal Cold Storage Co Ltd* 1908 TS 761 at 777-778 and *Humphries & Jewell (Pty) Ltd v Federal Council of Retail & Allied Workers Union & Others* (1991) 12 ILJ 1032 (LAC) at 1037G.

²³¹See par 2.4.10.3 above where this right is discussed.

forming and joining trade unions.²³² However, by exercising its property rights, the employer may deny trade union officials access to its premises²³³ and, by exercising its superior bargaining strength, it may oblige an employee to cancel his trade union membership or to agree not to become a member.²³⁴ In addition, it brands the exercising of collective rights, such as the right to bargain, to strike and to picket, as breaches of employees' individual contracts of employment,²³⁵ requiring a judicial form of settlement for which individualised, contractual remedies are prescribed.²³⁶

The common law's subscribing to the concept of freedom of contract which allows the employer to discriminate when selecting people for employment,²³⁷ brings it into direct conflict with the Constitution²³⁸ which specifically prohibits unfair discrimination on grounds such as race, gender, sex, pregnancy, marital status, age, disability et cetera.²³⁹ In addition, the common law's emphasis on lawfulness²⁴⁰ and its virtual²⁴¹ negation of the concept of fairness, is also contrary to the Constitution which affords everyone the right to fair labour practices in the conducting of labour relations.²⁴² Furthermore, the common law's "antagonistic" approach to the collective aspect of industrial

²³²This is because the common law permits people to do anything which is not prohibited by law or which does not interfere with the rights of others (see AA Landman "Freedom of Association in South African Labour Law" in *Labour Law* 89 at 90).

²³³See AA Landman "Freedom of Association in South African Labour Law" in *Labour Law* 89 at 90.

²³⁴See par 2.2 above where this matter is discussed.

²³⁵See *R v Smit* 1955 (1) SA 239 (C) at 241H-142C; *Ngewu & Others v Union Co-Operative Bark & Sugar Co* 1982 (4) SA 390 (N) at 405E-F; *Egbep Ltd v Black Allied Mining & Construction Workers' Union & Others* 1985 (2) SA 402 (T) and *Marievale Consolidated Mines Ltd v National Union of Mineworkers & Others* (1986) 7 ILJ 108 (W) at 115E-I; 117H-118A and 120C-D. See further par 6.2 of chapter 6 where this matter is discussed in greater detail.

²³⁶See Paul Pretorius "Status Quo Relief and the Industrial Court: The Sacred Cow Tethered" (1983) 4 ILJ 167 at 173. See also par 6.2 of chapter 6 where these remedies are discussed in greater detail.

²³⁷See par 2.2 above in this regard.

²³⁸This refers to the final constitution entitled the Constitution of the Republic of South Africa Act 108 of 1996 published as notice 2083 in Government Gazette 17678 of 18 December 1996 (hereafter the Constitution).

²³⁹See s 9 of the Constitution which deals with equality.

²⁴⁰This is particularly evident in the employer's right to dismiss by merely giving the required notice (see par 2.4.10.3 above where this right is discussed).

²⁴¹The courts have on occasion required that the employer's instructions must not only be lawful but also reasonable (see note 79 in par 2.4.2.2 above).

²⁴²See s 23(1) of the Constitution.

relations²⁴³ also brings it into direct conflict with the Constitution. The latter affords employees the right to associate²⁴⁴ and to strike.²⁴⁵ It also affords trade unions the right to organise²⁴⁶ and to engage in collective bargaining.²⁴⁷

Clearly, legislation was necessary to bring the employment relationship in line with the Constitution and to address the unequal bargaining power between the parties. The legislature, often in response to collective demands of workers and their trade unions,²⁴⁸ introduced legislation which prescribed minimum terms and conditions of employment.²⁴⁹ It is currently in the process of drafting legislation which will protect applicants for jobs and employees against all forms of unfair discrimination.²⁵⁰ It has introduced legislation which infused the employment relationship with the concept of fairness.²⁵¹ Of principal importance in this regard was the statutory protection of employees against arbitrary dismissal.²⁵² In addition, the legislature introduced legislation which dealt with the collective dimension of labour law.²⁵³

In the next chapter the role of legislation in the individual employment relationship and its impact on the employer's right to manage are considered.

²⁴³See the discussion earlier in this paragraph.

²⁴⁴See s 23(2)(a).

²⁴⁵See s 23(2)(c).

²⁴⁶See s 23(4)(b).

²⁴⁷See s 23(5).

²⁴⁸See Paul Pretorius "Status Quo Relief and the Industrial Court: The Sacred Cow Tethered" (1983) 4 *ILJ* 167 at 172.

²⁴⁹See par 3.3.3 of chapter 3 in this regard.

²⁵⁰See the Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute published as Notice 804 of 1996 in Government Gazette 17303 of 1 July 1996.

²⁵¹This was originally done through the introduction of the unfair labour practice definition in s 1 of the Labour Relations Act, 1956. See par 3.1 of chapter 3 in this regard.

²⁵²This was originally achieved through the unfair labour practice definition in s 1 of the Labour Relations Act, 1956 as interpreted by the industrial court. It culminated in the right afforded in s 185 of the Labour Relations Act, 1995 to every employee not to be unfairly dismissed. For a discussion of the development of the law regarding unfair dismissal, see pars 3.4.1 and 3.4.3 of chapter 3.

²⁵³See chapter 4 in this regard.

CHAPTER 3

THE INFLUENCE OF LEGISLATION ON TERMS AND CONDITIONS OF EMPLOYMENT

3.1 INTRODUCTION

South African labour legislation has not challenged the basic common law premise that the employment relationship is a contractual one¹ and that the employer has the right to utilise and control the labour potential of the employee.

However, it has imposed limitations on the employer's right to manage the employee in various ways. The court in *R v Canqan*² explained the effect of legislation on the employer's right to manage as follows

It appears to me that [the statutory provision concerned in that case] is designed to protect the interests of employees and to safeguard their rights, and its effect is to limit the common law rights of employers and to enlarge the common law rights of employees. The history of social legislation discloses that for a considerable number of years there has been progressive encroachment on the rights of employers in the interests of workmen and all employees.

The first legislation in this regard was introduced in 1911 when the Mines and Works Act 12 of 1911 was promulgated.³ This Act represented the first legislation on health and safety in the mines and was a response to the danger and harmfulness of mining.⁴

¹ See the Basic Conditions of Employment Act which inter alia deals with aspects of the contract of employment such as notice periods (see s 14) and the furnishing of a certificate of service upon termination of a contract of service (see s 15). See also the Wage Act 5 of 1957 (hereafter the Wage Act) which also deals with aspects of the contract of employment such as the issuing of a certificate upon termination of the contract (see s 8(1)(s)) and payment in lieu of notice of termination of the contract (see s 8(1)(u)). See further the Labour Relations Act, 1995 which inter alia regulates the transfer of a contract of employment (see s 197). The Act also regulates the position of contracts of employment vis-a-vis collective agreements and arbitration awards (see s 199).

² 1965 (3) SA 360 (E) at 367H-368A.

³ This Act was amended in 1926 (see *Sonia Bendix Industrial Relations in South Africa* 3 ed (1996) 82).

⁴ See *Sonia Bendix Industrial Relations in South Africa* 3 ed (1996) 78 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 316-317 for a discussion of the main objectives of this Act. It was later replaced by the Mines and Works Act 25 of 1956 (hereafter the Mines and Works Act) (see Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 318) which was in turn repealed by the Minerals Act 50 of 1991 (hereafter the Minerals Act) (see s 68(1) thereof). This Act came into operation on 1 January 1992. Chapter V of this Act deals with safety and health in the mines (see SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 420-422 where they discuss this Act). The health and safety provisions of the latter Act have been replaced by the provisions of the Mine Health and Safety Act 29 of 1996 (hereafter the Mine Health and Safety Act) (see clause 8 of schedule 3 to the Act in terms of which the safety and health provisions of the Minerals Act 50 of 1991 are repealed). This Act, with the exception of s 86(2) and (3), came into operation on 15 January 1997 (see notice R 4, 1997 in Government Gazette 17725 of 15 January 1997).

Health and safety in other industries was first regulated by the Factories Act 28 of 1918. The Act declared certain processes to be noxious. It regulated issues such as ventilation, sanitation and nuisances in the workplace and made provision for the appointment of inspectors to ensure compliance with the Act.⁵

Between 1910 and 1924, South African workers, particularly those in the mining industry, became more socially aware and assertive. They tried to pressurise Government through strike action to introduce legislation which would protect them against exploitation by employers.⁶ The Government subsequently introduced a number of statutes aimed at providing employees with minimum terms and conditions of employment.

The first statute was the Regulation of Wages, Apprentices and Improvers Act 29 of 1918. It regulated minimum wages and targeted primarily women and juveniles who were being exploited in so-called sweat-shop industries.⁷ The Wage Act 27 of 1925⁸ provided for the establishment of minimum wage rates in industries where collective bargaining structures were either non-existent or under-developed.⁹ The first legislation which regulated minimum terms and conditions of employment other than minimum wages were the Shops and Offices Act 41 of 1939¹⁰ and the Factories, Machinery and Building Work Act 22 of 1941. These Acts¹¹ prescribed terms and conditions such as the maximum weekly working hours, minimum overtime rates and paid leave.

⁵See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 317 where they discuss this Act. In 1941, this Act was replaced by the Factories, Machinery and Building Work Act 22 of 1941 (for a discussion of this Act, see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 95 and 149). The latter Act was replaced by the Machinery and Occupational Safety Act 6 of 1983 (for a discussion of this Act, see Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 318-328) which was in turn repealed by the Occupational Health and Safety Act (see s 49 of the Act).

⁶See MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 8.

⁷For a discussion of this Act, see Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 312.

⁸For a discussion of this Act, see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 81 and 146 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 312.

⁹See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 81 and 146. This Act was repealed by the Wage Act 44 of 1937 which was in turn repealed by the Wage Act 5 of 1957 (see Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 312).

¹⁰See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 299 where this Act is discussed.

¹¹The Basic Conditions of Employment Act consolidated the issue of minimum terms and conditions of employment by repealing the Shops and Offices Act 41 of 1939 as well as those sections of the Factories, Machinery and Building Work Act 22 of 1941 which dealt with minimum terms and conditions of employment. See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 299 where this Act is discussed.

After the 1922 strike by mine workers,¹² the Government realised the collective strength of workers and in order to contain further industrial unrest, introduced the Industrial Conciliation Act 11 of 1924.¹³ This Act represented South Africa's first comprehensive piece of labour legislation on collective bargaining and the resolution of disputes between employers and employees.¹⁴ It was repeatedly amended until its repeal by the Industrial Conciliation Act 36 of 1937 which was in turn replaced by the Industrial Conciliation Act 28 of 1956. This Act became the new basis for labour legislation regarding collective bargaining.¹⁵ It was later renamed the Labour Relations Act 28 of 1956.¹⁶ The Act was extensively amended over the years. Some of the most important amendments¹⁷ were introduced in response to the suggestions made by the Wiehahn Commission of Inquiry.¹⁸

Of particular importance was the introduction of the unfair labour practice concept¹⁹ and the industrial court²⁰ which was afforded jurisdiction to interpret and develop the con-

¹²Which became known as the Rand Rebellion (see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 79).

¹³For a discussion of the events which led to the promulgation of this Act, see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 77-80.

¹⁴For a discussion of the Act and its aims, see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 81 as well as D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 3-6.

¹⁵See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 87.

¹⁶The Labour Relations Act 28 of 1956 was repealed by the Labour Relations Act 66 of 1995 (see s 212 read with schedule 6 thereto) which came into operation on 11 November 1996 (see Proclamation R 66 of 1996 in Government Gazette 17516 of 1 November 1996 headed Commencement of the Labour Relations Act, 1995 (Act No 66 of 1995) and the Labour Relations Amendment Act, 1996 (Act No 42 of 1996).

¹⁷See the Industrial Conciliation Amendment Act 94 of 1979, the Industrial Conciliation Amendment Act 95 of 1980, the Labour Relations Amendment Act 57 of 1981, the Labour Relations Amendment Act 51 of 1982 and the Labour Relations Amendment Act 2 of 1983.

¹⁸See the *Report of the Commission of Inquiry into Labour Legislation* RP 47/1979.

¹⁹This was done in terms of the Industrial Conciliation Amendment Act 94 of 1979. The original purpose with the unfair labour practice provision was to protect minority groups from unfair practices by majority groups (see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 96 and 98).

²⁰This was done in terms of the Industrial Conciliation Amendment Act 94 of 1979.

cept.²¹ Through its interpretation of the unfair labour practice concept, the industrial court infused both collective and individual labour law with the concept of fairness.

The fairness requirement affected every aspect of the employer's right to manage employees.²² The most far-reaching consequence of this requirement was, however, the limitation of the employer's right to dismiss by giving notice.²³ The fact that it was no longer sufficient for a dismissal to be lawful, that the employer had to have a reason for dismissal and that that reason had to be a fair one, significantly affected the employer's right to manage. It could no longer force employees to comply with its instructions or to accept changes to their terms and conditions of employment by threatening them with dismissal on notice.²⁴

The fairness requirement also impacted on the employer's decision-making power regarding collective bargaining. One of the most important restrictions was the duty to bargain developed by the industrial court.²⁵ This duty restricted the employer's right to decide whether or not to recognise a trade union as the representative of its employees. It also restricted its right to decide whether or not to bargain with a trade union about an employment matter or matters.

The employer's right to manage their employees was also restricted by the Apprenticeship Act 37 of 1944. This was the first statute to regulate the training of employees.²⁶ It made the training or retraining of employees the employer's responsibility and restricted the Government's role to a supporting one.²⁷

²¹See s 17(11) of the Labour Relations Act, 1956.

²²The impact of the unfair labour practice definition on the various aspects of the employer's right to manage is pointed out where those various aspects are discussed in this chapter.

²³See par 2.4.10.3 of chapter 2 where the dismissal of employees by giving the required notice is discussed. See also par 3.4.3 below where the statutory restriction of this right is discussed.

²⁴See pars 2.4.10.3 and 2.5 of chapter 2 where the implications of the right to dismiss on notice for the employer's right to manage were discussed.

²⁵See note 27 in chapter 4 where the development of this duty by the industrial court is discussed.

²⁶Statutes such as the Training of Artisans Act 38 of 1951 and the In-Service Training Act 95 of 1979 had similar objectives. These Acts were all repealed by the Manpower Training Act 56 of 1981 (hereafter the Manpower Training Act) (see s 58(1) of the Act read with the schedule attached thereto). See also Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 95 and 158.

²⁷See JV du Plessis, MA Fouché, B Jordaan and MW van Wyk *A Practical Guide to Labour Law* 2 ed (1996) 115.

The most important statutes currently in force regarding labour relations are the Basic Conditions of Employment Act,²⁸ the Wage Act,²⁹ the Minerals Act, the Public Service Act,³⁰ the Occupational Health and Safety Act,³¹ the Mine Health and Safety Act, the Manpower Training Act,³² the Labour Relations Act, 1995³³ and the Constitution.

The Basic Conditions of Employment Act prescribes general minimum terms and conditions of employment,³⁴ other than wages, for employees in offices, factories and shops³⁵ as well as for farm workers³⁶ and domestic workers.³⁷ Minimum terms and conditions of employment, including minimum wages, may also be prescribed in terms of the Wage Act³⁸ in respect of those employees who are not covered by collective agreements.³⁹ In addition, the Minerals Act⁴⁰ provides minimum terms and conditions

²⁸See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 138-146; SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 280-290 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 299-311 for a discussion of the Act.

²⁹See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 146-148; SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 290-301 as well as Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 311-316 for a discussion of the Act.

³⁰See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 304-305 for a discussion of this Act.

³¹See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 95 and 149 where she discusses this Act.

³²See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 158-160 for a discussion of the Act.

³³For an overview of the history of the Industrial Conciliation Act 11 of 1924, which culminated in the promulgation of the Labour Relations Act, 1995 see John Grogan *Riekert's Basic Employment Law* 2 ed (1993) 6-7; Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 87, 96-97, 100-102 and D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 3-39.

³⁴See the long title of the Act. Supplementing the Act are regulations giving the maximum rates of remuneration before an employee is excluded from the provisions of the Act and the prescribed manner in which the employee's wage must be paid.

³⁵See s 1.

³⁶See s 1 of the Basic Conditions of Employment Amendment Act 104 of 1992.

³⁷See s 1 of the Basic Conditions of Employment Amendment Act 137 of 1993 in terms of which domestic workers in private households were also included in this Act.

³⁸See the long title of the Act.

³⁹See s 2(3)(a) of the Act. See also Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 146 and SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 291. The Basic Conditions of Employment Act and the Wage Act are to be replaced by a new Act which will be entitled the Employment Standards Act (see *The Green Paper: Policy Proposals for a New Employment Standards Statute* published as notice 156 of 1996 in *Government Gazette* 17002 of 23 February 1996 at 9).

⁴⁰Together with the regulations made in terms of the Act or those regulations made in terms of the Mines and Works Act 27 of 1956 which have not been repealed in terms of s 63 of the Minerals Act 50 of 1991.

of employment for certain categories of workers employed by the mines whereas public servants' terms and conditions of employment are regulated by the Public Service Act.⁴¹

As in the past, different Acts regulate health and safety in the mining industry and other industries. Health and safety in the mining industry will in future be regulated by the Mine Health and Safety Act⁴² whereas the Occupational Health and Safety Act imposes stringent health and safety conditions in the workplaces of other industries.⁴³

The Manpower Training Act's principal aim is to regulate the training of apprentices.⁴⁴ It also allows for and encourages the establishment of training facilities suitable to the requirements of industry.⁴⁵

Although primarily aimed at regulating collective bargaining and related issues (which can, of course, affect the employer's right to manage),⁴⁶ the Labour Relations Act, 1995 has a more direct impact on employer prerogative. The most important provisions of the Act in this regard are to be found in chapter VIII and the Code, which regulate the employer's powers to dismiss employees,⁴⁷ and the residual unfair labour practices

⁴¹See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 304-305 for a discussion of the various terms and conditions of public servants regulated by this Act. See also John Grogan *Rieker's Basic Employment Law* 2 ed (1993) 6.

⁴²This Act's long title states that the purpose of the Act is, "[t]o provide for protection of the health and safety of employees and other persons at mines and, for that purpose- to promote a culture of health and safety; to provide for the enforcement of health and safety measures; to provide for appropriate systems of employee, employer and State participation in health and safety matters; to establish representative tripartite institutions to review legislation, promote health and enhance properly targeted research; to provide for effective monitoring systems and inspections, investigations and inquiries to improve health and safety; to promote training and human resources development; to regulate employers' and employees' duties to identify hazards and eliminate, control and minimise the risk to health and safety; to entrench the right to refuse to work in dangerous conditions; and to give effect to the public international law obligations of the Republic relating to mining health and safety...".

⁴³See the Act's long title which sets out the Act's purpose as follows, "[t]o provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council for occupational health and safety...". See also Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 149-154 and SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 411-420 where they discuss the aims and major provisions of the Act.

⁴⁴See the long title of the Act. See also Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 158.

⁴⁵See the long title of the Act. See also Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 158.

⁴⁶See chapter 4 for a discussion of the collective bargaining provisions of the Labour Relations Act, 1995 and their impact on the employer's right to manage.

⁴⁷See par 3.4.3 below where these provisions of the Labour Relations Act, 1995 are discussed.

provisions in Schedule 7 which regulate disciplinary actions short of dismissal, such as suspension,⁴⁸ and other actions or omissions by the employer which may constitute unfair labour practices such as unfair discrimination.⁴⁹

The Labour Relations Act, 1995 also contains an important innovation in that it now also regulates, addresses and limits the employer's contractual freedom to enter into employment contracts with persons of its own choosing.⁵⁰

The Labour Relations Act, 1995 also accepts the premise that rights granted to a person may be of little or no value unless effective mechanisms exist for the enforcement of such rights. A significant feature of this Act is therefore an emphasis on the creation of effective mechanisms for the resolution of disputes between employer and employee, including those which may affect employer prerogative.⁵¹

In future, the Constitution will also play an important role in the restriction of employers' right to manage. The legislature will have to ensure that labour legislation is in accordance with the Bill of Rights⁵² and every court, tribunal or forum will have to promote the

⁴⁸See clause 2(1)(c).

⁴⁹See clause 2(1)(a) and (b).

⁵⁰See s 5 of the Act which deals with the protection of persons seeking employment against victimisation as well as clause 2(1), read with clause 2(2)(a) of Schedule 7, which deals with residual unfair labour practices against applicants for jobs by employers. See further par 3.2 below where these statutory restrictions on an employer's right to manage are discussed.

⁵¹See the preamble to the Labour Relations Act, 1995 which lists as one of its aims the providing of simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration and through independent alternative dispute resolution services accredited for that purpose. See also the Ministerial Legal Task Team *Explanatory Memorandum* notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 122.

⁵²In terms of s 8(1) of the Constitution, the Bill of Rights applies to all law "and binds the legislature, the executive, the judiciary, and all organs of state". The legislature gave effect to this provision when the Labour Relations Act, 1995 was drafted. One of the purposes of the Labour Relations Act, 1995 contained in s 1 thereof is that the Act must give effect to and regulate the fundamental rights conferred by the Constitution's labour relations provisions contained in its Bill of Rights. See also the foreword to the Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute published as notice 804 of 1996 in Government Gazette 17303 of 1 July 1996 where it is stated that "[e]radicating all forms of discrimination in the labour market is one of the fundamental objectives of the Government. This is demanded by the constitution and is an integral part of processes that would help achieve social justice in South Africa".

spirit, purport and objectives of the Bill of Rights when interpreting any legislation and when developing the common law.⁵³

Of particular importance in this regard are the equality⁵⁴ and labour relations provisions⁵⁵ of the Constitution. The equality provisions impact on employers' right to decide whom to employ.⁵⁶ They also restrict unfair discrimination on arbitrary grounds as regards terms and conditions of employment between employees.⁵⁷ The Constitution's labour relations provisions affect employers' right to manage in that they subscribe to the concept of fairness in labour relations.⁵⁸ In addition, they also promote collective bargaining by providing a right to freedom of association⁵⁹ and to strike.⁶⁰

In this chapter, the statutory limitations on employer prerogative will be discussed. An analysis of these statutes shows that the limitations can take three basic forms. The first set of limitations limits or regulates the ability of the employer to enter into contracts of employment.⁶¹ The second set limits the powers of the employer vis-a-vis a person already in employment.⁶² In this regard, a distinction can be made between the employer's right to give instructions⁶³ and the terms and conditions of employment.⁶⁴

⁵³See s 39(2) of the Constitution. See also s 3(b) of the Labour Relations Act, 1995 which stipulates that any person when applying the Act, must interpret its provisions in compliance with the Constitution. Presiding officers of the industrial court also gave due regard to the spirit, purport and objectives in chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993 (hereafter the interim Constitution) (see, for instance, *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) at 1077B-E; *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) at 584E-F as well as AC Basson "Labour Law and the Constitution" 1994 (57) THRHR 498 et seq).

⁵⁴See s 9.

⁵⁵See s 23.

⁵⁶See par 3.2 below in this regard.

⁵⁷See par 3.2 below in this regard.

⁵⁸See s 23(1) which affords "everyone ... [with] the right to fair labour practices".

⁵⁹See s 23(2)(a) and (b) of the Constitution. See further par 4.2.2 of chapter 4 in this regard.

⁶⁰See s 23(2)(c) of the Constitution. See also par 4.2.1 of chapter 4 in this regard.

⁶¹See par 3.2 below in this regard.

⁶²See par 3.3 below in this regard.

⁶³See par 3.3.2 below in this regard.

⁶⁴See par 3.3.3 below in this regard.

The third set limits or restricts the employer's right to discipline and to dismiss.⁶⁵

3.2 LEGISLATIVE RESTRICTIONS ON THE EMPLOYER'S ABILITY TO ENTER INTO CONTRACTS OF EMPLOYMENT

An employer's discretion as to whom to select for employment has been limited to a certain extent by the Basic Conditions of Employment Act. It prohibits an employer from employing anyone under the age of 15 years⁶⁶ and requiring or permitting a pregnant employee to work during the four weeks prior to the expected date of her confinement and for eight weeks thereafter.⁶⁷

The Manpower Training Act also limits the employer's right to decide whom to take on as an apprentice since it prohibits the employer from taking on anyone under the age of 15 years.⁶⁸ In addition, the Minister of Manpower may restrict the number of apprentices that an employer may employ.⁶⁹

An employer's discretion as to *whom* to select for employment has also been limited to a significant extent by the Labour Relations Act, 1995. A person who has been refused employment may rely on the residual unfair labour practice contained in Schedule 7⁷⁰ to the Labour Relations Act, 1995 and argue that the employer has committed an unfair

⁶⁵See par 3.4 below in this regard.

⁶⁶Section 17(a). See also s 17(1)(c) of the Manpower Training Act in terms of which persons under the age of 15 years are not allowed to bind themselves as apprentices. See further s 32 of the Minerals Act in terms of which mines are prohibited from allowing persons under the age of 16 years to work underground. The Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 64 proposes that children below 15 years should not work and that children below 18 years may not perform work which is inappropriate for that child's age or which is hazardous or harmful to their health.

⁶⁷Section 17(b). The Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 61 proposes that an employee may not work for six weeks after the birth of a child (unless her doctor certifies that she is fit to return to work).

⁶⁸See ss 13(2)(a) and 17(1)(c).

⁶⁹See s 13(2)(q).

⁷⁰See clause 2(2)(a), read with clause 2(1)(a) of the transitional arrangements contained in Schedule 7 to the Labour Relations Act, 1995. This schedule contains the transitional arrangements pending the introduction of more comprehensive equal opportunity legislation (see André van Niekerk "Discrimination in Selection and Recruitment" (1995) 4(10) *CLL* 105).

labour practice in that it has either directly⁷¹ or indirectly⁷² unfairly discriminated⁷³ against him on an arbitrary ground.⁷⁴

In practice, this means that an employer may no longer unfairly discriminate on grounds such as race, gender, sex, age, marital status et cetera when advertising vacant or new positions.⁷⁵ It may also not unfairly discriminate on such grounds when interviewing job applicants.⁷⁶ Furthermore, it may not unfairly discriminate on such grounds when deciding whom to employ.⁷⁷ The employer may also not unfairly discriminate with regard to the terms and conditions on which employment is offered.

Schedule 7,⁷⁸ however, makes specific provision for affirmative action. Accordingly, if an employer can prove that its selection was based on considerations of affirmative action, it may be permitted to proceed with its selection of employees on this basis.

In addition, Schedule 7 allows an employer to discriminate where it can prove that the inherent requirements of the particular job⁷⁹ necessitate it. The Labour Relations Act, 1995 does not indicate which test or tests should be used to determine whether such "inherent requirements" exist. It has been suggested⁸⁰ that the criteria listed in the (English) Sex Discrimination Act 1975 (hereafter the Sex Discrimination Act) for judging the validity of "inherent requirements" could be used for the purposes of Schedule 7. The

⁷¹For a discussion of "direct discrimination", see André van Niekerk's "Discrimination in Selection and Recruitment" (1995) 4(10) CLL 105 at 106-107.

⁷²For a discussion of "indirect discrimination", see André van Niekerk's "Discrimination in Selection and Recruitment" (1995) 4(10) CLL 105 at 107.

⁷³For a discussion on the concept discrimination, see André van Niekerk's "Discrimination in Selection and Recruitment" (1995) 4(10) CLL 105 at 106.

⁷⁴Included are grounds such as race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

⁷⁵See André van Niekerk's "Discrimination in Selection and Recruitment" (1995) 4(10) CLL 105 at 106-107.

⁷⁶It may, for instance, not require only those belonging to a particular race or of a specific sex to take tests to determine whether they can actually do the job.

⁷⁷Ibid.

⁷⁸See clause 2(2)(b). See further section 9(2) of the Constitution which also provides for affirmative action.

⁷⁹See clause 2(2)(c). The Constitution does not contain a similar provision. In this sense, the qualifications to the right of equality in Schedule 7 are broader than those in the Constitution (see André van Niekerk "Discrimination in Selection and Recruitment" (1995) 4(10) CLL 105 at 107).

⁸⁰See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 403-404.

list includes criteria such as authenticity,⁸¹ the need to preserve decency or privacy,⁸² the sex of the recipient of the service,⁸³ the nature or location of workplaces which require employees to live-in,⁸⁴ the nature of the establishment within which the work is done,⁸⁵ customer preference where certain personal services are provided,⁸⁶ statutory

⁸¹See s 7(2)(a) of the Sex Discrimination Act which provides a defence where "the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the physical nature of the job would be different if carried out by a woman". See Carol Louw *Sex Discrimination in Employment* LLD thesis University of South Africa (1992) 199 where she discusses this defence. She points out that the defence is generally seen as applying to actors and models. See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 404 where they discuss this defence.

⁸²See s 7(2)(b) of the Sex Discrimination Act. In terms of this provision, an employer will have a defence where a job needs to be held by a man to preserve decency or privacy because it is likely to involve physical contact with men in circumstances where they might reasonably object to it being carried out by a woman or where the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities. See Carol Louw *Sex Discrimination in Employment* LLD thesis University of South Africa (1992) 199-210 where she discusses this defence. See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 404.

⁸³See s 7(2)(ba) of the Sex Discrimination Act. In terms of this provision, a defence will exist where the employee must work and/or live in a private home and the job entails physical or social contact with a person living in the home or will allow knowledge of intimate details of the person's life. The defence enables personal companions and nurses to be restricted to the sex of the recipient of the service. See Carol Louw *Sex Discrimination in Employment* LLD thesis University of South Africa (1992) 201 for a discussion of this defence.

⁸⁴See s 7(2)(c) of the Sex Discrimination Act. In terms of this provision, a defence exists where the nature or location of the workplace requires employees to live-in and the premise is not equipped with separate sleeping accommodation and sanitary facilities for employees of different sexes and it is also not reasonable to expect the employer to equip the premises with such separate accommodation and facilities. See Carol Louw *Sex Discrimination in Employment* LLD thesis University of South Africa (1992) 201-202 for a discussion of this defence.

⁸⁵See s 7(2)(d) of the Sex Discrimination Act. In terms of this provision, a defence exists where the work must be done in a hospital, prison or other establishment for persons requiring special care, supervision or attention and those persons are all of one sex. Under such circumstances, it is reasonable that the job should be done by someone of the same sex. See Carol Louw *Sex Discrimination in Employment* LLD thesis University of South Africa (1992) 202 where she discusses this defence.

⁸⁶In terms of s 7(2)(e) of the Sex Discrimination Act a defence exists where the employee provides individuals with personal services promoting their welfare or education and those services can most effectively be provided by a person of a particular sex. Carol Louw *Sex Discrimination in Employment* LLD thesis University of South Africa (1992) 203 points out that this defence is a "narrow exception" to the general rule that customer preference is *not* regarded as a defence. According to her, this defence envisages a situation where the efficacy of welfare services is linked to the sex of the provider, eg persons working in rape crisis centres. The defence relates to the effectiveness of the performance of services rather than mere customer preference.

provisions which prohibit the employment of a particular sex for the specific job⁸⁷ and where the job involves the performance of duties in a country whose laws or customs are such that the duties could not be performed by a person of the other sex.⁸⁸

The employer's right to decide *whom* to employ has further been restricted by the Labour Relations Act, 1995,⁸⁹ which brands the selective non-re-employment of an ex-employee as a dismissal.⁹⁰ It is for the employer to prove that the selective non-re-employment was fair.⁹¹ The employer will have to prove that its reason for non-selection falls within one of the three broad categories of reasons for a fair dismissal.⁹² It will also have to be careful that its ground for non-selection does not constitute an automatically unfair dismissal.⁹³

The employer's right to decide *whom* to employ is also restricted by s 186(b) of the Labour Relations Act, 1995.⁹⁴ In terms of this section, an employer which refuses to renew a fixed term contract may be guilty of an unfair dismissal⁹⁵ if the employee had reasonable grounds to expect that it would be renewed.

⁸⁷See s 7(2)(f) of the Sex Discrimination Act as well as Carol Louw *Sex Discrimination in Employment* LLD thesis University of South Africa (1992) 203-204 where she discusses this provision. A South African example of this defence is in the Minerals Act which prohibits females from working underground.

⁸⁸See s 7(2)(g) of the Sex Discrimination Act. See also Carol Louw *Sex Discrimination in Employment* LLD thesis University of South Africa (1992) 204 where she discusses this defence.

⁸⁹See s 186(d). See also par 3.4.3.1 below where the statutory definition of dismissal is discussed.

⁹⁰This statutory provision has its origin in the appellate division's decision in *National Automobile & Allied Workers Union (now known as National Union of Metalworkers of SA) v Borg-Warner (Pty) Ltd* (1994) 15 ILJ 509 (A). It was necessary for the legislature to insert selective non-re-employment in the definition of dismissal as the aggrieved ex-employee would otherwise be without a remedy in terms of the Labour Relations Act, 1995. It is further submitted that the residual unfair labour practice definition in Schedule 7 is probably not wide enough to cover this scenario and, even if it is, it must be borne in mind that the Schedule is merely transitional.

⁹¹See s 192(2).

⁹²See par 3.4.3.3 below.

⁹³See s 187 as well as par 3.4.3.2 below where automatically unfair dismissals are discussed.

⁹⁴See also par 3.4.3.1 below in this regard.

⁹⁵The legislature has branded such an action as a "dismissal". This was necessary as an aggrieved ex-employee would otherwise have been without a remedy under the Labour Relations Act, 1995. He would also have found it difficult to pursue his action in terms of Schedule 7 as the definition of a residual unfair labour practice is not as wide as the unfair labour practice definition of the Labour Relations Act, 1956. Even if it could be argued that the definition is wide enough, it must be borne in mind that Schedule 7's provisions are merely transitional.

Furthermore, the provisions of the Labour Relations Act, 1995 protecting freedom of association⁹⁶ also limit the employer's freedom to choose *whom* to employ. Essentially, these provisions have removed the employer's freedom to employ only non-unionised persons. In terms of s 5 of the Act, the employer may not require an applicant not to be a union member,⁹⁷ or not to become a member⁹⁸ or to resign as member.⁹⁹ It may also not prevent an applicant from exercising any right conferred by the Labour Relations Act, 1995, including his statutory right to freedom of association.¹⁰⁰ In addition, the employer may not prejudice an applicant because of past, present or anticipated trade union membership,¹⁰¹ or because of his participation in forming a trade union¹⁰² or in its lawful activities.¹⁰³ It may also not prejudice an applicant because of his past, present or anticipated exercising of any right conferred by the Act, including the right to freedom of association.¹⁰⁴

3.3 LEGISLATIVE RESTRICTIONS DURING EMPLOYMENT

3.3.1 Introduction

Statutory restrictions on the employer's right to manage during employment can be divided into two broad categories namely those restrictions that impact on the employer's right to give instructions¹⁰⁵ and those that impact on the terms and conditions of employment.¹⁰⁶

⁹⁶See s 5 of the Act.

⁹⁷See subsec (2)(a)(i).

⁹⁸See subsec (2)(a)(ii).

⁹⁹See subsec (2)(a)(iii).

¹⁰⁰See subsec (2)(b) read with s 4.

¹⁰¹See subsec (2)(c)(i).

¹⁰²See subsec (2)(c)(ii).

¹⁰³See subsec 2(c)(iii).

¹⁰⁴See s 5(2)(c)(vi) read with s 4 of the Labour Relations Act, 1995.

¹⁰⁵See par 3.3.2 below where these restrictions are discussed.

¹⁰⁶See par 3.3.3 where these restrictions are discussed.

3.3.2 Legislative Restrictions on the Employer's Right to Give Instructions

The legislature has accepted that the employer has the right to utilise¹⁰⁷ and control¹⁰⁸ the employee's labour potential. The legislature, however, has restricted this right of the employer through a number of statutory provisions.

The Labour Relations Act, 1995 restricts the right to give instructions to a significant extent by requiring that all instructions must not only be *lawful* but also *fair* or *reasonable*. It does this, albeit indirectly, through its requirement that a dismissal must be for a fair reason¹⁰⁹ read with the guideline in the Code¹¹⁰ that the *validity* or *reasonableness* of a work rule must be considered when the fairness of a dismissal is determined.¹¹¹

The Occupational Health and Safety Act¹¹² and the Mine Health and Safety Act¹¹³ also

¹⁰⁷See par 2.4.2 of chapter 2 where the employer's (common law) right to give instructions in respect of the employee's labour potential is discussed.

¹⁰⁸See par 2.4.3 of chapter 2 where the employer's (common law) right to control and inspect the work of the employee is discussed.

¹⁰⁹See s 188(1) of the Labour Relations Act, 1995.

¹¹⁰See clause 7(b)(i) thereof.

¹¹¹This requirement was first laid down by the ordinary courts (see par 2.4.2.2 of chapter 2 in this regard). Thereafter, the industrial court, while deciding the fairness of alleged unfair dismissal cases, prescribed this requirement (see *National Union of Mineworkers & Others v Driefontein Consolidated Ltd* (1984) 5 ILJ 101 (IC) at 141F; *Ntull & Others v Litemaster Products Ltd* (1985) 6 ILJ 508 (IC) at 518E-F; *Building Construction & Allied Workers Union & Another v E Rogers & C Buchel CC & Another* (1987) 8 ILJ 169 (IC) at 173A; *Commercial Catering & Allied Workers Union of SA & Another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 314 (IC) at 314H-I; *Amalgamated Clothing & Textile Workers Union of SA & Others v JM Jacobsohn (Pty) Ltd* (1990) 11 ILJ 107 (IC) at 112E-F; *Madlala v Vynne & Tedder t/a Thornville Engineering* (1990) 11 ILJ 394 (IC) at 395F-H; *Tubecon (Pty) Ltd and National Union of Metalworkers of South Africa* (1991) 12 ILJ 437 (ARB) at 445G-I; and *Humphries & Jewell (Pty) Ltd v Federal Council of Retail & Allied Workers Union & Others* (1991) 12 ILJ 1032 (LAC) at 1036H-I; *Corobrik Natal (Pty) Ltd and Construction & Allied Workers Union* (1991) 12 ILJ 1140 (ARB) at 1145D-E; *National Union of Mineworkers of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC) at 1028C-D; *Ntsibande v Union Carriage & Wagon Co (Pty) Ltd* (1993) 14 ILJ 1566 (IC) at 1570I-J; *National Trading Co v Hiazo* (1994) 15 ILJ 1304 (LAC) at 1307E-F; *National Union of Mineworkers on behalf of Mokgotho v Greenside Colliery* (1995) 16 ILJ 387 (LAC) at 388G; and *Ellman v Mossgas (Pty) Ltd(1)* (1995) 16 ILJ 946 (IC) at 954-955). See also MSM Brassey E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 430 and PAK le Roux and André van Niekerk *The South African Law of Dismissal* (1994) 140-141.

¹¹²This Act deals with health and safety in industries other than the mining industry (see s 1(3)(a)). It also does not apply in respect of any load line ship, fishing boat, sealing boat and whaling boat as defined in the Merchant Shipping Act 57 of 1951 or any floating crane (see s 1(3)(b)).

¹¹³This Act deals with health and safety in mines (see s 1 read with s 103 of the Act).

restrict the employer's right to give instructions. As with the employer's common law duty of care,¹¹⁴ these Acts limit the employer's right to give instructions regarding the *work* that must be done, the *manner* in which it must be done as well as *where* it must be done, by subjecting such instructions to considerations of health and safety.

The duties imposed by the Occupational Health and Safety Act¹¹⁵ are more detailed than the common law duty of care.¹¹⁶ It provides for a general duty¹¹⁷ as well as a number of specific duties¹¹⁸ regarding health and safety. The general duty is contained in s 8(1) of the Act. Essentially, it is a codification of the common law duty of care.¹¹⁹ In terms of this provision, the employer must provide and maintain, as far as is reasonably practicable, a working environment which is safe and without risk to the health of its employees.¹²⁰

The words "working environment" have a wide application and cover not only the *place* where the work must be done, but also the *type of work* and the *manner* in which it must be done. Consequently, an employer's instructions regarding any of these aspects of work must be given with due regard to the safety and health of employees.

¹¹⁴See pars 2.4.2.2-2.4.2.4 of chapter 2 where the various aspects of this duty are discussed.

¹¹⁵The discussion will focus on the Occupational Health and Safety Act's restriction of the employer's right to give instructions. Cross-references to similar provisions in the Mine Health and Safety Act are made in footnotes. However, those provisions of the Mine Health and Safety Act that regulate the giving of instructions in circumstances peculiar to the mining industry will also be discussed in the text.

¹¹⁶See pars 2.4.2.2-2.4.2.4 of chapter 2 where the various aspects of this duty are discussed.

¹¹⁷See s 8(1).

¹¹⁸See s 8(2).

¹¹⁹See Carl Mischke and Christoph Garbers *Safety at Work: A Guide to Occupational Health, Safety and Accident Compensation Legislation* (1994) 20 where they state that s 8(1) "is, in effect, an affirmation of the duty imposed by the common law".

¹²⁰In terms of s 2(1)(a) of the Mine Health and Safety Act, the owner must ensure that, as far as reasonably practicable, the mine is designed, constructed and equipped to provide conditions for safe operation and a healthy working environment. Section 2(1)(b) obliges the owner to ensure, as far as reasonably practicable, that the mine is operated and maintained in such a way that employees can perform their work without endangering their health and safety. The Mine Health and Safety Act also has a general duty for managers which is described in similar terms to that of employers in s 8(1) of the Occupational Health and Safety Act. In terms of s 5(1) thereof, a manager must, to the extent that it is reasonably practicable, provide and maintain a working environment which is safe and without risk to the health of employees.

In addition, the employer's right to give instructions is restricted to the extent that it is "reasonably practicable"¹²¹ for it to comply with its duty of health and safety. This criterion for compliance differs from the common law's one of "reasonableness".¹²² It has been suggested that "practicability" on its own is a more stringent test than that of "reasonableness".¹²³ However, by linking it to that of "reasonableness", the legislature has made it less stringent.¹²⁴ Nevertheless, the statutory criterion appears to be more stringent than that of the common law. Consequently, the statutory restriction of the employer's right to give instructions is probably more extensive than that of the common law.

Section 8(2) of the Occupational Health and Safety Act lists a number of specific duties regarding health and safety which also restrict the employer's right to give instructions.¹²⁵ The employer's right to tell the employee *what* work to do, is for instance, restricted by its duty to establish what hazards are attached to any work and what precautionary measures should be taken and the obligation to provide the necessary means to apply such precautionary measures.¹²⁶ It must also, as far as is reasonably practicable, not allow an employee to do any work unless the precautionary measures stipulated in the Act¹²⁷ have been taken.¹²⁸ The employer must furthermore ensure that work is performed under the supervision of a person trained to understand the hazards associated with it.¹²⁹

¹²¹The criterion in the Mine Health and Safety Act in respect of managers' general duty is also that of "reasonable practicability" (see s 5(1)).

¹²²See pars 2.4.2.2-2.4.2.4 of chapter 2 where the common law duty is discussed.

¹²³See Carl Mischke and Christoph Garbers *Safety at Work: A Guide to Occupational Health, Safety and Accident Compensation Legislation* (1994) 18.

¹²⁴The criterion "reasonably practicable" is defined in s 1 of the Act and, in terms thereof, factors such as the severity and scope of the hazard or risk; the state of knowledge reasonably available concerning the hazard or risk and of any means of removing or mitigating that hazard or risk; the availability and suitability of means to remove or mitigate the hazard or risk; and the cost of removing or mitigating that hazard or risk in relation to the benefits derived therefrom will be taken into consideration.

¹²⁵See subsecs (a)-(j).

¹²⁶See s 8(2)(d).

¹²⁷See s 8(2)(b) and (d) in this regard.

¹²⁸See s 8(2)(f).

¹²⁹See s 8(2)(l). See also s 7(1)(e) of the Mine Health and Safety Act in terms of which a manager must ensure that work is performed under the general supervision of a person trained to understand the hazards associated with the work and who has the authority to ensure that the precautionary measures laid down by the manager are implemented.

Some of the specific duties listed in s 8(2) restrict the employer's right to instruct the employee as to the *manner* in which the work must be done. The employer, for example, must ensure that the production, processing, use, handling, storage or transport of articles or substances are done in a manner which is safe and does not hold any risks to health and safety.¹³⁰ The employer's right to tell the employee *where* to work, is also restricted by a number of these specific duties. The employer, for example, must provide and maintain a plant which is safe and without risks to health.¹³¹

The right of the employer to instruct the employee *where* to work has been extensively restricted by the Mine Health and Safety Act. The Act affords an employee the right to leave any working place whenever circumstances arise at that working place which, with reasonable justification, appear to that employee to pose a serious danger to his health or safety.¹³² The employee also has the right to leave a working place whenever the health and safety representative responsible for the working place directs that employee to leave that working place.¹³³

The Basic Conditions of Employment Act, Minerals Act¹³⁴ and the Manpower Training Act¹³⁵ restrict the employer's right to instruct an employee as to *when* he must work. The Basic Conditions of Employment Act regulates both the maximum daily¹³⁶ and

¹³⁰See s 8(2)(c). See also s 8(1)(a) of the Mine Health and Safety Act in terms of which managers must establish health and safety policies that inter alia describe the organisation of work.

¹³¹See s 8(2)(a). The industrial court has also limited an employer's right to instruct employees *where* to work by stipulating that employees may refuse to work in a place which they fear is unsafe, provided that their fear is real and reasonable under the circumstances. See *SA Laundry, Dry Cleaning, Dyeing & Allied Workers Workers Union & Others v Advance Laundries Ltd t/a Stork Napkins* (1985) 6 ILJ 544 (IC) at 568A.

¹³²See s 23(1)(a). The industrial court has also limited a mine's right to tell employees *where* to work by stipulating that employees may refuse to work in a place which they fear is unsafe, provided that their fear is real and reasonable under the circumstances. See *National Union of Mineworkers & Others v Driefontein Consolidated Ltd* (1984) 5 ILJ 101 (IC).

¹³³See s 23(1)(b).

¹³⁴See those regulations to the Mines and Works Act 27 of 1956 which deal with hours of work of persons employed in mines and which have not been repealed in terms of s 63 of the Minerals Act. Cross-references will be made to this Act in footnotes where the provisions of the Basic Conditions of Employment Act are discussed.

¹³⁵Cross-references will be made to this Act in footnotes where the provisions of the Basic Conditions of Employment Act are discussed.

¹³⁶See s 4. See also s 6 which provides that a shop worker's ordinary daily working hours may be extended by 15 minutes per day but that in the aggregate extensions may not exceed one hour in a week. See also s 13(2)(k) of the Manpower Training Act in terms of which the Minister may determine the maximum number of ordinary daily working hours to be worked by apprentices. Consider further the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 46 which proposes a maximum working day of nine ordinary hours and eight hours for employees who work six days per week.

weekly¹³⁷ hours that may be worked by an employee. It also prescribes the maximum ordinary working hours per shift for shift workers.¹³⁸ The Act furthermore prescribes the maximum period during which an employee may be required to work on any particular day.¹³⁹ Although it does not make provision for tea or coffee breaks, the Basic Conditions of Employment Act does prescribe a meal interval and the duration thereof.¹⁴⁰ It stipulates that the employee must consent to work overtime.¹⁴¹ It also regulates the maximum overtime that may be worked.¹⁴² In addition, the Act requires the employer to

¹³⁷See s 2. Regulations to the Minerals Act also prescribe the maximum weekly hours that an employee of a mine may work. See also s 13(2)(k) of the Manpower Training Act in terms of which the Minister may determine the maximum ordinary weekly working hours to be worked by apprentices. See further the proposal contained in the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 46 to the effect that the maximum weekly hours of work should be 45 hours.

¹³⁸See s 5.

¹³⁹See s 1 in which the term "spread-over" is defined as well as s 3 which sets out the maximum spread-overs. Consider also the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 46 which proposes that employees should not work more than 12 hours in a day.

¹⁴⁰See s 7 of the Basic Conditions of Employment Act. See also s 13(2)(k) of the Manpower Training Act in terms of which the Minister may determine the meal intervals and the duration thereof for apprentices. Consider also the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 51 which proposes a meal interval of at least 30 minutes. It also suggests that an employee should be entitled to payment for meal intervals if the employee is required to remain in control of machinery or a vehicle during the meal interval, or if he works for longer than ten hours or if the employee is required by the employer to take a meal interval of longer than one and one-quarter hours.

¹⁴¹See s 8(1) as well as *Moswane & Others v Quick Freeze (Pty) Ltd* (1988) 9 ILJ 473 (IC) at 476D where the court stated in respect of s 8(1), "It can further be deduced that overtime might be considered to be voluntarily worked by an employee in the sense that he would not be obliged to work overtime if he elects not to do so". See also *Plascon Evans Paint (Natal) Ltd v Chemical Workers Industrial Union & Others* (1987) 8 ILJ 605 (D) at 605H and *Masengane v Speedbox (Pty) Ltd* (1991) 12 ILJ 879 (IC) at 882F-H. Where an employer has dismissed employees who have refused to work *voluntary overtime* the court has held that their dismissal was unfair (see *National Union of Textile Workers & Others v Jaguar Shoes (Pty) Ltd* (1986) 7 ILJ 359 (IC) at 365C-D and *Khan & Others v Rainbow Chicken Farms (Pty) Ltd* (1985) 6 ILJ 60 (IC) at 72A-B). Consider also the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 47 which proposes that overtime must be voluntary.

¹⁴²See s 8. The industrial court has held in *Masengane v Speedbox (Pty) Ltd* (1991) 12 ILJ 879 (IC) at 882G that the dismissal of an employee who refuses to work overtime in excess of the maximum hours stipulated in s 8 will be unfair. See also the regulations to the Minerals Act which prescribe the maximum overtime which may be worked by someone employed by a mine. See further s 13(2)(l) of the Manpower Training Act in terms of which the Minister of Manpower may stipulate the maximum period of overtime to be worked by apprentices. Consider further the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 47 which proposes a maximum of ten hours' overtime per week.

obtain the written permission of an inspector for an employee to work on Sundays.¹⁴³ However, the Act does not restrict the employer's right to insist that an employee works on a Public Holiday.¹⁴⁴ The Act also prohibits an employer from requiring a pregnant employee to work four weeks prior to and eight weeks after her confinement.¹⁴⁵

The Manpower Training Act restricts the employer's right to give instructions to an apprentice in various ways. Training boards, for instance, frame conditions of apprenticeship.¹⁴⁶ The Minister, on the recommendation of a training board, may prescribe the full-time training courses which apprentices must attend, the period or periods of attendance and the intervals at which those courses must be attended.¹⁴⁷ He may also prescribe the types of work in which the employer must provide practical training, and the proportion of the working hours during which the employer must provide such training.¹⁴⁸ If a training board is of the view that an apprentice is not receiving adequate training, it may order the employer to take steps to ensure that the apprentice receives such training.¹⁴⁹ The board may specify the classes of work in which the apprentice is to be trained and when he should be so trained.¹⁵⁰ It may also specify the method and place of work.¹⁵¹

3.3.3 Legislative Restrictions Regarding Terms and Conditions of Employment

As indicated in chapter 2, the common law principle of freedom of contract operates on the premise that the employer and the employee are on an equal footing when negotiat-

¹⁴³See s 10 of the Basic Conditions of Employment Act. See s 9(1)(c) of the Mines and Works Act in terms of which employees employed in a "works" operating as a continuous chemical, metallurgical or smelting process can be expected to work on a Sunday. Consider the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 50 which proposes that the requirement of obtaining the necessary permission to work on a Sunday in factories, shops and mines should be repealed.

¹⁴⁴See s 11. See also s 9(1)(c) of the Mines and Works Act in terms of which employees employed in a "works" operating as a continuous chemical, metallurgical or smelting process can be expected to work on Christmas day, Day of the Covenant and Good Friday.

¹⁴⁵See s 17(b).

¹⁴⁶See s 12D(1)(b).

¹⁴⁷See s 13(2)(f).

¹⁴⁸See s 13(2)(g).

¹⁴⁹See s 19(1).

¹⁵⁰See s 19(2).

¹⁵¹*Ibid.*

ing the terms and conditions of employment.¹⁵² In practice, however, this is seldom the case. The employer is usually in a much stronger bargaining position because of its economic and social power. These factors enable it to prescribe the terms and conditions of employment.¹⁵³

The legislature has addressed the unequal bargaining power through legislation prescribing minimum terms and conditions of employment.

From the employee's perspective, the most important term in a contract of employment is usually *remuneration*. The legislature's attitude has been that it is a matter which should preferably be determined through collective bargaining. Accordingly, in areas and industries where trade unions are active and collective bargaining does take place, it has left it to the collective bargaining parties to determine minimum wages.¹⁵⁴

In certain instances, however, the legislature has statutorily provided for the regulation of minimum wages. In terms of the Wage Act minimum wages can be determined by a wage board¹⁵⁵ in areas and industries where trade unions do not really feature or are not well organised and effective collective bargaining does not therefore exist.¹⁵⁶ Also, in the Manpower Training Act, it has afforded the Minister of Manpower the power to prescribe the minimum wages of apprentices.¹⁵⁷

Although the Basic Conditions of Employment does not stipulate minimum wages, it does contain a number of provisions regarding remuneration. It stipulates the minimum remuneration for overtime work,¹⁵⁸ work on Sundays¹⁵⁹ and public holidays¹⁶⁰ and

¹⁵²See par 2.2 of chapter 2.

¹⁵³See par 2.2 of chapter 2 for a detailed discussion of the unequal bargaining relationship between an employer and an employee.

¹⁵⁴See par 5.3.2.4 of chapter 5 where the determination of minimum wages through collective bargaining is discussed.

¹⁵⁵See s 8(1). See, for example, clause 3(1) of the wage determination published as notice R5560 of 1995 in Government Gazette 16627 of 25 August 1995 which inter alia regulates minimum wages in certain areas of the commercial distributive trade.

¹⁵⁶See s 2(3).

¹⁵⁷See s 13(2)(c).

¹⁵⁸See s 9(1). See also the proposals contained in the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 47.

¹⁵⁹See s 10(2). See also the proposals contained in the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 50.

sets out the formulae according to which such remuneration must be calculated. It also makes provision for paid annual leave¹⁶¹ and sick leave.¹⁶²

The Act also contains a number of provisions regarding certain acts relating to payment of remuneration.¹⁶³ An employer may not require an employee to pay or repay to it any remuneration payable or paid to that employee in accordance with the Act.¹⁶⁴ It may also not do anything as a direct or indirect result of which an employee is deprived of the remuneration, or a portion thereof, which has been paid to him.¹⁶⁵ The employer may also not require an employee to give a receipt for more than he actually received by way of remuneration.¹⁶⁶ Furthermore, it may not levy a fine against an employee for any act or omission committed in the course of his employment.¹⁶⁷ The employer may also not deduct any amount from the employee's remuneration except with the latter's written consent¹⁶⁸ or in accordance with a court order or a provision of any law.¹⁶⁹ Lastly, the Act stipulates that the employer must remunerate the employee on the day agreed upon between them.¹⁷⁰

¹⁶⁰See s 11. See also the proposals contained in the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 57.

¹⁶¹See s 12(1)(a). Consider also the proposals contained in the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 56.

¹⁶²See s 13(1). Consider also the proposals contained in the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 58.

¹⁶³See s 19. See also Regulation 2A to the Act which sets out the prescribed manner in which an employee's wage must be paid. The Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 71 proposes that the protections contained in the Basic Conditions of Employment Act should be retained as there is no basis to depart from its approach.

¹⁶⁴See s 19(1)(a).

¹⁶⁵See s 19(1)(a). See also s 42(1) of the Manpower Training Act.

¹⁶⁶See s 19(1)(c). See also s 42(2) of the Manpower Training Act.

¹⁶⁷See s 19(1)(d).

¹⁶⁸See s 19(1)(e)(i).

¹⁶⁹See s 19(1)(e)(ii).

¹⁷⁰See s 19(2).

The Labour Relations Act, 1995, albeit indirectly, also restricts the employer's decision-making power regarding remuneration. In terms of Schedule 7, the employer's unfair¹⁷¹ discrimination between employees regarding remuneration on arbitrary grounds such as gender or race¹⁷² may constitute an unfair labour practice.¹⁷³

Apart from *remuneration*, the legislature has also specifically provided for a number of matters which are not dealt with by the common law.¹⁷⁴ In the Basic Conditions of Employment Act, it has provided employees with *paid vacation leave*¹⁷⁵ and *sick leave*.¹⁷⁶

The Basic Conditions of Employment Act does not regulate *maternity leave*. Although it stipulates that pregnant employees may not work four weeks prior to their confinement and eight weeks thereafter,¹⁷⁷ this cannot be regarded as maternity leave as these employees are not afforded any form of job security and/or payment for the period during which they are prohibited from working.¹⁷⁸ These are accordingly matters for

¹⁷¹The employer is not absolutely prohibited from discriminating as long as it can prove that such discrimination is *fair* under the circumstances. Consider in this regard *Raad van Myrvakbonde v Minister van Mannekrag en 'n Ander* 1983 (4) SA 29 (T); (1983) 4 ILJ 202 (T) at 209A-C where the court held that it was acceptable for an employer to differentiate between employees and the remuneration paid to them where their jobs were different. See further MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 66-69.

¹⁷²See also *SA Chemical Workers Union & Others v Sentrachem Ltd* (1988) 9 ILJ 410 (IC) at 429F where the industrial court held that wage discrimination based on race is an unfair labour practice. See further *Sentrachem Ltd v John NO & Others* (1989) 10 ILJ 249 (W) at 259C-D.

¹⁷³See clause 2(1)(a). This provision is also in accordance with the Constitution's anti-discriminatory provisions contained in s 9(4) thereof.

¹⁷⁴See par 2.4.8 of chapter 2 where the matters which are not dealt with by the common law are discussed.

¹⁷⁵See s 12. Consider also the proposals contained in the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 56. The Manpower Training Act also regulates paid leave for apprentices (see s 13(2)(m)).

¹⁷⁶See s 13. Consider also the proposals contained in the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 58.

¹⁷⁷See s 17(b).

¹⁷⁸This view is confirmed by the fact that the Labour Relations Act, 1995 differentiates between *maternity leave* granted in terms of any law, collective agreement or contract of employment (see s 186(c)(i)) and *absence from work* for the periods stipulated in s 17 of the Basic Conditions of Employment Act (see s 186(c)(ii)). Consider the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 61 which proposes four months' maternity leave during which the employee's security of employment is protected.

negotiation.¹⁷⁹

The Labour Relations Act, 1995, however, has provided a measure of job security for female employees through its provisions regarding unfair dismissal.¹⁸⁰ It brands the refusal of an employer to allow a female employee to resume work after she took agreed maternity leave or was absent for the compulsory period stipulated in the Basic Conditions of Employment Act, as a dismissal.¹⁸¹ In addition, it brands a dismissal of a female employee *because* of her pregnancy, or intended pregnancy, or any reason related to her pregnancy, as automatically unfair.¹⁸²

There are also a number of other matters which the Basic Conditions of Employment Act does not regulate. It does not contain, for instance, any provisions regarding *paternity leave*,¹⁸³ *compassionate leave* or *study leave*. It also does not regulate matters such as *increments*, *bonuses*, *training* and the provision of *accommodation* and *food*. Nor does it contain any provisions regarding *medical aid* and *pension fund membership* and contributions to these funds by either the employer or the employee. Accordingly, all these matters remain topics for bargaining.

A number of these matters have been regulated in wage determinations by the wage board acting in terms of the Wage Act. The Wage determination in respect of the commercial distributive trade¹⁸⁴, for example, regulates issues such as *transport expenses* and *allowances*,¹⁸⁵ *subsistence expenses* and *allowances*,¹⁸⁶ *compassionate*

¹⁷⁹Consider the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 60 which recommends that consideration must be given to the regulation of maternity pay.

¹⁸⁰See s 186(c) as well as s 187(1)(e) read with 187(2)(a).

¹⁸¹See s 186(c).

¹⁸²See s 187(1)(e). See also par 3.4.3.2 below where automatically unfair dismissals are discussed.

¹⁸³Consider the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 62 which proposes three days' paid paternity or child-care leave during the year of the birth of the child for employees with more than one year's service.

¹⁸⁴Published as notice R5560 of 1995 in Government Gazette 16627 of 25 August 1995.

¹⁸⁵See clause 3(5).

¹⁸⁶See clause 3(6).

leave,¹⁸⁷ and uniforms, overalls and protective clothing.¹⁸⁸

The employer's prerogative regarding these terms and conditions is restricted by the Labour Relations Act, 1995. In terms of Schedule 7, the employer's unfair¹⁸⁹ discrimination between employees regarding any terms and conditions of employment on arbitrary grounds¹⁹⁰ such as gender, race,¹⁹¹ age or marital status¹⁹² may constitute an unfair labour practice.¹⁹³

Furthermore, Schedule 7 brands unfair conduct by the employer relating to promotion, demotion or training of an employee or relating to the provision of benefits to an employee as an unfair labour practice.¹⁹⁴ The term "benefits" is not defined in the Labour Relations Act, 1995. According to Le Roux, if common usage is any guide, most benefits accorded to employees would also constitute terms and conditions of employment.¹⁹⁵ He points out,¹⁹⁶ however, that if such a wide interpretation is given to "benefits", they would also constitute matters of mutual interest in terms of the definitions of a

¹⁸⁷See clause 8.

¹⁸⁸See clause 12.

¹⁸⁹The employer is not absolutely prohibited from discriminating as long as it can prove that such discrimination is *fair* under the circumstances. See the comments made by the industrial court in this regard in *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) at 1085D.

¹⁹⁰See *Mthembu & Others v Claude Neon Lights* (1992) 13 ILJ 422 (IC) at 423F-G where the court held that differentiation between employees regarding merit increases on the ground of productivity did not constitute an arbitrary ground and was therefore fair.

¹⁹¹See also *Chamber of Mines of SA v Council of Mining Unions* (1990) 11 ILJ 52 (IC) at 71J-72A where the industrial court held that separate but equal facilities based on racial grounds constituted an unfair labour practice.

¹⁹²The industrial court in *George v Western Cape Education Department & Another* (1995) 16 ILJ 1529 (IC) held (at 1544J-1545B-C) that the employer's policy to exclude married female employees whose husbands were not permanently unfit to work from the benefits of its house allowance scheme constituted unfair discrimination in terms of the interim Constitution and (at 1549), that the discrimination was also unfair in terms of the Education Labour Relations Act 146 of 1993. See also the facts and findings of the industrial court in *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) at 1076-1084 and 1090F-G.

¹⁹³See clause 2(1)(a). This provision is also in accordance with the Constitution's anti-discriminatory provisions contained in s 9(4) thereof.

¹⁹⁴See clause 2(1)(b).

¹⁹⁵See PAK le Roux "Economic Disputes and the New Unfair Labour Practice" (1997) 6(7) CLL 67 at 68.

¹⁹⁶*ibid.*

strike¹⁹⁷ and lock-out¹⁹⁸ read with the definition of a collective agreement.¹⁹⁹ However, they cannot be the subject of strike action or a lock-out as s 65(1)(c) of the Labour Relations Act, 1995 specifically stipulates that a strike or lock-out cannot take place if the issue in dispute is one that a party has to refer to arbitration in terms of the Labour Relations Act, 1995.²⁰⁰ As disputes about unfair labour practices in terms of clause 2(1)(b) must be referred to arbitration,²⁰¹ it would mean that "benefits" disputes cannot be the subject of a strike or lock-out. This would constitute a significant limitation of the right to strike which may have constitutional implications.²⁰²

Le Roux²⁰³ suggests that an interpretation of "benefits" has to be found which prevents the arbitration of what would otherwise be interests disputes and which does not unduly limit the right to strike or lock-out. One suggestion advanced by him is to limit the term to matters which do not form part of the traditional economic issues which are the subject of collective bargaining and industrial action. However, he points out that this approach would not accord with everyday usage of the term.²⁰⁴

Another approach suggested by Le Roux²⁰⁵ is to categorise "benefits" so as to distinguish between disputes regarding changes to terms and conditions of employment and disputes about the interpretation and application of existing contractual benefits. The former would be the classic interest dispute which should be resolved through the exercise

¹⁹⁷See s 213 of the Labour Relations Act, 1995 as well as par 6.3.2 of chapter 6 where the statutory definition of a "strike" is examined.

¹⁹⁸See s 213 of the Labour Relations Act, 1995 as well as par 7.3.2 of chapter 7 where the statutory definition of a lock-out is examined.

¹⁹⁹See s 213 of the Labour Relations Act, 1995 as well as par 6.3.2 of chapter 6 where the definition of a collective agreement is examined.

²⁰⁰See par 6.3.3.1 of chapter 6 where s 65(1)(c) is discussed in detail.

²⁰¹See clause 3(4)(b) of Schedule 7.

²⁰²Particularly in view of s 23(2)(c) of the Bill of Rights, which affords every worker the right to strike, read with s 3(b) of the Labour Relations Act, 1995 which enjoins any person applying the Labour Relations Act, 1995 to interpret its provisions in compliance with the Constitution.

²⁰³PAK le Roux "Economic Disputes and the New Unfair Labour Practice" (1997) 6(7) *CLL* 67 at 68.

²⁰⁴PAK le Roux "Economic Disputes and the New Unfair Labour Practice" (1997) 6(7) *CLL* 67 at 70.

²⁰⁵*Ibid.*

of economic power.²⁰⁶ The latter would deal with the typical rights dispute about the interpretation and application of a contractual provision which would fall within the ambit of clause 2(1)(b) of Schedule 7.

In conclusion, it is foreseen that the interpretation and application of clause 2(1)(b), particularly the term "benefits", is going to be the subject of debate and judicial scrutiny. In the words of Le Roux, "[i]ts formulation is such that a suitable answer is difficult to determine and amendments may be necessary to resolve the issue".²⁰⁷

3.4 LEGISLATIVE RESTRICTIONS REGARDING DISCIPLINE AND DISMISSAL

3.4.1 Introduction

As was pointed out in chapter 2, the employer has a common law right to discipline an employee.²⁰⁸ In many cases the disciplinary sanction would have been dismissal, either summarily or on notice. Sanctions less severe than dismissal, such as suspension without pay or demotion, were only permitted if they did not amount to a breach of the contract of employment.²⁰⁹ In practice, however, an employer's range of penalties was usually not limited to those which fell within the ambit of the contract as it was able, through its superior bargaining power²¹⁰ and its right to dismiss by merely giving the required notice,²¹¹ to "convince" the employee to agree to a more serious penalty which would otherwise have amounted to a breach of contract.²¹²

²⁰⁶See *East Rand Gold and Uranium Co and National Union of Mineworkers* (GA 193) where the commissioner acting as arbitrator held that the dispute about a proposed implementation by the employer of a new medical aid scheme constituted a dispute about the unilateral change to the terms and conditions of employment which was an economic or interest dispute which should be the subject of industrial action rather than arbitration. The commissioner's finding was perhaps prompted by the fact that the union had originally characterised the dispute as one dealing with a unilateral change to terms and conditions of employment. PAK le Roux "Economic Disputes and the New Unfair Labour Practice" (1997) 6(7) *CLL* 67 at 69 asks whether the arbitrator's conclusion is supported by the wording of the Labour Relations Act, 1995. According to him, medical aid schemes are a "benefit" for purposes of clause 2(1)(b) of Schedule 7.

²⁰⁷PAK le Roux "Economic Disputes and the New Unfair Labour Practice" (1997) 6(7) *CLL* 67 at 70.

²⁰⁸See par 2.4.9 in this regard.

²⁰⁹*ibid.*

²¹⁰See par 2.2 of chapter 2 where the superior bargaining power of the employer is discussed.

²¹¹See par 2.4.10.3 of chapter 2 where this common law right of the employer is discussed.

²¹²See par 2.4.9 of chapter 2 in this regard.

In addition to this, the right to dismiss on notice²¹³ enabled the employer to dismiss an employee in a completely arbitrary fashion. It could dismiss the employee for no reason whatsoever, or for a very minor offence or for a first occurrence of a particular form of misconduct. Where it did have a reason for dismissal, it did not have to give it. If, however, it elected to give the reason, neither the lawfulness nor the fairness thereof could be challenged in a court of law.

The industrial court, through the exercising of its unfair labour practice jurisdiction, developed the principles regarding unfair dismissal.²¹⁴ These principles did not rescind the employer's right to discipline²¹⁵ and to dismiss²¹⁶ but seriously restricted them, principally by eradicating arbitrariness.

In terms of these principles, it was not sufficient for a dismissal to be lawful, it also had to be fair.²¹⁷ For a dismissal to be fair, there had to be a fair reason²¹⁸ for the dismissal and it had to be effected in accordance with a fair procedure.²¹⁹

There were three primary grounds on which the employer could justify the dismissal of an employee, namely misconduct, the incapacity of the employee or the operational requirements of the business.²²⁰

The fact that an employer had to have a fair reason to dismiss significantly affected the ability of an employer to dismiss. The fairness of an employer's disciplinary and work

²¹³See par 2.4.10.3 of chapter 2 where this common law right of the employer is discussed.

²¹⁴See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 345; PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 2 and 20-28 as well as Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 193-195.

²¹⁵See *National Union of Mineworkers & Others v Randfontein Estates Gold Mining Co (Witwatersrand) Ltd* (1988) 9 ILJ 859 (IC) at 879 where the court stated that "[d]iscipline is after all the prerogative and duty of management".

²¹⁶See *Zulu v Empangeni Transport Ltd* (1990) 11 ILJ 123 (IC) at 127C.

²¹⁷See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 193-195 where they discuss the development by the industrial court of the concept of unfair dismissal.

²¹⁸See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 3 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 195-196.

²¹⁹See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 3 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 196.

²²⁰See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 3.

performance standards were subjected to the scrutiny of an independent third party, the industrial court. Furthermore, the employer could no longer use the threat of dismissal by notice to force an employee to agree to changes to terms and conditions of employment, unless this could be justified on the basis of the operational requirements of the business.

Within the context of discipline, the guidelines developed for dismissals based on misconduct were the more important. The industrial court held that a dismissal would be for a fair reason if the circumstances indicated that dismissal was a fair sanction or penalty. The court developed a number of guidelines for determining whether dismissal was a fair sanction. Of particular importance were the nature and seriousness of the offence,²²¹ the provisions of an existing disciplinary code,²²² previous warnings for the same or similar offence,²²³ the nature of the employer's business²²⁴ and consistency.²²⁵

These guidelines were all indicative of the court's view that dismissal was the ultimate penalty to be imposed only in serious cases.²²⁶ This view was also the basis for the concept of progressive discipline.²²⁷ In accordance with this concept, discipline is regarded as a means by which employees know and understand the behaviour which is required of them. Efforts must be made to correct an employee's behaviour through a system of graduated disciplinary measures such as counselling and warnings. Repeated misconduct would warrant warnings, which themselves could be graded according to

²²¹See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 97 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law 2 ed* (1992) 199-201.

²²²See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 97.

²²³See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law 2 ed* (1992) 201-202.

²²⁴See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 97.

²²⁵See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law 2 ed* (1992) 202-203.

²²⁶See *National Union of Mineworkers & Others v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddie's Mine* (1992) 13 ILJ 366 (IC) at 386I where the court, when it considered the fairness of dismissal as sanction, stated, "Considering that dismissal should be the sanction of last resort and that it is especially serious for mineworkers because of the limited scope for re-employment, I am not persuaded that dismissal was an unfair sanction".

²²⁷See *Changula v Bell Equipment* (1992) 13 ILJ 101 (LAC) at 111C-D where the labour appeal court stated that "[s]ound industrial relations practice requires an employer to endeavour to correct misconduct and adopt a policy of progressive discipline, except in circumstances where the conduct complained of is serious enough in itself to justify terminating the employment relationship". For a discussion on the concept of progressive discipline, see *National Union of Mineworkers & Others v Deelkraal Gold Mining Co Ltd* (1993) 14 ILJ 1346 (IC) at 1352B-D as well as Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law 2 ed* (1992) 179.

degrees of severity. More serious offences or repeated misconduct could result in a final warning, or other action short of dismissal for instance, such as suspension without pay and demotion. Dismissal was considered the most severe penalty only to be implemented in cases of serious misconduct or repeated offences.²²⁸

Dismissal on the grounds of incapacity was justified where the employee could not perform the duties the job entailed. This may have been because he did not have the necessary skill or aptitude, health or other physical or mental ability to do the job.²²⁹

Dismissal on the grounds of operational requirements was justified where the needs of the business justified this.²³⁰ The most common example of dismissal for this reason was where employees' services had to be terminated because they became redundant to the needs of the business. A number of factors could cause their redundancy such as an economic downturn,²³¹ technological changes,²³² the sale of the business²³³ and mergers.²³⁴ The industrial court has also held that dismissals could be justified on the grounds of operational requirements in situations other than redundancy.²³⁵ Employees could, for instance, be dismissed for this reason where they have been unable or unwilling to comply with certain operational needs of the business²³⁶ or where the employer has a justifiable suspicion that the employee has been guilty of some form of misconduct but does not have the evidence to prove it.²³⁷

²²⁸See clause 3(2) and (3) of the Code in which the concept "progressive discipline" is explained.

²²⁹See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 3 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 211.

²³⁰See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 4.

²³¹See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 240.

²³²*Ibid.*

²³³See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 240-242.

²³⁴See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 242-243.

²³⁵See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 4.

²³⁶See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 4 as well as par 3.4.3.3.4.1 below where this operational reason for dismissal is discussed.

²³⁷*Ibid.*

Although there have been relatively few cases dealing with this,²³⁸ the industrial court has also been prepared to consider the fairness of disciplinary sanctions short of dismissal.²³⁹

The guidelines developed by the industrial court have now been given statutory recognition in the Labour Relations Act, 1995. The relevant provisions are found in chapter VIII.²⁴⁰ Section 188, for example, states that a dismissal will be unfair unless the employer can show that it has a fair reason to dismiss related to the employee's conduct, or capacity, or related to the operational requirements of the business. A fair procedure also has to be followed.²⁴¹ The general principles contained in chapter VIII are expanded in the Code. This regulates dismissal on the grounds of conduct or incapacity. In terms of s 188(2) any person considering the fairness of a dismissal must take into account this Code.²⁴² Disputes over the fairness of dismissals based on the conduct or capacity of an employee will usually be arbitrated by a commissioner of the the Commission, or by a person employed for this purpose by a bargaining or statutory council or an accredited agency.²⁴³ The fairness of dismissals on the basis of the operational requirements of the employer will normally be adjudicated by the labour court.²⁴⁴

In the paragraphs below, the statutory restrictions on the employer's right to discipline²⁴⁵ and to dismiss²⁴⁶ in terms of the Labour Relations Act, 1995 will be considered.

²³⁸See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 183.

²³⁹See, for instance, *National Union of Mineworkers & Others v Transvaal Navigation Collieries & Estate Co Ltd* (1986) 7 ILJ 393 (IC) at 397C where the court indicated that it regarded suspension, as opposed to dismissal, as a fair penalty under the circumstances. See also *Rikhotso & Others v Transvaal Alloys (Pty) Ltd* (1984) 15 ILJ 228 (IC) at 242C-E where the court considered the appropriateness of warnings and suspension as alternatives to dismissal. See further *Wahl v AECI Ltd* (1983) 4 ILJ 298 (IC) at 307B.

²⁴⁰See s 185 which affords every employee the right not to be unfairly dismissed. See further s 186 which defines dismissal and s 187 which defines automatically unfair dismissals. These sections are discussed in detail in par 3.4.3 below.

²⁴¹See par 4.3.4 below where s 188 is discussed in detail.

²⁴²The provisions of the Code is discussed in detail in par 3.4.3 below.

²⁴³See s 191(5)(a)(i) of the Labour Relations Act, 1995.

²⁴⁴See s 191(5)(b)(ii) of the Labour Relations Act, 1995.

²⁴⁵See par 3.4.2 below.

²⁴⁶See par 3.4.3 below.

3.4.2 Legislative Restrictions on the Employer's Right to Discipline

As far as dismissal based on the conduct of employees is concerned, the Code recognises the supremacy of collective agreements.²⁴⁷ Where such agreements exist, they should take precedence over the provisions of the Code.

In the absence of such a collective agreement, clause 3(1) of the Code states that employers should adopt disciplinary rules which establish the standard of conduct required of employees. This implies that the employer retains the ability to set the standards.²⁴⁸ However, clause 7 of the Code permits the arbitrator to decide whether the standard is a valid or reasonable one when determining the substantive fairness of a dismissal for misconduct.²⁴⁹ This, at least in part, will be determined with reference to the Code.

The Code provides examples of serious offences which would warrant dismissal.²⁵⁰ However, the list does not impact on the employer's decision-making power as all of

²⁴⁷In clause 1(2) of the Code the legislature acknowledges the supremacy of collective agreements. It has accordingly not made the provisions of the Code applicable to disciplinary codes and procedures where these are the subject of collective agreements or the outcome of joint decision-making by an employer and a workplace forum.

²⁴⁸This was also the view of the industrial court (see *National Union of Mineworkers & Another v Western Areas Gold Mining Co Ltd* (1985) 6 ILJ 380 (IC) at 386D; *Sweet Food & Allied Workers Union & Another v Delmas Kuikens* (1986) 7 ILJ 628 (IC) at 635A), the labour appeal court (see *Empangeni Transport (Pty) Ltd v Zulu* (1992) 13 ILJ 352 (LAC) at 357C-D) and the supreme court (see *Atlantis Diesel Engines (Pty) Ltd v Roux NO & Another* (1988) 9 ILJ 45 (C) at 52H-J). See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 99 and MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 65, 74-75. It is, however, suggested that the decision-making power of the bigger employers in this regard (see s 80 which provides that workplace forums can only be established in a workplace which has more than 100 employees) has been limited by the Labour Relations Act, 1995 which lists the disciplinary code as a matter for joint decision-making by the employer and a workplace forum (see s 86(1)(a) as well as par 4.3.3.2 of chapter 4 where joint decision-making and its effect on the decision-making power of employers is discussed in detail).

²⁴⁹See clause 7(b)(i). This is in accordance with the courts' view that they should be entitled to interfere where the rule is "grossly unreasonable" (see *Empangeni Transport (Pty) Ltd v Zulu* (1992) 13 ILJ 352 (LAC) at 357) or "wholly capricious" (see *Atlantis Diesel Engines (Pty) Ltd v Roux NO & Another* (1988) 9 ILJ 45 (C) at 52I).

²⁵⁰See clause 3(4) in terms of which gross dishonesty, wilful damage to the employer's property, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination are listed as examples of serious misconduct.

these offences have also been branded by both the common law²⁵¹ and the industrial court²⁵² as serious offences.

However, the Code does limit the employer's decision-making power regarding sanctions to a certain extent by endorsing the concept of progressive discipline and dismissal as the ultimate sanction for serious or repeated offences.²⁵³

The Code specifically provides that some rules may be so well established and known that it is unnecessary to communicate them.²⁵⁴ Whether this is so, is a factual question.²⁵⁵ A rule or standard, however, may also be considered to be well established by virtue of common law contract principles.²⁵⁶ In terms of these principles, an employee will be guilty of misconduct where he breaches his implied duty to act in good faith²⁵⁷ or to be respectful²⁵⁸ or to be subordinate.²⁵⁹

It does not prescribe the exact form of the disciplinary code but it does urge larger businesses to adopt "a more formal approach" to discipline.²⁶⁰ Smaller enterprises will

²⁵¹ See par 2.4.10.2 of chapter 2.

²⁵² See, for instance, *Bhengu & Others v Union Co-Operative Ltd* (1990) 11 ILJ 117 (IC) at 122E (failure to work honestly and accurately); *SA Chemical Workers Union & Others v Noristan Holdings Ltd & Others* (1987) 8 ILJ 682 (IC) at 690F (wilful damage to property); *Abrahams v Pick 'n Pay Supermarkets OFS (Pty) Ltd* (1993) 14 ILJ 729 (IC) at 731J-732I (assault on subordinates) and *Zwane v Umgeni Iron (Pty) Ltd* (1993) 2 LCD 268 (IC) (gross insubordination).

²⁵³ See clauses 3(3) and (4). The industrial court as well as the labour appeal court also listed previous warnings for a particular offence as a factor which could play a role in determining the appropriateness of dismissal as sanction (see, for instance, *King v Beacon Island Hotel* (1987) 8 ILJ 485 (IC) at 491D and *Rhodes v SA Bias Binding Manufacturers (Pty) Ltd* (1985) 6 ILJ 106 (IC) at 120D-E; *Noddele v Mount Nelson Hotel & Another* (1984) 5 ILJ 216 (IC) at 225B; *Commercial Catering & Allied Workers Union of SA & Another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC) at 315H-J and *Deelkraal Gold Mining Co Ltd v National Union of Mineworkers & Others* (1994) 15 ILJ 573 (LAC) at 583D-G).

²⁵⁴ See clause 3(1).

²⁵⁵ It, for instance, may depend on the nature of the business and the type of work that the employee does. The fact that the employer has in the past always disciplined employees who have committed a particular act may also be indicative of the existence of such a rule.

²⁵⁶ See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 101-102.

²⁵⁷ See par 2.4.5 of chapter 2.

²⁵⁸ See par 2.4.4 of chapter 2.

²⁵⁹ See par 2.3.1 of chapter 2.

²⁶⁰ See clause 3(1). It is suggested that such a "more formal approach" may entail a written code of conduct or disciplinary code which sets out both the conduct expected from the employee and the penalty should he misbehave. Or, it may entail a formal initiation period during which the employee is informed what conduct is expected from him and what the penalty will be if he misbehaves (see, for example, *Deelkraal Gold Mining Co Ltd v National Union of Mineworkers & Others* (1994) 15 ILJ 573 (LAC) at 579C).

apparently merely have to advise new employees during, for instance, an informal discussion, what is expected of them.²⁶¹ In addition, the Code requires that the standards of conduct must be clear and made available to employees in a manner which is easily understood.²⁶²

Different opinions exist over the interpretation of disciplinary codes. In a number of decisions there has been a tendency to interpret codes in a way similar to that in which a contract might be interpreted: In terms of such an approach, an employer is usually held to the code which it has drafted and voluntarily applied to its plant.²⁶³ However, the court may be prepared to interfere where the employer's "standard of industrial justice" falls short of that which it would have applied under the circumstances.²⁶⁴ Where, however, the standard to be applied by the employer is higher than that which the court would have applied, it may not intervene "as a matter of course". The court stated in *Sweet Food & Allied Workers Union & Another v Delmas Kuikens*²⁶⁵

It may perhaps be said that this approach places too high a premium on contractual principles (or established practice) whilst it should be concentrating on equity. It should be remembered that equity may have its roots in contract or in an established practice or commitment. It seems appropriate for this court to acknowledge the standards of justice set in a given relationship and to see that they are observed.

Le Roux and Van Niekerk,²⁶⁶ however, are of the view that this approach is incorrect. According to them, a code is best viewed as a set of guidelines. There are a number of industrial and labour court decisions that have also adopted such a less technical

²⁶¹See clause 3(1).

²⁶²See clause 3(1). It is suggested that a written disciplinary code must be written in clear and unambiguous terms. Such a code may be attached to employees' contracts of employment or to notice boards in the workplace or a copy thereof may be available for inspection. Where the code has not been reduced to writing, an employer may be expected to inform the employee verbally thereof in such a manner that the employee understands what is expected of him.

²⁶³See *Sweet Food & Allied Workers Union & Another v Delmas Kuikens* (1986) 7 ILJ 628 (IC) at 634J-635A and *Rampersad v BB Bread Ltd* (1986) 7 ILJ 367 (IC) at 373F-I and 374B. See also *Deelkraal Gold Mining Co Ltd v National Union of Mineworkers & Others* (1994) 15 ILJ 573 (LAC) at 582I where the labour appeal court held the same view.

²⁶⁴See *Sweet Food & Allied Workers Union & Another v Delmas Kuikens* (1986) 7 ILJ 628 (IC) at 635B.

²⁶⁵(1986) 7 ILJ 628 (IC) at 635.

²⁶⁶*The South African Law of Unfair Dismissal* (1994) 90.

approach. See, for example, *Chemical Workers Industrial Union & Another v Hoechst (Pty) Ltd*²⁶⁷ where the industrial court stated that

[a] disciplinary code should not be a hierarchical code of conduct. It is clear that no code can cater for all possible forms of misconduct. An employer would still have a discretion in instances where a disciplinary code does not specifically provide for a specific offence. A disciplinary code is not an immutable set of commandments which have to be slavishly adhered to.

It is submitted that the latter view is to be preferred. It is impossible for an employer, when drafting a code, to anticipate and cater for all offences that might be committed. It is equally impossible to determine a penalty for a specific offence which will be fair under all possible circumstances.²⁶⁸ Nevertheless, when the employer elects a penalty, it must ensure that it is one which is fair under the circumstances as the fairness thereof may be determined by a commissioner of the Commission acting as arbitrator in terms of the residual unfair labour practice provisions contained in Schedule 7.²⁶⁹

3.4.3 Legislative Restrictions on the Employer's Right to Dismissal

3.4.3.1 Introduction

The legislature's direct statutory interference²⁷⁰ with the employer's right to dismiss undoubtedly represents one of the most far-reaching erosions of the employer's

²⁶⁷(1993) 14 ILJ 471 (IC) at 475E-F. See also *National Education Health & Allied Workers Union & Others v Director-General of Agriculture & Another* (1993) 14 ILJ 1488 (IC) at 1500D-G and *Changula v Bell Equipment* (1992) 13 ILJ 101 (LAC) at 109B-E.

²⁶⁸It is nevertheless suggested that the employer should preferably provide in its code that it is not an all-encompassing document which caters for all eventualities and that circumstances may demand a penalty different to the one listed in the code for a particular offence.

²⁶⁹See clause 2(1)(c) read with clause 3(4)(b).

²⁷⁰See chapter VIII of the Labour Relations Act, 1995 read with the Code. Most of the requirements have their origin in the guidelines developed by the industrial court when it had to determine the fairness of a dismissal in terms of the Labour Relations Act, 1956. The court, in turn, found guidance in some of the conventions of the International Labour Organisation regarding fair dismissal (such as the Recommendation Concerning Termination of Employment at the Initiative of the Employer 119 of 1963 and the Convention entitled Termination of Employment at the Initiative of the Employer 158 of 1982) and also English Law. It is submitted that the industrial court will continue to play a role in regard to the law of fair dismissal, as it is foreseen that it will be some time before it will have determined all the cases that have been referred to it (see AA Landman *Industrial Court Communiqué* 20/1995 as well as MAE Bulbulia *Industrial Court Communiqué* 1/1997). In addition, the legislature's provisions in the Labour Relations Act, 1995 provide the broad outlines for fair dismissal. It is impossible for it to cover all eventualities. Also, the Code is written in wide and general terms (see clause 1(1) where it states that it deals with "some of the key aspects of dismissals for reasons related to conduct and capacity"). It is foreseen that both the Commission and the labour court will turn to the decisions of the industrial court for guidance.

decision-making power. Its main aim was to prevent arbitrary dismissal.²⁷¹ Linked to this, were its aims to provide a measure²⁷² of job security; to ensure that dismissal is the employer's last option²⁷³ and to promote industrial peace.²⁷⁴

The most important of the statutory provisions aimed at achieving these objectives is s 185 of the Labour Relations Act, 1995. It stipulates that every²⁷⁵ employee has the right not to be unfairly dismissed. This means that it is no longer sufficient for an employer to ensure that the dismissal of an employee is *lawful* in that it has given the required notice²⁷⁶ or has made payment in lieu of notice;²⁷⁷ it must also ensure that such a dismissal is *fair*. Even where the employer is entitled to dismiss an employee summarily for a serious offence,²⁷⁸ it must ensure that such a dismissal is *fair*.

The Labour Relations Act, 1995, read with the Code, sets out the requirements for a *fair* dismissal. All that it requires of the dismissed employee is to prove that he has been dis-

²⁷¹See par 2.4.10.3 of chapter 2 where the employer's common law right to dismiss by way of notice is discussed.

²⁷²The Ministerial Legal Task Team accepted that a balance had to be struck between work security and the efficiency of the enterprise (see chapter VI of *Explanatory Memorandum* as notice 97 of 1995 in Government Gazette 16259 of 10 February 1995).

²⁷³See clause 3(4) of the Code regarding dismissal for misconduct and clauses 8(2), 9(b)(iii), 10(1) and 11 of the Code in respect of dismissal for incapacity. See s 189(2)(a)(i) in the case of dismissal for operational requirements.

²⁷⁴In the past, the dismissal of an employee often sparked industrial action by co-workers. This was actually allowed by the Labour Relations Act, 1956 which entitled co-workers to collectively refuse to work until the dismissed workers had been reinstated (see the definition of a strike in s 1 of the Act). The industrial court, however, regarded this type of strike as "less acceptable" since the dismissed employee had recourse to it in terms of s 46(9) (see *Chemical Workers Industrial Union & Others v Bevaloid (Pty) Ltd* (1988) 9 ILJ 447 (IC) at 451I-452F). Section 65(1) of the Labour Relations Act, 1995 specifically prohibits strikes over issues which a party can refer to arbitration. As an employee who has been dismissed has the right to refer the unsettled dispute to arbitration (see s 191(5)(a)(i)), his co-workers are prohibited from striking over his dismissal. See further par 6.3.2 of chapter 6 where the definition of a strike in terms of the Labour Relations Act, 1995 is discussed.

²⁷⁵The Labour Relations Act, 1995 covers *all* employees except members of the National Defence Force, the National Intelligence Agency and the South African Secret Service (see s 2).

²⁷⁶See par 2.4.10.3 of chapter 2 where the common law provisions regarding dismissal through notice is discussed. See also s 14 of the Basic Conditions of Employment Act where the statutory notice periods are discussed. Consider further the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 69 which contains more favourable terms in respect of employees who are given notice.

²⁷⁷See par 2.4.10.3 of chapter 2 where payment in lieu of notice is discussed.

²⁷⁸See par 2.4.10.2 of chapter 2 for a discussion of the employer's common law contractual right to dismiss summarily in the case of a serious breach.

missed.²⁷⁹ Once the existence of the dismissal has been established, the onus is on the employer to prove that the dismissal is *fair*.²⁸⁰

The Act defines "dismissal" in very wide terms.²⁸¹ The definition covers the more typical forms of dismissal, namely termination of the contract by notice or the payment of salary in lieu of notice as well as summary dismissal.²⁸² It also goes further and includes actions and omissions which would not ordinarily be regarded as dismissal.²⁸³ It covers, for example, selective non-re-employment²⁸⁴ and the refusal to renew a fixed term contract or an offer to renew it on less favourable terms.²⁸⁵ It also covers constructive dismissal²⁸⁶ and an employer's refusal to allow a female employee to resume work after the expiry of maternity leave²⁸⁷ or the period stipulated in the Basic Conditions of

²⁷⁹See s 192(1).

²⁸⁰See s 192(2). This brings an end to the debate which has been raging about the question of onus in dismissal cases. For a discussion on the various views, see P le Roux "The Onus of Proof in Unfair Dismissal Disputes" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D Van Zyl Smit (eds) *Labour Law* (1991) 100.

²⁸¹See s 186.

²⁸²See s 186(a).

²⁸³See s 186(b)-(e). These actions and omissions have been the subject of much litigation in the past. The industrial court held that these actions and omissions constitute unfair labour practices. By including them in the definition of dismissal, the legislature wanted to ensure that employees are not left without a remedy; particularly as the unfair labour practice definition in Schedule 7 may not be wide enough to cover such actions and omissions and as the definition is a temporary provision. See also AA Landman "Unfair Dismissal: The New Rules for Capital Punishment in the Workplace: (Part one)" (1995) 5(5) *CCL* 41 at 42 where he explains the reasons for the detailed definition in the Labour Relations Act, 1995 as follows, "Because dismissal is such a crucial concept and because there are several interpretations as to what this may mean and as the legislature was anxious to preserve the concept of a constructive dismissal the legislature has defined, probably exhaustively, the meaning of 'dismissal'".

²⁸⁴See s 186(d) as well as par 3.2 above where this form of dismissal is discussed.

²⁸⁵See s 186(b) as well as par 3.2 above.

²⁸⁶See s 186(e). This concept was introduced to South African dismissal law by the industrial court (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 84). The legislature has specifically included it in the definition as an employee would otherwise be without a remedy in terms of chapter VIII. In addition, the employee may have problems relying on the unfair labour practice definition contained in Schedule 7 as it is not as wide as the definition in the Labour Relations Act, 1956. It is also a temporary provision.

²⁸⁷See s 186(c)(i). This provision reflects a greater awareness of the plight of pregnant employees in South Africa and is an attempt to provide them with a measure of job security. It is also an attempt to bring South African law in line with the international labour standards. These standards are based on an acceptance of the important role which women have come to play in the labour market and of their role in ensuring the continued existence of society. Nevertheless, until such time as the legislature makes paid maternity leave obligatory, it will not have gone far enough in addressing the discrimination against pregnant employees.

Employment Act during which she is prohibited to work.²⁸⁸

In addition, the Labour Relations Act, 1995 prescribes procedures for the resolution of disputes regarding the fairness of dismissals.²⁸⁹ These procedures are relatively simple²⁹⁰ and inexpensive²⁹¹ and are aimed at the speedy resolution of such disputes.²⁹² It furthermore prescribes reinstatement or re-employment as the primary remedies in the case of an unfair dismissal.²⁹³ The Act also places a statutory limitation on the maximum amount of compensation that may be ordered in the event of a finding that a dismissal was unfair.²⁹⁴

²⁸⁸See s 186(c)(ii) read with s 17 of the Basic Conditions of Employment Act. This provision was necessary and founded on equity. It is grossly unfair for an employee to lose her job because of her compliance with an obligatory statutory requirement.

²⁸⁹See s 191 read with ss 133, 135-145 and 157-158.

²⁹⁰See chapter VI of the *Explanatory Memorandum* by the Ministerial Legal Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995. However, these procedures are not always as simple and straightforward as the task team had strived for them to be (see Annali Basson and Elize Strydom "The Labour Relations Act 66 of 1995: The Resolution of Disputes about Alleged Unfair Dismissals" (1996) 8(1) *SAMercLJ* 1). One of the difficulties is for the employee to select the correct dispute-resolution procedure (see AC Basson and EML Strydom "Draft Negotiating Document in Bill Form: Some Thoughts 1995 (59) *THRHR* 46 at 64). An attempt, however, has been made to address this problem in s 148 which affords the Commission the right to provide advice about the dispute resolution-procedure to be followed. Furthermore, in terms of s 149, the Commission may arrange, together with the Legal Aid Board, advice or assistance by a legal practitioner for either the employee or employer.

²⁹¹There are a number of aspects which ensure inexpensiveness: legal representation is minimised (see s 135(4)), the Commission may only charge a fee under certain circumstances (see s 123), the labour court may only make an order for costs where the law and fairness requires it (see s 162(1)) and a commissioner may only make an order for costs where a party acted in a frivolous or vexatious manner in either proceeding with or defending the matter (see s 138(10)).

²⁹²See chapter VI of the *Explanatory Memorandum* by the Ministerial Legal Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995. See also Annali Basson and Elize Strydom "The Labour Relations Act 66 of 1995: The Resolution of Disputes about Alleged Unfair Dismissals" (1996) 8(1) *SAMercLJ* 1 at 12-13 where the problems experienced under the Labour Relations Act, 1956 as a result of the delay between the date of the dismissal and the date of the court's order, are pointed out.

²⁹³See s 193(1)(a) and (b) read with (2) of the Labour Relations Act, 1995. This provision ensures that employers will carefully consider the fairness of their decision to dismiss. See also Annali Basson and Elize Strydom "The Labour Relations Act of 1995 and the Resolution of Disputes over Alleged Unfair Dismissals" (1996) 8(1) *SAMercLJ* 1 at 24.

²⁹⁴See s 194. This provision attempts to address the criticism levelled against the system in terms of the Labour Relations Act, 1956 which made it possible to grant open-ended compensation orders. The limiting of compensation will lead to greater certainty and will enable both the employer and the aggrieved employee to gauge what the approximate amount of compensation might be (see also Annali Basson and Elize Strydom "The Labour Relations Act of 1995 and the Resolution of Disputes over Alleged Unfair Dismissals" (1996) 8(1) *SAMercLJ* 1 at 24).

The Act distinguishes between two main categories of unfair dismissal namely dismissals that are *automatically unfair*²⁹⁵ and those which only become unfair if they are not for a fair reason and in accordance with a fair procedure.²⁹⁶

3.4.3.2 Dismissals which are Automatically Unfair

Section 187 lists a number of reasons which will make a dismissal *automatically unfair*.²⁹⁷ The rationale for this provision is that dismissal for any of these reasons infringes certain basic rights of an employee. This makes the unfairness of the dismissal self-evident²⁹⁸ and leaves the employer with no defence.²⁹⁹

The section protects an employee against dismissal for exercising his statutory rights regarding collective bargaining³⁰⁰ and collective action.³⁰¹ It also protects him against victimisation where he institutes legal action against his employer in terms of the Act.³⁰² It furthermore protects him against an infringement of his contractual rights in that it brands a dismissal in order to compel him to accept a demand³⁰³ in respect of any mat-

²⁹⁵See s 187.

²⁹⁶See s 188(1).

²⁹⁷The concept of the automatically unfair dismissal is derived from art 5 of the International Labour Organisation's convention entitled Termination of Employment at the Initiative of the Employer 158 of 1982.

²⁹⁸See PAK le Roux "Developments in Individual Labour Law" in Halton Cheadle, PAK le Roux, C Thompson and André van Niekerk (1995) *Current Labour Law* 1 at 8.

²⁹⁹See AA Landman "Unfair Dismissal: The New Rules for Capital Punishment in the Workplace: (Part one)" (1995) 5(5) *CCL* 41 at 44.

³⁰⁰See the introductory part of s 187(1). These automatically unfair dismissals are discussed in par 4.2.2 of chapter 4 below.

³⁰¹See s 187(1)(a) and (b). These automatically unfair dismissals are discussed in par 6.3.6.2 of chapter 6.

³⁰²See s 187(1)(d). The section probably has wider import and would also include dismissals due to the exercising of rights in terms of the Act such as the right to freedom of association (see s 4), the right to strike (see s 64) and to take part in protest action (see s 77). It is submitted that the exercising of these rights, however, are also covered by the general provision in s 187(1) as well as subsecs (a) and (b) thereto.

³⁰³See par 2.4.10.3 of chapter 2 where the dismissal of an employee by giving the required notice in order to achieve this purpose was discussed.

ter of mutual interest as automatically unfair.³⁰⁴ The section also endeavours to protect employees against dismissal on unfair discriminatory grounds³⁰⁵ such as race, gender, age, disability, marital status, pregnancy,³⁰⁶ intended pregnancy, or any reason related to her pregnancy.³⁰⁷

Although this section curtails the employer's right to dismiss fairly drastically, it does not provide an employee with absolute protection against dismissal for any one of these reasons under all circumstances. The section itself stipulates certain requirements which must be complied with by the employee before being entitled to its protection.³⁰⁸ It also affords the employer two statutory defences for using discriminatory grounds for dismissal.³⁰⁹ The section stipulates that a dismissal may be fair if the employer can prove that the reason for it was not based on considerations of a discriminatory nature, but rather on the inherent requirements of the particular job.³¹⁰ It stipulates furthermore that

³⁰⁴See s 187(c). In terms of the Labour Relations Act, 1956, the dismissal of a number of employees for this purpose constituted a lock-out which might have been legal if the employer had complied with s 65. In terms of the Labour Relations Act, 1995, however, such action does not constitute a lock-out (see the definition of a lock-out in s 213 as well as par 7.3.2 of chapter 7 below where the lock-out as economic weapon of the employer and its effect upon the employer's decision-making power is discussed). It is nevertheless submitted that an employer may be able to dismiss an employee who refuses to accept new terms and conditions of employment on the ground that the operational requirements of the business require employees who are willing and able to work under such new terms and conditions (see PAK le Roux "Developments in Individual Labour Law" (1995) *Current Labour Law* 1 at 9 as well as par 3.4.3.3.4 below where this ground for dismissal is discussed in greater detail).

³⁰⁵See s 187(1)(e) and (f). These provisions are also in accordance with the Constitution which prohibits unfair discrimination (see s 9(3)).

³⁰⁶The industrial court has also indicated that the dismissal of an employee on the grounds of pregnancy could be an unfair labour practice (see, for instance, *Randall v Progress Knitting Textiles Ltd* (1992) 13 ILJ 200 (IC) at 204A as well as *Collins v Volkskas Bank (Westonaria Branch)-A Division of ABSA Bank Ltd* (1994) 15 ILJ 1398 (IC) at 1407H and 1409-1412).

³⁰⁷It is submitted that "any reason related to her pregnancy" includes incapability due to, for instance, medical and/or emotional complications. PAK Le Roux "Developments in Individual Labour Law" (1995) *Current Labour Law* 1 at 10, however, suggests that an employer should be able to dismiss a pregnant employee on this ground where the complications lead to her being permanently incapable of doing her work or if the incapacity is for a lengthy period of time. But see John Grogan *Workplace Law* (1996) 111. See further par 3.4.3.3.3 below where dismissal for incapacity is discussed.

³⁰⁸For instance, the strike or protest action provided for in s 187(1)(a) must be protected in terms of the Labour Relations Act, 1995. See also s 187(1)(b) which requires that the strike must be a protected one. The legislature's aim was to limit its protection to those employees who are themselves acting within the parameters of the Act.

³⁰⁹See s 187(2).

³¹⁰See s 187(2)(a). Under such circumstances, the discriminatory consideration makes the employee incapable or unsuitable for the job. The real ground for dismissal is therefore the employee's incapacity or inability to do the job (see par 3.4.3.3.3 below where dismissal for incapacity or inability is discussed) not the discriminatory ground.

a dismissal based on age may be fair if the employer can prove that the employee has reached the normal or agreed retirement age.³¹¹

In addition, it remains possible for the employer to dismiss such employees for one or more of the reasons distinguished in s 188(1) of the Labour Relations Act, 1995.³¹² The onus will nevertheless be on it to prove that it actually dismissed for such a reason³¹³ and that it did not merely serve as a cover-up for the real (automatically unfair) reason.³¹⁴

The prohibition of discriminatory dismissals apart,³¹⁵ from a practical perspective, the most important potential limitation of employer prerogative is to be found in s 187(1)(c). In terms of this section, a dismissal which is aimed at compelling an employee to accept a demand in respect of any matter of mutual interest is automatically unfair.

The employer was able to use this strategy during the operation of the Labour Relations Act, 1956. In terms of the definition of a lock-out in s 1 of the Labour Relations Act, 1956, a dismissal in order to force employees to agree to or comply with any demands concerning terms and conditions of employment or to accept any change in the terms and conditions of employment, constituted a lock-out as defined. Provided the employer had complied with the statutory requirements for a legal lock-out in s 65 of the Act, it became entitled to the protection afforded in s 79 of the Act against civil claims for losses suffered by the employees as a result of the lock-out. These statutory provisions disturbed the balance in the bargaining power between employers and employees in favour of the employer. They enabled the employer to enforce its unilateral changes to the terms and conditions of employment on employees.³¹⁶

³¹¹See s 187(2)(b). It is submitted that this provision is of particular importance for an employer which wants to dismiss employees of retirement age as an alternative to retrenchment, or which has decided on age as selection criterion during retrenchment (see par 3.4.3.3.4 below where the requirements for a fair retrenchment are discussed).

³¹²Consider, for example, the fact that the employer may be entitled to dismiss a striker in a protected strike for misconduct or because of the operational requirements of the business (see s 67(5) of the Labour Relations Act, 1995). See further par 6.3.6.2 of chapter 6 where the dismissal of strikers is discussed.

³¹³See s 192(2).

³¹⁴Contra PAK le Roux "Developments in Individual Labour Law" 1 at 12 in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law 1995* (1995) 12 who suggests that where the employee argues that the reason for dismissal is one which is automatically unfair, it is for him to prove this.

³¹⁵See s 187(1)(e) and (f) as well as the discussion earlier in this paragraph.

³¹⁶For a discussion of the definition of a lock-out in s 1 of the Labour Relations Act, 1956, see par 7.3.2 of chapter 7.

The definition of a lock-out in the Labour Relations Act, 1995 does not include dismissal as one of the actions that the employer can resort to in order to compel employees to accept its changes to the terms and conditions of employment.³¹⁷ This factor, together with the provision contained in s 187(1)(c) of the Labour Relations Act, 1995, significantly limits the employer's ability to utilise its stronger bargaining position³¹⁸ and right to terminate by notice³¹⁹ so as to enforce changes in respect of matters of mutual interest. In addition, the concept matter of "mutual interest" used in s 187(1)(c) is very wide. It covers all matters relating to the employment relationship and may also cover anything which, bona fide, relates to the industry or which, in the words of the court in *Rex v Woliak*,³²⁰ "can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned".³²¹

In conclusion it is submitted that, although s 187(1)(c) may be necessary in the interests of industrial justice, it could significantly affect an employer's ability to adapt to changing conditions and the needs of flexibility.

3.4.3.3 Other Unfair Dismissals

3.4.3.3.1 Introduction

It is generally accepted that an employer is entitled to satisfactory conduct and work performance from employees.³²² The legislature has also placed a premium on the efficient and profitable running of the business.³²³ Accordingly, it distinguished three broad categories of reasons for which an employer may dismiss namely misconduct,

³¹⁷See par 7.3.2 of chapter 7 where the definition of a lock-out in terms of the Labour Relations Act, 1995 is discussed.

³¹⁸See par 2.2 of chapter 2 in this regard.

³¹⁹See par 2.4.10.3 of chapter 2 in this regard.

³²⁰1939 TPD 428 at 430-431.

³²¹For a detailed discussion of the concept "matters of mutual interest", see par 6.3.2 of chapter 6 where the concept is discussed in the context of the definition of a strike.

³²²See clause 1(3) of the Code.

³²³*ibid.*

incapacity and the operational requirements of the business.³²⁴ The employer may dismiss for any of these three categories of reasons provided that such a dismissal is both *substantively* and *procedurally fair*.³²⁵

The legislature's main aim with its requirement of *substantive fairness* is to ensure that a dismissal is not effected arbitrarily. The employer must prove that there is a reason for dismissal and that this proffered reason is fair under the circumstances.³²⁶ Generally, a reason will be fair if the employer can prove that it exists; that it is a serious reason; that the employee knew that he could be dismissed for that reason and that the penalty of dismissal is the appropriate penalty under the circumstances.³²⁷

Procedural fairness is aimed at ensuring that the affected employee is afforded an opportunity to either state his version³²⁸ or to explain³²⁹ or to make suggestions.³³⁰ This, in turn, ensures that the employer's decision to dismiss is a considered and informed one.³³¹

³²⁴See s 188(1) of the Labour Relations Act, 1995. This distinction was taken over from the industrial court (see *Gumede & Others v Richdens (Pty) Ltd t/a Richdens Foodliner* (1984) 5 ILJ 84 (IC) at 93 and *National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* (1985) 6 ILJ 369 (IC) at 374H-375B and 378A-B) which, in turn, has adopted it from the International Labour Organisation's Convention 158 of 1982 entitled Termination of Employment at the Initiative of the Employer.

³²⁵See s 188(1) of the Labour Relations Act, 1995. This requirement is in accordance with the decisions of the industrial court which also required that a dismissal for any one or more of these reasons had to be substantively and procedurally fair (see, for instance, *National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* (1985) 6 ILJ 369 (IC) at 376).

³²⁶See s 188(1) of the Labour Relations Act, 1995.

³²⁷See the discussion in pars 3.4.3.3.2.1; 3.4.3.3.3.1 and 3.4.3.3.4.1 regarding substantive dismissal for the different categories of reasons for dismissal.

³²⁸This is the case in misconduct cases (see par 3.4.3.3.2.2 below where the fairness of disciplinary enquiries is discussed).

³²⁹Consider the requirements for a procedurally fair dismissal for incapacity (see par 3.4.3.3.3.2 below) where the employee must be afforded an opportunity to explain why his work is below the required standard.

³³⁰In the case of dismissal for operational reasons, the employee must be afforded an opportunity to make suggestions regarding alternatives to dismissal or regarding the timing of dismissals or to suggest which selection criteria must be used (see par 3.4.3.3.4.2 below where the procedural requirements for a fair dismissal for operational reasons are discussed).

³³¹See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 152-153.

The Code sets out the guidelines for substantive and procedural fairness regarding a dismissal for misconduct³³² and for incapacity.³³³ These guidelines are fairly detailed. They are, however, mere guidelines and not hard and fast rules.³³⁴ This means that the employer's non-compliance with a particular guideline will not necessarily make the dismissal unfair.³³⁵ The question of whether or not non-compliance with a particular guideline is in order, will depend on the facts of the matter.³³⁶ Nevertheless, an employer should carefully consider whether or not circumstances are such that non-compliance will be in order, as the Labour Relations Act, 1995 specifically requires that the fairness of a dismissal must be judged against the guidelines of the Code.³³⁷

The legislature has set out the requirements for a fair dismissal for operational reasons in the Labour Relations Act, 1995 itself.³³⁸ This was probably done as the guidelines for a fair dismissal for this reason were not as developed and clear as those for the other two reasons for dismissal.³³⁹ The requirements are not mere guidelines³⁴⁰ and non-compliance makes the dismissal statutorily unfair. The employer's decision-making power regarding dismissal for this reason, therefore, appears to be more restricted than in the case of the other two reasons. This was probably also motivated by the fact that "operational reasons" is an extremely wide concept which affords employers with virtually limitless scope for dismissal.³⁴¹

³³²See clauses 3(4)-(6), 4 and 7 of the Code.

³³³See clauses 9 and 11.

³³⁴See clause 1(1) which stipulates that the Code is "intentionally general" and that "[e]ach case is unique, and departures from the norms established by this Code may be justified in proper circumstances".

³³⁵This is in line with the labour appeal court's decision in *Seven Abel CC t/a The Crest Hotel v Hotel & Restaurant Workers Union* (1990) 11 ILJ 504 (LAC) at 507H-I where it held that the courts developed mere guidelines and that parties could depart from them under appropriate circumstances.

³³⁶See clause 2(1) of the Code.

³³⁷See s 188(2).

³³⁸See s 189 read with ss 16 and 196.

³³⁹See chapter 6 of the *Explanatory Memorandum* by the Ministerial Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995.

³⁴⁰See, for example, s 189(1) where it is stipulated that the employer "must" consult. See also s 189(2)-(3) and (5)-(7) as well as s 196(1) of the Labour Relations Act, 1995.

³⁴¹See par 3.4.3.3.4.1 below where the breadth of the concept "operational requirements" is discussed. The breadth thereof probably also led to the legislature's inclusion of dismissal for this reason to the list of matters that the employer must consult the workplace forum about (see s 84(1)(e) of the Labour Relations Act, 1995 as well as par 4.3.3.1 of chapter 4).

The onus is on the employer³⁴² to prove that there has been substantial compliance with either the guidelines or the statutory provisions and it must prove this on a balance of probabilities.³⁴³ When considering whether there has been sufficient compliance, the commissioner and the labour court will probably take all facts into consideration; including those which only became known after the dismissal.³⁴⁴

As the details regarding substantive and procedural fairness differ in respect of the three broad categories of reasons for dismissal, they are discussed separately.

3.4.3.3.2 The Requirements for a Fair Dismissal for Misconduct

3.4.3.3.2.1 Substantive Fairness

Substantive fairness in misconduct cases essentially revolves around the disciplinary rule which the employee has allegedly contravened.

In terms of the Code, the employer must prove that the rule existed³⁴⁵ and that the

³⁴²See s 192 of the Labour Relations Act, 1995.

³⁴³Neither the Labour Relations Act, 1995 nor the Code stipulates the standard by which the employer must prove this. It is suggested that the standard should be that which is required in civil cases. This will be in accordance with the view of most of the presiding officers of the industrial court (see, for example, *Lefu & Others v Western Areas Gold Mining Co Ltd* (1985) 6 ILJ 307 (IC) at 314B-C as well as PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 105). In *Chemical Workers Industrial Union v Reckitt & Colman SA (Pty) Ltd* (1990) 11 ILJ 1319 (IC) at 1328E-F and *Food & Allied Workers Union & Another v SA Breweries Ltd (Denver)* (1992) 13 ILJ 209 (IC) at 214G-215B the reasonable employer test in terms of which the employer needs only show that there were reasonable grounds for believing that the offence was committed, was expressly rejected.

³⁴⁴Most presiding officers of the industrial court (see, for instance, *Govender v SASKO (Pty) Ltd t/a Richards Bay Bakery* (1990) 11 ILJ 1282 (IC) at 1286H-I and *Visagie & Andere v Prestige Skoonmaak-dienste (Edms) Bpk* (1995) 16 ILJ 421 (IC) at 425B-E) treated the matters before them as de novo hearings. The labour appeal court had also expressed the view that a complete rehearing of the matter took place before the industrial court (see *Hoechst (Pty) Ltd v Chemical Workers Industrial Union & Another* (1993) 14 ILJ 1449 (LAC) at 1456B). Arbitrators have also treated the arbitration as a de novo hearing (see *Pick 'n Pay Retailers (Pty) Ltd (Gallo Manor Branch) and Commercial Catering & Allied Workers Union of SA* (1990) 11 ILJ 1352 (ARB) at 1356H-1357B).

³⁴⁵See clause 7(1) of the Code. If there is a written disciplinary code which contains the relevant rule, or if it is contained in the contract of employment or in a notice on the notice board, the employer's task is fairly easy. However, even where it is not contained in such documents, the employer's task may remain fairly easy, particularly where the rule appears to be one founded on the common law (see clause 3(1) as well as par 3.4.2 above in this regard) or in legislation such as, for instance, the Occupational Health and Safety Act (see, for instance, ss 14 and 15 thereof). Where, however, the rule is not contained in the employer's code or in any of the other sources mentioned, it may experience greater difficulty to prove the rule's existence. The employer could argue that circumstances are such that the rule may be read into its disciplinary code. Under such circumstances, the success of the employer's argument will largely depend on the commissioner's interpretation of a disciplinary code. In other words, whether he regards a code as merely a set of guidelines or as something akin to a contract (see par 3.4.2 above where this matter is discussed).

employee has contravened the rule.³⁴⁶ The employer must also prove that the rule or standard was valid or reasonable.³⁴⁷ In general terms, a rule or standard will be valid or reasonable if the facts indicate that it is lawful and that it can be justified with reference to the needs and circumstances of the business.³⁴⁸

In addition, the employer must prove that the employee was aware, or could reasonably be expected to have been aware, of the rule or standard.³⁴⁹ The rationale for this guideline is obvious; an employee should only be penalised for actions or omissions which he knew were unacceptable. Also implied in this requirement is that the employee must have known that a transgression of this rule may lead to dismissal.³⁵⁰

³⁴⁶See clause 7(a) of the Code.

³⁴⁷See clause 7(b)(i). The industrial court also considered the validity or reasonableness of a rule when deciding on the substantial fairness of a dismissal (see, for example, *Amos v Stuttafords Ltd* (1986) 7 ILJ 506 (IC) at 508H-509B). This provision curtails the employer's right to decide on the disciplinary rules of the workplace and serves to ensure that the rules are not unreasonable (see also par 3.4.2 where the employer's right to discipline its employees is discussed).

³⁴⁸See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 108. There are a number of factors which may help to determine whether or not a rule is so justified namely the nature of the business (see, for instance, *Black Allied Workers Union & Others v One Rander Steak House* (1988) 9 ILJ 326 (IC) at 330G-H as well as PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 108 and the other cases referred to in note 50 thereof), the circumstances in which the business operates (see, for instance, *Swanepoel v AECI Ltd* (1984) 5 ILJ 41 (IC) at 43I-44B as well as PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 108 and the other cases referred to in note 51 thereof), the type of work the employee did (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 108) and the consistency with which the employer applied the rule in the past (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 109).

³⁴⁹See clause 7(b)(ii). It was also generally accepted by the industrial court and the labour appeal court that an employee can only be disciplined for contravening a rule if he knew of its existence (see *National Union of Mineworkers & Others v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddie's Mine* (1993) 14 ILJ 341 (LAC) at 358D-E and *SA Laundry, Dry Cleaning, Dyeing & Allied Workers Union & Others v Advance Laundries Ltd t/a Stork Napkins* (1985) 6 ILJ 544 (IC) at 567H-568A).

³⁵⁰See *SA Laundry, Dry Cleaning, Dyeing & Allied Workers Union & Others v Advance Laundries Ltd t/a Stork Napkins* (1985) 6 ILJ 544 (IC) at 567H-568A. The employer will be able to satisfy this guideline where the rule is contained in its disciplinary code or in a document (see *Knoetze v Rustenburg Platinum Mines Ltd* (1985) 6 ILJ 450 (IC) at 452E-I where the industrial court held that the dismissal of Knoetze was fair as he had signed a document in which it was explicitly stated that employees found guilty of assaulting somebody belonging to a different race group would be subject to dismissal) or written briefs and the documents are available to its employees (see clause 3(1) of the Code). Knowledge of a rule may also be ensured through meetings with workers and notices on notice boards. Furthermore, certain forms of misconduct may be so well known and generally accepted in the workplace that employees can reasonably be expected to know that they may face dismissal for transgression thereof. Another factor which may serve as proof of the employee's knowledge is previous warnings which he may have in respect of this rule.

Furthermore, the employer must prove that it has applied this rule consistently.³⁵¹ The reason for this guideline is that an employer, as far as possible, must treat its employees the same where they have committed the same or similar offences. In other words, the employer must be consistent in the meting out of discipline.³⁵²

Lastly, the employer must prove that dismissal was an appropriate sanction for the contravention of the rule or standard.³⁵³ The Code lists a number of factors which must be taken into consideration when determining this question³⁵⁴ namely the gravity of the misconduct,³⁵⁵ the employee's circumstances,³⁵⁶ the nature of the job,³⁵⁷ the circumstances of the infringement itself³⁵⁸ and the consistency with which the employer has

³⁵¹ See clause 7(b)(ii) of the Code.

³⁵² Two types of inconsistency can be distinguished namely historical inconsistency and contemporaneous inconsistency. Historical inconsistency occurs where the employer has in the past, as a matter of practice, not proceeded against its employees when they have contravened a certain rule but then suddenly decides to proceed against an employee for contravening that particular rule. Contemporaneous inconsistency takes place where employees who breach the same rule at roughly the same time are not all disciplined, or where they are all disciplined receive different penalties. See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 110-111 for a more detailed discussion on these two types of inconsistency.

³⁵³ See clause 7(b)(iv) of the Code.

³⁵⁴ See clause 3(5) and (6).

³⁵⁵ The Code subscribes to the concept of progressive discipline (see clause 3(2)) and stipulates that dismissal is not appropriate for a first offence, except if the misconduct is serious (see clause 4(4)). See also par 3.4.2 above where the employer's right to discipline its employees is discussed.

³⁵⁶ Such as length of service, previous disciplinary record and personal circumstances (see clause 3(5) of the Code). These factors were also taken into account by the industrial court (see, for instance, *Nadasen v CG Smith Sugar Ltd* (1992) 13 ILJ 1571 (IC) at 1583C-D). However, some debate arose regarding the importance of a good disciplinary record and long service as mitigating factors and the labour appeal court appeared to be of the view that these factors should not play such an important role (see *Central News Agency v Commercial Catering & Allied Workers Union of SA & Another* (1991) 12 ILJ 340 (LAC) at 344H-I and *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC) at 592I-593A). This dispute has now been resolved as the Code clearly indicates that these factors should be taken into account in determining whether dismissal is the appropriate sanction.

³⁵⁷ Consider, for instance, *Black Allied Workers Union v One Rander Steak House* (1988) 9 ILJ 326 (IC) at 330G-I where the industrial court took into account the fact that efficient and quick service was essential in a restaurant functioning on the principle of low price and high turnover, and decided that the employees' disobedience and slack and inefficient service constituted a fair reason for dismissal. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 113 and the cases discussed there.

³⁵⁸ Surrounding circumstances may have a tempering effect, not on the seriousness of the offence as such, but on the severity of the penalty (see, for instance, *Nkomo v Pick 'n Pay Retailers* (1989) 10 ILJ 937 (IC) at 940G-H).

dismissed other employees for the same offence in the past.³⁵⁹

None of these factors in isolation can determine the appropriateness of dismissal as a penalty. They must all be considered and weighed up against each other. To decide whether or not dismissal is the appropriate penalty may be a fairly difficult task, particularly where factors such as consistency and the personal circumstances of the employee must be balanced.³⁶⁰

Both the industrial court and the labour appeal court increasingly subscribed to the reasonable employer test when they had to determine the appropriateness of dismissal as penalty.³⁶¹ They often took a less interventionist approach and did not substitute the employer's penalty with one which they thought would be fair, if it was clear that a reasonable employer would have imposed the same penalty. In *Bhengu & Others v Union Co-Operative Ltd*,³⁶² for instance, the industrial court explained this approach as follows

It is now well established that this court will not interfere with the sanction decided upon by the employer unless that sanction falls outside the range of sanctions which a fair employer would be likely to impose. The fact that the presiding officer, if he had to impose a penalty himself, would have imposed some other penalty is not a relevant consideration.

The authors of *The Labour Relations Act of 1995*³⁶³ are doubtful whether this approach by the industrial court and the labour appeal court can still be valid in terms of the Labour Relations Act, 1995. They point out that s 23(1) of the Constitution entitles every person to "fair" labour practices. According to them³⁶⁴

[t]his implies that the common law should be interpreted as requiring the employer to behave not only reasonably but fairly in exercising its disciplinary power.

³⁵⁹See clause 3(6) of the Code. Two types of inconsistency can be distinguished namely historical and contemporaneous inconsistency. In the case of historical inconsistency, the employer dismisses an employee for an offence in respect of which it has not in the past dismissed. Contemporaneous inconsistency entails that an employer dismisses one employee for a particular offence but elects not to dismiss another who has committed the same offence at roughly the same time as the first employee.

³⁶⁰See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 117-118 where they discuss the difficulties surrounding the selection of the appropriate penalty.

³⁶¹See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 118-120.

³⁶²(1990) 11 ILJ 117 (IC) at 1211. See also *National Union of Mineworkers & Another v Western Areas Gold Mining Co Ltd* (1985) 6 ILJ 380 (IC) at 386D.

³⁶³D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 354.

³⁶⁴At 354.

In addition, the commissioner determining the fairness of a dismissal is enjoined by clause 7(b)(iv) of the Code to consider whether dismissal is an "appropriate" sanction. The authors of *The Labour Relations Act of 1995*³⁶⁵ suggest that the term "appropriate" must be read in the light of the purpose of the Labour Relations Act, 1995. They argue that³⁶⁶

[i]t would be difficult to maintain that the aims set out in section 1, in addition to the constitutional right to fairness, permit the arbitrator to require no more than 'reasonableness' on the part of the employer. It is submitted that the arbitrator must also consider whether the employer's sanction was fair, thus broadening the scope for legal intervention and the protection extended to employees.

3.4.3.3.2 Procedural Fairness

Clause 4 of the Code sets out the requirements for a procedurally fair dismissal for misconduct. It is here that, arguably, the Code adopts a different approach³⁶⁷ from that of the jurisprudence developed by the industrial court.³⁶⁸ Although there were differing approaches, generally speaking, the industrial court required fairly high standards of procedural fairness.³⁶⁹ It appears that the Code does not subscribe to this approach. It requires a substantially fair procedure rather than compliance with prescribed formalities.³⁷⁰

³⁶⁵D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 354.

³⁶⁶At 354.

³⁶⁷See André van Niekerk and PAK le Roux "Procedural Fairness and the New Labour Relations Act" (1997) 6(6) *CLL* 51 where they state, "One of the most important but understated changes introduced by the 1995 Labour Relations Act relates to procedural fairness in dismissal. The precise nature and extent of these changes will have to be determined by the labour courts in due course, but the wording of the Act and in particular, the Code of Good Practice on unfair dismissal, suggest that they are far reaching". See further (at 52) where they suggest that the new provisions represent a shift from a model based on respect for dignity, to one that more fully accounts for considerations of efficiency.

³⁶⁸For a discussion of the court's jurisprudence, see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 152-176; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 203-210; Edwin Cameron "The Right to a Hearing before Dismissal - Part 1" (1986) 7 *ILJ* 183 and Edwin Cameron "The Right to a Hearing before Dismissal - Problems and Puzzles" (1988) 9 *ILJ* 147.

³⁶⁹For a discussion of the industrial court's requirements for a procedurally fair dismissal, see André van Niekerk and PAK le Roux "Procedural Fairness and the New Labour Relations Act" (1997) 6(6) *CLL* 51 at 53; D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 357; PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 154 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 204.

³⁷⁰See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 357.

The Code states that the employer should conduct an investigation, which does not need to be a formal enquiry, to determine whether there are grounds for dismissal.³⁷¹ Van Niekerk and Le Roux³⁷² point out that although the word "enquiry" is used in the Code, it is clear that what was envisaged by the Code is not the formal disciplinary enquiry often contemplated by the industrial court.³⁷³

The Code lists a number of minimum requirements for such an investigation. Firstly, the employer must notify the employee of the allegations using a form and language that the employee can reasonably understand.³⁷⁴ Secondly, the employee should be allowed the opportunity to state a case in response to the allegations against him.³⁷⁵ Thirdly, the employee should be afforded a reasonable time to prepare his response³⁷⁶ and, fourthly, he should be entitled to the assistance of a trade union representative or fellow employee.³⁷⁷

After the investigation, the Code requires the employer to communicate the decision taken and preferably furnish the employee with written notification of that decision.³⁷⁸

³⁷¹See clause 4(1).

³⁷²André van Niekerk and PAK le Roux "Procedural Fairness and the New Labour Relations Act" (1997) 6(6) *CLL* 51 at 57.

³⁷³See, for instance, *Mahlangu v CIM Deltak*, *Gallant v CIM Deltak* (1986) 7 *ILJ* 346 (IC).

³⁷⁴See clause 4(1). The industrial court also laid down this guideline (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 156-157 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 208).

³⁷⁵See clause 4(1). The industrial court developed the same guideline (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 157-161 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 208).

³⁷⁶See clause 4(1). The industrial court developed a similar guideline. It required that the employer afford the employee timeous notice of the hearing to enable him to prepare for it (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 157 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 208).

³⁷⁷See clause 4(1). The industrial court developed a similar guideline. It allowed the employee to be assisted by someone during the hearing (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 161-162 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 208).

³⁷⁸See clause 4(1). The industrial court also developed the guideline that the employer had to inform the employee of its decision. It did not, however, require that it had to be done in writing (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 169 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 208).

The Code contains special provisions in the case of disciplinary action against trade union representatives³⁷⁹ or an employee who is an office-bearer³⁸⁰ or official³⁸¹ of a trade union. It requires the employer not to institute such disciplinary action against these employees without first informing and consulting the trade union.³⁸² The aim of this provision is probably to afford these employees a measure of protection against bias or victimisation by the employer.

If the employee is dismissed, the Code requires that the employee should be given the reason for dismissal³⁸³ and reminded of any rights to refer the matter to a council³⁸⁴ with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.³⁸⁵ It is important that the employee be informed of the reason for dismissal, particularly if he intends to pursue the matter in terms of the Labour Relations Act, 1995, as the Act prescribes different dispute resolution procedures for the various reasons for dismissal.³⁸⁶

The Code does not make provision for an appeal against a dismissal to a higher authority in the hierarchy of the enterprise.³⁸⁷ This is to the advantage of the employer as it

³⁷⁹A trade union representative is defined in s 213 as "a member of a trade union who is elected to represent employees in a workplace". For a discussion of trade union representatives, see par 4.2.3.4 of chapter 4.

³⁸⁰An office bearer of a trade union is defined in s 213 of the Labour Relations Act, 1995 as a person who holds office in a trade union and who is not an official. See further par 4.2.3.5 of chapter 4 where reference is made to office bearers.

³⁸¹An official of a trade union is defined in s 213 of the Labour Relations Act, 1995 as a person employed as the secretary, assistant secretary or organiser of a trade union, or in any other prescribed capacity, whether or not that person is employed in a full-time capacity. See further par 4.2.3.5 of chapter 4 where reference is made to officials of trade unions.

³⁸²See clause 4(2). The industrial court did not develop such a guideline.

³⁸³The industrial court also developed such a guideline (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 169 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 208).

³⁸⁴See par 4.2.5 of chapter 4 for a discussion of the various types of councils provided for in the Labour Relations Act, 1995.

³⁸⁵See clause 4(3).

³⁸⁶See s 191.

³⁸⁷Compare this with the industrial court which often required that an employee had to be afforded an appeal (see, for example, *Mahlangu v CIM Deltak*, *Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC) at 357A-F). For a discussion of this requirement, see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 169-174 and Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 208.

entails a saving in production hours and manpower. However, it is also advantageous for the (dismissed) employee as he will be able to refer the matter to the Commission³⁸⁸ for speedy settlement by an objective third party.³⁸⁹

Lastly, the Code provides that the employer may dispense with pre-dismissal procedures in exceptional circumstances where the employer cannot reasonably be expected to comply with the Code's guidelines regarding a fair procedure.³⁹⁰ The question of whether or not exceptional circumstances are present is a factual one. Nevertheless, it is suggested that the exceptional circumstances distinguished by the industrial court, namely the so-called crises-zone cases³⁹¹ and the instances where the employee has waived his right to an enquiry,³⁹² will serve as guidelines for the commissioners of the Commission.³⁹³

3.4.3.3.3 The Requirements for a Fair Dismissal for Incapacity

3.4.3.3.3.1 Substantive Fairness

The Code distinguishes between two broad categories of incapacity³⁹⁴ namely poor

³⁸⁸See s 191(1)(b) of the Labour Relations Act, 1995.

³⁸⁹See s 191(1) in terms of which the employee must refer the dispute within 30 days of the dismissal as well as s 191(5) in terms of which the commissioner must endeavour to conciliate the dispute within 30 days of receipt of the referral.

³⁹⁰See clause 4(4). The industrial court also identified exceptional circumstances where the employer could dispense with a hearing (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 174-176).

³⁹¹See, for example, *Lefu & Others v Western Areas Gold Mining Co Ltd* (1985) 6 ILJ 307 (IC) at 313C and *National Union of Mineworkers v Buffelsfontein Gold Mining Co Ltd (Beatrix Mines Division)* (1988) 9 ILJ 341 (IC) at 348A-D.

³⁹²See, for instance, *Mfazwe v SA Metal and Machinery Co Ltd* (1987) 8 ILJ 492 (IC) at 493D.

³⁹³See also the comments by D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 359 and A van Niekerk and PAK le Roux "Procedural Fairness and the New Labour Relations Act" (1997) 6(6) CLL 51 at 57.

³⁹⁴The industrial court also distinguished between these two forms of incapacity. See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 219 where they discuss these two forms of incapacity distinguished by the court.

work performance³⁹⁵ and ill health or injury.³⁹⁶ In essence, the guidelines for a substantively fair dismissal for these categories are the same.³⁹⁷

In the case of dismissal for *poor work performance*, the Code provides for a reasonable probationary period.³⁹⁸ The aims of such a period are normally twofold: to allow the employer to determine the employee's suitability for the job and to enable it to dismiss an unsuitable employee for reasons which are "less compelling"³⁹⁹ than would be required in the case of ordinary employees. However, the guidelines for a fair dismissal of a probationary employee prescribed by the Code⁴⁰⁰ are essentially the same as those for an ordinary dismissal.⁴⁰¹

An employer which wants to dismiss an employee for *poor work performance*⁴⁰² must firstly prove that there was a performance standard and that the employee failed to meet

³⁹⁵See clauses 8 and 9. The dividing line between incapacity and misconduct in the case of poor work performance is often very fine. The cause for poor work performance must be carefully considered. If there is some measure of culpability on the part of the employee, his dismissal would probably be based on his misconduct and not on incapacity. See further PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 219 as well as John Grogan *Workplace Law* (1996) 114.

³⁹⁶See clauses 10 and 11. The employer must be careful that a dismissal for permanent or serious temporary incapacity does not amount to an automatically unfair dismissal (see par 3.4.3.2 above where automatically unfair dismissals are discussed). The employer will be able to avoid this where it can prove that it is not the employee's disability which is the reason for his dismissal but rather the inherent requirements of the job which make the disabled person incapable of doing the work. The employer may also possibly dismiss a disabled person for operational reasons. Under such circumstances, the emphasis will be on the harm which the employee's incapacity is inflicting on the economic well-being of the business and not on the incapacity as such (see par 3.4.3.3.4 below where dismissal for operational reasons is discussed).

³⁹⁷The Code deals with the substantive guidelines for these two categories under separate headings merely to accommodate the peculiarities of the different categories.

³⁹⁸See clause 8(1).

³⁹⁹See John Grogan *Workplace Law* (1996) 114.

⁴⁰⁰See clause 8(1).

⁴⁰¹This is largely in accordance with the view expressed in the majority of industrial court decisions namely that the requirements for a substantially fair dismissal during probation are essentially the same as those for an ordinary dismissal. See John Grogan *Workplace Law* (1996) 113-114.

⁴⁰²Essentially, the Code has codified the guidelines developed by the industrial court for a substantively fair dismissal (see D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 360). See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 221-222 for a discussion of the court's guidelines).

the required performance standard.⁴⁰³ In the second instance, the employer must prove that this reason for dismissal was fair under the circumstances. In this regard, it must prove that the employee knew what was expected of him;⁴⁰⁴ that he was given a fair opportunity to meet the required standard⁴⁰⁵ and that dismissal was the appropriate sanction.⁴⁰⁶

In the case of dismissal for *ill health or injury*,⁴⁰⁷ the employer will have to prove that the employee was ill or that he was injured and that this made the employee incapable of doing his work.⁴⁰⁸ In the second instance, the employer must prove that ill health or injury was a fair reason for dismissal under the circumstances. In this regard, the employer must indicate that the extent to which the employee was unable to perform his work was substantial;⁴⁰⁹ that it was not possible or feasible to adapt the employee's

⁴⁰³See clause 9(a). The required standard is essentially that which is required in terms of the common law, namely that the employee is able to do the work that he has undertaken to do (see par 2.4.6 of chapter 2 where this duty of the employee is discussed). However, the circumstances of the job may be such that a certain amount of training or guidance or instruction is required from the employer. Under such circumstances, the employer must prove that the employee did not meet the standard demanded by the peculiarities of the job or the workplace.

⁴⁰⁴See clause 9(b)(i) read with clause 8(2)(a). Normally, it could be argued that the employee would have been aware of the requirements as he had indicated, by accepting the job offer, that he could do the work. The Code (see clause 8(2)(a) nevertheless appreciates that circumstances may be such that the employer may be required to evaluate, instruct, train, guide or counsel the employee. All these actions are aimed at informing the employee what is expected of him and how he must go about achieving this.

⁴⁰⁵See clause 9(b)(ii) read with clause 8(2)(b).

⁴⁰⁶See clause 9(b)(iii) of the Code. In this regard, aspects such as the nature of the performance standard, the period given for improvement, the number of chances given for improvement, the employee's personal circumstances, his explanation for non-compliance as well as the alternatives to dismissal which have been considered, will be relevant. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 227 where they suggest that the employer must show that the possibility of alternative employment was at least considered.

⁴⁰⁷The guidelines for a substantively fair dismissal are those which have been developed by the industrial court (see D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 360 and 364). See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 229 for a discussion of the industrial court's guidelines).

⁴⁰⁸See clause 11(a) of the Code.

⁴⁰⁹See clause 11(b)(i) read with clause 10(3) of the Code. In the case of temporary incapacity, it must prove that the extent of the incapacity is so great that continued employment is not a feasible option. It may prove this where the facts show that the employee will be absent for an unreasonably long time (see clause 10(1) of the Code). Where an employee is permanently incapable, the employer must prove that it cannot accommodate his disability by adapting his duties or work circumstances or that there is no alternative employment (see clause 10(1) of the Code).

work circumstances or to change his duties⁴¹⁰ and that no suitable alternative work was available.⁴¹¹

3.4.3.3.2 Procedural Fairness

The Code does not provide a structured list of procedural guidelines in respect of poor work performance or ill health or injury. This is probably because procedural fairness is linked to substantive fairness.⁴¹²

In the case of *poor work performance*, be it in respect of a probationary employee or an ordinary employee, the employer must counsel the employee.⁴¹³ During such counselling, the employee must be informed what is expected of him⁴¹⁴ and warned that dismissal is a real possibility.⁴¹⁵ Provision may also be made for further counselling sessions during which the employee's progress will be monitored.⁴¹⁶ Where appropriate,

⁴¹⁰See clause 11(b)(ii) of the Code. The Code indicates that an employer's duty to accommodate an employee who is injured at work or who is suffering from a work-related illness is more onerous under these circumstances (see clause 10(4)).

⁴¹¹See clause 11(b)(iii) of the Code. In clause 10(4) the Code stipulates that the duty on the employer to try and find suitable alternative work is more onerous where the illness or injury is work-related.

⁴¹²See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 222 where they state, "The requirement of fair procedure...is inextricably linked to that of substantive fairness; the process of assessment, advice, guidance, and ultimately warning are an integral part of the dismissal". See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 365.

⁴¹³See clause 8(1) in respect of probationary employees and clause 8(2)(a) in respect of ordinary employees. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 224.

⁴¹⁴See clause 8(1) in the case of probationary employees and clause 8(2)(a) in respect of ordinary employees. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 224.

⁴¹⁵See clause 9(b)(i) of the Code. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 225. There has been a difference of opinion as to whether or not warnings are necessary in the case of managerial employees. In *Stevenson v Sterns Jewellers (Pty) Ltd* (1986) 7 ILJ 318 (IC) at 324H the court held that managerial employees should be capable of judging for themselves whether or not they are meeting the standard set by the employer. In *De Klerk v Del Ingenieurswerke (Edms) Bpk* (1993) 14 ILJ 231 (IC) at 233H and *Visser v Safair Freighters (Edms) Bpk* (1989) 10 ILJ 529 (IC) at 534H-I, however, the court held that a manager is entitled to receive warnings. It could be argued that the Code also provides for this possibility by providing (in clause 9(b)(i)) that an employee "could reasonably be expected to have been aware of the required performance standard".

⁴¹⁶See clauses 8(2)(b) and 9(b)(iii) which provide that an ordinary employee must be given a reasonable period to improve. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 224. It is submitted that an opportunity for improvement is also implied in clause 8(1) in respect of probationary employees. PAK le Roux and André van Niekerk at 225, however, indicate that there may be circumstances where the consequences due to poor performance are so serious that the employee need not be afforded an opportunity to improve.

the employer may be under a duty to provide training and instruction to an employee.⁴¹⁷

The overlap between substantive and procedural fairness in cases of *poor work performance* is clear from clause 8(2)(b). It states that the procedure leading to dismissal should include an investigation to establish the reasons for unsatisfactory work performance and that the employer should consider alternatives to dismissal. In terms of clause 8(4) the employee is also entitled to be heard and to be assisted by a trade union representative or a fellow employee during the investigation process.

Where the employee is incapable because of *ill health or injury*, the employer must also enter into an investigative process and hold discussions with the employee.⁴¹⁸ During these discussions, the employee must be informed what impact his incapacity has on his job security.⁴¹⁹ Provision may also be made for further discussions⁴²⁰ during which progress regarding his physical well-being is considered⁴²¹ and, where relevant, alternatives⁴²² to dismissal or the adaptation of his duties is discussed.⁴²³ In the process of investigation, the employee should be given an opportunity to state his case and to be assisted by a trade union representative of fellow employee.⁴²⁴

⁴¹⁷See clause 8(1) in the case of probationary employees and clause 8(2)(a) in the case of ordinary employees.

⁴¹⁸This is implied in clause 10(1) and (2) of the Code. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 230.

⁴¹⁹See clause 10(1) of the Code. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 230.

⁴²⁰See clause 10(2) where mention is made of the "process" of the investigation.

⁴²¹Clause 10(3) enjoins employers to consider counselling and rehabilitation in the case of alcoholism and drug abuse. John Grogan *Workplace Law* (1996) 117 states that rehabilitative steps need not be undertaken at the employer's expense.

⁴²²With regard to the question of alternatives, see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 231-232. Le Roux and Van Niekerk point out that the employer is not required to create a job for the employee.

⁴²³See clause 10(1) of the Code. Clause 10(4) states that the duty on the employer to accommodate the incapacity of the employee is more onerous where the employee was injured at work or is suffering from a work-related illness. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 231-232.

⁴²⁴See clause 10(2).

3.4.3.3.4 The Requirements for a Fair Dismissal for Operational Reasons

3.4.3.3.4.1 Substantive Fairness

Although the Labour Relations Act, 1995 provides a definition of what constitutes "operational requirements",⁴²⁵ the definition does not provide clear guidance as to when dismissals on this ground will be justified.

Both the industrial court and the labour appeal court, in exercising their jurisdiction in terms of the Labour Relations Act, 1956, developed certain guidelines as to what constituted a fair reason to dismiss based on the operational requirements of the employer.⁴²⁶ It is likely that the labour court will look to these guidelines in interpreting the statutory definition in the Labour Relations Act, 1995.

The question of whether or not an employee's dismissal for operational reasons is substantively fair is a factual one. The employer will firstly have to prove that the proffered reason is one based on the operational requirements of the business.

The term "operational requirements" is defined as "requirements based on the economic, technological, structural or similar needs of an employer".⁴²⁷ "Technological reasons" refer to the introduction of new technology⁴²⁸ which leads to the redundancy of employees.⁴²⁹ "Structural reasons" refer to posts becoming redundant following a restructuring of the enterprise.⁴³⁰

⁴²⁵See s 213.

⁴²⁶For a discussion of these guidelines see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 235-289.

⁴²⁷See s 214 of the Labour Relations Act, 1995.

⁴²⁸Which may involve introducing technologically more advanced machinery, mechanisation or computerisation.

⁴²⁹See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 235.

⁴³⁰See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 235. The restructuring may be effected by the employer or by the purchaser of a business. It also often follows upon a merger or amalgamation between two or more businesses. Such a restructuring is not restricted to the cutting of costs and expenditure; it may also be aimed at making a profit (see, for example, *Môrester Bande (Pty) Ltd v National Union of Metalworkers of SA & Another* (1990) 11 ILJ 687 (LAC) at 689A-B) or increasing a profit or even ensuring a more efficient enterprise (see *Seven Abel CC t/a the Crest Hotel v Hotel & Restaurant Workers Union & Others* (1990) 11 ILJ 504 (LAC) at 508H-I).

"Economic reasons" is a very broad concept, covering all those reasons which relate to the economic well-being of the enterprise.⁴³¹ One of the most common economic reasons is financial difficulties experienced by a business, for example, due to a downturn in the economy. This causes employees to become redundant and necessitates their retrenchment.⁴³²

"Economic reasons" may also include circumstances where the employees do not actually become redundant, but economic considerations necessitate their dismissal.⁴³³ An investigation into the various other economic reasons which the courts have distinguished over the past fifteen years indicate that, although there can be no *numerus clausus* of economic reasons, a measure of categorisation of such reasons is possible.

The industrial court accepted, for example, that an employer is entitled to dismiss employees who are unable or unwilling to comply with certain operational needs of the business. In *Steel, Engineering & Allied Workers Union of SA & Others v Trident Steel (Pty) Ltd*,⁴³⁴ it held that the employer was entitled to dismiss⁴³⁵ employees who were unwilling to work overtime as the enterprise required workers who were prepared to work overtime as and when business demands necessitated it.⁴³⁶

⁴³¹See PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 235.

⁴³²See *Consolidated Frame Cotton Corporation v The President, Industrial Court* (1986) 7 ILJ 489 (A) at 494A as to the meaning of retrenchment. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 241.

⁴³³Under such circumstances, their dismissal does not amount to a retrenchment but to an ordinary dismissal for economic reasons. See also PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 279.

⁴³⁴(1986) 7 ILJ 86 (IC) at 95A-B read with 96A. See also *National Union of Food Workers v Elliot Bros (East London) (Pty) Ltd* (1990) 11 ILJ 575 (IC). In *National Union of Metalworkers of SA v Three Gees Galvanising* (1993) 14 ILJ 372 (LAC) the employer also argued the case on the basis of the requirements of the business. The court, however, failed to distinguish between misconduct and the operational requirements of the business. It treated the matter as one of unfair industrial action on the part of the employees.

⁴³⁵The employer should nevertheless be careful that its dismissal of the employees refusing to comply with its demand is not construed as a dismissal aimed at compelling them to accept its demand. Under such circumstances, the dismissal may be branded as automatically unfair in terms of s 187(1)(c) of the Labour Relations Act, 1995 (see par 3.4.3.2 above in this regard).

⁴³⁶Where the employer relies on business needs to dismiss employees who are either refusing or are unable to work overtime, the question of whether the overtime is compulsory or voluntary is irrelevant. However, where the overtime is compulsory, the employer may have another ground for dismissal namely misconduct in that the employee has breached his contract of employment by refusing to work such overtime. It may also possibly dismiss an employee obliged to work overtime on the ground of incapacity where the employee is willing but unable to work overtime for an unreasonably long time. In terms of the definition of a strike in s 213 of the Labour Relations Act, 1995 a concerted refusal to work either voluntary or compulsory overtime for one of the purposes mentioned in the definition may amount to a strike. If the strike is protected in terms of the Act, the employer will not be able to dismiss the strikers for participating in such a strike. It may nevertheless be entitled to dismiss such strikers in terms of s 67(5) where it can prove that operational requirements necessitate it. The operational requirement may be one presently

The court has also accepted that an employee whose presence or actions negatively affects the economic well-being of the business, could be fairly dismissed.⁴³⁷ This could occur where certain actions of the employee create disharmony amongst co-workers⁴³⁸ or detrimentally affect the relationship between the employer and the rest of its employees⁴³⁹ or a customer.⁴⁴⁰ It could also occur where the dismissal is based on the fact that the employee concerned had a special relationship with a co-worker.⁴⁴¹

under discussion namely that the business needs people who are willing and able to work overtime. It could also be based on another economic ground, namely that the business has reached its level of economic tolerance and that it needs to dismiss the strikers and to employ people who are prepared to work overtime in order for it to survive economically (see the discussion of this economic reason for dismissal in par 6.3.6.2 of chapter 6 where the dismissal of strikers is discussed).

⁴³⁷It is suggested that were an employee's inability or incompatibility has a fairly limited effect on the business, the reason for dismissal could be his incapability (see par 3.4.3.3.3 above where this reason for dismissal is discussed). However, where his inability or incompatibility has such a negative effect on other employees or customers that the economic well-being of the business as a whole is threatened, the reason for dismissal could be an economic one. D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 367 hold a different view. They maintain that incompatibility should be treated as a form of incapacity. According to them, "[i]ncompatibility relates wholly to the subjective relationship between the employee and others in the enterprise and bears no relation to the definition of operational requirements".

⁴³⁸The employee may, for instance be incompatible. See, for example, *Erasmus v BB Bread Ltd* (1987) 8 ILJ 537 (IC) at 543J where the employee's uncompromising and difficult attitude as well as his racist remarks created disharmony amongst his co-workers. See also *SA Quilt Manufacturers (Pty) Ltd v Radebe* (1994) 15 ILJ 115 (LAC) at 123G-I and 124A-C; *Larcombe v Natal Nylon Industries (Pty) Ltd Pietermaritzburg* (1986) 7 ILJ 326 (IC); *Stevenson v Sterns Jewellers (Pty) Ltd* (1986) 7 ILJ 318 (IC); *King v Beacon Island Hotel* (1987) 8 ILJ 485 (IC); *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC) at 1003J and 1004A; *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ 422 (IC) at 424A-B and *Visagie & Andere v Prestige Skoonmaakdienste (Edms) Bpk* (1995) 16 ILJ 421 (IC) at 438A-C. Incompatibility must be distinguished from eccentricity (see *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC) at 230H-I).

⁴³⁹See, for instance *Mazibuko & Others v Mooi River Textiles Ltd* (1989) 10 ILJ 875 (IC) where the employer endeavoured to justify the dismissal of employees who were all members of a minority union, on the ground that their dismissal had become necessary to ensure continued productivity and industrial peace in the workplace. The court accepted that there was a commercial rationale for the employer's decision to dismiss but held that the dismissals were not legitimate in the face of protective provisions on freedom of association of the Labour Relations Act, 1956. This comment should be read in context as at the time of the judgment interference with an employee's freedom to associate was specifically branded as an unfair labour practice (see par (j) of the unfair labour practice definition in s 1 of the Act as it read between 1 September 1988 and 30 April 1991). It is suggested that the labour court will probably also regard it as a substantively unfair dismissal as both the Constitution (see s 23(2)(a) and (b)) and the Labour Relations Act, 1995 (see s 4) afford employees a right to freedom of association. See also *Jonker v Amalgamated Beverage Industries* (1993) 14 ILJ 199 (IC) at 208E-F.

⁴⁴⁰Consider, for instance, *Rostoll & 'n Ander v Lœupoort Minerale Bron (Edms) Bpk* (1987) 8 ILJ 366 (IC) at 370H-J.

⁴⁴¹For instance, where the employee is married to the co-worker (see *Govender & Another v MA Motlala Lads Hostel* (1987) 8 ILJ 809 (IC) at 812D-F; *Rostoll & 'n Ander v Lœupoort Minerale Bron (Edms) Bpk* (1987) 8 ILJ 366 (IC) at 369I and *Trompeter & 'n Ander v Barnard h/a Plaas Kruisaar* (1995) 16 ILJ 745 (ALC) at 756H-757D).

The decisions of the courts under the Labour Relations Act, 1956 made it clear that, although the right to dismiss in these circumstances could be justified, this was only the case in exceptional situations.⁴⁴² The same is likely to be the case in terms of the Labour Relations Act, 1995, especially where dissatisfaction or disharmony is caused by the employee's race, sex, disability, marital status et cetera as dismissal under these circumstances could possibly constitute an automatically unfair dismissal in terms of s 187(1)(e) and (f).⁴⁴³

The industrial court and the labour appeal court were also prepared to accept that a dismissal could be justified on the basis of the operational requirements of the business where an employee's conduct had led to a breakdown of the trust relationship between him and the employer. This could occur, for example, where the employer suspected the employee of breaching the duty to act in good faith⁴⁴⁴ or of serious dishonesty, but did not have sufficient evidence to establish this. Provided the employer could establish good grounds for such suspicion, dismissal could be justified.⁴⁴⁵

The industrial court and the labour appeal court also accepted that business requirements could be such that changes needed to be made to existing employees' terms and

⁴⁴²See, for example, *G v K* (1988) 9 ILJ 314 (IC) at 316J-317A where it was held that dismissal under these circumstances could be construed as discrimination.

⁴⁴³See par 3.4.3.2 above where automatically unfair dismissals are discussed.

⁴⁴⁴See par 2.4.5 of chapter 2 where this common law duty of an employee is discussed in detail.

⁴⁴⁵An examination of the industrial court decision indicates that, at first, the court was not amenable to the argument that an employer should be able to dismiss on a mere suspicion of theft (see *Mahlangu v CIM Deltak*, *Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC)). Brassey in MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) at 97 has the following to say in regard to the *Mahlangu* case, "One can quarrel about whether *Mahlangu* falls within the doctrine, but what one cannot dispute, it is submitted, is the validity of the doctrine itself: namely that in appropriate circumstances it will not be unfair to dismiss a person on mere suspicion of misconduct. This is not, it should be clear, an exception to the rules governing dismissal for misconduct: it is the application of the rules governing dismissal for operational reasons". At present, the industrial court appears to be prepared to consider the argument and, under certain circumstances, to endorse it (see *Electrical & Allied Workers Union & Another v The Productions Casting Co (Pty) Ltd* (1988) 9 ILJ 702 (IC) at 708G-J; *Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 2 LCD 310 (IC) and *Food & Allied Workers Union & Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 630 (IC) at 644C-G). The labour appeal court in *Dion Discount Centres v Sarah Rantlo* (NH 11/2/16821 dated 23 August 1995) at 8 of the typed judgement warns that the test should not be a "reasonable" or "strong" suspicion, but a suspicion "on a balance of probabilities".

conditions of employment.⁴⁴⁶ Where employees were not prepared to agree to such changes, the courts were prepared to accept that their dismissals were fair, provided that the changes were reasonable.⁴⁴⁷ However, an employer trying to persuade the labour court of the fairness of a dismissal on this ground, could face the problem of s 187(1)(c) of the Labour Relations Act, 1995. In terms of this section, a dismissal to compel an employee to accept changes to his terms and conditions of employment, is branded as automatically unfair.⁴⁴⁸

Another category of economic reasons distinguished by the industrial and labour appeal courts was the economic harm caused by employees to the enterprise through industrial action.⁴⁴⁹ As economic harm through industrial action was both expected and accepted by all the parties involved in collective bargaining,⁴⁵⁰ the employer had to prove that the economic harm caused by the industrial action was more than it could have been expected to suffer under the circumstances.⁴⁵¹ In other words, it had to prove that the

⁴⁴⁶See, for example, *Ndlela v SA Stevedores Ltd* (1992) 13 ILJ 663 (IC) where the employer reorganised its staff requirements by changing the command structure and the job requirements of the posts in the new command structure. See also *Manganese Metal Co (Pty) Ltd and National Union of Metalworkers of SA* (1993) 14 ILJ 500 (ARB) at 505C where the arbitrator stated, "Unquestionably the company is entitled to ensure that its staff is employed to the maximum efficiency and consequently it is entitled to effect transfers in order to achieve this particular objective". See further *Alert Employment Personnel (Pty) Ltd v Leach* (1993) 14 ILJ 655 (LAC) at 658C-D where the company proposed a four-day week as a measurement to save it from going bankrupt.

⁴⁴⁷See, for instance, *Chetty v Raydee (Pty) Ltd t/a St James Accomodation* (1988) 9 ILJ 318 (IC) where the court held that the employee's dismissal upon her refusal to accept new terms and conditions was unfair as the new terms and conditions were unfair (she was inter alia required to work 16 hours a day). In *Steynfields Restaurant CC v Ndlovu & Others* (1994) 15 ILJ 297 (LAC) at 304A the court also held that there were no operational requirements necessitating new contracts of employment in terms of which the permanent employees would become casual labourers. The court also held in *Ndlela v SA Stevedores Ltd* (1992) 13 ILJ 663 (IC) at 666I-667A that where the change in the terms and conditions of employment entails a transfer, the employer must endeavour to ensure that the new position does not amount to a demotion. Where, however, this cannot be avoided, the employer must take steps to ensure that "as little harm to the employees as possible arises".

⁴⁴⁸See par 3.4.3.2 above where automatically unfair dismissals are discussed.

⁴⁴⁹See par 6.3.6.2 of chapter 6 where the dismissal of employees participating in industrial action is discussed in detail.

⁴⁵⁰In *MAN Truck & Bus (SA) (Pty) Ltd and United African Motor & Allied Workers Union* (1991) 12 ILJ 181 (ARB) at 189H-I the arbitrator stated that, "Industrial action is the exercise of collective muscle in support of collective goals". See also *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) at 970I and 972B and *Perskorporasie van SA Bpk v Media Workers Association of SA* (1993) 14 ILJ 938 (LAC) at 941.

⁴⁵¹See, for example, *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) at 972F.

economic harm had become unbearable.⁴⁵² The Labour Relations Act, 1995 adopts the same approach with regard to the dismissal of protected strikers.⁴⁵³

Secondly, for a dismissal for operational reasons to be substantively fair, the employer will have to prove that the operational reason actually existed and that it was the real reason⁴⁵⁴ for the retrenchment or dismissal.

In many of the disputes regarding the fairness of dismissals based on the operational requirements of the business, the courts also had to decide to what extent they would consider the business merits of the decision. Here two approaches emerged. The one approach was that the court should not investigate the merits of the employer's decision. The industrial court in *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd*,⁴⁵⁵ stated⁴⁵⁶

We are somewhat doubtful...- after all in business frequently not always the best, nor the correct decision is taken. Perhaps management has a right to be foolish as long as it is strictly bona fide in its deliberations.

Le Roux and Van Niekerk,⁴⁵⁷ while examining the law regarding dismissal for operational reasons in terms of the Labour Relations Act, 1956, also endorsed this approach.

⁴⁵²This may prove to be fairly difficult, the question being when will the harm be sufficient to warrant dismissal? PAK le Roux and AJ van Niekerk "The Dismissal of Strikers: Ten Years On..." (1993) 2(12) *CLL* 131 at 138 phrase the question as follows, "...at which point will the employer's right to continue its business trump the right to strike?" This question is considered in detail in par 6.3.6.2 of chapter 6 where the dismissal of strikers is discussed in detail.

⁴⁵³See par 6.3.5.2 of chapter 6 where the provisions of the Labour Relations Act, 1995 regarding the dismissal of protected strikers on the ground of the operational requirements of the business is discussed in detail.

⁴⁵⁴Consider, for instance, *SA Chemical Workers Union & Others v Toilettek Manufacturers (Pty) Ltd & Others* (1988) 9 *ILJ* 925 (IC) where the industrial court found the employees' dismissal to have been unfair as the real reason for their dismissal had been their misconduct (see also *Kebezi & Others v Cementile Products (Ciskei) (Pty) Ltd & Another* (1987) 8 *ILJ* 442 (IC)). See further *Simelane & Others v Audell Metal Products (Pty) Ltd* (1987) 8 *ILJ* 438 (IC) where the industrial court found that a drop in the sales figures of the employer was not its real reason for closing down. It appeared that the real reason was its desire to rid itself of a particular trade union and those employees who were actively involved in trade union activities. See also *Môrester Bande (Pty) Ltd v National Union of Metalworkers of SA & Another* (1990) 11 *ILJ* 687 (LAC) at 689B.

⁴⁵⁵(1992) 13 *ILJ* 405 (IC). See also *De Vries & Andere v Lanserac Hotel & Andere* (1993) 14 *ILJ* 432 (IC) at 435-436; *Mobius Group (Pty) Ltd v Corry* (1993) 2 *LCD* 193 (LAC); *Building Construction & Allied Workers Union & Another v Murray & Roberts Buildings (Tvl) (Pty) Ltd* (1991) 12 *ILJ* 112 (LAC) at 119 and *Transport & General Workers Union & Others v City Council of the City of Durban & Another* (1991) 12 *ILJ* 156 (IC) at 158F-I.

⁴⁵⁶At 408A.

⁴⁵⁷PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994).

They argued that, if an operational reason for a dismissal existed, judicial intervention had to be restricted to dismissals in bad faith or for improper motives. They stated that⁴⁵⁸

[i]n the absence of the enactment of legislation which establishes a system of co-determination, it is submitted that the role of the industrial court should not extend beyond the enforcement of procedural standards which permit employees and their representatives the right to proper consultation prior to a final decision to implement the proposed changes. While it has been suggested that the industrial court ought to have the capacity to intervene in the merits of a decision affecting the operational requirements of the business, the court has neither the expertise nor the procedural means to evaluate the commercial sense of an employer's decision and impose an economic outcome. The only exception, it is suggested, is where the employer acts in a *mala fide*⁴⁵⁹ fashion.

The labour appeal court in *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd*,⁴⁶⁰ however, held a different view. It stated⁴⁶¹

What is at stake here is not the correctness or otherwise of the decision to retrench, but the fairness thereof. Fairness in this context goes further than bona fides and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the courts to state that termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operational reasons.

In terms of the labour appeal court's dictum in the *Atlantis Diesel Engines* case, a court is not only entitled to investigate the bona fides of the employer and the merits or soundness of its decision to dismiss for operational reasons; it is also entitled to determine whether this decision is the best or most reasonable one under the circumstances. In other words, it is entitled to determine whether there are other options apart from dismissal and to compare them with the option of dismissal in order to determine whether the latter option is the best or only reasonable one under the circumstances.

According to the authors of *The Labour Relations Act of 1995* ⁴⁶² this dictum "comes close to recognising a property right in a job by requiring the decision to 'expropriate' that right to be fair and reasonable".

⁴⁵⁸At 237-238.

⁴⁵⁹Authors' emphasis.

⁴⁶⁰(1993) 14 ILJ 642 (LAC). See also *Mohamedy's v Commercial Catering & Allied Workers Union of SA* (1992) 13 ILJ 1174 (LAC) at 1179H-I.

⁴⁶¹At 648C-D.

⁴⁶²D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 370.

The said authors⁴⁶³ argue that the approach adopted by the Labour Relations Act, 1995 appears to be that employees have a real contribution to make to the substantive decision-making process. Accordingly, the decision to retrench should be subject to the greatest possible degree of consultation⁴⁶⁴ with them, not simply for reasons of procedural fairness, but also to establish whether substantive grounds for dismissal are present.

They argue further that, in terms of the Act, the labour court "has a clear responsibility to ensure that the provisions of the Act are complied with".⁴⁶⁵ In terms of s 192(2), the onus is on the employer to prove that the dismissal is fair.⁴⁶⁶ As indicated earlier in this paragraph, "fair" means that an operational reason for dismissal must exist and that it must be the real reason for dismissal. This places the onus on the employer to present evidence of such a reason.⁴⁶⁷ If the employer's evidence is disputed, the labour court will have to weigh up the opposing arguments and make a finding as to whether the employer's proffered reason for dismissal is valid within the meaning of s 189 of the Labour Relations Act, 1995.

In conclusion, two issues must be highlighted regarding the labour court's determination of the fairness of the employer's business decision to dismiss. Firstly, judges of the labour court will not necessarily possess the required expertise to determine the business merits of the employer's decision to dismiss.⁴⁶⁸ The authors of *The Labour Relations Act of 1995*,⁴⁶⁹ however, point out that this should not necessarily present a problem as the court could rely on the assistance of expert assessors to help it determine the

⁴⁶³See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 370.

⁴⁶⁴See s 189 of the Labour Relations Act, 1995 which regulates consultation in respect of dismissals based on operational requirements. This section is discussed in greater detail in par 3.4.3.3.4.2 below. See also s 84(1)(e) which lists dismissal for reasons based on operational requirements as one of the matters for consultation with workplace forums. This section is discussed in greater in detail in par 4.3.3.1 below.

⁴⁶⁵See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 370.

⁴⁶⁶See also par 3.3.3.3.1 above where the question of onus in dismissal cases is discussed.

⁴⁶⁷*ibid.*

⁴⁶⁸The judge president, deputy judge president as well as the judges are all members of the legal profession (see s 153(2) and (6) of the Labour Relations Act, 1995). This argument was also raised regarding presiding officers of the industrial court (see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 237-238).

⁴⁶⁹D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 370.

business merits of the employer's decision.⁴⁷⁰ Secondly, the court may be judging the fairness of the employer's decision with hindsight as it may have facts at its disposal that were either unavailable or unknown to the employer when it made the decision to dismiss. It is suggested that the court should take this factor into consideration when determining the fairness of the employer's decision and the remedy to be awarded to the employees.

3.4.3.3.4.2 Procedural Fairness

The requirements for a procedurally fair dismissal for operational reasons are set out in s 189 (read with s 16) and s 196 of the Labour Relations Act, 1995. They are a mixture of the old guidelines developed by the industrial court in terms of its unfair labour practice jurisdiction under the Labour Relations Act, 1956 and new requirements.⁴⁷¹

In essence, there are three requirements. Firstly, the employer must consult about the possibility of dismissal.⁴⁷² Secondly, it must disclose information⁴⁷³ and thirdly, it must select employees for retrenchment according to certain selection criteria.⁴⁷⁴

The legislature is fairly prescriptive as far as the obligation to consult is concerned. Not only does it require the employer to "consult" but it also instructs the employer *when* to consult,⁴⁷⁵ with *whom* to consult,⁴⁷⁶ *how* to consult⁴⁷⁷ and about *what* to consult.⁴⁷⁸

Section 189(1) requires that consultation must take place when an employer "contemplates" dismissal. The word "contemplate" clearly indicates that the employer must consult at the stage when it has not yet reached a final decision to dismiss, but has only

⁴⁷⁰See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 370 note 125.

⁴⁷¹See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 371.

⁴⁷²See s 189(1)-(2) and (5)-(6).

⁴⁷³See s 189(3)-(4) read with s 16.

⁴⁷⁴See s 189(7).

⁴⁷⁵See s 189(1).

⁴⁷⁶See s 189(1)(a)-(d).

⁴⁷⁷See s 189(2), (5) and (6).

⁴⁷⁸See s 189(2).

foreseen the possibility of dismissal.⁴⁷⁹ This ensures that the other side is afforded the opportunity to influence the employer in its (final) decision to dismiss or not.

Section 189(2) requires that the parties must "attempt to reach consensus".⁴⁸⁰ These words indicate *how* the employer must consult. Essentially, the parties must embark on a joint problem-solving exercise, striving for consensus where possible.⁴⁸¹ The employer must consult in good faith in that it must not have made up its mind prior to consultation to dismiss. This can be deduced from the statutory requirements that the employer must allow the other party an opportunity to make representations,⁴⁸² which it must consider and respond to⁴⁸³ and if it does not agree with the other party's representations, the employer must state its reasons for disagreeing.⁴⁸⁴ Should the parties fail to reach agreement, the final decision remains that of the employer.⁴⁸⁵

⁴⁷⁹This brings to an end the controversy which existed about the timing of consultation. A number of presiding officers of the industrial court distinguished between two stages in the dismissal. During the first stage, the employer makes its decision to retrench and, during the second stage, it consults with the other side as to the best means by which the employer's decision to dismiss may be implemented fairly. In other words, the other side is merely informed of the employer's final decision to dismiss and is then afforded an opportunity to make recommendations regarding only the timing of the dismissals and the selection criteria to be used (see *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1992) 13 ILJ 405 (IC) at 409J-410B as well as *Karbusicky v Anglo American Corporation of SA Ltd* (1993) 14 ILJ 166 (IC) at 169B). Others argued that at the consultation the employer must consult with the other side regarding its decision to retrench. It implies that the employer's decision to dismiss cannot be final at that stage. At most, it must have an intention to retrench (see *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) at 650A-C and 648H-I; *Mohamedy's v Commercial Catering & Allied Workers Union of SA* (1992) 13 ILJ 1174 (LAC) at 1179H; *Hoogenoeg Andolusite (Pty) Ltd v National Union of Mineworkers & Others (1)* (1992) 13 ILJ 87 (LAC) at 93H-I; *Môrester Bande v National Union of Metalworkers of SA* (1990) 11 ILJ 687 (LAC) at 689D-F; *Chemical Workers Industrial Union & Others v Sopedog CC* (1994) 15 ILJ 90 (LAC) at 104A-B and *Kellogg SA (Pty) Ltd v Food & Allied Workers Union & Others* (1994) 15 ILJ 83 (LAC) at 89C-D).

⁴⁸⁰See also s 85(1) of the Labour Relations Act, 1995 which deals with the employer's duty to consult with the workplace forum where the employer is also enjoined to consult the workplace forum "and to attempt to reach consensus with it". See further par 4.3.3.1 of chapter 4 where the employer's duty to consult with the workplace forum is discussed.

⁴⁸¹See *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A). In this case, the advocate acting on behalf of the trade union argued that consultation should amount to a "joint problem-solving exercise with the parties striving for consensus where possible". The court, in its response to the advocate's contention, had the following to say (at 1253F-G), "I agree that consultation, if circumstances permit, should be geared to achieve that purpose [ie that consensus be reached]...".

⁴⁸²See s 189(5).

⁴⁸³See s 189(6).

⁴⁸⁴*Ibid.*

⁴⁸⁵See *Metal & Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) as well as *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) where the appellate division stated (at 1253F-G), "I agree that consultation, if circumstances permit, should be geared to achieve that purpose (bearing in mind that problem solving is something distinct from bargaining and that the final decision, where consensus cannot be achieved, always remains that of management)".

Apart from having to consult about its intention to dismiss, section 189(2) also lists a number of other matters *about which* the employer must attempt to reach consensus. It must firstly consult about ways in which dismissal can be avoided.⁴⁸⁶ Where they are agreed that dismissal is unavoidable, it must attempt to reach consensus about minimising the number of dismissals,⁴⁸⁷ the timing of dismissals, mitigating the adverse effects of the dismissals,⁴⁸⁸ selection criteria⁴⁸⁹ and the amount⁴⁹⁰ of severance pay to be paid to dismissed employees.

⁴⁸⁶Examples of alternatives to dismissal are the granting of either paid or unpaid leave; the reduction or elimination of overtime; the reduction or elimination of work on Sundays; the transfer of employees to other positions in the same undertaking; the spreading of the retrenchment over a period of time in order to allow time for a natural reduction in personnel numbers to occur and the training or retraining of employees to enable them to take up alternative positions in the same undertaking. Another possible alternative to retrenchment is to reduce salaries (see *Mkhize & Others v Kingsleigh Lodge* (1989) 10 ILJ 944 (IC)).

⁴⁸⁷This may include the transfer of redundant employees to other positions or sections in the same undertaking; asking employees to volunteer for retrenchment; the spreading of the retrenchment over a period of time in order to allow time for a natural reduction in personnel numbers to occur through, for instance, resignations, and the training or retraining of redundant employees to enable them to take up alternative positions in the same undertaking.

⁴⁸⁸The employer and trade union may agree that the employer will assist the employee in finding alternative work. The employer, for instance, may allow the employees selected for retrenchment time off, without loss of pay, to search for alternative work and to go for interviews. The employer may also make an office available which retrenched employees may use to complete job application forms and to telephone from in respect of advertised positions and to make appointments for interviews. The employer, in addition to the certificate of service which he or she is compelled to furnish in terms of the Basic Conditions of Employment Act, may also provide employees with references. The employer and the trade union may also conclude an agreement in terms of which the employer undertakes to give priority to those who are to be retrenched should vacancies arise or should business improve and the employer needs to employ more people. The enforceability of such a re-hiring agreement was the subject of a lot of controversy and debate in both the industrial court and the labour appeal court. It also came under the scrutiny of the appellate division (see *National Automobile & Allied Workers Union (now known as National Union of Metalworkers of SA) v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A)). This matter is also discussed in par 3.2 above.

⁴⁸⁹Selection criteria are discussed in greater detail later in this paragraph.

⁴⁹⁰In view of the fact that section 196(1) of the Labour Relations Act, 1995 makes the payment of severance pay obligatory, it is suggested that s 189(2)(c) refers only to a possible agreement on the actual amount of severance pay payable. Furthermore, as s 196(1) also sets out the minimum severance pay, it is suggested that s 189(2)(c) is only applicable where the trade union or employees are actually demanding more than the minimum stipulated in s 196(1).

As a second procedural requirement, the Labour Relations Act, 1995 requires the employer to disclose, in writing,⁴⁹¹ all "relevant information" to the other party.⁴⁹² This is an extremely important provision and is aimed at ensuring effective consultation.

The Act does not define "relevant information". It nevertheless provides that the concept includes all information which will allow the other party to consult effectively⁴⁹³ and it specifically includes information on those matters in respect of which the Act requires the parties to try and reach consensus.⁴⁹⁴

"Relevant information" is clearly a very broad concept which must be decided on the facts.⁴⁹⁵ The onus will probably be on the employer to prove that the information demanded by the other party is not relevant.⁴⁹⁶ In addition, it may be expected to take whatever reasonable steps necessary to obtain relevant information which is unavailable to it at the time it is requested.⁴⁹⁷

The other party's right to demand relevant information, however, is not unrestricted. The Act provides that the employer is not required to disclose information which is legally privileged⁴⁹⁸ or which it is prohibited to disclose by any law or court order.⁴⁹⁹ It also provides that an employer is not required to disclose confidential information which, if

⁴⁹¹Verbal assurances, explanations and information will not constitute compliance with this requirement.

⁴⁹²See s 189(3). The Labour Relations Act, 1956 did not contain such a provision and trade unions had to rely on the unfair labour practice definition and argue that the employer's failure or refusal to provide information constituted an unfair labour practice.

⁴⁹³See s 189(4) read with s 16(2) of the Labour Relations Act, 1995.

⁴⁹⁴See s 189(3)(a)-(h).

⁴⁹⁵Disputes regarding the of question whether or not information is "relevant" may be referred to the Commission for possible conciliation and, where the dispute remains unsettled, for arbitration. See s 189(5) read with s 16(6), (8)-(9) of the Labour Relations Act, 1995. This factual question has also been the subject of a number of industrial court and labour court decisions. Even the appellate division had occasion to consider this question in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) at 1253-1257.

⁴⁹⁶See *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) at 652E.

⁴⁹⁷See *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) at 652D.

⁴⁹⁸Privilege is usually claimed in respect of documents prepared for the purpose of obtaining professional legal advice; State documents and communications made "without prejudice".

⁴⁹⁹See s 189(4) read with s 16(5)(a)-(b).

disclosed, may cause substantial harm to it or an employee.⁵⁰⁰ It furthermore provides that an employer is not required to make private personal information⁵⁰¹ relating to an employee available unless the employee consents to such a disclosure.⁵⁰²

The restriction regarding confidential information and personal information relating to an employee is not absolute. The Act affords a commissioner with a discretion to order the disclosure of such information.⁵⁰³ In order to decide if he must make such an order, the commissioner must balance the harm which the disclosure is likely to cause the employee or the employer against the harm which the failure to disclose the information is likely to cause to the ability of the trade union to perform effectively its functions or the ability of the trade union to engage effectively in consultation.⁵⁰⁴

The legislature appreciated the serious implications which such a disclosure may hold for the employee or the employer and has accordingly provided some safeguards. The commissioner may order the disclosure on terms designed to limit the harm likely to be caused.⁵⁰⁵ In addition, he must take into account any breach of confidentiality by the trade union in the past and may refuse to order the disclosure for a period specified in his award.⁵⁰⁶ Furthermore, if a dispute ensues about an alleged breach of confidentiality

⁵⁰⁰See s 189(4) read with s 16(5)(c). See also *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) at 1253J. Confidential information entails information which, if it becomes known, will impact negatively on the employer's competitiveness. Examples of such information are trade secrets (see *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) at 652C and *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) at 1254), price concessions obtained from customers and price reductions which have been negotiated with suppliers of raw material or of components necessary for the production of the employer's products (see *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) at 1253I-J).

⁵⁰¹Such information includes an employee's medical record compiled through obligatory regular medical check-ups with the enterprise's doctor.

⁵⁰²See s 189(4) read with s 16(5)(d).

⁵⁰³See s 189(4) read with s 16(6)-(12). In this regard the legislature went further than the appellate division in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) at 1253I-J where it held that an employer could not be expected to disclose information which "could harm the employer's business interest for reasons other than its relevance to the consultation process, eg trade secrets and other confidential information". See also *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) at 652C. The commissioner, however, may not order an employer to disclose legally privileged information or information which the employer is prohibited from disclosing in terms of a court order (see s 16(11)).

⁵⁰⁴*Ibid.*

⁵⁰⁵See s 189(4) read with s 16(12).

⁵⁰⁶See s 189(4) read with s 16(13).

by the trade union, the commissioner may order that the right to disclosure of information be withdrawn for a stipulated period.⁵⁰⁷ This represents a fairly serious curtailment of trade unions' right to information as such an order apparently covers *all* relevant information.⁵⁰⁸

The third procedural requirement becomes relevant once it is clear that dismissal is the only viable solution. The Act⁵⁰⁹ requires the employer to select employees for dismissal according to agreed selection criteria⁵¹⁰ or criteria that are fair and objective.⁵¹¹

In terms of s 196 of the Labour Relations Act, 1995 the employer must pay the employees who have been selected for dismissal severance pay.⁵¹² The Act is prescriptive as far as the payment of severance pay is concerned. It sets out the manner in which it must be calculated and prescribes the minimum⁵¹³ to which an employee would be entitled.⁵¹⁴

⁵⁰⁷See s 189(4) read with 16(14).

⁵⁰⁸See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 98.

⁵⁰⁹In terms of s 189(7) of the Labour Relations Act, 1995.

⁵¹⁰See s 189(2)(b) in terms of which the method for selecting the employees to be dismissed is listed as one of the matters over which the consulting parties must attempt to reach consensus.

⁵¹¹The industrial court has set out guidelines as to what would constitute fair and objective criteria. For a detailed discussion, see PAK le Roux and André van Niekerk *The South African Law of Unfair Dismissal* (1994) 253-262. The employer must be careful that the dismissal of an employee through the implementation of a selection criterion does not amount to an automatically unfair dismissal (see par 3.4.3.2 above where automatically unfair dismissals are discussed). Age is such a criterion. It is often applied in jobs which require physical fitness and strength; the argument being that a person's physical fitness and strength lessens as he or she ages. Non-residency (see *National Union of Metalworkers of SA & Others v Televisions and Electrical Distributors (Pty) Ltd* (1993) 14 ILJ 738 (IC)) and double income families (see *Manquidi & Others v Continental Barrel Plating (Pty) Ltd* (1994) 15 ILJ 400 (IC) at 407-408) may also constitute such criteria. Where, however, the employer and workplace forum or trade union have agreed on these selection criteria, the dismissed employee will probably not be allowed to attack the fairness of his dismissal as he has selected these bodies as his representatives (see, for instance, *Mbobo & Others v Randfontein Estate Gold Mining Co* (1992) 13 ILJ 1485 (IC) and *Ramolesane & Another v Andrew Mentis & Another* (1991) 12 ILJ 329 (LAC) at 336A).

⁵¹²See s 196(1) of the Labour Relations Act, 1995. This provision brings to an end the debate which has raged in both the industrial court and the labour appeal court as to whether or not an employer is obliged to pay severance pay (for an overview of the different arguments, see Elize Strydom and Kathleen van der Linde "Severance Packages: A Labour Law and Income Tax Perspective" (1994) 15 ILJ 447-449).

⁵¹³The words "at least" in s 196(1) indicate that the section prescribes the minimum severance pay that must be paid. The parties, however, may agree on more favourable terms during consultation (see s 189(2)(c)).

⁵¹⁴See s 196(1).

The employer's duty to pay severance pay, however, is not absolute. Of importance is the fact that the Act provides that the employer is not obliged to pay severance pay to an employee who unreasonably⁵¹⁵ refuses to accept alternative employment.⁵¹⁶ In addition, the employer may apply for an exemption.⁵¹⁷ This provision is to be welcomed as there will definitely be instances where the employer will be unable to pay severance pay (particularly where it must dismiss because of financial difficulties) or where such a payment will cause undue hardship for the employer.⁵¹⁸

3.4.3.4 Notice Periods

The employer's right to dismiss is not only restricted in that it must ensure that a dismissal is *fair*, it must also ensure that the dismissal is *lawful*. This entails that the employer must give the employee the required notice of termination of the contract of employment or make payment in lieu of such notice.⁵¹⁹ If the notice period is regulated in the contract of employment⁵²⁰ or in a collective agreement⁵²¹ or a wage determination in terms of the Wage Act,⁵²² the employer must give notice in accordance with these provisions.

⁵¹⁵The question of whether or not an employee's refusal is "unreasonable" is one of fact. It is suggested that where the offered position is largely on a par with the employee's old job, his refusal may be regarded as unreasonable. Where, however, the offered position effectively amounts to a demotion, his refusal may be regarded as reasonable.

⁵¹⁶See s 196(3).

⁵¹⁷See s 196(1) and (5) of the Labour Relations Act, 1995.

⁵¹⁸Some of the presiding officers of the industrial court held that fairness dictates that the circumstances of the employer must also be taken into consideration when determining whether the employer should be ordered to pay severance pay (see, for example, *Construction & Allied Workers Union & Others v Hensberg Bros* (1992) 13 ILJ 116 (IC) at 171 D-H and *Transport & General Workers Union v Action Machine Moving & Warehousing (Pty) Ltd* (1992) 13 ILJ 646 (IC) at 653I-654C).

⁵¹⁹See s 14(4) of the Basic Conditions of Employment. See also s 8(1)(u) of the Wage Act which lists the payment of an amount in lieu of notice as one of the matters about which the wage board can make recommendations.

⁵²⁰See s 14(1)(a) and (b) of the Basic Conditions of Employment Act which affords precedence to contractual terms, provided they are more favourable than the statutory terms.

⁵²¹See s 1(3) of the Basic Conditions of Employment Act which affords precedence to collective agreements concluded in terms of the Labour Relations Act, 1995.

⁵²²See s 8 of the Wage Act which lists the matters about which the wage board may make recommendations. The section does not contain specific provisions regarding the giving of notice, apart from subsec (1)(u) which provides for payment in lieu of notice, but its catch-all provision at the end of the list of matters is broad enough to include provisions in this regard.

If the period is not regulated in this manner, the employer must give notice in accordance with the provisions of the Basic Conditions of Employment Act. The Act distinguishes between employees who have been in employment for four weeks or less and those who have more than four weeks' service. Employees who have been in employment for four weeks or less are entitled to one working-day's notice of termination.⁵²³ Those who have more than four weeks' service and are paid weekly, are afforded a week's notice⁵²⁴ whereas employees who are paid on a monthly basis are entitled to two weeks' notice.⁵²⁵ The Act also regulates the manner⁵²⁶ in which notice must be given as well as when notice must be given.⁵²⁷ It also requires the employer to pay the employee his agreed wages during the notice period.⁵²⁸

In conclusion, the provisions regarding the giving of notice are reciprocal in nature in that they are also applicable to the employee who wants to resign. In practice, however, the fact that the employee can terminate the contract by giving notice, is of little value to him as he is usually intent on keeping his job. In addition, the option of payment in lieu of notice is not of much value to the employee as he will usually not be able to afford such a payment.

3.5 CONCLUSION

The legislature achieved the objectives which it set for itself namely to prevent or limit the exploitation of employees and to promote job security.⁵²⁹ It did not alienate the employer's common law right to manage in order to achieve these aims but limited or restricted this right and infused it with the concept of fairness.

⁵²³See s 14(1)(a).

⁵²⁴See s 14(1)(b).

⁵²⁵*Ibid.*

⁵²⁶The Act requires that notice must be given in writing except in the case of an illiterate employee (see s 14(2)).

⁵²⁷See s 14(2).

⁵²⁸See s 14(3).

⁵²⁹See par 3.1 above.

Accordingly, the employer still has the right to elect whom it wants to employ provided it is not statutorily prohibited from employing the applicant and it does not unfairly discriminate against an applicant on arbitrary grounds.⁵³⁰

An employer has also retained the right to give instructions regarding the work which must be done provided that the instructions are lawful and reasonable and are in accordance with certain statutory measures regarding the work that must be done, the manner in which the work must be done, the place where the work must be done and when the work must be done.⁵³¹

In addition, employers have retained the right to discipline. However, the employer's right to decide on rules of conduct has been restricted by the requirement that rules must be reasonable or fair.⁵³² Furthermore, the Code's subscribing to the concept of progressive or corrective discipline, restricts the employer's right to elect a penalty. In accordance with this concept, it will have to implement penalties with due consideration of the severity of the offence and will only be able to dismiss for a serious offence or for repeated offences.⁵³³

Nevertheless, the common law right to demand respect⁵³⁴ and good faith⁵³⁵ on the part of employees has remained relatively unaffected by legislation and will accordingly continue to play an important role in determining acceptable conduct of employees in the workplace. The right to demand good faith will remain particularly important. Because of its broad import, it will, as in the past, enable an employer to rely on it in misconduct cases, particularly if the offence the employee is accused of is not listed in the disciplinary code.⁵³⁶

Although the legislature has not rescinded the employer's right to dismiss, it has restricted it severely. Through its provisions regarding dismissal in chapter VIII and the

⁵³⁰See par 3.2 above.

⁵³¹See par 3.3.2 above.

⁵³²See par 3.4.3.3.2.1 above where it was pointed out that the fairness or reasonableness of a rule must be considered when the substantive fairness of a dismissal for misconduct is considered.

⁵³³See pars 3.4.1 and 3.4.2 above in regard to the concept of progressive discipline.

⁵³⁴See par 2.4.4 of chapter 2.

⁵³⁵See par 2.4.5 of chapter 2.

⁵³⁶See par 3.3.6 of chapter 3.

Code, the legislature has succeeded in its aim to prevent arbitrary dismissals. It has provided employees, irrespective of whether they are probationary or ordinary employees or even fixed term employees, with a substantial measure of job security.

The legislature has also succeeded in limiting the exploitation of employees through its minimum terms and conditions of employment.⁵³⁷ Nevertheless, there remains a vast number of employment matters which have been left for the parties to bargain about. The legislature, except in certain instances, has not made provision for minimum wages.⁵³⁸ It has also left matters such as bonuses, increments, training, bursaries, maternity leave, paternity leave, study leave, compassionate leave, accommodation, meals, clothing, travel allowances, housing subsidies and other allowances to the parties to bargain about.⁵³⁹ However, the employer's prerogative regarding these terms and conditions is restricted by Schedule 7 in that it must ensure that it does not commit an unfair labour practice in terms thereof when structuring the terms on which it is prepared to afford these benefits to employees.⁵⁴⁰

But the legislature has not only used minimum standards to prevent exploitation and to promote bargaining equality between an employer and an individual employee. It has also endeavoured to do this through the concept of collective bargaining and its statutory promotion thereof.⁵⁴¹ In fact, it has clearly indicated that it regards collective bargaining as the preferred method to determine all terms and conditions of employment, including those in respect of which it has stipulated minimums.⁵⁴²

In the next chapter, the steps which the legislature has taken to promote collective bargaining will be examined.

⁵³⁷See par 3.3.3 above.

⁵³⁸See par 3.3.3 above.

⁵³⁹*ibid.*

⁵⁴⁰See par 3.3.3 above where the implications of Schedule 7 for the employer's prerogative regarding terms and conditions of employment are discussed.

⁵⁴¹See par 3.1 above as well as chapter 4 in this regard.

⁵⁴²See its aims set out in the preamble to the Act; s 1(c) and (d)(i) and clause 1(2) of the Code. See also s 1(3) of the Basic Conditions of Employment Act which provides that collectively bargained minimum terms and conditions of employment override the statutory provisions. See also the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 at 9.

CHAPTER 4

THE ROLE OF COLLECTIVE BARGAINING AND WORKPLACE FORUMS IN THE RESTRICTION OF EMPLOYER PREROGATIVE

4.1 INTRODUCTION

The role of collective bargaining in redressing the bargaining imbalance between employers and employees, and in this limiting employers' prerogative, was referred to in chapter 3.¹ In this chapter, the role of the law in regulating collective bargaining and its affecting or regulating employer prerogative is discussed.²

It was pointed out in chapter 2³ that the common law does not promote collective bargaining. At most, it permits freedom of association. It allows employers, by exercising their property rights, to deny trade union officials access to their premises. It also allows employers to exercise their superior bargaining strength and to oblige employees to cancel their trade union membership or to agree not to become members. The common law also brands the exercising of collective rights such as the right to bargain, to strike and to picket as breaches of employees' individual contracts of employment, requiring settlement by ordinary courts whose remedies are contractual and individualised in nature. Such actions could also give rise to possible delictual claims.⁴

Legislative intervention was necessary to provide a legal framework more favourable to collective bargaining.⁵ The framework is found in the Labour Relations Act, 1995.⁶ This chapter analyses the approach by the Labour Relations Act, 1995 towards collective bargaining.⁷

¹See par 3.1 of chapter 3.

²See par 4.2 below.

³See par 2.5 of chapter 2.

⁴See par 6.2 of chapter 6 where possible delictual liability for such actions in terms of the common law is discussed.

⁵See the comments made in this regard in par 2.5 of chapter 2 as well as par 3.1 of chapter 3.

⁶See s 1(c) thereof which lists the provision of a framework within which employers and employees and their trade unions can collectively bargain as one of the primary objectives of the Act. The Labour Relations Act, 1995 has its origin in the Industrial Conciliation Act 11 of 1924, South Africa's first comprehensive piece of labour legislation on collective bargaining. For an historical account of South African legislation on collective bargaining, culminating in the Labour Relations Act, 1995, see par 3.1 of chapter 3.

⁷See par 4.2 below.

The primary purpose of collective bargaining is the regulation of terms and conditions of employment.⁸ Davies and Freedland⁹ explain trade unions' main objective with collective bargaining as follows¹⁰

By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure.

Collective bargaining also plays an important role in the resolution of disputes.¹¹ Bendix¹² describes¹³ this function of collective bargaining as follows

At the least, the process of bargaining endows the parties with equal status. It also rests on the presuppositions that neither party is completely right or completely wrong, that concessions by either party do not necessarily signify weakness in that party and that, while the individual goals of the parties may be important, the ultimate achievement of these goals should not occur at the cost of disrupting the organisation as a whole. For these reasons collective bargaining, though not ideal, has hitherto served as the most feasible and mutually beneficial method of resolving basic and ongoing conflicts between the parties to the labour relationship.

Notwithstanding the importance they attached to collective bargaining, the drafters of the Labour Relations Act, 1995 also realised its shortcomings in the South African context. They argued that a second channel of communication was necessary between employers and employees to make it easier for South African industry and commerce to adapt to the changes.¹⁴ The result has been the introduction of provisions which

⁸See s 1(c) of the Labour Relations Act, 1995 which stipulates the determining of wages, terms and conditions of employment and other matters of mutual interest as the objective or purpose of collective bargaining. See also s 28(a) which lists the conclusion of collective agreements as one of the functions of bargaining councils and the definition of a collective agreement in s 213 which defines it as a written agreement concerning terms and conditions of employment or any other matter of mutual interest. For a discussion of the meaning of the concept "matters of mutual interest", see par 4.2.6 below. See further chapter 5 where the matters about which collective bargaining parties have been prepared to bargain, are discussed.

⁹Paul Davies and Mark Freedland *Kahn-Freund's Labour and the Law* 3 ed (1983).

¹⁰At 69.

¹¹See s 28(c) of the Labour Relations Act, 1995 which lists the prevention and resolution of labour disputes as one of the functions of bargaining councils. See also s 28(d) in terms of which bargaining councils are afforded the function to perform the dispute resolution functions referred to in s 51 of the Act. See further par 4.2.10 below in this regard.

¹²Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996).

¹³At 255.

¹⁴See the *Explanatory Memorandum* by the Ministerial Legal Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at page 135.

envisage the establishment of workplace forums.¹⁵ The bodies can be seen as supplementing rather than undermining collective bargaining.¹⁶ Nevertheless, they could give employees in a workplace significant power to influence managerial decision-making. The potential influence of these bodies on the extent of managerial prerogative will also be discussed in this chapter.¹⁷

4.2 THE PROMOTION OF COLLECTIVE BARGAINING BY THE LABOUR RELATIONS ACT, 1995

4.2.1 Introduction

In formulating the Labour Relations Act, 1995, the legislature was influenced by a variety of considerations.¹⁸ From a legal perspective, the most important factor to be considered were the provisions of the interim Constitution¹⁹ of relevance to labour law in general and collective bargaining in particular.²⁰

Section 23 of the Constitution deals with labour relations. It contains a number of provisions regarding collective bargaining. The section promotes freedom of association. It affords every worker the right to form and join a trade union²¹ and to participate in the

¹⁵See chapter V of the Labour Relations Act, 1995 which deals with workplace forums. See also par 4.3 below where workplace forums are discussed.

¹⁶See the *Explanatory Memorandum* by the Ministerial Legal Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at page 135 where it is stated that "[t]heir [ie workplace forums'] purpose is not to undermine collective bargaining but to supplement it. They achieve this purpose by relieving collective bargaining of functions to which it is not well suited".

¹⁷See par 4.3 below.

¹⁸See s 1 of the Act which lists its primary objectives. See also the *Explanatory Memorandum* of the Ministerial Legal Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 110-111.

¹⁹The interim Constitution was in operation when the Labour Relations Act, 1995 was being drafted. In this chapter, all further references to constitutional powers will be made in relation to the Constitution and not the interim Constitution.

²⁰See s 1(a) of the Labour Relations Act, 1995 which lists the giving effect to and regulating of the fundamental rights conferred by s 27 of the interim Constitution (ie s 23 of the Constitution) as one of the primary objectives of the Act. See also the *Explanatory Memorandum* by the Ministerial Legal Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 111.

²¹See s 23(2)(a).

activities and programmes thereof.²² The section furthermore affords trade unions the right to organise.²³ In addition, it affords trade unions, employers' organisations and employers the right to engage in collective bargaining.²⁴

Also of importance was the legislature's express desire to formulate legislation that conformed to International Labour Organisation standards.²⁵

The central question facing the legislature was whether collective bargaining should be compulsory;²⁶ whether the legally enforceable duty to negotiate established by the industrial court acting in terms of the Labour Relations Act, 1956²⁷ should find expression in the Labour Relations Act, 1995.

²²See s 23(2)(b).

²³See s 23(4)(b).

²⁴See s 23(5).

²⁵See s 1(b) of the Labour Relations Act, 1995 which lists the effectuation of International Labour Organisation standards as one of the primary objectives of the Act. See also the *Explanatory Memorandum* by the Ministerial Legal Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 110. See further the Report of an International Labour Organisation Commission entitled "Prelude to Change: Industrial Relations Reform in South Africa: Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa" (1992). The conclusions reached by this commission were published in (1992) 13 *ILJ* 739.

²⁶See the explanatory memorandum of the ministerial legal task team annexed to the Draft Negotiating Document in the Form of a Labour Relations Bill published as general notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 121.

²⁷It is suggested by DM Davies "Voluntarism and South African Labour Law - Are the Queensbury Rules an Anachronism?" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D van Zyl Smit (eds) *Labour Law* (1991) 50 that the Labour Relations Act, 1956 was also underpinned by a form of voluntarist philosophy. The industrial court has, however, changed this through its creation of a duty to bargain (see *SA Clothing & Textile Workers Union v Maroc Carpets & Textile Mills (Pty) Ltd* (1990) 11 *ILJ* (IC) 1101 at 1104E where the court stated, "Let it at once be said that, despite some earlier decisions to the contrary, it is clear that this court today unequivocally recognizes the existence of an enforceable duty upon all employers to bargain with trade unions representative of their employees, in respect of all matters concerning their relationship with those employees"). See also *Buthelezi & Others v Labour For Africa* (1989) 10 *ILJ* 867 (IC) at 869C; *SA Woodworkers Union v Rutherford Joinery (Pty) Ltd* (1990) 11 *ILJ* 695 (IC) at 700D; *National Union of Steel & Allied Workers v Besaans Du Plessis (Pretoria Foundries) (Pty) Ltd* (1990) 11 *ILJ* 359 (IC) at 367G; *Radio Television Electronic & Allied Workers Union v Tedalex (Pty) Ltd & Another* (1990) 11 *ILJ* 1272 (IC) at 1275H and *Steel Engineering & Allied Workers Union v BRC Weldmesh* (1991) 12 *ILJ* 1304 (IC) at 1307C.

Controversially,²⁸ the drafters decided against a general legal obligation to bargain.²⁹ However, they did not adopt a "neutral" position but opted for a policy of actively encouraging and promoting collective bargaining through a variety of mechanisms.³⁰ They did so in various ways. Firstly, by providing extensive protection for the right of employees and employers to form, join and participate in the lawful affairs of trade unions and employers' organisations.³¹ Secondly, by providing for the acquisition of organisational rights.³² Thirdly, by providing for the establishment of collective bargaining structures such as bargaining councils.³³ Fourthly, by regulating the legal nature and enforceability of collective agreements.³⁴ Fifthly, by making provision for the right to strike to enforce collective bargaining rights, subject to the prior requirement of obtaining

²⁸The trade unions were opposed to the removal of a duty to bargain and demanded a statutory duty to bargain collectively (see D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 28).

²⁹See the *Explanatory Memorandum* by the Ministerial Legal Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 121.

³⁰See the preamble to the Act which states that one of its purposes is "to promote and facilitate collective bargaining at the workplace and at sectoral level". See also s 1(d) which states that the purpose of the Act is "to promote - (i) orderly collective bargaining; (ii) collective bargaining at sectoral level". See further the explanatory memorandum by the ministerial legal task team annexed to the Draft Negotiating Document in the Form of a Labour Relations Bill published as general notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 122.

³¹See ss 4(1)-(3) and 5(1)-(3) of the Labour Relations Act, 1995. This right to freedom of association, however, has been restricted by the statutory requirement of registration. In terms of s 27(1) of the Labour Relations Act, 1995, only registered trade unions and employers' organisations may establish a bargaining council which is the primary statutory body through which agreements about terms and conditions of employment will be concluded. See par 4.2.2 below where the statutory right to freedom of association is discussed in greater detail.

³²The Labour Relations Act, 1995 makes provision for trade union access to the workplace (see s 12), for the deduction of trade union subscriptions (see s 13) and for the election of trade union representatives in the workplace (see s 14). See par 4.2.3 below where these organisational rights are discussed in greater detail.

³³See s 27 of the Labour Relations Act, 1995 which deals with the establishment of bargaining councils. See also par 4.2.5 below where the various statutory structures for collective bargaining are discussed.

³⁴See s 23 of the Labour Relations Act, 1995 which deals with the legal effect of collective agreements. See also ss 31 and 32 which respectively deal with the binding nature of collective agreements concluded in bargaining councils and the extension of such collective agreements. See further par 4.2.7 below where the binding force of collective agreements is discussed.

an advisory award.³⁵ And, sixthly, by limiting unilateral decision-making by the employer.³⁶

In the paragraphs that follow, these statutory mechanisms for the promotion and encouragement of collective bargaining are considered in greater detail.³⁷

4.2.2 The Right to Freedom of Association

The right to freedom of association is regulated in ss 4³⁸ and 6³⁹ of the Labour Relations Act, 1995.⁴⁰ In terms of s 4, employees have the right to form⁴¹ and to become members of trade unions.⁴² In addition, they have the right to participate in lawful trade

³⁵See s 64(2) of the Labour Relations Act, 1995. This requirement reflects the drafters' views that no statutory duty to bargain should be enforced by the courts and that the intervention of skilled mediators in these types of disputes can promote their resolution without resort to industrial action (see the *Explanatory Memorandum* by the Ministerial Legal Task Team notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 129).

³⁶See s 64(4) of the Labour Relations Act, 1995 in terms of which an employer can be forced not to unilaterally change terms and conditions of employment, or, if it has already implemented the change unilaterally, require it to restore the terms and conditions that applied before the change (see further par 7.3.6 of chapter 7). See also s 187(c) of the Labour Relations Act, 1995 in terms of which the dismissal of employees in order to force them to agree to their employer's changes to their terms and conditions of employment is branded as an automatically unfair dismissal (see par 3.4.3.2 of chapter 3 where automatically unfair dismissals are discussed). See also s 5(3) of the Labour Relations Act, 1995 in terms of which an employer is prohibited from affording employees an advantage in exchange for them not exercising any statutory right such as the right to strike (see par 7.3.6 of chapter 7 where s 5(3) in relation to employees' statutory right to strike is discussed).

³⁷The first four mechanisms mentioned in the previous paragraph are discussed in this chapter. However, the right to strike is considered in par 6.3.3 of chapter 6 and the statutory limitation of unilateral employer decision-making is discussed in par 7.3.6 of chapter 7.

³⁸Section 4 regulates the right in respect of employees.

³⁹Section 6 regulates the right in respect of employers.

⁴⁰This is in accordance with the International Labour Organisation's Convention Concerning Freedom of Association and Protection of the Right to Organize 87 of 1948. The origin and nature of the freedom to associate in its international context is comprehensively discussed by AC Basson "Die Vryheid om te Assosieer (Deel 1)" (1991) 3 *SAMerLJ* 171 et seq. See also A Pankert "Freedom of Association" in R Blanpain (ed) *Comparative Labour Law and Industrial Relations* 3 ed (1987) 173 et seq. It is also in accordance with s 18 of the Constitution which makes provision for a general *right* to freedom of association (be it for religious, political or labour objectives). The Constitution also specifically affords employees the *right* to form and join trade unions (see s 23(2)(a) and (b)). Section 78(1) of the Labour Relations Act, 1956 had not explicitly conferred such a *right* on employees.

⁴¹See s 4(1)(a).

⁴²See s 4(1)(b).

union activities,⁴³ to participate in the election of the union's office-bearers, officials or trade union representatives⁴⁴ or to stand for election as office bearers, officials⁴⁵ or trade union representatives.⁴⁶

The Labour Relations Act, 1995 affords this right to "every employee" covered by it.⁴⁷ Section 2 of the Act, however, excludes certain categories of workers from its ambit. They include members of the National Defence Force,⁴⁸ the National Intelligence Agency and the South African Secret Service.—

Furthermore, those employees covered by the Labour Relations Act, 1995 may find that their right to freedom of association is restricted by one of two statutory trade union security arrangements, namely *closed shop agreements* and *agency shop agreements*.⁴⁹ In addition, the Act's requirement that only registered trade unions are entitled to the statutory organisational rights⁵⁰ and may participate in the establishment of a bargaining council⁵¹ might also restrict employees' right to decide which trade union they would like to represent them.

The mere affording of a right to associate, however, will be of scant value if persons are not also protected against pressure exerted by employers not to exercise this right or against discrimination or victimisation for exercising this right. Such protection is pro-

⁴³See s 4(2)(a). Examples of such activities are participation in a protected strike or protest action.

⁴⁴See s 4(2)(b).

⁴⁵See s 4(2)(c).

⁴⁶See s 4(2)(d).

⁴⁷See s 4(1).

⁴⁸Their exclusion is accepted by most international bodies (see AC Basson "Die Vryheid om te Assosieer (Deel 1)" (1991) 3 *SAMercLJ* 171 at 180 and 183 et seq as well as the Report of an International Labour Organisation Commission entitled "Prelude to Change: Industrial Relations Reform in South Africa: Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa" (1992) par 726 on page 282).

⁴⁹See par 4.2.4 below.

⁵⁰See s 11 of the Labour Relations Act, 1995 which stipulates that only a registered trade union may become a representative trade union.

⁵¹See s 27(1).

vided in s 5 of the Labour Relations Act, 1995.⁵² The protection is not only afforded to employees but also to persons seeking employment.⁵³ The legislature recognised that most job applicants are in an extremely weak bargaining position⁵⁴ and may easily be pressurised into agreeing not to exercise their right to freedom of association.

Section 5(1) commences with a general prohibition. No person may discriminate against any person for exercising any right conferred by the Labour Relations Act, 1995. Section 5(2) sets out more specific prohibitions. An employer is prohibited from requiring an employee or applicant not to be a member, not to become a member, or to resign as a member of a trade union.⁵⁵ It also prohibits an employer from preventing an employee or an applicant from exercising his right to associate.⁵⁶ It furthermore prohibits an employer from prejudicing or victimising⁵⁷ an employee or an applicant *because* he has exercised this right or intends to exercise it.⁵⁸ It also prohibits an employer from promis-

⁵²This is in accordance with article 11 of the International Labour Organisation's Convention Concerning Freedom of Association and Protection of the Right to Organize 87 of 1948 which stipulates that every member of the Organisation must take all necessary and appropriate measures to ensure that workers may exercise freely the right to organise.

⁵³See s 5(2)-(3). This makes the ambit of s 5 much wider than that of article 11 of the International Labour Organisation's Convention Concerning Freedom of Association and Protection of the Right to Organize 87 of 1948 as this article deals only with employees. It is also wider than s 78(1) of the Labour Relations Act, 1956. Contra, however, AA Landman "Freedom of Association in South African Labour Law" in TW Bennett, DJ Devine, DB Hutchison, I Leeman, CM Murray and D van Zyl Smit (eds) *Labour Law* (1991) 89 at 91 who is of the view that s 78(1) was also inclusive of applicants.

⁵⁴See par 2.2 of chapter 2 where the weak bargaining power of an applicant for a job is discussed.

⁵⁵See s 5(2)(a). Such a demand was also held by the industrial court to constitute an unfair labour practice (see *United African Motor & Allied Workers Union and Others v Fodens (SA) (Pty) Ltd* (1983) 4 ILJ 212 (IC) at 213H read with 227E; 214F read with 227E; and 214H read with 227E; *National Automobile & Allied Workers Union v ADE (Pty) Ltd & Others* (1990) 11 ILJ 342 (IC) at 344B and *Keshwar v Sanca* (1991) 12 ILJ 816 (IC) at 818G-819A).

⁵⁶See s 5(2)(b).

⁵⁷Victimisation can take a number of forms. It may entail the altering of the terms and conditions to less favourable terms (see, for instance, *United African Motor and Allied Workers Union & Others v Fodens (SA) (Pty) Ltd* (1983) 4 ILJ 212 (IC) at 214H read with 227E) or the advancement of other employees in preference to the employee or even dismissal. In *Keshwar v SANCA* (1991) 12 ILJ 816 (IC) at 821H, for instance, the employee was dismissed because she refused to relinquish her position as a union official (see also *National Union of Mineworkers & Another v Unisel Gold Mines Ltd* (1986) 7 ILJ 398 (IC) at 403A-B and *National Union of Food Workers v Champ Food Manufacturing Group* (1988) 9 ILJ 469 (IC) at 471H).

⁵⁸See s 5(2)(c). This provision is very similar to s 66 of the Labour Relations Act, 1956. It is, however, wider in the sense that it does not only cover victimisation for having exercised this right, but also includes victimisation in anticipation of exercising this right.

ing an employee or applicant some benefit in exchange for not exercising his right to associate.⁵⁹

In addition to the protection afforded in s 5, the Labour Relations Act, 1995 also brands the dismissal of an employee *because* he has exercised his right to freedom of association as automatically unfair.⁶⁰

4.2.3 Organisational Rights

4.2.3.1 Introduction

The granting of organisational rights to unions in certain circumstances is one of the central features of the Labour Relations Act, 1995.⁶¹ It is based on the assumption that if a trade union or unions are granted such rights, it would enable them to organise and to act effectively within the workplace. This would entrench their position in the workplace and enhance the possibility that the employer will be prepared to enter into a collective bargaining relationship with them, without the necessity of making use of legal compulsion.⁶²

⁵⁹Such action was also labelled as unfair by the industrial court (see, for instance, *National Automobile & Allied Workers Union v ADE (Pty) Ltd* (1990) 11 ILJ 342 (IC) at 344C). In *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A), however, the appellate division held that the making of such an offer in order to get employees not to go on strike (ie not to take part in the lawful activities of the union -- see s 4(2)(a) of the Labour Relations Act, 1995), only amounted to an unfair labour practice where an impasse had been reached *and* the trade union had been bargaining in good faith. In other words, such an offer would *not* amount to an unfair labour practice where an impasse had been reached and the union had bargained in bad faith. It seems that in terms of s 5(3) of the Labour Relations Act, 1995, an employer will no longer be able to make such an offer, irrespective of whether an impasse has been reached as a result of bargaining either in bad or in good faith. This statement, however, is made on the assumption that the strike will be a protected one. Where this is not the case, employees will not enjoy the protection afforded by s 5. For a discussion of s 5(3) and its impact on exercising of certain forms of economic pressure by employers, see par 7.3.6 of chapter 7.

⁶⁰See the introductory provisions to s 187(1) as well as subsecs (a) and (d) thereof. See also par 3.4.3.2 of chapter 3 where automatically unfair dismissals are discussed.

⁶¹See the preamble to the Labour Relations Act, 1995 which has as one of its aims the regulation of organisational rights of trade unions. See also part A of chapter III of the Labour Relations Act, 1995. These provisions are in accordance with s 23(4)(b) of the Constitution which provides trade unions with the right to organise as well as art 11 of the International Labour Organisation's Convention Concerning Freedom of Association and Protection of the Right to Organise 87 of 1948.

⁶²See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 278.

The rights granted by the Labour Relations Act, 1995 are the following: access to the workplace,⁶³ the deduction of trade union subscriptions,⁶⁴ the election of trade union representatives,⁶⁵ leave for trade union activities⁶⁶ and the disclosure of all relevant information that will allow the trade union representative to perform effectively the functions referred to in s 14(4) of the Labour Relations Act, 1995.⁶⁷

The Act envisages that these rights can be acquired (or retained) in a variety of ways. Collective bargaining parties may conclude an agreement that regulates organisational rights.⁶⁸ The authors of *The Labour Relations Act of 1995*⁶⁹ submit that such an agreement will not exclude the rights provided for in the Labour Relations Act, 1995. However, if such an agreement specifically regulates some of these rights, they submit that it will replace the corresponding provisions of the Act.

A registered trade union will automatically acquire these rights if it is recognised as the collective bargaining agent in an existing collective agreement concluded in terms of the Labour Relations Act, 1995.⁷⁰ A registered trade union also automatically acquires the right of access to the workplace and to trade union subscriptions by virtue of it being a party to a bargaining council.⁷¹ However, to acquire the other statutory rights, it will have to follow the procedures set out in s 21 of the Labour Relations Act, 1995.

The statutory organisational rights may also be acquired by a registered trade union through an award by the Commission if it has followed the procedures in s 21 of the

⁶³See s 12. See also par 4.2.3.2 below where this right is discussed.

⁶⁴See s 13. See also par 4.2.3.3 below where this right is discussed.

⁶⁵See s 14. See also par 4.2.3.4 below where this right is discussed.

⁶⁶See s 15. See also par 4.2.3.5 below where this right is discussed.

⁶⁷See s 16(2) read with s 14(4). See also par 4.2.3.6 below where this right is discussed.

⁶⁸See s 20 of the Labour Relations Act, 1995 in terms of which collective bargaining parties are entitled to conclude a collective agreement that regulates organisational rights. See also par 5.2.1 of chapter 5 where examples are given of organisational rights to which parties have voluntarily agreed.

⁶⁹D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 90-91.

⁷⁰See clause 13(1)-(3) of Schedule 7.

⁷¹See s 19 of the Labour Relations Act, 1995.

Labour Relations Act, 1995 and the parties have been unable to conclude an agreement regulating these rights.⁷²

In the paragraphs below, the various statutory organisational rights will be discussed in greater detail.

4.2.3.2 Access to the Workplace

Section 12 of the Labour Relations Act, 1995⁷³ affords trade unions the right of access to a workplace⁷⁴ for the purpose of recruiting employees,⁷⁵ to communicate with members⁷⁶ and to hold meetings with them.⁷⁷

However, the right is not unconditional. It must be exercised at a time and place that is reasonable and necessary to safeguard life and property or to prevent the undue disruption of work.⁷⁸

⁷²See s 21(7) of the Labour Relations Act, 1995.

⁷³The Labour Relations Act, 1956 did not provide such an explicit right of access. The industrial court developed such a right through its unfair labour practice jurisdiction. It held, for instance, in *National Union of Mineworkers & Others v Buffelsfontein Gold Mining Co* (1991) 12 ILJ 346 (IC) at 351H-I that employers' restrictions on mass meetings on their premises without valid reasons could in principle be regarded as unfair. See also the obiter remarks by the supreme court in *Kloof Gold Mining Co Ltd v National Union of Mineworkers* (1987) 8 ILJ 99 (T) at 107G-J.

⁷⁴Access has proved to be a particularly serious problem where employees actually live on premises belonging to the employer, such as in the case of miners who live in hostels on the mine's premises. In the Report of an International Labour Organisation Commission entitled "Prelude to Change: Industrial Relations Reform in South Africa: Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa" (1992) 274 it was suggested that until housing replaces mine compounds, it is important that access should be granted freely to unions for the purpose of carrying out normal trade union activities. It is also extremely difficult for trade union officials to organise farm labourers who live on farmers' land and live-in domestic workers. The International Labour Organisation Commission suggested that the protection provided under the Labour Relations Act should be extended to these categories of workers (see page 272 of the report). The legislature has afforded this right of access to trade unions who want to recruit farmworkers. It has, however, restricted this right in the case of a domestic worker in that it does not include the right to enter the employer's home, unless he agrees (see s 17(2)(a) of the Labour Relations Act, 1995).

⁷⁵See s 12(1) of the Labour Relations Act, 1995.

⁷⁶See s 12(1). This right was also acknowledged by the labour appeal court in *Doornfontein Gold Mining Co Ltd v National Union of Mineworkers & Others* (1994) 15 ILJ 527 (LAC) at 542I-J.

⁷⁷See s 12(2).

⁷⁸See s 12(4). This proviso was also articulated by the labour appeal court in *Doornfontein Gold Mining Co Ltd v National Union of Mineworkers & Others* (1994) 15 ILJ 527 (LAC) at 543A.

4.2.3.3 Deduction of Trade Union Subscriptions or Levies

A source of income for trade unions is membership contributions. Section 13 of the Labour Relations Act, 1995 provides an efficient mechanism for the collection of such funds. In terms of this section, employers which have received written authorisation by employees must deduct trade union subscriptions from their wages and remit the amount deducted to the union.⁷⁹

4.2.3.4 The Election of Trade Union Representatives in the Workplace

The most visible manifestation of a trade union's presence within a workplace is the activities of its representatives as shop stewards. Since the Seventies,⁸⁰ unions have placed great emphasis on the election of shop stewards who represent the interests of the union and its members in the day to day dealings with the employer.⁸¹ Many collective agreements recognise and regulate the activities of such representatives.⁸²

Section 14 recognises the importance of these representatives and makes provision for the election of trade union representatives. Where a union, or two or more unions acting jointly, represent the majority of employees in a workplace, the members of the union or unions are entitled to elect from among themselves trade union representatives.⁸³

The section also regulates trade union representatives' functions. At the request of an employee, a trade union representative has the right to assist and represent him in a grievance or disciplinary proceeding.⁸⁴ Trade union representatives also have the right to monitor the employer's compliance with the workplace-related provisions of the

⁷⁹See subsecs (1) and (2). This is the only organisational right which the Labour Relations Act, 1956 expressly provided for (see s 78).

⁸⁰See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 187 where she points out that with the advent of the so-called "new" unions in the Seventies, shop steward representation gained increased prominence.

⁸¹See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 184-186 for a discussion of the role of the shop steward in the workplace.

⁸²See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 187. For a discussion of some of the provisions regarding trade union representatives contained in collective agreements, see par 5.2.1 of chapter 5.

⁸³See s 14(1) and (2).

⁸⁴See s 14(4)(a).

Labour Relations Act, 1995, any law regulating terms and conditions of employment⁸⁵ and any binding collective agreement.⁸⁶ They may report any alleged contravention of any of these provisions to the employer, the trade union and any responsible authority or agency.⁸⁷ In addition, trade union representatives have the right to perform any other function agreed to between the trade union and the employer.⁸⁸

Shop stewards, however, remain employees. In order to assist them in the exercising of their duties,⁸⁹ the legislature has afforded them the right to take reasonable time off with pay to perform their functions.⁹⁰ It has also afforded them the right to take time off for training in any subject relevant to the performance of these functions.⁹¹

4.2.3.5 Leave for Trade Union Activities

In terms of s 15 of the Labour Relations Act, 1995, employees who are office-bearers⁹² of a trade union are entitled to take reasonable leave during working hours for the purpose of performing the functions of that office.⁹³ The employer and trade union may agree to the number of days of unpaid leave, the number of days of paid leave and the conditions attached to any leave.⁹⁴ Where they are unable to reach agreement, a com-

⁸⁵Such as the Basic Conditions of Employment Act.

⁸⁶See s 14(4)(b).

⁸⁷See s 14(4)(c)(i)-(iii).

⁸⁸See s 14(4)(d).

⁸⁹See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 186 where she discusses the difficulties experienced by shop stewards when they must perform their internal or workplace functions during normal working hours.

⁹⁰See s 14(5)(a).

⁹¹See s 14(5)(b).

⁹²An office-bearer is defined in s 213 of the Labour Relations Act, 1995 as a person who holds office in a trade union and is not an official. "Official" is defined in the same section as a person employed as the secretary, assistant secretary or organiser of a trade union or in any other prescribed capacity.

⁹³See subsec (1).

⁹⁴See s 15(2) of the Labour Relations Act, 1995. Of interest is that they are afforded leave and not time off with full pay as in the case of shop stewards exercising their functions (see s 14(5) as well as par 4.2.3.4 above).

missioner of the Commission acting as arbitrator, may make an award which regulates the matter.⁹⁵ Such an award remains in force for 12 months.⁹⁶

4.2.3.6 Disclosure of Information

For a shop steward to be able to perform his functions effectively,⁹⁷ he must have all the relevant information. Information is also one of the essential ingredients for effective collective bargaining. Davies and Freedland⁹⁸ explain the necessity for such information as follows⁹⁹

Negotiations do not deserve its name if one of the negotiating parties is kept in the dark about matters within the exclusive knowledge of the other which are relevant to the agreements.

In s 16 of the Labour Relations Act, 1995, the legislature has provided shop stewards and trade unions with a right to information.¹⁰⁰ It is, however, a qualified right in that they can only demand *relevant* information.¹⁰¹

The Act furthermore limits this right by providing that the employer need not disclose information which is legally privileged¹⁰² or which the employer is prohibited from disclosing in terms of a court order.¹⁰³ The employer is also not required to disclose

⁹⁵See s 15(3).

⁹⁶*ibid.*

⁹⁷See par 4.2.3.4 above where shop stewards' functions are discussed.

⁹⁸Paul Davies and Mark Freedland *Kahn-Freund's Labour and the Law* 3 ed (1983) 210. See also *SA Commercial Catering & Allied Workers Union v Southern Sun Hotel Corporation (Pty) Ltd & Others* (1992) 13 ILJ 132 (IC) at 151A-C and *Metal & Allied Workers Union & Others v Natal Die Casting Co (Pty) Ltd* (1986) 7 ILJ 520 (IC) at 543D-F.

⁹⁹At 210.

¹⁰⁰Section 16 deals with the disclosure of information for purposes of *collective bargaining or negotiation*. This section, however, has also been made applicable to *consultations* regarding dismissal because of the operational requirements of the business (see s 189(3)-(4) read with s 16 as well as par 3.4.3.3.4.2 of chapter 3). Note further that this right to information does not apply to the domestic sector (see s 17(2)(b) of the Labour Relations Act, 1995). The reason for this exclusion was probably the personal nature of the information and the possible infringement of the constitutional right to privacy of the employer (see s 14 of the Constitution).

¹⁰¹See subsec (2).

¹⁰²See subsec (5)(a).

¹⁰³See subsec (5)(b).

information which is confidential and, if disclosed, may cause substantial harm to an employee or the employer,¹⁰⁴ nor is it required to disclose information which is private personal information relating to an employee,¹⁰⁵ unless that employee consents to the disclosure of that information.¹⁰⁶

However, if there is a dispute about which information must be disclosed and a commissioner of the Commission finds that the requested information is relevant,¹⁰⁷ he may order it to be disclosed, even if it is confidential or private personal information relating to an employee and the latter has not consented to the disclosure of that information.¹⁰⁸

In order to decide if he must make such an order, the commissioner must balance the harm that the disclosure is likely to cause the employer against the harm that the failure to disclose the information is likely to cause to the ability of the shop steward to perform effectively his functions or the ability of the trade union to engage effectively in consultation or collective bargaining.¹⁰⁹

The legislature appreciated the serious implications that such a disclosure may hold for the employee or the employer and has accordingly provided some safeguards. The commissioner may order the disclosure on terms designed to limit the harm likely to be caused.¹¹⁰ In addition, he must take into account any breach of confidentiality by shop stewards or the trade union in the past and may refuse to order the disclosure for a period specified in his award.¹¹¹ Furthermore, if a dispute ensues about an alleged breach of confidentiality by shop stewards or the trade union, the commissioner may order that the right to disclosure of information be withdrawn for a stipulated period.¹¹²

¹⁰⁴See subsec (5)(c). An example of such information is trade secrets (see *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) at 652C quoted with approval in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) at 1253I.

¹⁰⁵Such as medical records.

¹⁰⁶See subsec (5)(d).

¹⁰⁷See s 16(6)-(10).

¹⁰⁸See s 16(11) of the Labour Relations Act, 1995. However, he may not order an employer to disclose legally privileged information or information which the employer is prohibited from disclosing in terms of a court order.

¹⁰⁹*Ibid.*

¹¹⁰See s 16(12).

¹¹¹See s 16(13).

¹¹²See s 16(14).

This represents a fairly serious curtailment of shop stewards' and trade unions' right to information as such an order apparently covers *all* relevant information.¹¹³

4.2.4 Trade Union Security Arrangements

Closed shop and agency shop agreements have often been regarded as infringing freedom of association as they limit employees' right not to be a member of a trade union.¹¹⁴ Nevertheless, such agreements can assist unions to increase and/or maintain their membership, thus strengthening their position in a workplace and, at least arguably, increasing the possibility of effective collective bargaining.

The Labour Relations Act, 1995 accepts this approach and makes provision for both closed shop and agency shop agreements. In terms of s 26(1) of the Act, a closed shop agreement is defined as a collective agreement between a trade union and an employer which requires all employees covered by the agreement to be members of the trade union. An agency shop agreement¹¹⁵ is defined in s 25(1) of the Act as a collective agreement between a trade union and an employer which requires the employer to deduct an agreed agency fee from the wages of its employees who are identified in the agreement and who are not members of the trade union.¹¹⁶

In order to lessen the possibility of a constitutional challenge to the validity of ss 25 and 26 on the basis that they infringe freedom of association,¹¹⁷ the Labour Relations Act,

¹¹³See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 98.

¹¹⁴See SR van Jaarsveld and BPS van Eck *Kompendium van Suid-Afrikaanse Arbeidsreg* 2 ed (1996) 216 and the authorities referred to in note 176 thereof.

¹¹⁵The arbitration agreement in *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1993 (14) ILJ SA 1431 (A) was a precursor to the agency shop agreement in that it allowed the employer to make deductions from non-members to be paid over to a charity agreed on between the union and the employer.

¹¹⁶It is aimed at so-called free riders; employees who benefit from union efforts without paying for it. It is suggested that denying non-members the benefits of collective bargaining may constitute an unfair labour practice in terms of clause 2(1)(a) and (b) of schedule 7 to the Labour Relations Act, 1995. It may also be unconstitutional in terms of s 9(1) and (2) of the Constitution which stipulates that everyone is equal and that equality includes the full and fair enjoyment of all rights and freedoms.

¹¹⁷The protection of freedom of association in the Constitution (see s 23(2)(a) and (b) thereof) places the closed shop and agency shop agreements in the Labour Relations Act, 1995 at risk of constitutional attack. However, in terms of s 23(6) of the Constitution, the legislature is authorised to make provision for these agreements in the Labour Relations Act, 1995, provided that the statutory provisions regarding these agreements comply with s 36(1) of the Constitution. In terms of this section, the constitutional right to freedom of association may be limited only in terms of the Labour Relations Act, 1995 (ie by the closed shop and agency shop provisions) to the extent that the limitation is reasonable and justifiable, taking into account all relevant factors, including - the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and less

1995 sets fairly stringent requirements that have to be met before such agreements will be valid.¹¹⁸

As far as closed shop agreements are concerned, the Act stipulates various requirements.¹¹⁹ Only a majority union, or two or more unions who represent a majority of the employees in the workplace or sector, can conclude such an agreement.¹²⁰ The employees themselves must indicate whether or not they are in favour of such an agreement by way of a ballot and two thirds of those voting must vote in favour of it.¹²¹ The closed shop must be a post-entry one in the sense that employees will only be required to become members *after* they have become employees.¹²² Employees at the time a closed shop agreement is concluded may not be dismissed for refusing to join the trade union which is a party to the agreement.¹²³ Employees who refuse to join the trade union which is a party to the agreement on grounds of conscientious objection, may not be dismissed.¹²⁴ A trade union which is a party to an agreement may not refuse an

restrictive means of achieving the purpose. See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 33. They appear uncertain about s 25's chances to survive constitutional challenge (at 71-74) but are more optimistic about s 26's chances (at 74-75).

¹¹⁸See also s 5(4) of the Labour Relations Act, 1995 in terms of which agency shop and closed shop agreements not in compliance with the provisions of ss 26 and 25 will be invalid.

¹¹⁹In terms of clause 12(3) of Schedule 7 a closed shop agreement concluded in terms of the Labour Relations Act, 1956 will be deemed to be a closed shop agreement concluded in compliance with s 26 of the Labour Relations Act, 1995 except that the requirements in ss 26(3)(d) and 98(2)(b)(ii) of the Act become applicable at the commencement of the next financial year of the trade union party which is a party to the agreement. In accordance with s 26(3)(d), it is required that trade union subscriptions be used to advance or protect the socio-economic interests of the employees. And, in terms of s 98(2)(b)(ii) the auditor of the trade union must express an opinion as to whether or not the trade union has complied with the provisions of s 26.

¹²⁰See s 26(2). This requirement also ensures that the employer does not conclude a closed shop agreement with a so-called sweetheart union which may be a minority union.

¹²¹See s 26(3)(a) and (b). Although the Act requires that two thirds of the employees and not an ordinary majority must vote in favour, the Act links this requirement to the employees who have actually voted (see s 26(3)(b)). This may result therein that a minority of the employees in the workplace can ensure that such an agreement becomes binding!

¹²²See s 26(3)(c). This requirement also protects applicants for jobs as it ensures that trade union membership does not become a precondition to employment (see par 2.2 of chapter 2 where the weak bargaining position of job applicants is discussed). It is also in line with s 5 of the Labour Relations Act, 1995 which protects a job applicant against an infringement of his right to freedom of association (see par 4.2.2 above where this section is discussed).

¹²³See s 26(7)(a). However, those who are employed after the agreement was concluded, may be dismissed for refusing to join the trade union which is a party to the agreement (see s 26(6)(a)).

¹²⁴See s 26(7)(b).

employee membership or expel an employee from the trade union unless the refusal or expulsion is in accordance with its constitution and the reason for the refusal or expulsion is fair.¹²⁵ Finally, the Labour Relations Act, 1995 requires that trade union subscriptions be used to advance or protect the socio-economic interests of the employees.¹²⁶

In the case of agency shop agreements, the Labour Relations Act, 1995 also stipulates a number of requirements. In the first place, only a majority union or a number of unions who represent the majority of the employees in the workplace or sector may conclude such an agreement.¹²⁷ Secondly, the agreement may not compel employees who are non-members of the representative trade union to become members.¹²⁸ Thirdly, the fee payable to the union must either be the same or less than the membership fees.¹²⁹ Fourthly, the agency fee must be paid into a separate account¹³⁰ and used for the advancement or protection of the socio-economic interests of employees.¹³¹

4.2.5 Structures for Collective Bargaining

The Labour Relations Act, 1995 provides three structures through which trade unions and employers can bargain with one another¹³² namely bargaining councils,¹³³ the

¹²⁵See s 26(5).

¹²⁶See s 26(3)(d)(i)-(iii).

¹²⁷See s 25(2). A minority union is therefore not entitled to conclude such an agreement. It also ensures that an employer does not allow a so-called sweetheart minority union to benefit from such an agreement.

¹²⁸See s 25(3)(a). This requirement was necessary as such a provision will not only be contrary to s 4 of the Labour Relations Act, 1995 but it will also be unconstitutional (see s 23(2)(a) of the Constitution).

¹²⁹See s 25(3)(b). This provision ensures that non-members are not treated less favourably than members.

¹³⁰See s 25(3)(c).

¹³¹See s 25(3)(d)(i)-(iii).

¹³²See parts C-F of chapter III of the Labour Relations Act, 1995.

¹³³See s 27(1). They are essentially the successors to the industrial councils which were established in terms of the Labour Relations Act, 1956. Of interest is the fact that a single employer cannot be a party; it must form part of an employers' organisation (see s 27(1)). The exception, however, is the State as employer; it does not have to form an employers' organisation or be part of one to be able to be a party to a bargaining council (see s 27(2)-(3)).

public service co-ordinating bargaining council¹³⁴ and statutory councils.¹³⁵

Bargaining councils for a sector and area are voluntarily¹³⁶ established by one or more registered trade unions and one or more registered employers' organisations by adopting a constitution which meets the requirements of s 30 of the Labour Relations Act, 1995 and obtaining registration of the bargaining council in terms of s 29 of the Act.¹³⁷ Those industrial councils registered in terms of the Labour Relations Act, 1956 immediately before the commencement of the Labour Relations Act, 1995, are deemed to be bargaining councils under the latter Act.¹³⁸

Application may be made for the establishment of a statutory council in a sector and area in respect of which no bargaining or statutory council is registered.¹³⁹ Such an application may be made by one or more registered trade unions whose members constitute at least 30% of the employees in that sector and area or one or more registered employers' organisations whose members employ at least 30% of the employees in that sector or area.¹⁴⁰ The application must meet the requirements of s 39 read with s 29 of the Labour Relations Act, 1995 in order to establish a statutory council in terms of s 40(1) of the Act.¹⁴¹

¹³⁴See s 35 which provides for the establishment of a bargaining council for the public service as a whole, known as the public service co-ordinating bargaining council. It is supposed to deal with matters which are regulated by uniform rules and standards applicable across the public service as well as terms and conditions of service which apply to two or more sectors of the public service (see s 36). Thereafter, specific bargaining councils may be established for particular sectors within the public service (see s 37). As the emphasis of this thesis is on the private sector (see par 1.2 of chapter 1), the public service co-ordinating bargaining council will not be discussed in any detail.

¹³⁵The Act makes provision for the establishment of a so-called statutory council for a sector and area in respect of which no council is registered (see s 39). The registrar may establish such a council on application by trade unions whose members constitute at least 30% of the employees in that sector and area or by employers' organisations whose members represent at least 30% of the employees in that sector or area (see s 39(1)-(2)).

¹³⁶See s 27(1) where it is stated that registered trade unions and employers' organisations "may" establish a bargaining council. See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 139. Compare this with s 35(1) of the Labour Relations Act, 1995 which states that there "will" be a bargaining council for the public service known as the Public Service Co-ordinating Bargaining Council and for any sector within the public service that may be designated in terms of s 37 of the Act.

¹³⁷See s 27(1).

¹³⁸See clause 7(1) of Schedule 7.

¹³⁹See s 39(2).

¹⁴⁰See s 39(1).

¹⁴¹See s 40(1) read with ss 39 and 29(2)-(10).

Upon establishing the statutory council, the registrar invites the registered trade unions and employers' organisations in that sector and area to attend a meeting in order to conclude an agreement on which of the trade unions and employers' organisations will be parties to the council and to formulate a constitution that meets the requirements of s 30 of the Act.¹⁴² Trade unions and employers' organisations may involuntarily become parties to such a council.¹⁴³ This may happen where no agreement can be reached as to who will be party to the statutory council. In terms of s 41(3) of the Labour Relations Act, 1995, the Minister must admit the applicant and registered trade unions and employers' organisations which ought to be admitted, taking into account the factors referred to in s 40(5) of the Labour Relations Act, 1995.¹⁴⁴

It is interesting to note that, in accordance with the express objective of the Labour Relations Act, 1995 of encouraging sectoral bargaining,¹⁴⁵ all the above structures are envisaged as operating at sectoral level.¹⁴⁶ This approach is seen to have various advantages. Sectors faced with increased competition on internal and overseas markets, can develop co-ordinated and coherent sectoral policies to meet the challenge. Collective agreements at sectoral level dealing with pension, provident and other social security schemes hold obvious advantages.¹⁴⁷ The legislature also envisages sectoral bargaining structures playing an important role in dispute resolution.¹⁴⁸

¹⁴²See s 40(2)(a) and (3).

¹⁴³See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 139 and 145.

¹⁴⁴The factors which the Minister must take into account are the primary objectives of the Labour Relations Act, 1995, the diversity of registered trade unions and employers' organisations in the sector and area and the principle of proportional representation.

¹⁴⁵See s 1(d)(ii) in which the promotion of collective bargaining at this level is listed as one of the Act's primary objectives.

¹⁴⁶See s 27(1) of the Labour Relations Act, 1995 in respect of bargaining councils; s 35(b) which provides for the establishment of a bargaining council for any sector within the public service and s 40(1) which provides for the establishment of a statutory council for a sector.

¹⁴⁷See s 28(g) of the Labour Relations Act, 1995 in terms of which bargaining councils may establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds. See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 138. See further par 5.3.2.23 of chapter 5 where examples of the funds to which collective bargaining parties have agreed are discussed.

¹⁴⁸See s 28(c) and (d) read with s 51 in the case of bargaining councils. See s 43(1)(a) read with s 51 in the case of statutory councils. See further par 4.2.10 below where dispute resolution by bargaining councils is discussed.

From a trade union perspective and also possibly from a wider perspective, the most important advantage of sectoral bargaining is the potential it holds for extending the scope of collective bargaining to employees and employers who would not be covered by a collective agreement if collective bargaining took place only at workplace or enterprise level.¹⁴⁹ Sectoral bargaining creates the possibility of collective agreements which will bind all employers and employees falling within the sector, irrespective of whether they were represented at the negotiations which led to the entering into of the agreement.¹⁵⁰

This clearly has the potential for increasing the significance of collective bargaining as a mechanism for limiting managerial prerogative in workplaces where collective bargaining does not take place. An analysis of how bargaining council agreements come into force, their legal value and whom they may bind is therefore necessary.

4.2.6 The Conclusion of Bargaining Council Agreements

Section 28 of the Labour Relations Act, 1995 sets out the functions of bargaining councils.¹⁵¹ One of their most important functions is the conclusion of collective agreements.¹⁵²

The Labour Relations Act, 1995 defines a collective agreement.¹⁵³ In terms of the definition, the agreement must deal with "terms and conditions of employment or any other matters of mutual interest" for the parties to the council.¹⁵⁴ The authors of *The Labour*

¹⁴⁹See s 32 of the Labour Relations Act, 1995.

¹⁵⁰See John Grogan *Workplace Law* (1996) 166-167. This was also one of the reasons for the bigger trade unions' insistence on central bargaining at NEDLAC (see Clive Thompson "Collective Bargaining" in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 30 at 31). See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 137-138.

¹⁵¹The functions of statutory councils are set out in s 43 of the Labour Relations Act, 1995 and are more limited than those of bargaining councils.

¹⁵²See subsec (a). See also Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 35. Although the Labour Relations Act, 1995 does not expressly afford statutory councils the right to conclude collective agreements, it affords them the possibility to amend their constitution to include this function. See s 43(2) in terms of which statutory councils may amend their constitutions to include any of the other functions of a bargaining council referred to in s 28 of the Labour Relations Act, 1995.

¹⁵³See s 213.

¹⁵⁴*Ibid.*

*Relations Act of 1995*¹⁵⁵ suggest that the expression "terms and conditions of employment" refers to the express or implied terms of the contract of employment in the narrow sense and does not include the physical conditions or the surrounding circumstances of employment. Concerning the interpretation of the expression "matters of mutual interest," guidance can be sought in the supreme court's interpretation thereof. It would appear that it has given an extremely wide interpretation to it. In *Rex v Woliak*¹⁵⁶ it held¹⁵⁷ that it included those matters that were in the interest of the industry as a whole. In *Rand Tyres and Accessories (Pty) Ltd and Appel v Industrial Council for the Motor Industry (Transvaal), Minister for Labour, and Minister for Justice*¹⁵⁸ the court gave a similar interpretation. It held¹⁵⁹

Whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned must be of mutual interest to them; and there is no justification for restricting in any way powers which the Legislature has been at the greatest pains to frame in the widest possible language. Mr Roper's construction, which seeks to confine "any matter whatsoever of mutual interest to employers and employees" to conditions of employment, would deprive these words of all effect...

Unlike s 24 of the Labour Relations Act, 1956 there is no section in the Labour Relations Act, 1995 which lists the matters for possible inclusion in a collective agreement. However, ss 28 and 43 of the Labour Relations Act, 1995, which set out the functions of bargaining and statutory councils respectively, provide some guidance in this regard. It is further suggested that the matters listed in ss 84 and 86 of the Labour Relations Act, 1995 for consultation and joint decision-making between employers and workplace forums, could also become subjects for collective bargaining. Both these sections take cognisance of this possibility.¹⁶⁰ In addition, it is pointed out by the authors of *The Labour Relations Act of 1995*¹⁶¹ that, given the requirement that only a representative

¹⁵⁵D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 159.

¹⁵⁶1939 TPD 428. It had to interpret the concept as provided for in s 24 of the Industrial Conciliation Act 36 of 1937.

¹⁵⁷At 431.

¹⁵⁸1941 TPD 108. It had to interpret the concept as provided for in s 24 of the Industrial Conciliation Act 36 of 1937.

¹⁵⁹At 115.

¹⁶⁰Both s 84(1) and s 86(1) begin with the proviso "unless the matters for consultation (see s 84(1)) / joint decision-making (see s 86(1)) are regulated by a collective agreement...".

¹⁶¹D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 160.

trade union may bring into effect the establishment of a workplace forum,¹⁶² the Act clearly expects the consultation and joint decision-making processes to yield collective agreements and therefore it is arguable that the matters listed in ss 84 and 86 are matters of mutual interest as contemplated by the definition of a collective agreement.

From the discussion above, it appears that the matters about which the parties to bargaining councils can collectively bargain are extremely wide. They include not only terms and conditions of employment, but also business or economic matters that may affect job security.¹⁶³ They may even include business or economic issues that have no direct or immediate foreseeable impact on job security.¹⁶⁴

4.2.7 The Legal Effect of Collective Agreements

For collective bargaining to be effective, collective agreements must be binding on the parties who have concluded them.¹⁶⁵ The Labour Relations Act, 1956, with one exception,¹⁶⁶ did not regulate the legality of collective agreements unless they had been promulgated in terms of s 48 thereof. Section 23(1) of the Labour Relations Act, 1995, however, specifically provides that all collective agreements bind the parties to the agreements.¹⁶⁷ It furthermore provides that a collective agreement binds each party to the agreement and the members of every other party to the agreement, in so far as the provisions are applicable between them.¹⁶⁸

In terms of s 23(1), the members of a registered trade union and the employers which are members of the registered employers' organisation which are party to the collective

¹⁶²See s 80(2) of the Labour Relations Act, 1995.

¹⁶³Consider some of the matters listed in s 84 of the Labour Relations Act, 1995 such as the restructuring of the workplace (see subsec (1)(a)), partial or total plant closures (see subsec (1)(c)) and mergers (see subsec (1)(d)).

¹⁶⁴See, for instance, some of the matters listed in s 84 of the Labour Relations Act, 1995 such as product development plans (subsec (1)(j)) and export promotion (see subsec (1)(k)).

¹⁶⁵See John Grogan *Workplace Law* (1996) 169 where he states that, "[T]he object of collective bargaining between management and organised labour is to reach binding agreements in terms of which their relationship is formalised...".

¹⁶⁶See s 31A(1) of the Act which made unenforceable certain collective agreements entered into by unregistered trade unions which had not complied with specific reporting provisions of the Act.

¹⁶⁷See subsec (a).

¹⁶⁸See s 23(1)(b). See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 161 for an analysis of the different contractual relationships which may be created through this provision.

agreement are also bound, if it regulates terms and conditions of employment or the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.¹⁶⁹ These employees and employers remain bound to such an agreement for the duration thereof.¹⁷⁰ They will accordingly be unable to resile from such a collective agreement by resigning from the signatory parties. This provision ensures that employees will not forfeit the terms and conditions of employment negotiated on their behalf by their unions if their employers resign as members of the employers' organisation which is party to the collective agreement.—

In terms of s 23(1), a collective agreement also binds employees who are not members of the registered trade union or unions which are party to the agreement if they are identified in the agreement, the agreement expressly binds them and the trade union or unions which have as their members the majority of employees employed by the employer in the workplace.¹⁷¹ This provision promotes uniformity in the terms and conditions of employment in a workplace. It also ensures that employees belonging to smaller unions or those who are not unionised are not exploited by their employers.

Section 23 further stipulates that a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.¹⁷² Accordingly, its provisions take precedence over similar provisions in contracts of employment. This provision is in line with the legislature's preference for collective bargaining as a means to determine terms and conditions of employment.¹⁷³ In addition, it ensures a greater measure of uniformity in terms and conditions of employment of employees.

So far, the discussion has centered on the legal effect of collective agreements generally and not on collective agreements concluded by bargaining councils in particular. The definition of a collective agreement is extremely wide. All that is required, is that the agreement must be concluded by a registered trade union or unions on the one hand and a registered employers' organisation and/or employer on the other and, of course,

¹⁶⁹See subsec (c).

¹⁷⁰See s 23(2).

¹⁷¹See subsec (d).

¹⁷²See subsec (2).

¹⁷³See the preamble to the Labour Relations Act, 1995 which lists the promotion of collective bargaining at the workplace and at sectoral level as one of the purposes of the Act. See also s 1 thereof which lists the promotion of collective bargaining as one of the primary objectives of the Act.

that it must deal with terms and conditions of employment or any other matter of mutual interest.¹⁷⁴ Clearly, agreements by bargaining councils about these matters fall within the definition of a collective agreement. However, the definition may also cover shopfloor or factory level agreements.¹⁷⁵ In addition, it may include a recognition agreement or a shopfloor agreement or an industrial council agreement, which has not been promulgated in terms of s 48 of the Labour Relations Act, 1956,¹⁷⁶ and in force immediately before the commencement of the Labour Relations Act, 1995.¹⁷⁷

Subscribing to sectoral level bargaining in accordance with the Labour Relations Act, 1995 affords collective agreements concluded by bargaining councils special treatment. Section 31¹⁷⁸ of the Act regulates the legal enforceability of such agreements.¹⁷⁹ In terms of this section, such an agreement binds the parties to the council which are also parties to the collective agreement.¹⁸⁰ Secondly, it binds each party to the collective agreement and the members of every other party to the agreement in so far as the provisions thereof apply to the relationship between such party and the said members.¹⁸¹ Thirdly, the agreement binds the members of a trade union which is a party to the agreement and the employers which are members of an employers' organisation which is such a party, if the agreement regulates terms and conditions of employment or the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.¹⁸²

¹⁷⁴See the definition of a collective agreement in s 213 of the Labour Relations Act, 1995.

¹⁷⁵Provided, of course, that the trade union and employers' organisation are registered and the agreement deals with the matters specified in the definition of a collective agreement. See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 164.

¹⁷⁶Compare this with industrial agreements promulgated in terms of s 48 of the Labour Relations Act, 1956 and in force immediately before the commencement of the Labour Relations Act, 1995. In terms of clause 12 of Schedule 7, these agreements remain in force for 18 months or until their expiry, whichever is the shorter period.

¹⁷⁷In terms of clause 13 of Schedule 7, these agreements are all deemed to be collective agreements for purposes of the Labour Relations Act, 1995.

¹⁷⁸This section was extensively amended by the Labour Relations Amendment Act 42 of 1996.

¹⁷⁹Its provisions are very similar to those contained in s 23(1)(a)-(c) dealing with the legal effect of collective agreements generally.

¹⁸⁰See s 31(a). In terms of s 27(7) read with s 48(1) of the Labour Relations Act, 1956, it was possible for the collective agreement to be made binding on parties to the council which were not party to the agreement.

¹⁸¹See s 31(b).

¹⁸²See s 31(c).

4.2.8 The Extension of Collective Agreements Concluded in Bargaining Councils

The special treatment afforded by the Labour Relations Act, 1995 to collective agreements concluded by bargaining councils is most obvious in the Act's provisions regarding the extension of such agreements to non-parties to these agreements.¹⁸³ Only collective agreements by bargaining councils can be so extended.

In terms of s 32(1) of the Act, a bargaining council may ask the Minister to extend a collective agreement concluded in the council to any non-parties to the agreement which are within the council's registered scope.¹⁸⁴ This may be done, if the trade unions whose members constitute the majority of the members of the trade unions which are party to the council and the employers' organisations, whose members employ the majority of employees of the members of the employers' organisations which are party to the council, have voted in favour of the extension.

The Minister may not extend a collective agreement unless he has satisfied himself of a number of issues. Firstly, that the decision by the bargaining council to request the extension complies with the voting requirements set out in s 32(1).¹⁸⁵ Secondly, that the majority of all the employees who, upon extension of the agreement, will fall within the scope thereof, are members of the trade unions which are parties to the bargaining council.¹⁸⁶ Thirdly, that the members of the employers' organisations which are parties to the council will, upon the extension, be found to employ the majority of all the employees who fall within the scope of the agreement.¹⁸⁷ Fourthly, the non-parties specified in the request for extension fall within the council's registered scope.¹⁸⁸ Fifthly, the collective agreement establishes an independent body to grant exemptions to non-parties and to determine the terms of those exemptions.¹⁸⁹ In the sixth place, the collective agree-

¹⁸³See s 32. Statutory council agreements concluded in terms of s 43(1)(d) may also be extended in accordance with the provisions of s 32 (see s 43(3) in this regard).

¹⁸⁴The term "registered scope" is defined in s 213 of the Labour Relations Act, 1995 and, in the case of a bargaining or statutory council, means the sector and area in respect of which such councils are registered. "Sector" is defined in s 213 to mean an industry or a service and "area" is defined as any number of areas, whether or not contiguous.

¹⁸⁵See s 32(3)(a).

¹⁸⁶See s 32(3)(b). This section was amended by the Labour Relations Amendment Act 42 of 1996.

¹⁸⁷See s 32(3)(c). This section was amended by the Labour Relations Amendment Act 42 of 1996.

¹⁸⁸See s 32(3)(d).

¹⁸⁹See s 32(3)(e).

ment contains criteria which must be applied by the independent body when it considers applications for exemptions, and that those criteria are fair and promote the primary objects of the Labour Relations Act, 1995.¹⁹⁰ Finally, that the terms of the collective agreement do not discriminate against non-parties.¹⁹¹

If the Minister is satisfied that all the requirements mentioned in the paragraph above have been met, he is obliged to extend the collective agreement within 60 days of receiving the request.¹⁹² However, the Minister is afforded a measure of discretion regarding the extension of a collective agreement where it appears that, upon such an extension, the majority of the employees covered will *not* be members of the trade unions which are parties to the council and the members of the employers' organisations which are parties to the council will *not* employ the majority of all the employees who fall within the scope of the (extended) collective agreement.¹⁹³ In terms of s 32(5), he may extend the agreement if the parties to the council are *sufficiently representative* within the registered scope of the council in the area in respect of which the extension is sought¹⁹⁴ and is satisfied that the failure to do so may undermine collective bargaining at sectoral level.¹⁹⁵

The provisions regarding the extension of collective agreements concluded in bargaining councils are indicative of the preference for sectoral bargaining manifested in the Act.¹⁹⁶ The aim of these provisions is to ensure uniformity in the industry and the area for which the bargaining council is registered with regard to terms and conditions of employment, most importantly wages, and other matters of mutual interest. It also serves to protect non-unionised employees and those who belong to minority unions against exploitation by their employers.

¹⁹⁰See s 1 of the Act which sets out those primary objects.

¹⁹¹See s 32(3)(g).

¹⁹²See s 32(2) in terms of which the Minister "must" extend the agreement.

¹⁹³See s 32(5)(a). This subsec was amended by the Labour Relations Amendment Act 42 of 1996.

¹⁹⁴See subsec (a).

¹⁹⁵See subsec (b). This subsec was amended by the Labour Relations Amendment Act 42 of 1996.

¹⁹⁶See s 1 in terms of which the promotion of collective bargaining at sectoral level is listed as one of the primary objectives of the Act.

4.2.9 The Enforcement of Collective Agreements

The effectiveness of collective bargaining in general and collective agreements in particular will be greatly reduced if such agreements cannot be enforced against those legally bound by them. The Labour Relations Act, 1995 affords bargaining councils the power to enforce collective agreements.¹⁹⁷ In addition, it entitles bargaining councils to request the Minister to appoint a person as the designated agent of that council to help it enforce any collective agreement concluded in that council.¹⁹⁸ Such a designated agent has most of the powers conferred on a commissioner of the Commission by s 142¹⁹⁹ of the Labour Relations Act, 1995 when attempting to resolve a dispute regarding alleged non-compliance with the collective agreement.²⁰⁰

The Act furthermore affords trade union representatives the right to monitor an employer's compliance²⁰¹ with a collective agreement binding on it and to report any contravention thereof to the employer, the representative trade union and any responsible authority or agency.²⁰²

4.2.10 The Prevention and Resolution of Disputes

The prevention and resolution of disputes between employers and trade unions is one of the primary purposes of collective bargaining. It plays a vital role in the promotion and maintenance of labour peace which, in turn, may promote economic development.²⁰³ The legislature regulates this important function of collective bargaining in the Labour Relations Act, 1995.

¹⁹⁷See s 28(b). Statutory councils may also acquire this power (see s 43(2) read with s 28(b)).

¹⁹⁸See s 33(1).

¹⁹⁹Except the powers conferred by s 142(1)(d) and (e).

²⁰⁰See s 33(3).

²⁰¹See s 14(4)(b). See also par 4.2.3.4 above where the election and duties of trade union representatives are discussed.

²⁰²See s 14(4)(c)(ii). See also par 4.2.3.4 above where the election and duties of trade union representatives are discussed.

²⁰³These are two of the main purposes of the Labour Relations Act, 1995 set out in s 1 thereof.

Bargaining councils are given the power to prevent and resolve labour disputes.²⁰⁴ In addition, they are afforded the power to perform the dispute resolution functions in s 51 of the Labour Relations Act, 1995.²⁰⁵ In terms of s 51(1), the disputes to be resolved by a bargaining council are disputes about "matters of mutual interest" between a trade union/s and/or employee/s on the one side and an employers' organisation/s and/or employer/s on the other side. It is suggested that the term "matters of mutual interest" must be afforded the same meaning given to it in connection with collective agreements.²⁰⁶ Accordingly, it may include terms and conditions of employment as well as those matters covered in ss 28, 43, 84 and 86 of the Labour Relations Act, 1995. In addition, a bargaining council must also endeavour to resolve those disputes referred to it in terms of other provisions of the Labour Relations Act, 1995. This includes disputes about the interpretation or application of the provisions of chapter II of the Act which deals with the right to freedom of association,²⁰⁷ disputes that form the subject matters of a proposed strike or lock-out,²⁰⁸ disputes in essential services,²⁰⁹ about unfair dismissals,²¹⁰ about severance pay²¹¹ and about unfair labour practices.²¹²

In terms of s 51(2)(a)(i) of the Labour Relations Act, 1995, the parties to a bargaining council must attempt to resolve any dispute between them in accordance with the council's constitution.²¹³ For purposes of this subsection, "party" includes the members of any registered trade union or registered employers' organisation which is a party to the council.²¹⁴

²⁰⁴See s 28(c) of the Labour Relations Act, 1995. Statutory councils may also acquire this right (see s 43(2) read with s 28 of the Act).

²⁰⁵See s 28(d). Statutory councils are also given the power to perform the dispute resolution functions referred to in s 51 (see s 43(1)(a) of the Act).

²⁰⁶See par 4.2.6 above where the meaning of the term as used in the definition of a collective agreement in s 213 of the Labour Relations Act, 1995 is discussed.

²⁰⁷See s 9(1).

²⁰⁸See s 64(1). See also par 6.3.3.1 of chapter 6 where s 64 is discussed.

²⁰⁹See s 74.

²¹⁰See s 191(1)(a).

²¹¹See s 196(6)(a).

²¹²See clause 3(1) in Schedule 7.

²¹³See subsec (a)(i). This subsection was amended by the Labour Relations Amendment Act 42 of 1996.

²¹⁴See s 51(2)(a)(ii) which was inserted in the Labour Relations Act, 1995 by the Labour Relations Amendment Act 42 of 1996.

A party to a dispute who is not a party to the council, but who falls within its registered scope, may refer the dispute to the council.²¹⁵ In terms of s 51(3) of the Labour Relations Act, 1995, if the dispute so referred is one which must be referred to the council in terms of the Act, the council must attempt to resolve it through conciliation²¹⁶ and, if the dispute remains unresolved, the council must arbitrate the dispute if the Act requires arbitration and any of the parties to the dispute has requested that it be so resolved or all the parties to the dispute consent to arbitration under the auspices of the council.²¹⁷

If, however, one or more of the parties to the dispute which has been referred to the council do not fall within the registered scope of the council, it must refer the dispute to the Commission.²¹⁸

A bargaining council may conclude an agreement with the Commission or an accredited agency²¹⁹ in terms of which the Commission or agency is to perform, on behalf of the council, its dispute resolution functions in terms of s 51 of the Labour Relations Act, 1995.²²⁰ If the bargaining council elects to perform the dispute resolution functions in s 51(3),²²¹ it must apply to the Commissioner for accreditation to perform those functions or appoint an accredited agency to perform same.²²²

²¹⁵See s 51(2)(b).

²¹⁶See subsec (a).

²¹⁷See subsec (b).

²¹⁸See s 51(4).

²¹⁹An accredited agency is a private agency which has been accredited by the governing body of the Commission to resolve disputes through conciliation and arbitrating disputes which remain unresolved after conciliation if the Labour Relations Act, 1995 requires arbitration (see s 127 of the Act).

²²⁰See s 51(6) which was added to the Labour Relations Act, 1995 by the Labour Relations Amendment Act, 1995.

²²¹See the discussion earlier regarding a council's dispute resolution function in terms of s 51(3).

²²²See s 52(1). Section 52 was substituted in terms of the Labour Relations Amendment Act 42 of 1996.

4.3 WORKPLACE FORUMS

4.3.1 Introduction

With the opening up of the international economic market, the need for South African businesses to become more competitive has become imperative.²²³ In order to achieve this, productivity needs to be improved.²²⁴ This may entail the restructuring of workplaces, the introduction of new technology and new work methods, changes in the organisation of work as well as mergers.

The drafters of the Labour Relations Act, 1995 appreciated that collective bargaining was not the ideal channel for the realisation of these objectives. Collective bargaining is adversarial in nature and is essentially geared to the distributive aspects of industrial relations such as higher wages, bonuses, leave pay, sick pay et cetera. What was needed, was a second channel of industrial relations which could deal with these workplace related issues.

This second channel has found form in workplace forums provided for in chapter V of the Labour Relations Act, 1995. Their purpose is not to undermine collective bargaining but to supplement it. In essence, they are meant to relieve collective bargaining of functions to which it is not well suited.²²⁵

Workplace forums are meant to afford employees a greater say or greater degree of participation in workplace related issues and to improve relations between labour and management.²²⁶ The drafters hoped that increased worker participation in the day-to-day running of the workplace through these forums would, in the long run, increase pro-

²²³See Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 257 and 265.

²²⁴See the *Explanatory Memorandum* of the Ministerial Legal Task Team published as notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 135.

²²⁵See the *Explanatory Memorandum* of the Ministerial Legal Task Team published as notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 135 and 137. See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 227 and Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 532-533.

²²⁶See the *Explanatory Memorandum* of the Ministerial Legal Task Team published as notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 136.

ductivity and so promote the country's competitiveness in the international economic market.²²⁷

In the paragraphs below, the manner in which workplace forums come into existence and their functions will be analysed. These aspects will be considered in the context of the overriding question - how do workplace forums affect employer prerogative?

4.3.2 The Establishment of Workplace Forums

The Labour Relations Act, 1995 makes provision for the establishment of workplace forums in workplaces²²⁸ in which more than a 100 employees²²⁹ are employed.²³⁰ The establishment of workplace forums are therefore limited to larger employers. The rationale was probably that the establishment of workplace forums would be too burdensome and expensive²³¹ for smaller employers.²³²

The establishment of workplace forums are effected by trade unions.²³³ Employers therefore have no say in the initial decision to establish forums at their workplaces. The

²²⁷See the *Explanatory Memorandum* of the Ministerial Legal Task Team published as notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 115 as well as 135 where they state "In creating a structure for ongoing dialogue between management and workers, statutory recognition is given to the realization that unless workers and managers work together more effectively they will fail adequately to improve productivity and living standards". See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 227.

²²⁸"Workplace" is defined in s 213 of the Labour Relations Act, 1995. Essentially, it means the place or places where the employees of an employer work. If an employer carries on two or more operations which are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.

²²⁹"Employee" is defined in chapter V of the Act to mean any person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to represent the employer in dealings with the workplace forum or to determine policy and take decisions on behalf of the employer which may be in conflict with the representation of employees in the workplace (see s 78(a)).

²³⁰See s 80(1).

²³¹Consider, for instance, the fact that the employer must, at its cost, provide fees, facilities and materials necessary for the conducting of elections. It must also, at its cost, provide administrative and secretarial facilities (see clause 8(a)(i) and (ii) of Schedule 2 to the Labour Relations Act, 1995 entitled "Guidelines for constitution of workplace forum" (hereafter referred to as Schedule 2)).

²³²This becomes apparent when one considers the number of different meetings that must be held at the workplace. A small enterprise might not have the necessary managerial manpower to hold all these meetings.

²³³See s 80(2) which provides that any representative trade union may apply for the establishment of a forum.

reason for this is to alleviate the fears of trade unions that workplace forums would undermine them.²³⁴

Not every trade union can apply for the establishment of a workplace forum. In terms of s 80(2) of the Labour Relations Act, 1995, application may be made by a "representative" trade union. A "representative" trade union is defined as a registered trade union, or two or more registered trade unions acting jointly, which have as members the majority of the employees in the workplace.²³⁵ The Act also entitles a representative trade union which is recognised by the employer for the purposes of collective bargaining in respect of all employees in a workplace, to apply for the establishment of a workplace forum.²³⁶

The procedure for applying for the establishment of a workplace forum is regulated in the Labour Relations Act, 1995. It is fairly simple. The representative trade union must apply to the Commission in the prescribed²³⁷ form.²³⁸ In addition, it must satisfy the Commission that a copy of the application has been served²³⁹ on the employer.²⁴⁰ Upon receiving the application, the Commission must consider it and satisfy itself that the employer employs more than 100 employees,²⁴¹ that the applicant is a representative

²³⁴See the *Explanatory Memorandum* of the Ministerial Legal Task Team published as notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 137.

²³⁵See s 78(b).

²³⁶See s 81(1) of the Labour Relations Act, 1995. D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 243 state that this provision "appears to be a concession to COSATU's proposal that the composition of the workplace forum should be the shop steward committee". The authors point out, however, that unions are seldom likely to comply with these requirements because they are usually recognised as bargaining agents for particular *bargaining units* and not for *workplaces* as required in this subsection.

²³⁷"Prescribed" is defined in s 213 to mean prescribed from time to time by regulation in terms of s 208 of the Act. Section 208 is headed "regulations" and provides that the Minister, after consulting NEDLAC and when appropriate, the Commission, may make regulations not inconsistent with this Act relating to inter alia any matter that in terms of the Act may or must be prescribed.

²³⁸See s 80(2).

²³⁹"Serve" is defined in s 213 to mean send by registered post, telegram, telex, telefax or to deliver by hand.

²⁴⁰See s 80(3).

²⁴¹See s 80(5)(b)(i) read with s 80(1). Section 80(5)(b)(i) actually states that "100 or more" employees must be employed. However, in view of s 80(1), the employer must employ *more than* 100.

trade union²⁴² and that there is no functioning workplace forum established in terms of the Labour Relations Act, 1995.²⁴³

If the Commission is satisfied that all these requirements have been met, it must appoint a commissioner to assist the parties to establish a workplace forum by collective agreement or, failing that, to establish one in terms of chapter V of the Labour Relations Act, 1995.²⁴⁴ By making provision for the employer to be involved in the establishment of a workplace forum, it is afforded a larger say in the forum's composition.

The commissioner must convene a meeting with the applicant, the employer and any registered trade union which has members employed in the workplace,²⁴⁵ in order to facilitate the conclusion of a collective agreement.²⁴⁶ If a collective agreement is concluded,²⁴⁷ the provisions of chapter V of the Labour Relations Act, 1995 *do not* apply.²⁴⁸ The exclusion of chapter V has important implications for the way in which the workplace forum will operate. It allows the applicant and the employer to regulate every aspect regarding the workplace forum including its composition, the election of its members, the appointment of an election officer, the procedure and manner in which elections and ballots must be held, the terms of office of its members and the circumstances and manner in which meetings must be held.

The exclusion of chapter V also allows the parties to regulate the functions of the workplace forum.²⁴⁹ Nevertheless, the statutory provisions regarding a workplace forum's

²⁴²See s 80(5)(b)(ii) read with s 80(2) and 78(b).

²⁴³See s 80(5). It appears that if there is a functioning non-statutory workplace forum, the Commissioner must ignore it and proceed with the other requirements in s 80 for the establishment of a workplace forum.

²⁴⁴See s 80(6).

²⁴⁵Those trade unions which are included in the meeting as workplace forums are established for all the employees in the workplace (see s 79(a) which stipulates that workplace forums must seek to promote the interests of "all employees in the workplace, whether or not they are trade union members").

²⁴⁶See s 80(7).

²⁴⁷In terms of s 80(7), the agreement is to be concluded by all three parties but if that is not possible, only the applicant union and the employer need to conclude the agreement.

²⁴⁸See s 80(8).

²⁴⁹Section 80(8) was amended by the Labour Relations Amendment Act 42 of 1996. Before its amendment, it read as follows, "If a collective agreement is concluded, the remaining provisions of this Chapter do not apply". The Labour Relations Amendment Act deleted the word "remaining". Accordingly, not only the provisions from s 80(9) onwards in chapter V are excluded, but also those which preceded s 80(8), including s 79 which regulates the general functions of a workplace forum.

functions will usually constitute the minimum terms.²⁵⁰ If the employer refuses to agree to (at least) the statutory terms, there may be no collective agreement and the provisions of chapter V, including those regulating a workplace forum's functions, come into operation. There may, however, be instances where a trade union is prepared to agree to terms less favourable than the statutory ones. Usually, this will be as a trade off for something else, or where the union does not want to undermine existing collective agreements.

If no collective agreement is concluded, chapter V of the Labour Relations Act, 1995 regulates the establishment of a workplace forum.²⁵¹ The commissioner must meet with the parties in order to facilitate agreement between them on the provisions of a constitution for the workplace forum in accordance with s 82 of the Labour Relations Act, 1995, taking into account the guidelines in Schedule 2.²⁵² Section 82 regulates the way in which a workplace forum operates. It lays down 23 topics²⁵³ which the constitution must regulate such as the workplace forum's composition,²⁵⁴ the election of its members,²⁵⁵ the appointment of an election officer,²⁵⁶ the procedure and manner in which elections and ballots must be held,²⁵⁷ the terms of office of its members²⁵⁸ and the circumstances and manner in which meetings must be held.²⁵⁹

In addition to these obligatory terms, s 82 lays down three topics which the constitution may deal with.²⁶⁰ One is the inclusion of provisions which "depart" from ss 83-92 of the Labour Relations Act, 1995.²⁶¹ In terms of this provision, the parties may regulate the

²⁵⁰See s 79 read with ss 84 and 86. See also par 4.3.3 below where the statutory functions of a workplace forum are discussed.

²⁵¹See s 80(6).

²⁵²See s 80(9).

²⁵³See s 82(1)(a)-(w). Subsec (w) was added by the Labour Relations Amendment Act 42 of 1996.

²⁵⁴See subsec (1)(a) and (b).

²⁵⁵See subsec (1)(c).

²⁵⁶See subsec (1)(d).

²⁵⁷See subsec (1)(g).

²⁵⁸See subsec (1)(k).

²⁵⁹See subsec (1)(n).

²⁶⁰See subsec (2)(a)-(c).

²⁶¹See subsec (2)(c).

workplace forum's consultation and joint decision-making functions in the constitution.²⁶² However, the statutory provisions regarding these functions will usually constitute the minimum terms.²⁶³ A trade union will in all probability only agree to terms less favourable than those in ss 84 and 86 of the Labour Relations Act, 1995 as a trade off for something more important to it and its members or where the union does not want to undermine existing collective agreements.

If no agreement is reached on any²⁶⁴ of the provisions of a constitution, the commissioner must establish a workplace forum and determine the provisions of the constitution in accordance with s 82, taking into account the guidelines in Schedule 2.²⁶⁵ Under these circumstances, the consultation and joint decision-making functions of the workplace forum are regulated by s 79 read with ss 84 and 86 of the Labour Relations Act, 1995.²⁶⁶

4.3.3 The Functions of Workplace Forums

Workplace forums established by collective agreement²⁶⁷ function in terms of that agreement and are not subject to chapter V of the Labour Relations Act, 1995's provisions regarding the functions of workplace forums, unless the parties have stipulated that those provisions are included in the agreement.

²⁶²These functions are regulated in ss 84 and 86.

²⁶³This is because the parties are covered by all the provisions in chapter V including s 79, which regulates the functions of workplace forums and ss 84 and 86 which deal in detail with these two functions. Should they be unable to reach consensus about these functions in the constitution, the statutory provisions will prevail.

²⁶⁴D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 241 point out that the word "any" is ambiguous. According to them, it could mean that the commissioner must step in if the parties fail to agree on any given one of the provisions or, alternatively, if they cannot agree on any at all. However, clause 1(2) of Schedule 2 offers a guideline. It provides that "if agreement is not possible, either in whole or in part, the commissioner must refer to this Schedule, using its guidelines in a manner that best suits the particular workplace involved". According to the authors, this suggests that "any" should be read as meaning "one or more".

²⁶⁵See s 80(10).

²⁶⁶It is suggested that the commissioner drafting the constitution is unlikely to interfere with the statutory provisions regulating the consultation and joint decision-making functions of the workplace forum by implementing s 82(2)(c) of the Labour Relations Act, 1995.

²⁶⁷See s 80(6) as well as par 4.3.2 above.

The functions of workplace forums established in terms of chapter V are regulated in the chapter.²⁶⁸ Section 79 lays down four functions. Two are in the form of duties²⁶⁹ whereas the other two are rights which workplace forums enjoy as against the employer.²⁷⁰

With regard to the duties, workplace forums are firstly enjoined to seek to promote the interests of all employees²⁷¹ in the workplace, whether or not they are trade union members.²⁷² This distinguishes workplace forums from trade unions whose primary objective is to promote the interests of their members. Often, however, the advantages negotiated on their members' behalf are also extended by the employer to its non-unionised employees.²⁷³

Secondly, workplace forums must seek to enhance efficiency in the workplace.²⁷⁴ This duty is owed to the employer and is reflective of one of the primary reasons for the statutory regulation of workplace forums.²⁷⁵ This duty also sets workplace forums apart from trade unions which do not owe such a duty towards employers. Their duty is to protect and promote their members' interests in the workplace. They are thus focussed on the distributive aspects of industrial relations such as increases and bonuses and on issues such as safety and health.²⁷⁶

As was mentioned earlier, s 79 of the Labour Relations Act, 1995 affords workplace forums two rights. They are entitled to be *consulted* by the employer with a view to

²⁶⁸See s 80(6) read with subsecs (9) and (10).

²⁶⁹See subsecs (a) and (b).

²⁷⁰See subsecs (c) and (d).

²⁷¹"Employee" is defined in s 78(a) to exclude senior managerial employees whose contracts of employment or status confers the authority to represent the employer in dealings with the workplace forum or determine policy and take decisions on behalf of the employer which may be in conflict with the representation of employees in the workplace.

²⁷²See s 79(a).

²⁷³This factor is one of the rationales behind the agency shop agreement provided for in s 25 of the Labour Relations Act, 1995. See par 4.2.4 above where this agreement is discussed.

²⁷⁴See s 79(b).

²⁷⁵See par 4.3.1 above in this regard.

²⁷⁶See par 1.6.1.2 of chapter 1 where the aims of employees and their trade unions are discussed. See also par 4.3.1 above where reference is made to trade unions, their objectives and the adversarial nature of collective bargaining.

reaching consensus about a number of matters referred to in s 84 of the Act. They are also entitled to participate in *joint decision-making* about the matters referred to in s 86 of the Act.

In order to exercise these two rights effectively, a workplace forum needs information. Section 89 regulates the disclosure of information by the employer to the workplace forum. In terms of this section, the employer must disclose all relevant information that will allow the forum to engage effectively in consultation and joint decision-making.²⁷⁷ The employer is not required to disclose information that is legally privileged²⁷⁸ or that it is prohibited to disclose by any law or court order.²⁷⁹ It also provides that an employer is not required to disclose confidential information which, if disclosed, may cause substantial harm to it or an employee.²⁸⁰ It furthermore provides that an employer is not required to make private personal information relating to an employee available unless the employee consents to such a disclosure.²⁸¹

The restriction regarding confidential information and personal information relating to an employee is not absolute. The Act affords a commissioner with a discretion to order the disclosure of such information.²⁸² In order to decide if he must make such an order, the commissioner must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of the workplace forum to engage effectively in consultation and joint decision-making.²⁸³

The legislature appreciated the serious implications that such a disclosure might hold for an employee or employer and has accordingly provided some safeguards. The commissioner may order the disclosure on terms designed to limit the harm likely to be caused.²⁸⁴ In addition, he must take into account any breach of confidentiality in respect

²⁷⁷See s 89(1).

²⁷⁸Privilege is usually claimed in respect of documents prepared for the purpose of obtaining professional legal advice; State documents and communications made "without prejudice".

²⁷⁹See s 89(2)(a) and (b).

²⁸⁰See s 89(2)(c).

²⁸¹See s 89(2)(d).

²⁸²See s 89(3)-(8).

²⁸³See s 89(8).

²⁸⁴See s 89(9).

of information disclosed in the past in terms of s 89 at that workplace and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in his award.²⁸⁵

A workplace forum's functions to *consult* about and to *jointly decide* certain matters with an employer, and their effect on employer prerogative, are discussed below.

4.3.3.1 The Right to be Consulted

Section 85 is headed "consultation" and regulates the meaning of consultation for purposes of chapter V of the Labour Relations Act, 1995. Section 85(1) requires an employer, prior to implementing a proposal in relation to any matter listed in s 84(1) of the Act, to consult the workplace forum and attempt to reach consensus about it.

A few comments about s 85(1) are warranted. It restricts the initiation of consultation about matters listed in s 84(1) to the employer. Accordingly, the workplace forum cannot initiate consultation. This distinguishes consultation in terms of s 85(1) from collective bargaining where both the employer and the trade union may initiate negotiations about matters of mutual interest.²⁸⁶

The word "proposal" indicates that the employer may not have decided the issue when consultation commences.²⁸⁷ The fact that the employer must "attempt to reach consensus" with the workplace forum significantly changes the distinction between consultation and collective bargaining. The distinction is no longer that, when consulting, the employer needs only to seek advice or confer.²⁸⁸ It must now, as in the case of collective bargaining, seek to reach agreement.²⁸⁹ The distinguishing feature between con-

²⁸⁵See s 89(10).

²⁸⁶See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 248.

²⁸⁷With regard to the timing of consultation in the context of retrenchment, s 189(1) of the Labour Relations Act, 1995 requires that consultation must take place when an employer "contemplates" dismissal. The word "contemplate" clearly indicates that the employer must consult at the stage when it has not yet reached a final decision to dismiss, but has only foreseen the possibility of dismissal. See par 3.4.3.3.4.2 of chapter 3 where consultation in the context of retrenchment is discussed.

²⁸⁸See *Metal & Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) at 493H-I.

²⁸⁹See *Metal & Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) at 493H-I where bargaining was defined as "to haggle or wrangle so as to arrive at some agreement on terms of give and take". The statutory meaning of consultation is similar to the appellate division's interpretation of "consult" in the context of retrenchment in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) at 1253E where it held that it should be seen as a "joint problem-solving exercise with the parties striving for consensus where possible". See par 3.4.3.3.4.2 of chapter 3 where consultation in the context of retrenchment is discussed.

sultation in terms of s 85(1) and collective bargaining is essentially the manner in which the parties must try to reach agreement. Collective bargaining is adversarial in nature and the parties try to reach consensus through the exertion of various forms of pressure including economic pressure such as strikes and lock-outs.²⁹⁰ The parties involved in consultation in terms of s 85(1), however, try to reach agreement by means of conciliation.²⁹¹

Section 85 regulates the manner in which the employer must try to reach consensus with the workplace forum. It must allow the workplace forum an opportunity during the consultation to make representations and to advance alternative proposals.²⁹² It must consider and respond to the representations or alternative proposals made by the workplace forum and, if it does not agree with them, it must state the reasons for disagreeing.²⁹³

If the parties are unable to reach consensus, two possibilities arise. If the employer and the trade union have not made provision for a deadlock-breaking mechanism in the workplace forum's constitution, the employer may unilaterally implement its proposal regarding the particular matter or matters listed in s 84(1). If, however, the constitution contains such a mechanism, the deadlock must be dealt with in accordance with it.²⁹⁴ This may entail that the deadlock must first be conciliated and if this fails to break the deadlock, it must be arbitrated.²⁹⁵

Section 84(1) states that "unless the matters for consultation are regulated by a collective agreement with the representative trade union", a workplace forum is entitled to be consulted about the matters listed in the section. It is suggested that two interpretations can be accorded to the quoted words. The words may be taken to mean that, unless the matters listed in s 84 have been collectively bargained about by the representative trade

²⁹⁰See chapter 6 where the different forms of economic pressure exerted by the union and its members against the employer are discussed. See chapter 7 where the different forms of economic pressure exerted by the employer against the trade union and its employees are discussed.

²⁹¹See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 247.

²⁹²See s 85(2).

²⁹³See s 85(3).

²⁹⁴See s 85(4) read with s 82(2)(a).

²⁹⁵See s 82(2)(a).

union and the employer and regulated in a collective agreement, they are subject to consultation.²⁹⁶ In terms of this interpretation, only those matters listed in s 84 which have not been collectively bargained about will be subject to consultation by the workplace forum.

In the second instance, the quoted words may be interpreted to mean that, unless the trade union and the employer have determined which matters will be fit for consultation by a workplace forum in a collective agreement, the workplace forum will be entitled to consult about the matters listed in s 84.

Nearly half of the matters listed in s 84(1) relate to the economic or business component of an enterprise.²⁹⁷ The rationale for the inclusion of these matters was probably that, although most economic or business decisions impact to some extent upon employees, the impact of these matters was more direct and far-reaching.

The employer must, for instance, consult about the restructuring of the workplace, including the introduction of new technology and new work methods.²⁹⁸ It must also consult over partial or total plant closures.²⁹⁹ Section 84 furthermore requires the employer to consult over mergers³⁰⁰ and transfers of ownership³⁰¹ in so far as they have an impact on the employees.

²⁹⁶See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 254 who seem to support this interpretation.

²⁹⁷See par 1.2 of chapter 1 where the distinction is made between the business or economic sphere of an enterprise and the human resources or labour component thereof.

²⁹⁸See subsec (a). Such a restructuring does not cause the employees to become redundant, but their dismissal may become necessary for operational reasons if they refuse or are unable to learn how to use the new machinery (see par 3.4.3.3.4 of chapter 3 where dismissal for operational reasons is discussed).

²⁹⁹See subsec (c). This may not necessarily lead to employees' redundancy, but they may be required to agree to a transfer or to learn different skills so as to be able to do different jobs. Where they do not agree to such alternatives their dismissal may become necessary for operational reasons (see par 3.4.3.3.4 of chapter 3 where this ground for dismissal is discussed).

³⁰⁰See subsec (d). The employer must consult if the merger requires employees to move to other offices, or to accept a transfer or to report to other managers et cetera. Where employees are unable or refuse to accept such changes, they may face dismissal for operational reasons (see par 3.4.3.3.4 of chapter 3 where this reason for dismissal is discussed).

³⁰¹Although s 197 of the Labour Relations Act, 1995 provides that a contract of employment may be transferred from one employer to another without the employee's consent under certain circumstances, such a transfer may impact on the employee. Under such circumstances, the employer is required in terms of s 84(1)(d) to consult with the workplace forum about the matter.

In addition, the section requires the employer to consult about product development plans³⁰² and export promotion.³⁰³ The listing of these two economic or business matters is not as self-explanatory as that of the other economic aspects. Although they have some impact on employees, it will clearly not be as direct as in the case of the other matters. In addition, it requires a certain amount of expertise to be able to make constructive suggestions about these matters; something which very few of the members of the workplace forum will possess.

In addition to these economic or business matters, s 84(1) also lists a number of matters which are directly related to the employees and the day-to-day running of the business. One of the most important of these matters is the dismissal of employees for reasons based on the operational requirements of the business.³⁰⁴ It was listed because it affects employees' job security under circumstances where they are usually³⁰⁵ not at fault. Section 84(1) also lists changes in the organisation of work.³⁰⁶ This matter may also affect employees' job security.³⁰⁷ In addition, it lists job grading,³⁰⁸ criteria for merit increases or the payment of discretionary bonuses,³⁰⁹ education and training³¹⁰ as matters for consultation with the workplace forum.

It is possible for the list of matters in s 84(1) to be extended. Section 84(2), read with s 28(j) of the Labour Relations Act, 1995, entitles a bargaining council to confer on a workplace forum the right to be consulted about additional matters in workplaces which fall within the registered scope of the bargaining council. In terms of s 84(3), a representative trade union and an employer may conclude a collective agreement conferring on the forum the right to be consulted about any additional matters in the workplace. Subject to occupational health and safety legislation such as the Occupational Health and Safety

³⁰²See subsec (j).

³⁰³See subsec (k).

³⁰⁴See subsec (e).

³⁰⁵See par 3.4.3.3.4.1 of chapter 3 where it was shown that not all dismissals for operational reasons are faultless.

³⁰⁶See subsec (b).

³⁰⁷See par 3.4.3.3.4.1 of chapter 3 where dismissal for operational reasons is discussed.

³⁰⁸See subsec (g).

³⁰⁹See subsec (h).

³¹⁰See subsec (i).

Act and the Mine Health and Safety Act, a representative trade union and an employer may agree that the employer must consult with the workplace forum with a view to initiating, developing, promoting, monitoring and reviewing measures to ensure health and safety at work.³¹¹

In conclusion, it is submitted that, although the list of matters in s 24 is extensive and the statutory duty to consult fairly onerous, the employer's prerogative regarding the listed matters is not severely restricted. The statutory duty to consult is essentially a procedural restriction. If the employer has complied with all the statutory requirements and no consensus is reached and provided the workplace forum's constitution does not contain a deadlock breaking mechanism, the employer may unilaterally implement its proposal.

4.3.3.2 The Right to Participate in Joint Decision-making

Section 86 of the Labour Relations Act, 1995 regulates workplace forums' right to participate in joint decision-making about the matters referred to in the section. Section 86(1) requires the employer to consult and reach consensus with a workplace forum before implementing any proposal concerning the matters listed in the section.

As in the case of the duty to consult, it is for the employer to initiate the joint decision-making process about the matters listed in s 86.³¹² It may also not have decided the matter when initiating the process.³¹³ However, this duty is more onerous than the one concerning consultation.³¹⁴ The employer must not merely consult and "attempt" to reach consensus, it must reach consensus. The obligation to reach agreement also sets it apart from collective bargaining which does not require consensus by the parties.

Section 86 also regulates the situation where the parties are unable to reach consensus. If the workplace forum's constitution contains a deadlock-breaking mechanism, the employer may refer the dispute to arbitration in terms of this mechanism.³¹⁵ The work-

³¹¹See s 84(5)(a).

³¹²See s 86(1).

³¹³See s 86(1) which requires consultation and the reaching of consensus about a "proposal".

³¹⁴See par 4.3.3.1 above where this duty is discussed.

³¹⁵See s 86(4)(a) read with s 82(2)(a).

place forum may not make the referral.³¹⁶ In addition, the word "may" denotes choice. The employer is not obliged to make such a referral. If it elects not to submit the deadlock to arbitration, the status quo before the employer initiated the joint decision-making process is retained. This discretion is not afforded to the employer if a deadlock develops during its duty to consult and the constitution of the workplace forum makes provision for a deadlock-breaking mechanism. Under such circumstances, the employer must invoke the mechanism.³¹⁷

If the constitution does not contain such a mechanism, the employer may refer the dispute to the Commission.³¹⁸ The workplace forum may not make the referral.³¹⁹ The Commission must attempt to resolve the dispute through conciliation.³²⁰ If the dispute remains unresolved, the employer may request that the dispute be resolved through arbitration.³²¹ Once again, the employer is under no obligation to refer the deadlock to the Commission and, if it elects to do so, it retains the discretion of whether or not to ask the Commission to arbitrate the matter.

Section 86(1) states that "unless the matters for joint decision-making are regulated by a collective agreement with the representative trade union", a workplace forum is entitled to jointly decide the matters listed in the section. It is suggested that two interpretations can be accorded to the quoted words. The words may be taken to mean that, unless the matters listed in s 86 have been collectively bargained about by the representative trade union and the employer and regulated in a collective agreement, they are subject to joint decision-making.³²² In terms of this interpretation, only those matters listed in s 86

³¹⁶However, a newly established workplace forum which has requested a meeting with the employer to review disciplinary codes and procedures and/or rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to work performance of employees in the workplace, may refer the dispute to arbitration (see s 87(1)(b) and (c) read with subsec (4) of the Labour Relations Act, 1995).

³¹⁷See s 85(4) read with s 82(2)(a) as well as par 4.3.3.1 above where this duty of the employer is discussed.

³¹⁸See s 86(4)(b).

³¹⁹However, a newly established workplace forum which has requested a meeting with the employer to review disciplinary codes and procedures and/or rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to work performance of employees in the workplace, may refer the dispute to the Commissioner (see s 87(1)(b) and (c) read with subsec (4) of the Labour Relations Act, 1995).

³²⁰See s 86(6).

³²¹See s 86(7).

³²²See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 254 who seem to support this interpretation.

which have not been collectively bargained about will be subject to joint decision-making by the workplace forum.

In the second instance, the quoted words may be interpreted to mean that, unless the trade union and the employer have determined which matters will be fit for joint decision-making by a workplace forum in a collective agreement, the workplace forum will be entitled to jointly decide the matters listed in s 86.

In terms of subsec (a), the parties must jointly decide about disciplinary codes and procedures. In the past, employers and trade unions have often concluded agreements about disciplinary procedures³²³ but it has been generally accepted that disciplinary codes are employers' prerogative.³²⁴ Subjecting this matter to joint decision-making with a workplace forum represents a drastic curtailment of employers' right to decide which conduct will be acceptable in the workplace.

Subsection (b) stipulates that employers and workplace forums must jointly decide on rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees. This matter relates to rules about workplace safety such as the wearing of safety equipment and clothing, the handling of machinery and the reporting of faulty equipment and machinery. The rationale was probably that the employees' physical well-being is at stake and, seeing that they are the ones doing the work, they will be able to make some valuable suggestions.

In terms of subsec (c), the employer and the workplace forum must jointly decide on measures³²⁵ designed to protect and advance persons disadvantaged by unfair discrimination. The introduction of affirmative action programmes is usually an emotive matter. Employees who are to benefit from such programmes are obviously in favour of them whereas those who are not are often sceptical and distrustful. Workplace forums' involvement in the designing of such programmes may promote industrial peace.

Subsection (d) stipulates that employers and workplace forums must jointly decide on changes by the employer, or by the employer-appointed representatives on trusts or

³²³See Halton Cheadle "Workplace Forums" in H Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 74. See also par 5.3.2.25 of chapter 5 where examples are given of collective agreements which contain disciplinary procedures.

³²⁴See par 3.4.2 of chapter 3 in this regard.

³²⁵Such measures may include training programmes for disadvantaged workers and an undertaking by the employer not to take on outsiders to fill vacancies but to offer them to employees.

boards of employer-controlled schemes, to the rules regulating social benefit schemes. Schemes such as pension and provident funds are linked to the social and economic welfare of employees and it therefore seems appropriate for them to have this right.

It is possible for the list of matters in s 86(1) to either be extended or restricted by a collective agreement between a representative trade union and an employer.³²⁶ The list may also be extended by any other law conferring on a workplace forum the right to participate in joint decision-making about additional matters.³²⁷

In conclusion, the range of matters about which a workplace forum can jointly decide with an employer is very limited compared to the range of matters about which it can consult with the employer.³²⁸ However, the reason for this is probably because the workplace forum's right to participate in joint decision-making is undoubtedly more restrictive of the employer's prerogative than its right to be consulted. Once the employer has initiated the joint decision-making process, it must reach consensus with the workplace forum.³²⁹ If this does not happen, its choices are very limited. It may either decide to risk arbitration or it may decide to retain the status quo.³³⁰ In addition, this discretion of the employer may be restricted in terms of s 87 of the Labour Relations Act, 1995. In terms of this section, a newly established workplace forum may initiate a meeting with the employer to review two of the matters listed in s 86(1) for joint decision-making namely disciplinary codes and procedures and rules relating to workplace safety.³³¹ A review of these matters is conducted in accordance with the provisions of s 86(2)-(7) except that, where a deadlock ensues, either the employer or the workplace forum may refer the dispute to arbitration in terms of the deadlock-breaking mechanism in the constitution or to the Commission.³³²

³²⁶See s 86(2).

³²⁷See s 86(3).

³²⁸See par 4.3.3.1 above where the matters about which the employer must consult the workplace forum are discussed.

³²⁹See s 86(1) as well as the discussion earlier in this paragraph.

³³⁰See s 86(4)-(7) as well as the discussion earlier in this paragraph.

³³¹See subsec (1).

³³²See subsec (4).

4.4 CONCLUSION

In the Labour Relations Act, 1995 collective bargaining is clearly seen as a method of limiting or regulating employer prerogative. Nevertheless, the support of collective bargaining in the Act does not extend as far as implementing compulsion.³³³ It does, however, provide effective mechanisms for encouraging or promoting collective bargaining.³³⁴

The effectiveness of collective bargaining as a means of regulating employer prerogative is, of course, dependent on the topics about which collective bargaining can take place. The Labour Relations Act, 1995 is phrased in very wide terms and does not restrict the collective bargaining parties' freedom in this regard.³³⁵ In addition, the Basic Conditions of Employment Act affords precedence to collective agreements which regulate terms and conditions of employment also regulated in the Act.³³⁶

The restriction of employer prerogative through collective bargaining is buttressed by the right to strike afforded to employees by the Labour Relations Act, 1995³³⁷ and their protection against dismissal.³³⁸

Clearly, collective bargaining has the potential for restricting employer prerogative. In the next chapter,³³⁹ the actual topics which collective bargaining parties have been prepared to regulate in collective agreements are examined.

As far as workplace forums are concerned, their function to consult does not represent a severe restriction of employer prerogative as this function is essentially procedural in nature. If the employer has complied with all the statutory requirements and no consensus is reached, providing that the workplace forum's constitution does not contain a

³³³See par 4.2.1 above.

³³⁴See par 4.2 above for a discussion of the statutory framework for collective bargaining provided in the Labour Relations Act, 1995.

³³⁵See, for example, the definition of a collective agreement in s 213 of the Labour Relations Act, 1995 and the discussion thereof in par 4.2.6 above.

³³⁶See s 1(3) of the Basic Conditions of Employment Act.

³³⁷See par 6.3.3 of chapter 6 where the statutory right to strike is discussed.

³³⁸See par 6.3.5.2 of chapter 6 where the statutory protection afforded to strikers is discussed.

³³⁹See chapter 5.

deadlock-breaking mechanism, the employer may unilaterally implement its proposal.³⁴⁰ The range of matters about which a workplace forum can exercise its joint decision-making function is limited compared to that about which it can consult, but its joint decision-making function is more restrictive on employer prerogative. Once the employer has initiated the joint decision-making process, it must reach consensus with the workplace forum. If this does not happen, its choices are very limited. It may either decide to risk arbitration or to retain the status quo.³⁴¹

As was mentioned, a workplace forum's purpose is not to undermine collective bargaining but to supplement it.³⁴² In practice, however, it appears that a workplace forum is actually subordinate to collective bargaining. The establishment of a workplace forum is effected by a representative trade union³⁴³ and its powers and functions are either regulated in a collective agreement or by chapter V of the Labour Relations Act, 1995.³⁴⁴ In addition, a representative trade union may also effect the dissolution of a workplace forum by requesting a ballot to dissolve the forum.³⁴⁵ Furthermore, it is foreseen that matters listed in ss 84 and 86 which are regulated in a collective agreement will not be relinquished by a trade union to a workplace forum even though it may effectively control the forum.³⁴⁶ A representative trade union's bargaining power is stronger than that of a workplace forum. It is not prohibited from invoking agreed dispute resolution procedures as is the workplace forum.³⁴⁷ The union also has different forms of economic pressure at its disposal.³⁴⁸ A trade union, however, may consider effecting the establishment of a

³⁴⁰See par 4.3.3.1 above where this function of workplace forums is discussed.

³⁴¹See par 4.3.3.2 above where this function of workplace forums is discussed.

³⁴²See par 4.3.1 above.

³⁴³See par 4.3.2 above.

³⁴⁴*ibid.*

³⁴⁵See s 93(1).

³⁴⁶Trade unions effecting the establishment of workplace forums (see s 80(2) as well as par 4.3.2 above). In addition, in the case of a trade union which has been recognised as the representative trade union for all employees in a workplace, the members of the forum may be elected from among its elected representatives (see s 81(2)). Also, office-bearers or officials of the representative trade union may attend meetings of the workplace forum, including meetings with the employer or the employees (see s 82(1)(u)). Furthermore, the trade unions and employers may agree about which matters the forum must be consulted (see s 84(1) read with (3)) or about which it will have joint decision-making power (see s 86(1) read with (2)).

³⁴⁷In the case of consultation and matters which must be jointly decided (see ss 85(4) and 86(4) as well as pars 4.3.3.1 and 4.3.3.2 above).

³⁴⁸See chapter 6 where the exercising of trade unions' economic power is discussed.

workplace forum if it is unable to reach consensus with the employer during the renegotiation of matters listed in ss 84 and 86. This may be a particularly viable option with regard to the matters listed in s 86 for joint decision-making.

In conclusion, therefore, it appears that collective bargaining remains employees' primary method through which employer prerogative can be restricted and that the degree to which a workplace forum restricts employer's prerogative is largely determined by the representative trade union and collective bargaining.---

CHAPTER 5

THE SCOPE AND CONTENT OF COLLECTIVE BARGAINING

5.1 INTRODUCTION

An indication of the extent to which collective bargaining limits employers' decision-making power in practice can be obtained from an examination of the content of collective agreements. The reason for this is that the provisions of such agreements¹ indicate which matters have been the subject of joint regulation through collective bargaining rather than the subject of unilateral employer determination. Blanpain² explains the effect of collective agreements on employers' decision-making power as follows

Bargaining, even when limited to subjects such as wages, working time, job classification, grievances and the like, necessarily means that the employer does not decide alone on these matters and that those decisions are the result of negotiation and agreement between the employer and the trade unions.

In South Africa, a substantial number of its 14 497 000³ economically active citizens' terms and conditions of employment are regulated by collective agreements.⁴ In the private sector, 823 823 employees' terms and conditions of employment, including wages, are regulated by industrial council agreements.⁵ Three industrial council agreements do

¹Although there is nothing which prevents parties from concluding only one agreement covering all the matters about which they have reached agreement, they may also conclude a number of agreements. Parties may, for instance, first conclude an agreement in terms of which the trade union is recognised as the employees' bargaining agent and the bargaining relationship is established (see par 5.2.1 below in this regard). Thereafter, the employer and the trade union may negotiate that which is often referred to as the "main agreement". In this agreement, the minimum terms and conditions of employment and other matters of mutual interest are normally regulated. The provisions of such a main agreement, especially those dealing with wages and other types of remuneration, will usually be open to re-negotiation on a regular basis (see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 285). In addition to the main agreement, the parties may also enter into further, separate agreements in terms of which, for instance, pension and other provident funds are created or the agreed procedures are set out for retrenchment, dispute settling et cetera (see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 285-286). It is also possible that an employer and employees may be bound by a statutory collective agreement, such as a bargaining council agreement, as well as a private or non-statutory agreement which regulates aspects peculiar to that particular enterprise.

²Roger Blanpain "The Influence of Labour on Management Decision Making: A Comparative Legal Survey" (1974) 3 *ILJ(UK)* 5 at 9.

³See page 1 of the statistical supplement to the *Annual Report: Public Service Commission 1995* RP 76/1996.

⁴All the figures mentioned in this paragraph were obtained from reports compiled for the year ending 1995.

⁵See page 15 of the *Annual Report 1995: Department of Labour* RP 101/1996. See also Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 429.

not regulate wages but they do regulate the other terms and conditions of employment of an additional 698 823 private sector employees.⁶ The Public Service⁷ employs 1 270 112 people.⁸ Approximately 1 031 100⁹ of these workers' terms and conditions of employment are regulated in collective agreements concluded in the various chambers of the Public Service Bargaining Council.¹⁰ In the mining industry, approximately 410 863 workers' terms and conditions are regulated by collective agreements concluded by trade unions and the Chamber of Mines.¹¹ The education sector employs approximately 364 545 educators.¹² Their terms and conditions of employment are also regulated in collective agreements concluded by the Education Labour Relations Council.¹³ The Police Service comprises of 140 941 members.¹⁴ Their terms and conditions are regulated in collective agreements concluded by a national and provincial negotiating forums established in terms of the regulations for the South African Police Service.¹⁵ In addition to these figures, the following must be added: approximately 30 000 employees whose

⁶See page 16 of the *Annual Report 1995: Department of Labour RP 101/1996* as well as Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 429.

⁷Public Service personnel are employed by the national departments and the nine provincial administrations as indicated in schedules 1 and 2 of the Public Service Act.

⁸See page 1 of the statistical supplement to the *Annual Report: Public Service Commission 1995 RP 76/1996*.

⁹The terms and conditions of employment of members of the Department of Defence, excluding the administrative staff of the Department, are not regulated in collective agreements as there are no unions which bargain on behalf of these members. According to the statistical supplement of the *Annual Report: Public Service Commission 1995 RP 76/1996* (see page 3), the Department consists of 98 071 members. Members of the Department of Safety and Security's (ie Police Service members) terms and conditions of employment are regulated at a separate collective bargaining forum (see the discussion later in this paragraph).

¹⁰See the Public Service Labour Relations Act 102 of 1993 where the different collective bargaining structures in the Public Service and their functions are regulated. This Act must be read in conjunction with clauses 14, 15 and 20 of Schedule 7.

¹¹See page 16 of *South African Mining Industry: Statistical Tables 1995*. This figure covers people employed in gold and coal mines. It does not include workers in diamond mines and other types of mines.

¹²See page 75 of the *Department of Education Annual Report 1996 RP 55/1997*. The figure includes educators in both public and private ordinary schools as well as educators in special schools, technical colleges and teacher training centres.

¹³In terms of the Education Labour Relations Act 146 of 1993. These collective agreements are usually transmitted to the Minister of National Education who extends them to non-unionised educators (see s 12(6)(a) of the Act). This Act must be considered in conjunction with clauses 16 and 17 of Schedule 7.

¹⁴See page 4 of the *Annual Report: Public Service Commission 1995 RP 76/1996*.

¹⁵Published as notice R 1489 in Government Gazette 16702 of 27 September 1995. See also clause 18 of Schedule 7 which makes provision for the continued existence of the National Negotiating Forum.

terms and conditions of employment are governed by the non-statutory national bargaining forum in the automobile industry¹⁶ and a further 100 000 employees in the chemicals sector whose terms and conditions are also regulated by a non-statutory forum.¹⁷

It appears that the terms and conditions of employment of approximately 3 600 095 employees are regulated by collective agreements. This figure represents 24,83% of the 14 497 000 economically active citizens of the country and 50,86% of the 7 078 000¹⁸ employees in formal wage employment.

In the paragraphs below, the matters about which employers and trade unions have reached agreement are considered.¹⁹ It must be stressed that the scope of collective bargaining or, put differently, the matters about which employers and trade unions have reached agreement, vary from one bargaining relationship to another.²⁰ Consequently, the matters referred to below have not necessarily been agreed to by *all* collective bargaining parties in South Africa. They also do not represent an exhaustive list of the matters about which employers and trade unions have reached agreement.

The matters have been divided into different categories. In the first category, matters relevant to collective bargaining are examined.²¹ In the second category, matters relating to the individual employment relationship are discussed.²² Here, the methodology is essentially the same as that adopted in chapters two²³ and three.²⁴ Accordingly,

¹⁶See Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 430.

¹⁷*Ibid.*

¹⁸According to the statistics of the Department of Labour, the total number of persons in formal wage employment in 1995 were 7 078 000 (see Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 429).

¹⁹In this regard, published industrial council agreements, concluded in terms of the Labour Relations Act, 1956, as well as non-statutory collective agreements, have been examined. On occasion, matters in respect of which parties have reached agreement have been gleaned from newspapers and periodicals dealing with collective bargaining such as the *South African Labour News*.

²⁰See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) at 261.

²¹See par 5.2 below.

²²See par 5.3 below.

²³See par 2.1 of chapter 2 where the methodology adopted for that chapter is set out.

²⁴See par 3.1 of chapter 3 where the methodology adopted for that chapter is set out.

preconditions to employment are considered first.²⁵ Thereafter, terms and conditions of employment are examined.²⁶ In the third category, matters which have no direct bearing on the employment relationship, such as economic policies and political issues, are considered.²⁷

5.2 MATTERS RELEVANT TO COLLECTIVE BARGAINING

5.2.1 Recognition and Organisational Rights —

By recognising a trade union as the representative of all or a number of its employees, an employer explicitly indicates that at least certain aspects of the employment relationship as well as other facets will be the subject of negotiation and joint regulation rather than being the subject of the sole prerogative of the employer.²⁸

Recognition normally includes the affording of organisational rights to the trade union. The organisational rights contained in collective agreements are often similar to those provided for in the Labour Relations Act, 1995²⁹ but, in certain instances, they are more favourable.

Collective agreements often afford trade union officials access to employers' premises for bargaining purposes,³⁰ meetings with members,³¹ the distribution of trade union

²⁵See par 5.3.1 below.

²⁶See par 5.3.2 below.

²⁷See par 5.4 below.

²⁸See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 289-290; Edwin Cameron, Halton Cheadle and Clive Thompson *The New Labour Relations Act: The Law after the 1988 Amendments* (1989) at 27 and Johan Piron *Recognition or Rejection? Trade Union Recognition in South Africa* 2 ed (1984) 7-9. See also *Black Allied Workers Union (SA) v PEK Manufacturing Co (Pty) Ltd* (1990) 11 ILJ 1095 (IC) at 1097G-H.

²⁹For a discussion of the organisational rights afforded by the Labour Relations Act, 1995 see par 4.2.3 of chapter 4. Of interest is the fact that none of the collective agreements that have been examined make provision for the disclosure of relevant information by the employer to shop stewards. It is, however, foreseen that agreements concluded in terms of the Labour Relations Act, 1995 will probably contain such provisions.

³⁰See clause 20 of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, in terms of which the employer, after prior arrangement with the trade union, must allow trade union officials to enter its establishment at off-peak periods. See also clause 3.4.1 of the agreement entered into between Amcoal Colliery & Industrial Operations Limited, Elandsrand Gold Mining Company Limited, Freegold Consolidated Gold Mines (Operations) Limited, Vaal Reefs Exploration & Mining Company Limited and Western Deep Levels Limited (the mine parties) and the National Union of Mineworkers (hereafter referred to as the Code of Conduct), in terms of which the right of access to company property by union officials is acknowledged as a labour

documentation³² and the use of the employer's notice boards for notices by the union.³³ They also frequently contain provisions arranging check-off facilities.³⁴ Often, agreements contain provisions about the election of shop stewards,³⁵ the *manner* in which they are to be elected,³⁶ their number and whether they will be full-time or part-time shop stewards.³⁷ Agreements also frequently afford shop stewards facilities such

right.

³¹In terms of clause 3.7 of the Code of Conduct the parties agree that the following principles will underpin the terms upon which the union will be entitled to hold mass meetings with its members: on union request, management must make meeting facilities available wherever practically possible; attendance at such meetings will be voluntary and no employee will be coerced in any way to attend mass meetings; traditional cultural expression in the form of singing and dancing will be allowed and the union will ensure that behaviour which incites violence does not occur at mass meetings. See also clause 22(2) of the Building Industry, North and West Boland: Main Agreement published as notice R 805 in Government Gazette 16452 of 9 June 1995.

³²In terms of clause 14(3) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992 the trade union is entitled to distribute its newspaper on company premises.

³³See in this regard clause 9 of the Recognition Agreement between Mercedes-Benz of South Africa (Pty) Limited (East London) and the National Union of Metal Workers of South Africa concluded on 13 July 1989 (hereafter the Recognition Agreement between Mercedes-Benz and NUMSA) in terms of which the union is entitled to make use of specifically demarcated sections of company notice boards for the display of union notices and union documents subject to the condition that the shop stewards must first submit every notice or document to the industrial relations manager before it is displayed.

³⁴See, for instance, clause 20(2) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991 in terms of which the employer must deduct from the wages the subscription and/or levy payable by an employee to the trade union and must forward, for the benefit of the union, the total amount so deducted during any one month, together with a list showing the names of the employees, to the secretary of the industrial council by no later than the 15th day of the month following that in which the deductions were due. See also clause 3.4.1 of the Code of Conduct in terms of which the right to stop order facilities is acknowledged as a labour right. See further clause 21.2 of the Building Industry (Transvaal) Main Agreement published as notice R 1994 in Government Gazette 16095 of 19 November 1994.

³⁵See clause 22 of the Building Industry, North and West Boland: Main Agreement published as notice R 805 in Government Gazette 16452 of 9 June 1995.

³⁶The actual organising of the election is normally left to the trade union. See, for example, clause 6 of the Recognition Agreement between Mercedes-Benz and NUMSA where it has been agreed that shop stewards are to be elected in accordance with the union's constitution. The union must give the employer written notice of any pending elections prior to calling for nominations and must furnish the company in writing with the names of the elected shop stewards.

³⁷See, for instance, clause 7 of the Recognition Agreement between Mercedes-Benz and NUMSA and clause 9 of the Contract Cleaning Industry (Natal) Amendment of Main Agreement published as notice R 620 in Government Gazette 15596 of 31 March 1994.

as office space,³⁸ telephones, fax machines and notice boards,³⁹ stationery and other administrative requirements and even transport.⁴⁰ A number of agreements also afford shop stewards time off to attend to their duties⁴¹ and/or grant them paid leave for the periods in which they undergo training.⁴²

Recognition may also include agreement on the bargaining level⁴³ as well as the

³⁸In terms of clause 7.4 of the Recognition Agreement between Mercedes-Benz and NUMSA, full-time shop stewards are entitled to work from an office provided by the company. See also clause 13(2) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992.

³⁹See clause 13(2) of the Agreement for the Knitting Industry, Transvaal which is published as notice R 3124 in Government Gazette 14395 of 13 November 1992.

⁴⁰See "TGWU to Raise Pressure for Centralisation" (1992) 4(3) *South African Labour News* 12. It is interesting to note that the Labour Relations Act, 1995 does not make provision for the making available of such facilities to shop stewards. However, it does require that the constitution of a workplace forum contain provisions about such facilities (see s 82(1)(r) read with clause 8 of Schedule 2).

⁴¹See, for example, clause 20(3) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991. In terms of clause 13 of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, shop stewards are granted four days per year paid leave on condition that all such leave is subject to the operational requirements of the establishment. In addition, one day's notice for such time off must be given and all leave granted must be used to attend bona fide industry-related trade union activities. See also clause 34(2) of the Clothing Industry, Eastern Province: Amendment of Main Agreement published as notice R 1037 in Government Gazette 17270 of 28 June 1996 in terms of which shop stewards are entitled to five days paid leave per annum per shop steward to attend to their trade union duties. This clause further provides that this leave may be pooled and that the shop stewards are entitled to use the pooled leave to attend to trade union duties "in any manner that the trade union deems fit...".

⁴²See clause 8.1.2 of the Recognition Agreement between Mercedes-Benz and NUMSA; clause 34 of the Clothing Industry, Eastern Province: Amendment of Main Agreement published as notice R 1037 in Government Gazette 17270 of 28 June 1996; clause 23 of the Leather Industry, Republic of South Africa: Amendment of Agreement for the Tanning Section published as notice R 219 in Government Gazette 16266 of 17 February 1995 and clause 33 of the Furniture Manufacturing Industry, Orange Free State: Main Agreement published as notice R 1427 in Government Gazette 15918 of 19 August 1994.

⁴³See, for instance, clause 13 of the Building Industry, Western Province: Amendment of Agreement for the Boland published as notice R 1671 in Government Gazette 16782 of 27 October 1995, which stipulates that bargaining takes place at sectoral level. See also clause 26 of the Building Industry (Transvaal) Main Agreement published as notice R 1994 in Government Gazette 16095 of 19 November 1994 and clause 5 of the Contract Cleaning Industry (Natal) Amendment of Main Agreement published as notice R 620 in Government Gazette 15596 of 31 March 1994. The majority of the big trade unions have developed a preference for centralised bargaining. SACCAWU, for instance, demanded centralised bargaining in the commercial and catering sections (see "Saccawu Gives Employers Final Chance" (1992) 4(7) *South African Labour News* 1 and 2; "Saccawu set for National Strike Over Central Bargaining" (1992) 4(6) 1 and 2 as well as "Militant Action at Lubners" (1992) 4(7) *South African Labour News* 2.) This was also an issue about which Cosatu campaigned at its conference held from 11 to 13 September 1992 (see "Programme of Action: Adopted by Cosatu Campaigns Conference: 11-13 September 1992" (1992) *South African Labour News: Special Document*). SACTWU also campaigned for national centralised bargaining in both the clothing and textile industry (see "Sactwu National Bargaining Strategy" (1992) 3(18) *South African Labour News* 1-2; "Sactwu Push for National Council" (1992) 3(20) *South African Labour News* 6; "Call for National

employees on whose behalf such bargaining will be conducted.⁴⁴

5.2.2 Dispute Resolution Procedures⁴⁵

Collective agreements often contain dispute resolution procedures for the settling of disputes between the parties.⁴⁶ In terms of some of these procedures, the parties must first attempt to resolve the dispute themselves.⁴⁷ Where this is unsuccessful, some of these procedures prescribe that the dispute must be referred to the bargaining council⁴⁸ and, where it cannot settle the matter, it must be referred to a mediator or an arbitrator.⁴⁹

Textile Industry Forum" (1992) 3 (23) *South African Labour News* 5; "Clothing Workers Push for Restructuring" (1992) 3(25) *South African Labour News* 1-2 and "Sactwu Gains on National Forum" (1992) 4(4) *South African Labour News* 4). On 3 March 1992 Kellogg and the FAWU signed an agreement which included a formal commitment to a national food industry forum (see "Fawu Moves Towards National Forum" (1992) 3(18) *South African Labour News* 5 and "Movement on Food Forum" (1992) 3(21) *South African Labour News* 8). CWIU also demanded centralised bargaining for the petroleum industry (see "CWIU Strike at Genref" (1992) 3(21) *South African Labour News* 9 and "No Agreement on Oil Industry Forum" (1992) 3 (23) *South African Labour News* 6). The Labour Relations Act, 1995 unequivocally subscribes to centralised bargaining (see par 4.2.5 of chapter 4 where this matter is discussed).

⁴⁴This is also referred to as the "bargaining unit". In terms of clauses 1(c) and 2(a) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, the agreement is only applicable in respect of employees who are employed in the knitting industry in certain prescribed areas at wages prescribed in the agreement. The industrial court held in *Amalgamated Engineering Union of SA & Others v Mondi Paper Co Ltd* (1989) 10 ILJ 521 (IC) at 525D-E as well as *Black Allied Workers Union & Others v Edward Hotel* (1989) 10 ILJ 357 (IC) at 372E-H that the collective bargaining parties must determine the bargaining unit and that it is not something which should be determined by the court. However, in *Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & Another* (1989) 10 ILJ 870 (IC) at 873F-H the industrial court held that the court was not entitled, as a matter of course, to determine the bargaining unit although circumstances may exist which would warrant such interference.

⁴⁵See par 4.2.10 of chapter 4 in which the dispute resolution procedures provided by the Labour Relations Act, 1995 for disputes about the exercising of any of the statutory collective bargaining rights are discussed.

⁴⁶This is in accordance with the Labour Relations Act, 1995 which subscribes to voluntarily agreed dispute-resolution procedures (see par 4.2.10 of chapter 4 in this regard).

⁴⁷In this regard, the procedure may provide for a declaration of a dispute by one of the parties and a response from the other. Thereafter, the parties must endeavour to settle the dispute and, in this regard, agreement must be reached on the number of meetings to be held (see clauses 14.1-14.3 of the Recognition Agreement between Mercedes-Benz and NUMSA).

⁴⁸See, for example, clause 39 of the Building Industry, North and West Boland: Main Agreement published as notice R 805 in Government Gazette 16452 of 9 June 1995.

⁴⁹*ibid.*

Other procedures circumvent the statutory collective bargaining structure and prescribe that the dispute must be referred directly to mediation or arbitration.⁵⁰

5.2.3 Matters Relating to Industrial Action⁵¹

The regulation of industrial action through collective agreements is in accordance with the provisions of the Labour Relations Act, 1995.⁵²

Certain collective agreements contain strike procedures or rules.⁵³ Often, these procedures are essentially in line with the requirements of the Labour Relations Act, 1995 for protected strike action.⁵⁴ There are, for example, agreements which curtail the employers' right to dismiss workers who participate in unprotected strike action⁵⁵ in that they must first allow the trade union to intervene and endeavour to convince the workers to desist from such action.⁵⁶ A number of collective agreements prohibit employees

⁵⁰This is what the Transvaal Provincial Division, Nehawu and COSATU agreed to in their agreement concluded on 25 September 1992 (see "Accord Ends Nehawu Strike" (1992) 4(7) *South African Labour News* 4).

⁵¹See chapter 6 where industrial action by employees is discussed and chapter 7 where industrial action by employers is discussed.

⁵²See s 65(3) which gives effect to the provisions of a collective agreement regarding participation in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out. The Act also gives effect to the procedures regulated in a collective agreement in respect of a strike or lock-out (see s 64(3)(b) which stipulates that the Act's procedures for a strike or lock-out do not apply if the strike or lock-out conforms to the procedures in a collective agreement). It also gives effect to collective agreements which prohibit a strike or lock-out in respect of the issue in dispute (see s 65(1)(a)).

⁵³See, for instance, clause 14.8.2 of the recognition agreement between Mercedes-Benz and NUMSA. In terms thereof the union must give the company at least 72 hours' written notice of the commencement of industrial action and the employees participating in the industrial action must not in any way hinder access to or exit from the premises by any vehicle or person. Furthermore, the employees participating in the industrial action must leave the company premises when requested to do so by the company. In addition, employees engaged in industrial action must do so without disrupting ongoing operations and must behave in an orderly manner and may not damage company property or the property of other employees or customers of the company. Also, the demand by employees or the union giving rise to the industrial action must relate to the collective relationship between the company and the union or to the employment relationship between the company and its employees, and must be capable of being resolved by the conclusion of an agreement between those parties which will be legally binding on them. Lastly, the industrial action must be legitimate and reasonable.

⁵⁴See s 64 which deals with the right to strike and s 65 which sets out the limitations on this right. See also pars 6.3.3 and 6.3.3.1 of chapter 6 where these matters are discussed more fully.

⁵⁵In terms of s 68(5) of the Labour Relations Act, 1995.

⁵⁶See clause 14.8.3 of the Recognition Agreement of Mercedes-Benz and NUMSA in terms of which Mercedes-Benz must give the union 72 hours' notice to remedy the breach of the conditions so that workers participating in industrial action are not dismissed. This requirement is in line with the requirement in clause 6(2) of the Code in terms of which the employer must give the strikers an ultimatum.

from striking and employers from locking their employees out about any of the matters covered by these agreements.⁵⁷

Some collective agreements contain picketing rules.⁵⁸ The Labour Relations Act, 1995 makes specific provision for picketing⁵⁹ and gives effect to picketing rules agreed to by the employer and the trade union.⁶⁰ The Constitution also affords everyone the right to picket.⁶¹ Accordingly, such collectively agreed provisions are valid in terms of both the Labour Relations Act, 1995 and the Constitution.

5.3 MATTERS RELATING TO THE INDIVIDUAL EMPLOYMENT RELATIONSHIP

5.3.1 Preconditions to Employment⁶²

Collective bargaining has been utilised to limit or restrict the ability of the employer to employ employees of its choice. There are, for instance, collective agreements which stipulate minimum ages for employment.⁶³ Certain collective agreements also stipulate

⁵⁷See, for example, clause 23 of Building Industry (Transvaal): Gauteng Agreement published as notice 2132 in Government Gazette 17690 of 27 December 1996 and clause 24 of the Building Industry (Transvaal) Main Agreement published as notice R 1994 in Government Gazette 16095 of 19 November 1994.

⁵⁸In terms of clause 3.4.1 of the Code of Conduct employees have the right to peaceful picketing provided that such picketing takes place under the auspices of the union and is conducted in accordance with rules agreed at mine level as to designated areas; numbers of people participating in such picketing and conduct of pickets (see also "NUM and Anglo Sign Historic Accords" (1992) 4(1) *South African Labour News* 3).

⁵⁹See s 69.

⁶⁰See s 69(4).

⁶¹See s 17.

⁶²See par 3.2 of chapter 3 where the preconditions stipulated by the legislature are discussed.

⁶³Some of the agreements (see clause 9 of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991 and clause 14 of the Main Agreement for the Diamond Cutting Industry published as Notice R 1648 in Government Gazette 14047 of 12 June 1992) stipulate the same minimum age as that prescribed by s 17 of the Basic Conditions of Employment Act namely 15 years (see par 3.2 of chapter 3 where this aspect is discussed). Others prescribe minimum ages which are in excess of that required by the Act. Consider, for instance, clause 2 of division A in the Secretary and Staff of the Council (eds) *National Industrial Council for the Motor Industry: Consolidated Agreements* (1992) (hereafter the Main Agreement for the Motor Industry), which prohibits the employment of any person under the age of 21 years, other than a journeyman, an apprentice in terms of the Manpower Training Act, or a trainee employed in terms of the said Act, on any operation which forms part of any trade designated for the motor industry. See also clause 6.2 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994 which provides that the minimum employment age is 16 years.

maximum ages for employees.⁶⁴

Nevertheless, the preconditions set in collective agreements sometimes actually assist the employer in its election of what it regards as "suitable" employees. There are, for example, collective agreements which require applicants for jobs to undergo medical examinations⁶⁵ and to be X-rayed.⁶⁶ It is, however, suggested that provisions of this nature may be invalid in terms of the Labour Relations Act, 1995 if they amount to unfair discrimination in terms of Schedule 7 thereof.⁶⁷

One type of agreement that seriously restricts employers' right to decide *whom* to employ, is the closed shop agreement. The closed shop provided for in the Labour Relations Act, 1995⁶⁸ is a post-entry closed shop in that it actually prevents an employer from employing a person who is not a member of the particular union; the employee must become a union member within a stipulated period.⁶⁹

Employers' decision-making power regarding *whom* to employ is also restricted by provisions which prescribe the proportion or ratio of specific categories of employees in

⁶⁴See clause 6.2.3.1 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994 in terms of which the employer may not employ anyone 65 years old or over. See also clause 40 of the Furniture Manufacturing Industry, Eastern Cape Province: Amendment of Main Agreement published as notice R 1416 in Government Gazette 15035 of 6 August 1993 which makes it obligatory for employees who are 65 years old to retire.

⁶⁵See, for example, clause 6.2.2 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994 in terms of which an employee's appointment is subject to proof of good health after a medical examination, at the council's expense, by a registered medical practitioner designated by the council.

⁶⁶See clause 10(4) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992. It appears from the terms of Cosatu's Aids Programme that they will not be prepared to agree to the testing of employees for the HIV virus as a precondition to employment (see "Cosatu Sets Out Aids Programme" (1992) 4(12) *South African Labour News* 11-12).

⁶⁷See clause 2(1)(a) read with subclause (2)(a) of Schedule 7.

⁶⁸See s 26 as well as par 4.2.4 of chapter 4 where the statutory closed shop is discussed.

⁶⁹See, for instance, the following post-entry closed shop agreements which were concluded in terms of s 24(x) of the Labour Relations Act, 1956: Clause 29 of the Millinery Industry (Transvaal) Agreement published as notice R 470 in Government Gazette 16332 of 31 March 1995 and clause 24 of the Furniture Manufacturing Industry, Orange Free State: Main Agreement published as notice R 1427 in Government Gazette 15918 of 19 August 1994. Section 24(1)(x) of the Labour Relations Act, 1956 stipulated a period of 90 days, but the Labour Relations Act, 1995 does not contain any provisions regarding the period within which an employee must become a member. Accordingly, it is for the employer and trade union to determine the period.

an enterprise.⁷⁰ These provisions usually relate to artisans or craftsmen and are aimed at preventing the employer from employing unskilled persons at cheaper rates to do skilled work. Their power to choose people for employment may also be restricted by retrenchment agreements in terms of which they have agreed to re-employ⁷¹ the retrenched.⁷² Often, such an obligation is linked to a pre-determined period.⁷³

5.3.2 Terms and Conditions of Employment

5.3.2.1 Introduction

As will be seen from the discussion below, virtually every aspect of the employment relationship has been regulated in collective agreements; including those aspects which neither the common law nor legislation has removed from the ambit of employers' prerogative.⁷⁴

In most instances, collective agreements contain provisions that are more favourable than the provisions of the common law or statutory terms regarding these aspects. But this is not always the case and there are instances where the collectively agreed terms

⁷⁰See, for instance, clause 12 of the Millinery Industry (Transvaal) Agreement published as notice R 470 in Government Gazette 16332 of 31 March 1995 which provides that one qualified milliner and one qualified trimmer must be employed before any unqualified milliners or trimmers may be employed in an establishment. See also clause 13 of the Motor Industry: Main Agreement published as notice R 838 in Government Gazette 16466 of 23 June 1995. Clause 13.1 thereof provides that an employer may not employ an auto-electrician's assistant unless it employs at least one journeyman and one apprentice.

⁷¹See par 3.2 of chapter 3 where the statutory restrictions on the employer's right to re-employ whom it wants to are discussed.

⁷²See, for instance, clause 2 of the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Lift Engineering Agreement published as notice R 1641 in Government Gazette 16782 of 27 October 1995; clause 1.9 of chapter 7 of the Building Industry (Transvaal) Main Agreement published as notice R 1994 in Government Gazette 16095 of 19 November 1994 and clause 17.4.7 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994. See also par 5.3.2.26 below in this regard.

⁷³See, for example, clause 2 of the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Lift Engineering Agreement published as notice R 1641 in Government Gazette 16782 of 27 October 1995 in terms of which the employer is obliged to give preference to retrenched employees for 24 months after their retrenchment. In terms of clause 17.4.7 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994 the period is one year.

⁷⁴See par 3.3.3 of chapter 3 which lists some of the matters which neither the common law nor legislation has specifically regulated.

are actually less favourable.⁷⁵ This may be due to the weaker bargaining strength of the trade union or because those matters have been used as trade-offs by trade unions in order to obtain more favourable terms in respect of those matters which they regard as important.⁷⁶ Such less favourable terms may depend on the nature of the industry involved.

5.3.2.2 The Nature of the Work to be Done⁷⁷

Employers' right to give instructions about the *type* of work that employees must do is restricted by collective agreements which categorise employees according to the type of work they do.⁷⁸ Depending on the precise formulation of the agreement, they may not be able to instruct employees, falling within a particular job category, to do work which falls within the parameters of another.

5.3.2.3 Hours of Work⁷⁹

Employers' right to instruct employees *when* and how long to work has been restricted by collective agreements which stipulate the maximum daily and weekly working hours of employees covered by these agreements. The provisions are often more favourable

⁷⁵See s 1(3) of the Basic Conditions of Employment Act which provides that the terms regarding any matter regulated in collective agreements will take precedence over the terms provided by the Act in respect of such matters.

⁷⁶A number of collective agreements' overtime provisions are more onerous for employees than those stipulated in the Basic Conditions of Employment Act. But the rates at which overtime is worked are more favourable than those prescribed by the Act.

⁷⁷See par 2.4.2.2 of chapter 2 where the employer's common law right to tell the employee *what* work to do is discussed. See also par 3.3.2 of chapter 3 where the statutory restrictions on the employer's common law right are discussed.

⁷⁸See, for example, clause 4 of the collective agreement entitled Furniture Manufacturing Industry, Natal: Exclusion from Main Agreement published as notice R 871 in Government Gazette 17207 of 24 May 1996 which distinguishes between 31 different categories of employees on the ground of the type of work they do. See also the Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995 which distinguishes between specified skills (see clause 1 of chapter 2), non-designated trades or artisan trades (see clause 2 of chapter 2) and designated trades or craftsman trades (see clause 3 of chapter 2). See further clause 7 of the Motor Industry: Main Agreement published as notice R 838 in Government Gazette 16466 of 23 June 1995 in terms of which an employer is prohibited from employing or utilising any person other than a journeyman on journeymen's work.

⁷⁹The employer's common law right to instruct the employee *when* work must be done, is discussed in par 2.4.2.5 of chapter 2. Statutory provisions regarding hours of work are discussed in par 3.3.2 of chapter 3.

than those contained in the Basic Conditions of Employment Act.⁸⁰ However, such a decrease in hours of work normally results in a decrease in wages. In order to combat this, trade unions usually pursue such a decrease in conjunction with demands for higher hourly wages⁸¹ and more overtime.⁸²

Apart from ordinary hours of work and overtime, collective agreements also regulate meal intervals,⁸³ rest intervals,⁸⁴ Sunday work⁸⁵ and work on public holidays.⁸⁶

⁸⁰Consider, for instance, clause 4 of division B of the Main Agreement for the Motor Industry which stipulates that the maximum weekly working hours are 45, whereas s 2 of the Basic Conditions of Employment Act provides for a maximum of 46 hours. See also clause 9.1 of the Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995 which makes provision for maximum weekly working hours of 40. In clause 6 of the Main Agreement for the Diamond Cutting Industry of South Africa published as notice R 1648 in Government Gazette 14047 of 12 June 1992 the maximum daily hours to be worked during a five day week are set at eight whereas s 4(1)(c)(i) of the said Act stipulates nine hours and 15 minutes as the maximum number of hours which may be worked per day.

⁸¹See par 5.3.2.4 below in this regard.

⁸²See, for instance, the Central Industrial Council for the Explosives and Allied Industries: Agreement published as notice R 1820 in Government Gazette 16827 of 17 November 1995. In terms of clause 6.1 thereof, the maximum weekly hours of work are 43. An employee who works in excess of 43 hours, is paid at overtime rates. See also the Millinery Industry (Transvaal) Agreement published as notice R 470 in Government Gazette 16332 of 31 March 1995. The maximum weekly hours are 41 hours (see clause 9(1)(a)). An employee who works in excess of 41 hours, is paid at overtime rates (see clause 10(2)).

⁸³See clause 5 of the Civil Engineering Industry: Agreement published as R 1841 in Government Gazette 16833 of 24 November 1995.

⁸⁴Some agreements provide for rest intervals *in addition to* meal intervals. See clause 28 of the Furniture Manufacturing Industry, Eastern Cape Province: Amendment of Main Agreement published as notice R 1416 in Government Gazette 15035 of 6 August 1993 which provides for a break of 10 minutes both in the forenoon and afternoon of each day. These intervals are treated as time worked. See clause 9(3)(a) of the Millinery Industry (Transvaal) Agreement published as notice R 470 in Government Gazette 16332 of 31 March 1995 which contains similar provisions.

⁸⁵There are agreements that prohibit Sunday work. Consider, for instance, clause 6 of the Motor Industry: Main Agreement published as notice R 838 in Government Gazette 16466 of 23 June 1995 in terms of which no employee may be required or permitted to work on a Sunday except for the purposes of stock-taking, supervising shift changes, collecting cash from petrol pump attendants or performing emergency work. See also clause 9(1)(c) of the Millinery Industry (Transvaal) Agreement published as notice R 470 in Government Gazette 16332 of 31 March 1995 which prohibits employees working in shops from working on Sundays.

⁸⁶See clause 8 of the Central Industrial Council for the Explosives and Allied Industries: Agreement published as notice R 1820 in Government Gazette 16827 of 17 November 1995 and clause 17 of the Motor Industry: Amendment of Administrative Agreement published as notice R 834 in Government Gazette 16464 of 23 June 1995.

5.3.2.4 Matters Relating to Remuneration⁸⁷

Collective agreements frequently prescribe the minimum wages payable to employees covered by the agreements. Employers and trade unions who are bound by industrial council agreements on minimum wages often conclude agreements on so-called actual wages⁸⁸ in addition to the minimum wages.⁸⁹ There are, however, a number of industrial council agreements that specifically provide for actual wages⁹⁰ and prohibit further negotiations over wages at shopfloor level.⁹¹

Employees' rate of remuneration for ordinary hours of work is often determined according to criteria such as personal performance related to experience,⁹² merit,⁹³ the type of

⁸⁷For a discussion of the employer's common law duty to remunerate and matters relating thereto, see par 2.4.7 of chapter 2. For a discussion on the statutory provisions about remuneration and matters ancillary thereto, see par 3.3.3 of chapter 3.

⁸⁸The industrial court held that it would not be unfair for a trade union, after agreement had been reached on the rate of wages at industrial council level, to demand that the employer bargain with it about actual wages (see *SA Woodworkers Union v Rutherford Joinery (Pty) Ltd* (1990) 11 ILJ 695 (IC) at 700F and 701B-D; *Black Allied Workers Union & Others v Asoka Hotel* (1989) 10 ILJ 167 (IC) at 169G-H, 173E-F and 176C-G and *Black Allied Workers Union & Others v Palm Beach Hotel* (1988) 9 ILJ 1016 (IC) at 1018C-D and 1023C-D).

⁸⁹See, for instance, clause 4(1) of the agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, which states that employers must pay to each of its employees "not less than the weekly wage prescribed". See also clause 4 of the Main Agreement of the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, which states that "...no employer shall pay, and no employee shall accept wages lower than the following...". See further clause 4 of the Main Agreement of the Diamond Cutting Industry of South Africa published as notice R 1648 in Government Gazette 14047 of 12 June 1992 which states that no employer will pay and no employee accept wages lower than the wage in the agreement or the higher wages agreed upon between an employer and an employee.

⁹⁰See the facts in *Black Allied Workers Union & Others v Asoka Hotel* (1989) 10 ILJ 167 (IC) at 175J. In the metal industry, SEIFSA agreed to an increase in actual wages on condition that the trade union thereafter desisted from further wage bargaining at plant level (see "Still no Metal Settlement" (1992) 7(4) *South African Labour News* 5).

⁹¹See, for instance, clause 26 of the Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995; clause 13 of the Building Industry, Western Province: Amendment of Agreement for the Boland published as notice R 1671 in Government Gazette 16782 of 27 October 1995 and clause 34 of the Motor Transport Undertaking (Goods): Amendment of Agreement published as notice R 1834 in Government Gazette 17548 of 8 November 1996.

⁹²See clause 3 of the Clothing Industry, Orange Free State and Northern Cape: Amendment of Main Agreement published as notice R 106 in Government Gazette 16938 of 26 January 1996.

⁹³See clause 4 of the Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, in terms of which the employer is allowed to pay higher wages than the agreed minimum, "according to personal performance related to merit".

job which the employee does,⁹⁴ the grade of the job,⁹⁵ whether or not he is skilled,⁹⁶ his length of service⁹⁷ and whether or not he is in charge of other employees.⁹⁸

Agreements also prescribe the rates for overtime,⁹⁹ work on Sundays¹⁰⁰ and public holidays.¹⁰¹

⁹⁴Most industrial council agreements concluded in terms of the Labour Relations Act, 1956 distinguished between classes of employees which receive different rates of remuneration. See, for instance, clause 3, read with clause 4, of the agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, where a distinction is made between a foreman, dyer, storeman, mechanic, supervisor, factory clerk, knitting machine operator and a general worker.

⁹⁵In clause 3 of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, the parties categorised employees into eight grades, depending on their jobs. Chefs and managers are, for instance, categorised as grade one employees while bartenders, clerks/cashiers, extra-heavy motor vehicle drivers, security guards and supervisors are grade three employees.

⁹⁶See, for example, clause 4 of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992. Distinction is made between different types of jobs, such as a "dyer", "storeman" and "mechanic", and a further distinction is made between employees who have qualified for these jobs and those who are still learners. See also clause 4(1)(a)(ii) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, which states that an employer must pay an employee in possession of a certificate of qualification an additional amount of 10% of the minimum prescribed wage. Clause 18(2) defines a certificate of qualification as a document recognised by the industrial council indicating that the holder has produced evidence that skills, necessary for employment, have been acquired.

⁹⁷See clause 4(1)(a) and (d) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992. In terms of subclause (1)(d) thereof, an employee who has ten years or more service, receives an additional amount.

⁹⁸See, for example, clause 4(1)(c) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992 in terms of which any employee who performs the duties of a team leader is paid an additional amount.

⁹⁹See, for instance, clause 5.3 of the Central Industrial Council for the Explosives and Allied Industries: Agreement published as notice R 1820 in Government Gazette 16827 of 17 November 1995 and clause 5 of the Civil Engineering Industry: Agreement published as notice R 1841 in Government Gazette 16833 of 24 November 1995.

¹⁰⁰See, for instance, clause 4 of the Meat Trade, East London: Amendment of Agreement published as notice R 102 in Government Gazette 16938 of 26 January 1996 which is actually more favourable than s 10 of the Basic Conditions of Employment Act as it provides for double pay irrespective of the number of hours worked on the Sunday. See also clause 8 of the Civil Engineering Industry: Agreement published as notice R 1841 in Government Gazette 16833 of 24 November 1995.

¹⁰¹See clause 8 of the Civil Engineering Industry: Agreement published as R 1841 in Government Gazette 16833 of 24 November 1995.

Collective agreements do not only prescribe the minimum wages that must be paid to employees, but also the *manner* in which payment must be made. They often prescribe the day of the week, the date, time, place and manner of payment.¹⁰² Agreements also contain provisions about the statements which must accompany payments, the container in which the remuneration must be put¹⁰³ and the information which must be written on the container.¹⁰⁴

Agreements also regulate the deductions that employers can make from employees' remuneration. There are agreements which provide for deductions for unauthorised absence from work,¹⁰⁵ absence from work on a workday before or following a public holiday,¹⁰⁶ damage maliciously caused to the employer's property¹⁰⁷ and a deficiency

¹⁰²Article 5 of the Agreement for the Knitting Industry, Transvaal, published as notice R 3124 in Government Gazette 14395 of 13 November 1992 provides that wages must be paid cash weekly or, with the written consent of the employee, in cash or by cheque monthly during working hours, on the nominated pay-day of the establishment. Article 5(1) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991 provides that wages must be paid weekly or monthly in cash, or, with the written consent of the employee, by uncrossed cheque. Clause 2 of the Motor Industry: Amendment of Administrative Agreement published as notice R 834 in Government Gazette 16464 of 23 June 1995 provides that payment may also be made by means of electronic transfer if the employee consents thereto.

¹⁰³In terms of clause 5(3) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, all payments to employees must be made in sealed envelopes. See also clause 5(4) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991.

¹⁰⁴In terms of clause 5(3) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, the container (ie a sealed envelope), must contain the following information: name of establishment, name, occupation and number of the employee, the weekly wage, number of hours worked on ordinary time, number of hours worked on overtime and/or Sunday time, amount earned for the time worked, amount of any bonuses earned, amount of holiday pay (if any), details of all deductions made from such amount, the amount contained in the envelope and the week in respect of which wages are paid.

¹⁰⁵See clause 5(9) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, as well as clause 5(2) of the Agreement for the Knitting Industry Transvaal, published as notice R 3124 in Government Gazette 14395 of 13 November 1992.

¹⁰⁶See clause 5(9) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, which provides that an employee who is absent under these circumstances will forfeit pay for such paid holiday unless he can produce a medical certificate from a registered medical practitioner, or any other medical certificate acceptable to the council or unless he can satisfy the council that his absence was due to circumstances beyond his control.

¹⁰⁷See clause 5(9) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991.

in cash handled by an employee who, by virtue of his position, is responsible for balancing receipts and disbursements.¹⁰⁸ Agreements also regulate deductions for short-time funds¹⁰⁹ and trade union dues.¹¹⁰ They may also regulate deductions in respect of insurance premiums, membership fees of pension or provident funds, medical aid societies and sick pay funds. Agreements may further regulate contributions to bargaining councils' funds.¹¹¹

A number of agreements specifically prohibit employers from setting off debts owing by employees or provide that set-offs may only be effected under certain conditions.¹¹²

5.3.2.5 Vacation Leave¹¹³

Collective agreements often prescribe the minimum number of days of paid annual leave which employers must afford their employees.¹¹⁴

¹⁰⁸See clause 5(9) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991. This clause contains a proviso that the employer can only make such a deduction where the employee accepts responsibility for such deficiency in writing and specifies therein the amount and conditions of repayment. It also provides that where the employee does not accept responsibility, the council may, at the request of the employer, conduct an enquiry into the matter and make such recommendation as it deems fit.

¹⁰⁹See clause 5(2) of the Agreement for the Knitting Industry, Transvaal, published as notice R 3124 in Government Gazette 14395 of 13 November 1992.

¹¹⁰See clause 5(2) of the Agreement for the Knitting Industry, Transvaal, published as notice R 3124 in Government Gazette 14395 of 13 November 1992 and clause 12 of division A of the Main Agreement for the Motor Industry.

¹¹¹See clause 5(2) of the Agreement for the Knitting Industry, Transvaal, published as notice R 3124 in Government Gazette 14395 of 13 November 1992.

¹¹²In terms of clause 5(2)(g) of the agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, an employer may, with the written consent of the employee, make deductions in respect of money borrowed or goods purchased from the employer, provided that the amount so deducted does not exceed one-third of the employee's wage. The Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991 also limits such a set-off to a third of the employee's remuneration (see clause 5(iv) thereof).

¹¹³The common law does not specifically provide for vacation leave (see par 2.4.8 of chapter 2). The Basic Conditions of Employment Act, however, does make provision for such leave (see par 3.3.3 of chapter 3).

¹¹⁴The agreed leave provisions generally appear to be more favourable than those contained in s 12 of the Basic Conditions of Employment Act (see, for instance, clause 14 of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, where the minimum amount of leave is 21 consecutive days as opposed to the Act's 14 consecutive days).

A number of collective agreements allow employees to accumulate leave.¹¹⁵ Some provide that there is no cut-off period for such accumulation, whereas others stipulate that leave can only be accumulated for a certain period.¹¹⁶ There are also agreements which provide that employees may be paid out for accumulated leave.¹¹⁷

5.3.2.6 Sick Leave¹¹⁸

Collective agreements prescribe the minimum paid sick leave which employers must afford employees.¹¹⁹ Often, agreements set out when proof of illness is required and what would be regarded as sufficient proof.¹²⁰

¹¹⁵See clause 14(3)(a) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991.

¹¹⁶In terms of clause 14(3)(a) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, the employer, at the written request of the employee, may permit the leave, or a portion thereof, to accumulate over a period of not more than 24 months.

¹¹⁷Transnet, which allows its employees to accumulate leave, agreed on a scheme with the unions to pay out employees on all leave accumulated to the end of December 1990 (see "Transnet Pays Out Accumulated Leave" (1992) 3(16) *South African Labour News* 4).

¹¹⁸The common law does not make specific provision for sick leave (see par 2.4.8 of chapter 2). The Basic Conditions of Employment Act does, however, make such provision (see par 3.3.3 of chapter 3).

¹¹⁹See, for instance, clause 31 of division A of the Main Agreement for the Motor Industry in terms of which an employee is entitled to ten working days paid sick leave if he normally works a five day week or 12 working days if he normally works a five-and-a-half day week during a period of 52 consecutive weeks of employment. It is interesting to note that these terms are *less* favourable than those contained in s 13 of the Basic Conditions of Employment Act.

¹²⁰Normally, a certificate signed by a medical practitioner is required (see, for instance, clause 7 of the The Civil Engineering Industry: Agreement published as R 1841 in Government Gazette 16833 of 24 November 1995 which requires such a certificate for absence of work for more than three consecutive days). In terms of the agreement reached by the University of Pretoria and NEHAWU, the University will also accept a certificate by a sangoma or traditional healer registered with his professional association. Such a certificate will be acceptable for one week at a time. Should a sangoma recommend that an employee needs more than one week's sick leave, a medical certificate from a doctor registered with the South African Medical and Dental Council would also be required (see "Nehawu Breakthrough in Traditional Healer Campaign" (1992) 3(17) *South African Labour News* 1). See also the demands made by CWIU in this regard in "Strikes Loom at Sasol Operations" (1992) 4(2) *South African Labour News* 9 and "CWIU Talks on Centralised Bargaining" (1992) 4(3) *South African Labour News* 5.

5.3.2.7 Maternity Leave¹²¹

A number of collective agreements entitle employers to terminate employees' services when they take maternity leave but also oblige them to re-employ these employees in the same or similar positions provided they apply for re-employment within a stipulated period.¹²² It is, however, submitted that such a provision is invalid as it is contrary to s 187(1)(e) of the Labour Relations Act, 1995 which brands the termination of an employee's service *because* of pregnancy as automatically unfair.¹²³ It is also unconstitutional as it constitutes unfair discrimination on the ground of pregnancy.¹²⁴

Other agreements prohibit the termination of such employees' services and oblige employers to give them their old jobs or similar positions after expiry of the maternity leave.¹²⁵ Maternity leave, however, is often subject to conditions such as that it will be unpaid,¹²⁶ that the employee must have a minimum period of continuous employment with the employer,¹²⁷ that the employee returns to work within a specified period¹²⁸

¹²¹The common law does not make provision for maternity leave (see par 2.4.8 of chapter 2). The Basic Conditions of Employment Act does not specifically provide for maternity leave. It does, however, prohibit a pregnant employee from working for four weeks prior to her confinement and eight weeks thereafter (see s 17). The Labour Relations Act, 1995 provides such employees with a measure of job security (see pars 3.3.5 as well as 3.3.3 of chapter 3).

¹²²See clause 41(1) of division A of the Main Agreement for the Motor Industry in terms of which an employee, with a minimum of two years' continuous service, is entitled, on termination of her services, to a guarantee of re-employment. The guarantee must be in writing and will be valid for a period of at least six months reckoned from the date of termination of services.

¹²³See par 3.4.3.2 of chapter 3 where automatically unfair dismissals are discussed. In addition, clause 1.2.1 of chapter D of the Green Paper: Policy Proposals for a New Employment Standards Statute published as Notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 labels automatically unfair dismissals as infringements of "fundamental rights" which collective agreements should not be able to vary.

¹²⁴See s 9(3) and (4) of the Constitution which inter alia prohibit unfair discrimination on the ground of pregnancy.

¹²⁵See clause 12.2 of the Central Industrial Council for the Explosives and Allied Industries: Agreement published as notice R 1820 in Government Gazette 16827 of 17 November 1995.

¹²⁶See, for instance, clause 6(2)(a) of the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Main Agreement published as notice R 1642 in Government Gazette 16782 of 27 October 1995.

¹²⁷See clause 12.3 of the Central Industrial Council for the Explosives and Allied Industries: Agreement published as notice R 1820 in Government Gazette 16827 of 17 November 1995 and clause 6(2) of the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Main Agreement published as notice R 1642 in Government Gazette 16782 of 27 October 1995. In terms of clause 1.3 of chapter G of the Green Paper: Policy Proposals for a New Employment Standards Statute published as Notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 four months' maternity leave is proposed. Nevertheless, it may be possible for the collective bargaining parties to bargain out of the maternity leave requirement under these circumstances (see clause 1.2.2 of chapter D of the Green Paper). However, the parties cannot agree that

and that the employer's obligation is restricted to a specified number of confinements.¹²⁹ It is submitted that these provisions may be labelled as unconstitutional in that they constitute unfair discrimination on the ground of pregnancy.¹³⁰

There are also collective agreements which afford employees paid maternity leave.¹³¹

such an employee may be dismissed as such a provision would be invalid in terms of s 187(1)(e) of the Labour Relations Act, 1995 which brands such a dismissal as automatically unfair. Also, automatically unfair dismissals are labelled as infringements of "fundamental rights" by the Green Paper and, in terms of clause 1.2.1 of chapter D, collective bargaining parties should not be able to vary the employee's statutory right not to be dismissed *because she is pregnant*.

¹²⁸See, for instance, clause 9(4)(a) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, in terms of which an employer may not terminate an employee's services by reason of such employee's approaching confinement. This provision is, however, subject to the proviso that the employee returns to work not later than six months after having taken leave for a confinement. If the proposal contained in clause 1.3(a) of chapter G of the Green Paper: Policy Proposals for a New Employment Standards Statute published as Notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 is made law, any period less than six weeks after the birth of the child may be invalid, unless the employee's doctor certifies that she is fit to return to work or the collective bargaining parties have agreed to a lesser period and they have obtained the necessary exemption or ratification (see clause 1.2.2 of chapter D of the Green Paper).

¹²⁹See, for instance, the terms of the agreement discussed in *Collins v Volkskas Bank (Westonaria Branch) - A Division of ABSA Bank Ltd* (1994) 15 ILJ 1398 (IC) at 1400I-1401A. Health workers employed by the State are at present allowed three confinements. The State has, however, indicated that it wants to reduce this to two (see "State v Health Workers" (1992) 4(7) *South African Labour News* 8). In terms of clause 16.18 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994 employees are afforded paid maternity leave for a maximum of two confinements. It is submitted that, in terms of clause 1.2.2 of chapter D of the Green Paper: Policy Proposals for a New Employment Standards Statute published as Notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 the collective bargaining parties may possibly obtain an exemption to the Green Paper's proposal of four months maternity leave under these circumstances. However, the parties cannot agree that such an employee may be dismissed as such a provision would be invalid in terms of s 187(1)(e) of the Labour Relations Act, 1995 which brands such a dismissal as automatically unfair. Also, automatically unfair dismissals are labelled as infringements of "fundamental rights" by the Green Paper and, in terms of clause 1.2.1 of chapter D, collective bargaining parties should not be able to vary the employee's statutory right not to be dismissed *because she is pregnant*.

¹³⁰See s 9(3) and (4) of the Constitution which inter alia prohibit unfair discrimination on the ground of pregnancy.

¹³¹See, for example, clause 4 of the Leather Industry, Republic of South Africa: Amendment of Sick Benefit Fund Agreement published as notice R 76 in Government Gazette 16938 of 26 January 1996 in terms of which employers must pay employees on maternity leave for 13 weeks of the maternity leave period at the rate of 33% of their basic wage rate. See also clause 12.1 of the Central Industrial Council for the Explosives and Allied Industries: Agreement published as notice R 1820 in Government Gazette 16827 of 17 November 1995. Core demands presented by NUMSA during 1992, included a demand for six months' paid maternity leave (see "Numsa Core Demands" (1992) 3(20) *South African Labour News* 5). The Women's Forum of COSATU demanded 12 months' paid maternity leave (see "Women Raise their Voices" (1992) 4(4) *South African Labour News* 1).

5.3.2.8 Paternity Leave¹³²

Some collective agreements oblige employers to afford their employees paternity leave.¹³³ Most of these agreements make the granting of such leave subject to proof of paternity.¹³⁴

5.3.2.9 Compassionate Leave¹³⁵

A number of collective agreements compel employers to afford employees compassionate leave when, for instance, a close member of an employee's family dies.¹³⁶ Some of these agreements require written proof of death of such a family member.¹³⁷

¹³²The common law does not deal with the question of paternity leave (see par 2.4.8 of chapter 2) nor does the Basic Conditions of Employment Act (see par 3.3.3 of chapter 3).

¹³³In an agreement reached by the National Union of Leatherworkers and the general goods sector of the leather industry, the employers have agreed to allow employees two days unpaid paternity leave (see "Settlements in Leather Industry" (1992) 4(3) *South African Labour News* 8). See also clause 6(2) of the Clothing Industry, Transvaal: Amendment of Main Agreement published as notice R 104 in Government Gazette 16938 of 26 January 1996 which affords employees three days' unpaid leave and clause 5(2) of The Clothing Industry, Orange Free State and Northern Cape: Amendment of Main Agreement published as notice R 106 in Government Gazette 16938 of 26 January 1996. In terms of clause 10(1) of the Hairdressing Trade, Pretoria published as notice R 1684 in Government Gazette 17500 of 18 October 1996 male employees are afforded seven days paid paternity leave per annum. It is interesting to note that clause 2.3 of chapter G of the Green Paper: Policy Proposals for a New Employment Standards Statute published as Notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 proposes three days' paid paternity leave. It is submitted that, unlike maternity rights which collective bargaining parties will probably only be able to vary through an exemption or ratification (see clause 1.2.2 of chapter D of the Green Paper), the parties will be able to vary the statutory provisions regarding paternity leave without a requirement for administrative exemption or ratification (see clause 1.2.4 of chapter D of the Green Paper).

¹³⁴See, for instance, clause 6(2) of the Clothing Industry, Transvaal: Amendment of Main Agreement published as notice R 104 in Government Gazette 16938 of 26 January 1996 and clause 7(2) of the Knitting Industry, Transvaal: Amendment of Agreement published as notice R 105 in Government Gazette 16938 of 26 January 1996 and clause 5(2) of the Clothing Industry, Orange Free State and Northern Cape: Amendment of Main Agreement published as notice R 106 in Government Gazette 16938 of 26 January 1996. It is interesting to note that the Green Paper: Policy Proposals for a New Employment Standards Statute published as Notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 also proposes that an employer may require reasonable proof of paternity (see clause 2.3(c) of chapter G).

¹³⁵Neither the common law (see par 2.4.8 of chapter 2) nor minimum legislation (see par 3.3.3 of chapter 3) provides for such leave.

¹³⁶See, for instance, clause 11 of the Central Industrial Council for the Explosives and Allied Industries: Agreement published as notice R 1820 in Government Gazette 16827 of 17 November 1995 which provides for five days' leave per occasion. See also clause 16.17.1.10 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994 and clause 35 of the Furniture Manufacturing Industry, Orange Free State: Main Agreement published as notice R 1427 in Government Gazette 15918 of 19 August 1994.

¹³⁷See, for instance, clause 10(2) of the Hairdressing Trade, Pretoria published as notice R 1684 in Government Gazette 17500 of 18 October 1996.

5.3.2.10 Study Leave¹³⁸

Some collective agreements make provision for the granting of study leave by employers to their employees.¹³⁹

5.3.2.11 Accommodation¹⁴⁰

The obligation to afford accommodation is often linked to the special nature of the industry or the type of work which the employees do. For example, most collective agreements concluded in the mining industry make it obligatory for the mines to provide their employees with accommodation and regulate the governance of the hostels.¹⁴¹

There are also a number of collective agreements which oblige employers to provide accommodation in special circumstances such as when employees must work on a site¹⁴² or have to travel for business purposes.¹⁴³

¹³⁸Neither the common law (see par 2.4.8 of chapter 2) nor minimum legislation (see par 3.3.3 of chapter 3) provides for such leave.

¹³⁹See clause 12 of Motor Transport Undertaking (Goods): Re-enactment of A-Agreement published as notice R 2129 in Government Gazette 17690 of 27 December 1996 in terms of which the employer must grant employees a maximum of four days' paid study leave per annum provided inter alia that the course is approved by the employer and is accredited by the Road Transport Industry Education and Training Board. See also clause 13 of the Central Industrial Council for the Explosives and Allied Industries: Agreement published as notice R 1820 in Government Gazette 16827 of 17 November 1995 and clause 16.17.2 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994.

¹⁴⁰Neither the common law (see par 2.4.8 of chapter 2) nor the Basic Conditions of Employment Act (see par 3.3.3 of chapter 3) makes specific provision for accommodation.

¹⁴¹See clause 3.4.2 of the Code of Conduct in terms of which the mining companies must provide hostels. The Code of Conduct also stipulates that the fundamental responsibility for the management and maintenance of good order in the hostels rests with the mining companies.

¹⁴²See clause 18 of the Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995 in terms of which the employer must provide its workers working on a site with suitable accommodation to serve as a shelter during wet weather and to serve as a change-room.

¹⁴³See clause 5.4 of the Central Industrial Council for the Explosives and Allied Industries: Agreement published as notice R 1820 in Government Gazette 16827 of 17 November 1995 in terms of which the employer must refund an employee who is required to be away from home overnight all reasonable expenses incurred in respect of board and accommodation. See also clause 8 of the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Lift Engineering Agreement published as notice R 1641 in Government Gazette 16782 of 27 October 1995.

5.3.2.12 Meals¹⁴⁴

In addition to meal intervals,¹⁴⁵ a number of collective agreements require employers to provide their employees with meals.¹⁴⁶

5.3.2.13 Clothing¹⁴⁷

A number of collective agreements oblige employers to provide certain categories of employees with protective clothing such as uniforms, overalls,¹⁴⁸ dustcoats or aprons.¹⁴⁹

5.3.2.14 Transport¹⁵⁰

Transport may be a serious problem for employees; particularly those who are dependent on public transport and have to travel long distances or have to work at night or early

¹⁴⁴Neither the common law (see par 2.4.8 of chapter 2) nor the Basic Conditions of Employment Act (see par 3.3.3 of chapter 3) makes specific provision for meals.

¹⁴⁵See par 5.3.2.3 above.

¹⁴⁶This is normally done in return for a small fee payable by the employee. See, for example, clause 15 of the Main Agreement for the Tearoom, Restaurant and Catering Trade Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, in terms of which the employee has the choice to accept meals from the employer. Should the employee elect to do so, the employer may deduct R30 per month in respect of part-time employees and R50 per month in respect of full-time employees.

¹⁴⁷The common law does not make provision for clothing (see par 2.4.8 of chapter 2). The Basic Conditions of Employment Act also does not contain any provisions regarding clothing (see par 3.3.3 of chapter 3) but employers may be obliged to provide their employees with protective clothing in terms of the Occupational Health and Safety Act or the Mine Health and Safety Act (see s 6(1)(a)).

¹⁴⁸See clause 34 of the Millinery Industry (Transvaal) Agreement published as notice R 470 in Government Gazette 16332 of 31 March 1995 in terms of which the employer must issue every employee with two new overalls of the required size. Thereafter, two overalls must be issued to every employee every 12 months.

¹⁴⁹See clause 10 of division B of the Main Agreement for the Motor Industry in terms of which the employer, which requires its employees to wear either a uniform, overall, dustcoat or apron, must provide such garment free of charge. See also clause 7 of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991.

¹⁵⁰Neither the common law nor minimum legislation deals with transport.

in the mornings. A number of collective agreements make it obligatory for employers to provide transport.¹⁵¹

5.3.2.15 Increments¹⁵²

The employer's right to decide whether or not to pay increases has been restricted by collective agreements. Some agreements limit this right only to a certain extent¹⁵³ whereas others limit it totally by making the payment of annual increases obligatory. The latter agreements also frequently contain criteria according to which the amount of the increment is to be calculated.¹⁵⁴

5.3.2.16 Bonuses¹⁵⁵

Collective agreements restrict employers' right to decide whether or not to pay their employees bonuses. In certain instances, the restriction is absolute and the employer

¹⁵¹See clause 15(2) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, in terms of which the employer must make reasonable arrangements for transport home of a "special function employee" or a "special function casual employee" or casual employee working later than 22:30. In lieu of providing such transport, an employer must order a taxi and pay the taxi in advance or pay such employee R10. See also clause 3 of the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Main Agreement published as notice R 1642 in Government Gazette 16782 of 27 October 1995 in terms of which the employer is obliged to provide transport, free of charge, to its employees who have to work away from their ordinary place of work. See further clause 6 of the Motor Industry: Main Agreement published as notice R 838 in Government Gazette 16466 of 23 June 1995 in terms of which no employee may be expected to use his own bicycle.

¹⁵²The common law does not specifically provide for increases (see par 2.4.8 of chapter 2), nor does minimum legislation (see par 3.3.3 of chapter 3). But the Labour Relations Act, 1995 (s 84(1)(h)) lists the criteria for merit increases as one of the matters about which employers must consult with workplace forums (see par 4.3.3.1 of chapter 4 in this regard).

¹⁵³Consider, for example, clause 8.1.1 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994 in terms of which the employer may elect not to increase an employee's salary if, in its opinion, the employee's work performance is unsatisfactory.

¹⁵⁴See, for instance, clause 4.2 of the Central Industrial Council for the Explosives and Allied Industries: Agreement published as notice R 1820 in Government Gazette 16827 of 17 November 1995 in terms of which increments are calculated according to years of service.

¹⁵⁵The common law does not deal with bonuses (see par 2.4.8 of chapter 2). Minimum legislation also does not deal with bonuses (see par 3.3.3 of chapter 3). The Labour Relations Act, 1995, however, does list criteria for the payment of discretionary bonuses as one of the matters about which the employer must consult with the workplace forum (see s 84(1)(h) as well as par 4.3.2.1 of chapter 4 where this issue is discussed).

has no discretion whatsoever. This is often the case where agreements provide for bonuses which are linked to objective considerations such as annual bonuses,¹⁵⁶ holiday bonuses,¹⁵⁷ setting bonuses,¹⁵⁸ attendance bonuses¹⁵⁹ and long service bonuses.¹⁶⁰ In the case of bonuses which are linked to subjective considerations such as incentive,¹⁶¹ competency or outstanding service¹⁶² and outstanding performance¹⁶³ employers may retain a measure of discretion.

¹⁵⁶See clause 4 of the Clothing Industry, Orange Free State and Northern Cape: Amendment of Main Agreement published as notice R 106 in Government Gazette 16938 of 26 January 1996 and clause 16 of the Civil Engineering Industry: Agreement published as R 1841 in Government Gazette 16833 of 24 November 1995.

¹⁵⁷See clause 13 of division B of the Main Agreement for the Motor Industry and clause 16.25 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994.

¹⁵⁸This bonus is payable to an employee who, in the course of his duties, sets or adjusts the machine or machines he operates. See clause 5(2) of division C in chapter 2 of the Main Agreement for the Motor Industry.

¹⁵⁹See clause 4(6)(a) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992.

¹⁶⁰See clause 39 of the Furniture Manufacturing Industry, Orange Free State: Main Agreement published as notice R 1427 in Government Gazette 15918 of 19 August 1994.

¹⁶¹See clause 11 of the Main Agreement for the Diamond Cutting Industry of South Africa published as notice R 1648 in Government Gazette 14047 of 12 June 1992, which provides that whenever the employer requires its employees to participate in such a scheme, it must negotiate with them in regard to a tariff or rate by which such bonus can be calculated. Details of such an agreement must be submitted to the bargaining council in writing within one week of being requested by the council to do so. See also clause 4(6)(b) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992.

¹⁶²See clause 8.2.1(a) and (b) of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994.

¹⁶³See clause 8.2.1(e) of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994.

5.3.2.17 Productivity Agreements¹⁶⁴

Bendix¹⁶⁵ describes productivity bargaining as follows

[It] is an extremely complicated process and each agreement is tailor-made to suit the needs of a particular company and its employees. Basically, it entails the reorganisation of work and the offer of various packages to the employees. It may also involve the introduction of job flexibility,....time flexibility, changes in payment structures, and the introduction of work groups.

A productivity agreement was concluded by employers and trade unions in the mining industry during their 1991 wage bargaining. It essentially entailed low basic salary increases and bonuses determined by production levels and the gold price.¹⁶⁶

5.3.2.18 Training¹⁶⁷

A number of agreements restrict employers' right to dismiss redundant employees by providing that they must retrain such employees.¹⁶⁸

Collective agreements also often make it obligatory for employers to provide their employees with the necessary technical training required for their jobs. In addition, there

¹⁶⁴The common law does not deal with productivity. Minimum legislation also does not deal with it. The Labour Relations Act, 1995, however, does list the restructuring of the workplace and changes in the organisation of work as matters about which the employer must consult with the workplace forum (see s 84(1)(a) and (b) as well as par 4.3.3.1 of chapter 4 where these issues are discussed).

¹⁶⁵Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 468.

¹⁶⁶Some time after the implementation of the scheme it was, however, criticised by both NUM and the Mineworkers' Union. The National Union of Mineworkers alleged that employers had provided insufficient information for the scheme to be monitored accurately and that the workers had been denied a role in setting targets (see "Body Blows for Productivity Bargaining" (1992) 3(15) *South African Labour News* 1-2 and "Ruling in Bonus Scheme Dispute" (1992) 3(22) *South African Labour News* 7). The National Union of Mineworkers and the Chamber of Mines' gold mine members thereafter agreed to a profit-sharing scheme in terms of which the employers shared 20 percent of their profits with their employees (see "NUM in Dispute with Coal Bosses" (1992) 4(2) *South African Labour News* 4 as well as "Agency Shop Agreement at Harmony" (1992) 4(4) *South African Labour News* 10 in this regard).

¹⁶⁷See par 2.4.2.3 of chapter 2 where the obligation to train employees as part of the employer's common law duty of care is discussed. See also par 3.3.2 of chapter 3 where the duty in terms of the Occupational Health and Safety Act, the Mine Health and Safety Act and the Manpower Training Act to train employees is discussed. The Labour Relations Act, 1995 makes provision for the promotion and establishment of training schemes as one of the functions of bargaining councils (see s 28(f)).

¹⁶⁸See "Numsa Sets Out Core Demands" (1992) 3(18) *South African Labour News* 5. Eskom follows a policy of no forced retrenchment on the understanding that employees who become surplus are adaptable and flexible, allowing themselves to be retrained and redeployed into other positions (see "No Forced Retrenchments at Eskom" (1992) 3(18) *South African Labour News* 9).

are collective agreements which require employers to provide training "to address past imbalances" between different races.¹⁶⁹ Often, and in order to facilitate the re-training or training of employees, collective agreements require employers to make funds available for the establishment¹⁷⁰ and running of training schemes.¹⁷¹

5.3.2.19 Tools and Equipment¹⁷²

A number of collective agreements require employers to provide their employees with tools.¹⁷³ In other instances, employees are required to provide their own tools, but employers are obliged to pay allowances in respect of these tools¹⁷⁴ and/or to insure

¹⁶⁹See, for instance, clause 3.4.1 of the Code of Conduct in terms of which the employers have committed themselves to a positive programme of job and skills development in accordance with their needs, to address past imbalances (see also "NUM and Anglo Sign Historic Accords" (1992) 4(1) *South African Labour News* 3).

¹⁷⁰Such provisions are in line with the social upliftment objective of the Labour Relations Act, 1995 contained in s 1 thereof. In s 28(f) of the Act, the promotion and establishment of training and education schemes by bargaining councils is listed as one of the functions of such councils. In terms of clause 42(1) of division D of the Main Agreement for the Motor Industry the employer is obliged to forward to the secretary of the regional council a training levy of 50 cents per week in respect of every employee employed by it. In terms of clause 42(5) levies received by the council must be paid to the Motor Industry Training Board which has been established in terms of the provisions of the Manpower Training Act. See also clause 30 of the Building Industry, North and West Boland: Main Agreement published as notice R 805 in Government Gazette 16452 of 9 June 1995 in terms of which an employer must pay to the secretary of the council the required amount which is to be contributed to the Building Industry Training Fund in terms of clause 7(3) of notice R 1886 of 31 August 1984. See further clause 5 of the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Education and Training Fund Agreement published as notice R 855 in Government Gazette 16474 of 15 June 1995 in terms of which employers must make monthly contributions to the Metal and Engineering Industries Education and Training Fund.

¹⁷¹See, for instance, clause 7 of the Textile Industry, Republic of South Africa: Amendment of Agreement published as notice R 1673 in Government Gazette 16782 of 27 October 1995 which requires the employer to make financial contributions on a regular basis to an education bursary scheme run by the trade union.

¹⁷²Neither the common law nor minimum legislation deals with this matter.

¹⁷³See clause 12 of the Motor Industry: Main Agreement published as notice R 838 in Government Gazette 16466 of 23 June 1995 and clause 11 of the Furniture Manufacturing Industry, Orange Free State: Main Agreement published as notice R 1427 in Government Gazette 15918 of 19 August 1994.

¹⁷⁴See, for instance, clause 4.5 of the Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995.

them.¹⁷⁵ Employers may also be required to provide secure storage places for such tools.¹⁷⁶

5.3.2.20 Anti-Discriminatory Provisions¹⁷⁷

There are collective agreements which explicitly prohibit employers from discriminating between employees solely on grounds such as race, colour, language, sex,¹⁷⁸ religion, ethnic origin, birth, political views, disability or other natural characteristics.¹⁷⁹ These agreements take on special significance in view of the fact that they are in line with the anti-discriminatory provisions contained in Schedule 7¹⁸⁰ to the Labour Relations Act, 1995 as well as the provisions of the Constitution.¹⁸¹

5.3.2.21 Health and Safety¹⁸²

Frequently, collective agreements specifically incorporate the provisions of the Occupational Health and Safety Act.¹⁸³ But a number of agreements prescribe their own health and safety procedures *in addition to* the health and safety procedures of the Act. These

¹⁷⁵See clause 7 of the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Lift Engineering Agreement published as notice R 1641 in Government Gazette 16782 of 27 October 1995.

¹⁷⁶See, for example, clause 12 of the Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995.

¹⁷⁷The common law, by operating on the premise that employees are an equal footing with their employers and that it does not have to provide protection against discrimination, makes it possible for employers to discriminate (see par 2.2 of chapter 2 in this regard). However, the residual unfair labour practice contained in schedule 7 to the Labour Relations Act, 1995 affords employees a measure of protection against unfair discrimination on arbitrary grounds. Protection is also afforded by the Constitution against discrimination (see pars 3.2 and 3.3.3 of chapter 3 where these provisions are discussed).

¹⁷⁸The Department of National Education agreed to do away with any salary disparities for married women in education as from 1 July 1992 (see "Women Teachers Gain Salary Parity" (1992) 3(18) *South African Labour News* 10). The Women's Forum of Cosatu have demanded an end to discrimination against women obtaining housing loans (see "Women Raise their Voices" (1992) 4(4) *South African Labour News* 1).

¹⁷⁹See clause 3.4.2 of the Code of Conduct in terms of which the right to human dignity and equality has been acknowledged as a civil right.

¹⁸⁰See clause 2.

¹⁸¹See s 9 thereof which deals with the principle of equality.

¹⁸²See pars 2.4.2.2-2.4.2.4 of chapter 2 where the employer's common law duty of care is discussed and par 3.3.2 of chapter 3 where the different health and safety Acts are discussed.

¹⁸³See clause 28 of the Building Industry (Transvaal): Main Agreement published as notice R 1994 in Government Gazette 16095 of 19 November 1994.

procedures are usually geared to specific circumstances in the workplaces¹⁸⁴ and may be more onerous for the employer than the statutory provisions. There are, for instance, agreements which require employers to allow trade union officials and office-bearers to form part of investigations into accidents involving workers at the workplace.¹⁸⁵

But collective agreements' safety provisions often go much further than employers' common law and statutory duties of care. A serious problem is the high level of crime and violence in our society and its effect on employees who, due to the nature of their jobs, are prone to attacks and other forms of violence. Demands have been made by trade unions for employers to provide a measure of protection to such employees.¹⁸⁶ Violence is also prevalent amongst employees with different political views and collective agreements also require employers to attempt to eliminate such violence.¹⁸⁷

¹⁸⁴See, for example, the specific provisions in clause 22 of the Hairdressing Trade, Pretoria published as notice R 1684 in Government Gazette 17500 of 18 October 1996 in terms of which the employer must ensure that the workplace is adequately lighted and ventilated and provided with an adequate supply of hot and cold running water; that it is fitted with glazed washbasins with waste pipes and a system for the innocuous disposal of waste water; that the walls and floors are constructed of material which will permit their being kept clean and that a place for the storage or preparation of food is separated from the part used for carrying on the trade by a wall or walls having no doors, windows, apertures or other means of communication therewith.

¹⁸⁵Premier Food Industries have reached such an agreement with FAWU (see "Epic Explosion Investigation" (1992) 3(23) *South African Labour News* 6).

¹⁸⁶Employees of the Post Office, for instance, have been subjected to acts of violence - particularly during the early 1990's. This was a matter of concern to the Post and Telecommunication Workers Association, which raised the question of restructuring security structures by the Post Office in co-operation with the unions concerned (see "New Shape for Post Office Wage Talks" (1992) 3(15) *South African Labour News* 7 and "Potwa Stoppage over Township Attacks" (1992) 4(3) *South African Labour News* 5 in this regard). The South African Railways and Harbour Workers Union has also demanded adequate security at all stations and on all trains for its employees (see "Spoornet Sit-in Follows March" (1992) 3(21) *South African Labour News* 4). See further the demands made by Johannesburg municipal security guards for improved safety provisions in "Jo'burg Security Guards Strike" (1992) 3(22) *South African Labour News* 5.

¹⁸⁷In terms of clause 3.6 of the Code of Conduct, Anglo American and NUM have agreed that the following is not permitted on mine property: language or behaviour which may incite, be derogatory or which may reasonably give offence to others; the wearing of any party political insignia at the workplace; the wearing, carrying or displaying of weapons; any form of coercive behaviour; any interference in the normal running of the operations. In terms of clause 3.5.1, management has the right to conduct searches for weapons and other illicit substances (see also "NUM and Anglo Sign Historic Accords" (1992) 4(1) *South African Labour News* 3).

5.3.2.22 Private Work by the Employee

An employee's common law duty not to compete with his employer¹⁸⁸ has been confirmed in a number of collective agreements which expressly prohibit employees from doing any other remunerative work after working hours.¹⁸⁹ There are, however, a number of agreements which permit employees to do such work, subject to the express permission of their employers.¹⁹⁰

5.3.2.23 Funds for the Benefit of Employees¹⁹¹

Collective agreements often require employers to establish funds for the benefit of their employees and/or to make regular contributions to such funds. Examples of such funds provided for in agreements are holiday funds,¹⁹² sick pay funds,¹⁹³ medical aid

¹⁸⁸See par 2.4.5 of chapter 2 where the employee's duty to act in good faith is discussed.

¹⁸⁹See, for instance, clause 4 of the Motor Industry: Main Agreement published as notice R 838 in Government Gazette 16466 of 23 June 1995 in terms of which employees are prohibited from soliciting or taking orders for or undertake any work falling within the scope of the motor industry, whether for gain or not, other than for their employers. Employees may also not engage in trading in motor vehicles or accessories on their own account or on behalf of any person or firm other than their employers. See also clause 6 of the Furniture Manufacturing Industry, Orange Free State: Main Agreement published as notice R 1427 in Government Gazette 15918 of 19 August 1994.

¹⁹⁰See, for example, clause 14.1.1 of the Industrial Council for the Local Government Undertaking, Transvaal: Standard Conditions of Service for Town Clerks and Chief Executive Officers published as notice R 1807 in Government Gazette 16038 of 21 October 1994 in terms of which employees are allowed, with special permission from the employer and on conditions determined by it, to perform remunerative work outside the employer's service. See also clause 15.2.1 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994.

¹⁹¹Neither the common law (see par 2.4.8 of chapter 2) nor minimum legislation (see par 3.3.3 of chapter 3) makes provision for the establishment and maintaining of such funds.

¹⁹²The purpose of such a fund is to provide employees with additional funds when they take their leave. Clause 33 of the Main Agreement for the Diamond Cutting Industry of South Africa published as notice R 1648 in Government Gazette 14047 of 12 June 1992, provides for such a fund. Membership is compulsory for all employees employed in the industry and employers which are members of the employers' organisation (see clause 33(2)). In terms of subclause (3)(a), each employer must contribute in respect of each employee a monthly sum, calculated at 6% of the employees' weekly or monthly earnings. In terms of subclause (6), payment of the holiday bonus must be made during the week preceding the commencement of the employee's annual leave. A very interesting provision, which actually provides the employer with some sort of hold over the trade union and its employees, is contained in sub-clause (8). It provides that in the event of the union's failure to bring about a cessation of a stoppage or retardation within four working days, the employers' organisation has the right to declare the provisions of the fund terminated.

¹⁹³See clause 20 of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, in terms of which a so-called sick pay fund is established for the benefit of the employees who are absent from work owing to illness. See also the National

funds,¹⁹⁴ unemployment funds,¹⁹⁵ maternity benefit funds,¹⁹⁶ bursary funds,¹⁹⁷ pension funds,¹⁹⁸ provident funds¹⁹⁹ and other insurance funds.²⁰⁰

5.3.2.24 Grievance Procedures²⁰¹

Agreements have been concluded which contain grievance procedures. In terms of these procedures, employees who have grievances against co-workers or superiors, or about their work, or the environment in which they work; or about their terms and condi-

Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry Sick Pay Fund Agreement published as notice R 1804 in Government Gazette 17548 of 8 November 1996 which makes provision for the payment of sick pay benefits (see clause 5(1)); benefits for injury on duty (see clause 5(2)); funeral benefits (see clause 5(3)); benefits in respect of pregnancy, confinement and stillborn confinement (see clause 5(4)) and benefits in respect of the adoption of children under two years of age (see clause 5(5)).

¹⁹⁴See clause 19 of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, in terms of which a medical benefit society is created. The aim of the society is to provide its members with medical treatment and medicines in case of illness. See also the Iron, Steel, Engineering and Metallurgical Industry: Steelmed-Agreement published as notice R 230 in Government Gazette 16266 of 17 February 1995.

¹⁹⁵In terms of clause 21 of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, the parties have established a so-called slack pay fund. The funds of the fund must be applied to provide benefits to employees who have been placed on short-time.

¹⁹⁶See, for instance, clause 35 of the Millinery Industry (Transvaal) Agreement published as notice R 470 in Government Gazette 16332 of 31 March 1995.

¹⁹⁷See clause 19(A) of Clothing Industry, Natal: Amendment of Main Agreement published as notice R 175 in Government Gazette 17763 of 7 February 1997.

¹⁹⁸See the Iron, Steel, Engineering and Metallurgical Industry: Engineering Industries Pension Fund Agreement published as notice R 627 in Government Gazette 17109 of 19 April 1996 in terms of which a pension fund is established.

¹⁹⁹See clause 22 of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, in terms of which a provident fund is established. See also the Iron, Steel, Engineering and Metallurgical Industry: Provident Fund Agreement for the Metal Industries published as notice R 624 in Government Gazette 17109 of 19 April 1996 in terms of which such a fund is established.

²⁰⁰Such as the funeral benefit scheme which Transnet and the unions represented on the bargaining council have established. The parties have agreed that Transnet would implement and finance the scheme for its employees (see "Agreement Reached at Transnet" (1992) 4(2) *South African Labour News* 9). See also clause 23 of the Agreement for the Knitting Industry published as notice R 3124 in Government Gazette 14395 of 13 November 1992, in terms of which a so-called maternity benefit fund is established which provides members thereof with maternity benefits in case of absence from work owing to confinement.

²⁰¹Neither the common law nor legislation make provision for grievance procedures.

tions of employment, may lodge a complaint with a manager or someone higher in the hierarchy of the enterprise.²⁰²

5.3.2.25 Disciplinary Codes and Procedures²⁰³

Although collective bargaining parties have generally accepted that it is for employers to determine what would be acceptable conduct in the workplace,²⁰⁴ there have been employers and trade unions which have concluded agreements on *disciplinary codes*.²⁰⁵ Others have only reached agreement on certain aspects of discipline such as the appropriate penalty for a particular offence. There are, for example, agreements that provide that the employer has the right to summarily dismiss an employee "for any cause recognised by law as sufficient"²⁰⁶ or for misrepresentation.²⁰⁷ Some agreements provide that an employer may temporarily suspend an employee on full pay,²⁰⁸ or may dis-

²⁰²See, for instance, clause 29 of the Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995. See also clause 2 of chapter 7 of the Building Industry (Transvaal) Main Agreement published as notice R 1994 in Government Gazette 16095 of 19 November 1994; clause 9 of the Industrial Council for the Local Government Undertaking, Transvaal: Standard Conditions of Service for Town Clerks and Chief Executive Officers published as notice R 1807 in Government Gazette 16038 of 21 October 1994 and clause 14 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994.

²⁰³See par 3.4.2 of chapter 3 where the statutory provisions regarding disciplinary codes and procedures are discussed.

²⁰⁴See par 2.4.9 of chapter 2 on the employer's common law right to discipline and par 3.4.2 of chapter 3 where it is indicated that the Code leaves it to the employer to determine what conduct will be acceptable. But see s 86 of the Labour Relations Act, 1995 which lists disciplinary codes and procedures as matters about which the employer must jointly decide with the workplace forum (see par 4.3.3.2 of chapter 4 in this regard).

²⁰⁵See, for instance, clause 10 of the Industrial Council for the Local Government Undertaking, Transvaal: Standard Conditions of Service for Town Clerks and Chief Executive Officers published as notice R 1807 in Government Gazette 16038 of 21 October 1994 which sets out the different forms of misconduct which will be unacceptable in the workplace. See also clause 10.4 of this agreement which sets out the penalties which may be imposed against employees who have been found guilty of misconduct. See further clauses 10 and 11.1.4 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994.

²⁰⁶See, for example, clause 14(1)(i) of division A of the Main Agreement for the Motor Industry.

²⁰⁷See clause 3 of the Motor Industry: Main Agreement published as notice R 838 in Government Gazette 16466 of 23 June 1995.

²⁰⁸See clause 4.2 of the Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995.

miss an employee who is absent from work without permission for a specified period.²⁰⁹ There are also agreements which provide for the demotion of an employee who is guilty of misconduct.²¹⁰

Many collective agreements contain *disciplinary procedures* which set out the procedure according to which an employer must exercise discipline in the workplace.²¹¹ There are also agreements which prescribe the procedure which must be followed where the dispute cannot be settled in the workplace.²¹²

5.3.2.26 Retrenchment Procedures²¹³

Negotiated retrenchment procedures are fairly common. The procedure is normally in accordance with the statutory requirements for a fair dismissal for operational reasons contained in the Labour Relations Act, 1995.²¹⁴ Retrenchment agreements provide for

²⁰⁹See clause 11 of the Building Industry, Western Province: Re-enactment of Agreement for the Cape Peninsula published as notice R 1657 in Government Gazette 16782 of 27 October 1995 in terms of which the employer may dismiss an employee who is absent from work without its consent for a continuous period of five or more days. See also clause 15 of the Motor Industry: Main Agreement published as notice R 838 in Government Gazette 16466 of 23 June 1995 which stipulates that an employee who has been absent, without permission, for a period of at least five days will be regarded as having deserted.

²¹⁰See clause 6.5.1.1 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994.

²¹¹See, for instance, the disciplinary procedures contained in clause 3 of chapter 7 of the Building Industry (Transvaal) Main Agreement published as notice R 1994 in Government Gazette 16095 of 19 November 1994 and clause 10.2 of the Industrial Council for the Local Government Undertaking, Transvaal: Standard Conditions of Service for Town Clerks and Chief Executive Officers published as notice R 1807 in Government Gazette 16038 of 21 October 1994.

²¹²In clause 4.2.6 of the Code of Conduct, for instance, it is stipulated that alleged unfair dismissal disputes must be referred to arbitration.

²¹³See par 2.4.10.3 of chapter 2 where the employer's common law right to dismiss by notice is discussed. See par 3.4.3.3.4 of chapter 3 where the statutory regulation of an employer's right to dismiss for operational reasons is discussed. See also par 4.3.3.1 of chapter 4 where the listing of dismissal for operational reasons as a matter for consultation with the workplace forum is discussed.

²¹⁴See par 3.4.3.3.4.2 of chapter 3 where the requirements are discussed. See, for instance, clause 17 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994.

the consideration of alternatives to retrenchment,²¹⁵ prior notice of the intention to retrench,²¹⁶ prior consultation in regard to the contemplated retrenchment,²¹⁷ the disclosure of information,²¹⁸ the implementing of objective criteria for the selection of those to be retrenched,²¹⁹ notification and assistance to the employees, an undertaking to re-employ²²⁰ and the quantum of severance pay.²²¹

²¹⁵See clause 13 of division B and clause 6 of chapter 1 of division C of the Main Agreement for the Motor Industry in terms of which the parties have agreed to the implementation of short-time as an alternative to retrenchment. They have agreed that the employer may introduce short-time where there is a slackness of trade and, in such an event, the employer is not required to pay wages. The parties to the Main Agreement for the Diamond Cutting Industry of South Africa published as notice R 1648 in Government Gazette 14047 of 12 June 1992 have also agreed to short-time. In clause 10 they provide that, whenever the employee is placed on short-time, he should be paid a minimum of 65% of his daily rate. See also clause 1 of annexure A to the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Lift Engineering Agreement published as notice R 1641 in Government Gazette 16782 of 27 October 1995. See further clause 13 of the Motor Industry: Main Agreement published as notice R 838 in Government Gazette 16466 of 23 June 1995 in terms of which the reduction of wages is listed as an alternative to retrenchment.

²¹⁶See clause 25(1) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992, and clause 1(b) of annexure A to the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Lift Engineering Agreement published as notice R 1641 in Government Gazette 16782 of 27 October 1995.

²¹⁷See clause 25(2) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992; clause 1(c) of annexure A to the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Lift Engineering Agreement published as notice R 1641 in Government Gazette 16782 of 27 October 1995 and clause 1.3 of chapter 7 of the Building Industry (Transvaal): Main Agreement published as notice R 1994 in Government Gazette 16095 of 19 November 1994.

²¹⁸See clause 1(c)(ii) of annexure A to the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Lift Engineering Agreement published as notice R 1641 in Government Gazette 16782 of 27 October 1995. Of interest is the fact that the agreement stipulates that the employer is not expected to disclose information which "could harm the employer's business interests, for example trade secrets and other confidential information". This provision is not as onerous as s 189(4) read with s 16 of the Labour Relations Act, 1995 in terms of which an employer may be ordered to disclose confidential information which, if disclosed, may cause substantial harm to it (see par 3.4.3.3.4.2 of chapter 3 where this matter is discussed in detail).

²¹⁹See clause 25(3) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992. In terms of clause 25(3)(c), an employee who is elected for retrenchment on account of old age, is paid a certain sum, which appears to be something akin to severance pay. The amount depends on the age of the employee as well as his length of service. See also clause 1.6 of chapter 7 of the Building Industry (Transvaal): Main Agreement published as notice R 1994 in Government Gazette 16095 of 19 November 1994 which lists LIFO as the primary criterion but also allows selection on the ground of proven poor work performance.

²²⁰See clause 25(5) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992; clause 2 of annexure A to the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Lift Engineering Agreement published as notice R 1641 in Government Gazette 16782 of 27 October 1995 as well as clauses 1.8.2 and 1.9 of chapter 7 of the Building Industry (Transvaal): Main Agreement published as notice R 1994 in Government Gazette 16095 of 19 November 1994.

An interesting development in regard to retrenchment is the demand by certain trade unions that employers agree to implementing a moratorium on retrenchments.²²² Although this demand has met with strong opposition from some employers,²²³ others have agreed to such a moratorium.²²⁴

5.3.2.27 Notice Periods²²⁵

Collective agreements often stipulate the period of notice to which employees will be entitled if their services are terminated.²²⁶

5.3.2.28 Atypical Employees

Some collective agreements prohibit employers from giving *piece-work*²²⁷ or taskwork

²²¹In terms of clause 39 of division A of the Main Agreement for the Motor Industry payment of retrenchment pay or severance pay must be made by the employer. In terms of this clause, the employer must pay a sum equal to one week's wages for each completed year of service. This is in accordance with the minimum stipulated in s 196(1) of the Labour Relations Act, 1995 (see par 3.4.3.3.4.2 of chapter 3 where severance pay is discussed). Clause 17.4.8.8 of the Local Government Undertaking: Conditions of Employment Agreement, Transvaal published as notice R 1828 in Government Gazette 16047 of 28 October 1994 provides for much more favourable terms. It stipulates that all employees with less than 10 years' service must be paid three weeks' salary for each completed year of service.

²²²See "Job Security Key Demand" (1992) 3(20) *South African Labour News* 5; "Job Security Crucial Issue" (1992) 3(22) *South African Labour News* 10 and "Fawu Seeks Job Security at SAB" (1992) 3(22) *South African Labour News* 11.

²²³See "Job Security Key Demand" (1992) 3(20) *South African Labour News* 5.

²²⁴See, for instance, "Saccawu Ends Fredsmollen Strike" (1992) 4(7) *South African Labour News* 4; "Job Security Critical Issue" (1992) 3(22) *South African Labour News* 10 and "Agreement Reached at Transnet" (1992) 4(2) *South African Labour News* 9.

²²⁵See par 2.4.10.3 of chapter 2 where the common-law notice requirements are discussed and par 3.4.3.4 of chapter 3 where the statutory provisions are discussed.

²²⁶See, for instance, clause 11 of the Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995. It is interesting to note that the majority of the provisions contained in this clause are less favourable than those contained in s 14 of the Basic Conditions of Employment Act.

²²⁷A piece-worker is a permanent employee of the business who is given a specific piece of work to do and is paid for work done. In clause 3 of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, a piece-worker is defined as "an employee...employed permanently by the establishment for not more than 24 ordinary hours in any week" and piece-work is defined as "any system by which earnings are based solely on quantity or output of work done".

out to any of their employees.²²⁸ Other agreements allow the giving out of piece-work but regulate it,²²⁹ for instance, by prescribing the manner in which piece-workers' remuneration must be calculated.²³⁰

There are also collective agreements which regulate employers' right to appoint *casual employees*.²³¹ Such employees' terms and conditions are usually less favourable than those of permanent employees²³² and they are also normally ineligible for membership of certain funds such as pension and provident funds and medical aid schemes.²³³

²²⁸See, for instance, clause 10 of the Building Industry, North and West Boland: Main Agreement published as notice R 805 in Government Gazette 16452 of 9 June 1995 and clause 8 of the Millinery Industry (Transvaal) Agreement published as notice R 470 in Government Gazette 16332 of 31 March 1995.

²²⁹See clause 16 of division A of the Main Agreement for the Motor Industry and clause 5 of The Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995 as well as clause 9 of the Civil Engineering Industry: Agreement published as R 1841 in Government Gazette 16833 of 24 November 1995.

²³⁰In clause 16 of division A for the Main Agreement for the Motor Industry, for instance, it is stipulated that a piece-worker may not be paid less than the remuneration which he would have received had he been employed as a time-worker. See also clause 5 of The Building Industry (Transvaal): Main Agreement published as notice R 1896 in Government Gazette 16870 of 15 December 1995.

²³¹In clause 3 of division A of the Main Agreement for the Motor Industry a casual employee is defined as a person who is employed on not more than three days in any week. There is, however, a rider that that employee is also not employed on more than 28 calendar days in any period of six months. See also clause 11 of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991 which provides that an employee may be employed as a temporary employee for a period not exceeding 3 months on condition that the employer has in writing clearly conveyed his temporary status to the employee at the time of his engagement.

²³²Consider, for instance, clause 5 of the Laundry, Cleaning and Dyeing Industry (Cape): Amendment of Main Agreement published as notice R 1429 in Government Gazette 15918 of 19 August 1994 in terms of which probationary employees are not entitled to the normal disciplinary procedures which precede termination of employment.

²³³See, for instance, the Civil Engineering Industry: Agreement published as R 1841 in Government Gazette 16833 of 24 November 1995. In terms of clause 14.4 thereof such workers are not entitled to annual leave. They are also not entitled to sick leave (see clause 14.5) and the employer does not have to provide such an employee with a certificate of service (see clause 14.7). It is for this reason that trade unions are so keen to obtain permanent status for temporary workers where possible. NEHAWU, for instance, has striven to obtain permanent employee status for hospital workers who had, some of them after many years of service, merely temporary worker status. It was successful as an agreement was concluded in 1992 in terms of which approximately 160 000 health sector workers got permanent status before the start of the 1993 financial year (see in this regard "State v Health Workers" (1992) 4(7) *South African Labour News* 8).

Certain collective agreements, however, do contain more favourable terms for such workers than the minima stipulated by the Basic Conditions of Employment Act.²³⁴

Collective agreements confirm employers' right to appoint employees on a *probationary* basis.²³⁵ Some of these agreements prescribe a notice period for dismissal during the probation period²³⁶ whereas others entitle employers to terminate probationary employment without notice.²³⁷ Other agreements require employers to train probationary employees or to allow them time off to undergo training.²³⁸

Collective agreements sometimes entitle employers to hire employees for a *fixed term*,²³⁹ usually to work on a special project.²⁴⁰

²³⁴See clauses 3 and 4(1) of the Main Agreement for the Tearoom, Restaurant and Catering Trade, Witwatersrand published as notice R 412 in Government Gazette 13038 of 1 March 1991, and clause 30 of division A of the Main Agreement for the Motor Industry. See also clause 6(3) of the Furniture Manufacturing Industry, Natal: Exclusion from Main Agreement published as notice R 620 in Government Gazette 17207 of 24 May 1994.

²³⁵In terms of clause 14 of the Building Industry, North and West Boland: Main Agreement published as notice R 805 in Government Gazette 16452 of 9 June 1995 certain employees are subject to a trial period of 42 working hours. Clause 21 of the Industrial Council for the Tearoom, Restaurant and Catering Trade, Pretoria: New Agreement published as notice R 1797 in Government Gazette 17548 of 8 November 1996 makes provision for a trial period of 30 days for certain employees and a three month probation period for others.

²³⁶Clause 21 of the Industrial Council for the Tearoom, Restaurant and Catering Trade, Pretoria: New Agreement published as notice R 1797 in Government Gazette 17548 of 8 November 1996 prescribes 24 hours' notice for dismissal during a 30 day probation period and seven days' notice for employees who are on a three month probation period and who are paid weekly.

²³⁷See, for instance, clause 9(1)(e) of the Agreement for the Knitting Industry, Transvaal published as notice R 3124 in Government Gazette 14395 of 13 November 1992 in terms of which the first ten working days of the period of employment of an employee is deemed to be a trial period and such employment may be terminated either by the employer or the employee at any time within such trial period without notice. However, the Labour Relations Act, 1995's guidelines for the fair dismissal of a probationary employee clearly require that the employer must dismiss in a fair manner (see pars 3.4.3.3.1 and 3.4.3.3.2 of chapter 3).

²³⁸See clause 8 of the Building Industry, North and West Boland: Main Agreement published as notice R 805 in Government Gazette 16452 of 9 June 1995.

²³⁹See pars 3.2 and 3.4.3.1 of chapter 3 for a discussion on fixed term contracts and employees' right to attack the fairness of employers' refusal to renew their contracts.

²⁴⁰See, for instance, clause 4 of the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Lift Engineering Agreement published as notice R 1641 in Government Gazette 16782 of 27 October 1995 in terms of which an employer may employ an employee "for a specified limited contract period in terms of a limited duration contract of employment". Such employees are required to do sitework, or turnaround work, or ship repair work or they are employed because the employer has managed to secure additional work of a short term nature. See also clause 6(3) read with the annexure to the Iron, Steel, Engineering and Metallurgical Industry: Re-enactment of Main Agreement published as notice R 1642 in Government Gazette 16782 of 27 October 1995 in terms of which the employer is entitled to employ a substitute

5.4 MATTERS WHICH DO NOT HAVE A DIRECT BEARING ON THE EMPLOYMENT RELATIONSHIP

5.4.1 Introduction

Trade unions often involve themselves in matters which do not have a direct bearing on the employment relationship. Some of them have, for instance, become involved in matters such as economic policies²⁴¹ and political issues. They do not engage in formal collective bargaining about these matters. Usually, their involvement entails making suggestions, or submitting proposals, or commenting on these matters or endeavouring to reach consensus.²⁴²

5.4.2 Economic Policies

Subsequent to trade unions' and employers' discussions²⁴³ about the possibility of establishing a joint forum on economic matters to formulate a macro-economic policy²⁴⁴ and to ensure that no unilateral economic decisions are taken by the

employee on a fixed term contract during the period of maternity leave taken by a permanent employee.

²⁴¹Trade unions deemed it necessary to become involved in the active promotion of economic growth and job creation because of the extent of unemployment and its negative social consequences (see Ebrahim Patel "New Institutions of Decision-making: The Case of the National Economic Forum" in Ebrahim Patel (ed) *Engine of Development? South Africa's National Economic Forum* (1993) 1 at 3).

²⁴²See clause 3.3 of the founding document of the National Economic Forum as reproduced in Ebrahim Patel (ed) *Engine of Development? South Africa's National Economic Forum* (1993) 64. See also the founding document of National Economic Development and Labour Council (hereafter NEDLAC) as well as the Ministerial Legal Task Team *Explanatory Memorandum* notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 page 112.

²⁴³See "Joint Economic Forum Takes Shape" (1992) 3(15) *South African Labour News* 9 and "NEF Gets Down to Business" (1992) 4(11) *South African Labour News* 3. The foundations for such a macro-economic forum were laid by business and labour leaders on 5 February 1992 (see "Economic Forum Lays Foundations" (1992) 3(16) *South African Labour News* 3).

²⁴⁴For a detailed discussion on the unions' motivation for the establishment of such a joint forum, see Ebrahim Patel "New Institutions of Decision-making: The Case of the National Economic Forum" in Ebrahim Patel (ed) *Engine of Development? South Africa's National Economic Forum* (1993) 1 at 2-5. See also Jayendra Naidoo "The Role of the National Economic Forum" In Ebrahim Patel (ed) *Engine of Development? South Africa's National Economic Forum* (1993) 28 at 30.

employers and/or the State, the National Economic Forum was formed.²⁴⁵ Its main objective was set out in clause 1 of its founding documents.²⁴⁶ It reads as follows

In recognition of the economic challenges facing South Africa, we believe that major economic stakeholders need to develop co-operative mechanisms for addressing South Africa's economic challenges. Organised labour, organised business and the governing authority have a central role in developing strategies geared towards the generation of sustained economic growth, the addressing of distortions in the economy, stability and the addressing of social needs.

The body had to endeavour to achieve its objectives through "practical and effective consensus".²⁴⁷

The National Economic Development and Labour Council, an amalgamation of the National Manpower Commission and the National Economic Forum, was formed in May 1995.²⁴⁸ The founding document of NEDLAC cites its purpose as the bringing together of labour, business, Government and development actors in order to "ensure consensus on all matters relating to economic policy" and to "consider all proposed labour legislation".²⁴⁹

In accordance with NEDLAC's stated purpose, trade unions tabled formal responses to the draft negotiating document in the form of a Labour Relations Bill²⁵⁰ and participated

²⁴⁵See Ebrahim Patel "New Institutions of Decision-making: The Case of the National Economic Forum" in Ebrahim Patel (ed) *Engine of Development? South Africa's National Economic Forum* (1993) 1 at 7 as well as D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 16.

²⁴⁶See Ebrahim Patel (ed) *Engine of Development? South Africa's National Economic Forum* (1993) 62-68 where the forum's founding documents are reproduced.

²⁴⁷See clause 3.3 of its founding documents as reproduced in Ebrahim Patel (ed) *Engine of Development? South Africa's National Economic Forum* (1993) 64. See also Ebrahim Patel "New Institutions of Decision-making: The Case of the National Economic Forum" in Ebrahim Patel (ed) *Engine of Development? South Africa's National Economic Forum* (1993) 1 at 6.

²⁴⁸It was formed in terms of the National Economic, Development and Labour Council Act 35 of 1994 (hereafter the National Economic, Development and Labour Council Act) which came into operation on 5 May 1995 in terms of Proclamation No R 48, 1995 published in Government Gazette 16403 of 3 May 1995. See also D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 18.

²⁴⁹See also s 5(1)(b) and (c) of the National Economic, Development and Labour Council Act. See further Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 114 and D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 18.

²⁵⁰Published as notice 97 of 1995 in Government Gazette 16259 of 10 February 1995.

in negotiations with the State and employers concerning the Bill.²⁵¹ On 21 July 1995 NEDLAC tabled a report recommending the adoption of the draft Bill, subject to the necessary amendments occasioned by the agreements reached by the negotiating parties.²⁵²

Through their participation in these negotiations at NEDLAC, trade unions have ensured that those sections which either directly or indirectly promote the social and economic upliftment of the South African workforce have been included in the Labour Relations Act, 1995.²⁵³

5.4.3 Political Issues

Trade unions have, especially prior to the first democratic elections in 1994,²⁵⁴ endeavoured in a number of different ways to force employers to put pressure on the Government in order to introduce political changes. The method most often utilised by trade unions was stayaways²⁵⁵ although they also occasionally resorted to overtime bans.²⁵⁶

Most employers have treated political issues as matters about which they can do very little and have accordingly been reluctant to compromise in this regard. Some of them,

²⁵¹See the "Explanatory Memorandum" published in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law 1995: A Review of Recent Developments in Key Areas of Labour Law* (1995) 214.

²⁵²See the "Explanatory Memorandum" published in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law 1995: A Review of Recent Developments in Key Areas of Labour Law* (1995) 215. For a detailed account of the negotiations between the various parties at NEDLAC, see D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 26-32.

²⁵³See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 21-32 for a discussion of the various matters which trade unions regarded as relevant for the social and economic upliftment of workers and the negotiations which surrounded these matters prior to the passing of the Labour Relations Act, 1995 by Parliament.

²⁵⁴See "Cosatu Mass Action Programme" (1992) 4(7) *South African Labour News* 3 and "Programme of Action: Adopted by Cosatu Campaigns Conference: 11-13 September 1992" (1992) *South African Labour News: Special Document*.

²⁵⁵See Ebrahim Patel "New Institutions of Decision-making: The Case of the National Economic Forum" in Ebrahim Patel (ed) *Engine of Development? South Africa's National Economic Forum* (1993) 1 at 4-6.

²⁵⁶See, for instance, the facts in *Cape Gate (Pty) Ltd v Namane & Others* (1990) 11 ILJ 766 (IC) at 769A-B and 775A.

however, have been prepared to become involved.²⁵⁷ On closer scrutiny of the reasons for their willingness to become involved, it appears that they were mostly moved by business considerations!²⁵⁸

5.5 CONCLUSION

From the above survey, it is apparent that very few aspects of the employment relationship are excluded from collective bargaining. In practice, therefore, in many places of work most facets of the employment relationship are regulated by collective agreements rather than being the product of unilateral employer decisions.

It is also apparent that the ambit of collective bargaining is, in certain cases at least, being extended to issues beyond the employment relationship.

* Matters which have not received much attention from trade unions so far are those related to the business or economic component of enterprises²⁵⁹ such as the issuing of shares, investment of surplus funds, the purchasing of a plant or new equipment,²⁶⁰ the relocation of the business,²⁶¹ exporting, customer services, the prices of products and product development.

²⁵⁷Consider, for instance, the case of Bertrands Holdings, a major textile employer which had in 1992 been prepared to call on the then President to remove Brigadier Oupa Gqoza as head of State in the Ciskei. In its letter to the President, the company alleged that this had been done as a result of demands from its labour force. The company also urged the re-incorporation of Ciskei into South Africa (see "Sactwu Harnesses Employers" (1992) 4(7) *South African Labour News* 9). South African businesses also became involved in the then Bophuthatswana concerning the promulgation of legislation in terms of which unions, with their head offices outside the homeland, were barred from registration in Bophuthatswana (see "Business Joins Unions in Opposition to Bop Labour Law" (1992) 3(15) *South African Labour News* 1-2).

²⁵⁸ Bertrands Holdings, for instance, had subsidiaries in the Ciskei. See Lionel Hodes "The Social Responsibility of a Company" (1983) 100 *SALJ* 468 at 490 where he points out that there are businesses which maintain that political action by employers will in the long run enhance business prospects.

²⁵⁹See par 1.2 of chapter 1 where this sphere of a business is discussed.

²⁶⁰The purchasing of a plant, however, has been indirectly challenged where trade unions were consulted about the retrenchment of employees who could not or would not move to the newly acquired plant (see par 3.4.3.3.4 of chapter 3 where the requirements for a fair dismissal for operational reasons are discussed). The purchasing of equipment has also been indirectly challenged where trade unions were consulted about the dismissal of employees who became redundant as a result of such purchase (see par 3.4.3.3.4 of chapter 3) or where they negotiated about the retraining of employees affected by the purchase (see par 5.3.2.18 above).

²⁶¹This matter has received a measure of attention from trade unions in so far as it may lead to dismissals. Under such circumstances, employers are statutorily obliged to consult either the workplace forum (if there is one) or the trade union (see par 3.4.3.3.4.2 of chapter 3 where the statutory requirements for a procedurally fair dismissal for operational reasons are discussed).

There may be a number of reasons for this. Trade unions' historical interest in collective bargaining issues has traditionally been limited to the "job territory".²⁶² They may also believe that they lack the expertise to make decisions in these areas. Furthermore, their members may not be interested in these issues and thus the risk of pursuing them may be too high,²⁶³ particularly as most employers hold the view that these matters are part of their prerogative. Nevertheless, employers may in future also be challenged by trade unions about these matters, particularly now that the Labour Relations Act, 1995 lists some of these matters for consultation with workplace forums.²⁶⁴

In future, collective bargaining parties will have to ensure that their agreements are in accordance with the provisions of the Constitution²⁶⁵ and the Labour Relations Act, 1995. They will have to be particularly sensitive to the equality clause of the Constitution²⁶⁶ and the provisions of Schedule 7 to the Labour Relations Act, 1995 and ensure that their agreements about the treatment of co-workers as well as applicants for jobs do not constitute unfair discrimination between such people. In addition, they will also have to give due consideration to the Constitution's provisions regarding labour relations,²⁶⁷ particularly those relating to the right to freedom of association,²⁶⁸ organisational rights of trade unions²⁶⁹ and the right to strike²⁷⁰ as well as the Labour Relations Act, 1995's provisions in this regard.²⁷¹

²⁶²See Martin M Perline and David J Poynter "Union and Management Perceptions of Managerial Prerogatives: Some Insight into the Future of Co-operative Bargaining in the USA" (1990) 28 *British Journal of Industrial Relations* 179 at 187.

²⁶³*ibid.*

²⁶⁴See s 84 which lists the restructuring of the workplace, partial or total plant closures, mergers and transfers of ownership, product development plans and export promotion as matters about which consultation must take place (see also par 4.3.3.1 of chapter 4 where this section and its implications for employers' decision-making power are discussed).

²⁶⁵Particularly the Bill of Rights contained in chapter 2 thereof.

²⁶⁶See s 9.

²⁶⁷See s 23.

²⁶⁸See s 23(2)(a).

²⁶⁹See s 23(4).

²⁷⁰See s 23(2)(c).

²⁷¹See ss 4, 11-22 and ss 64 and 65. See also chapters 4 and 6 where these statutory rights are discussed.

CHAPTER 6

THE RESTRICTION OF EMPLOYER PREROGATIVE THROUGH ECONOMIC POWER

6.1 INTRODUCTION

In the previous chapter,¹ the role which collective bargaining plays in the restriction of an employer's decision-making power was considered. It appeared that collective bargaining could constitute a significant restriction on virtually every aspect of the management of an enterprise. The restriction, however, takes place with the employer's co-operation as it is implemented through collective bargaining.

Where the parties are unable to reach agreement through collective bargaining, the employees and their trade union have a number of options. They may decide to drop the matter. They would normally do this where they do not feel too strongly about the matter or where they realise that their bargaining power is not strong enough. The collective bargaining parties may agree on mediation² or they may be obliged to refer the matter to arbitration, either because they are involved in an essential or maintenance service³ or because their collective agreement contains a clause in terms of which they are obliged to do so.⁴ The matter may also be referred to arbitration by the employees and their trade union in terms of a right to do so contained in the Labour Relations Act, 1995.⁵ Or, where the parties are not obliged to refer a matter to arbitration,⁶ they may agree to (voluntary) arbitration.⁷ The employees and their trade union may also decide to exert economic pressure on the employer.

¹ See chapter 5 in which the scope and content of collective bargaining are considered.

² Strictly speaking, this is not an alternative to collective bargaining as mediation is really a continuation of collective bargaining under the guidance of a mediator.

³ See s 65(1)(d) of the Labour Relations Act, 1995 as well as par 6.3.3.1 below where the provisions of s 65 of the Labour Relations Act, 1995 are discussed.

⁴ See s 65(1)(b) of the Labour Relations Act, 1995. See also par 6.3.3.1 below where the provisions of s 65 of the Labour Relations Act, 1995 are discussed.

⁵ See s 65(1)(c) of the Labour Relations Act, 1995. See further par 6.3.3.1 below where s 65 is discussed.

⁶ Perhaps because the matter falls under the jurisdiction of the labour court. Consider, for instance, automatically unfair dismissals and dismissals for operational reasons which, in terms of s 191(5)(b)(i) and (ii) of the Labour Relations Act, 1995, must be referred to the labour court for settlement.

⁷ See s 141 of the Labour Relations Act, 1995.

Economic pressure can take various forms. Pressure could, for example, be exerted through picketing,⁸ boycotts⁹ and the mobilising of public opinion through press statements,¹⁰ advertisements, television interviews¹¹ and the distributing of pamphlets.¹² In practice, however, the most important form of economic pressure is through collective action at the workplace. In colloquial terms, employees embark on a "strike" or "industrial action".¹³

In this chapter, the way in which the law prohibits or regulates the use of economic power as a method to enforce employee demands will be discussed.

6.2 COMMON LAW PRINCIPLES

Employees who use economic power to enforce demands can, depending on the form which the economic pressure takes, incur civil and/or criminal liability on the basis of common law principles. They may, for example, incur civil liability in the form of delictual liability or breach of contract. They may also incur criminal liability in terms of certain common law offences.

Employees who organise a boycott¹⁴ of a business or who picket¹⁵ may be interdicted

⁸Picketing, as a form of economic pressure exerted by employees, is discussed in greater detail in par 6.2 below.

⁹Boycotts, as a form of economic pressure exerted by employees, is discussed in greater detail in par 6.2 below.

¹⁰See, for example, *Dunlop SA Ltd v Metal & Allied Workers Union & Another* (1985) 6 ILJ 167 (D) at 175G-176B and 176B-D and *VNR Steel (Pty) Ltd v National Union of Metalworkers of SA* (1995) 16 ILJ 1483 (LAC) at 1489C-D. See also Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 436.

¹¹See, for example, *VNR Steel (Pty) Ltd v National Union of Metalworkers of SA* (1995) 16 ILJ 1483 (LAC) at 1489C-D.

¹²See, for instance, *BTR Dunlop Ltd v National Union of Metalworkers of SA* (1989) 10 ILJ 181 (IC) at 186F-187A. See also Neil W Chamberlain and James W Kuhn *Collective Bargaining* 3 ed (1986) 189-190.

¹³As will be seen in par 6.3.2 below, the definition of a strike in South African labour legislation has a very technical meaning which does not correspond to the layman's concept of a strike.

¹⁴To "boycott" means "to engage in a concerted refusal to have dealings with (... a person, store or organisation)" (see HB Woolf (editor in chief) *Webster's New Collegiate Dictionary* (1976)) or to abstain from buying or using another person or entity's products (see HG Emery and KG Brewster (eds) *The New Century Dictionary* (1948)). See also JJ Gauntlett SC and DF Smuts "Boycotts: The Limits of Lawfulness" (1990) 11 ILJ 937. In terms of industrial relations, persons organising a boycott try to persuade customers or prospective customers not to do business with an employer (see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 471, 532 and 543-544).

¹⁵AA Landman "Picketing in South Africa" (1988) 2(3) LLB 17 describes picketing as "a congregation of one or more employees with the intention to communicate a message or enforce a demand or persuade their employer or other persons". See also Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law*

from continuing to do so on the ground that their actions amount to a delict.¹⁶ The question of whether or not they may be interdicted on the ground that their actions amount to breach of contract, remains inconclusive.¹⁷ They may also be liable for any damages these actions may cause the employer.¹⁸ In addition, they may be guilty of certain common law offences.¹⁹ Picketers may furthermore defame²⁰ an employer²¹ or a manager.

2 ed (1992) 289. Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) states (at 530) that "[p]icketing has traditionally been regarded as a peaceful method by which striking workers can publicise their action and encourage others to join them".

¹⁶Picketers may be committing a delict if, for example, they persuade fellow employees to stop working in breach of their contracts of employment. They may also be committing a delict where they persuade employees to terminate their contracts of employment lawfully. In addition, they may be committing a delict where they persuade would-be strike breakers not to accept employment with the employer (see, for instance, the facts of *Laursens Division of BTR Ltd v National Union of Metalworkers of SA & Others* (1992) 13 ILJ 1405 (T)) or suppliers to stop deliveries in breach of their contracts with the employer. For a discussion of these various delicts, see AA Landman "Picketing in South Africa" (1988) 2(3) LLB 17 at 20-21.

¹⁷On the one hand, it could be argued that their actions amount to breach of contract. Employees who incite others not to deal with their employer, breach their common law duty to act in good faith towards it (see par 2.4.5 of chapter 2). This constitutes a serious breach of their contracts of employment. On the other hand, if the incitement to boycott and picket is regarded as a mere ancillary to strike action, breach of contract flows from their participation in strike action and not from these actions. It is submitted that these actions are currently regarded as mere ancillaries to strike action (see Reagan Jacobus "The Ancillaries to the Right to Strike" in Paul Benjamin, Reagan Jacobus and Chris Albertyn (eds) *Strikes Lock-outs & Arbitration in South African Labour Law: Proceedings of the Labour Law Conference 1988* (1989) 53 at 54 as well as CJ Napier and SW McBride "Industrial Picketing in South Africa. Does it have a Role?" (1986) 6(2) IRJSA 50). Consequently, these actions do not constitute breach of contract and an interdict cannot be obtained on this ground. In terms of s 69 of the Labour Relations Act, 1995 the purpose of picketing is to peacefully demonstrate in support of a protected strike. Once more, it is treated as something ancillary to strike action.

¹⁸If, for example, picketers' actions amount to a delict and an employer suffers damages as a result thereof, they may be liable for delictual damages (see AA Landman "Picketing in South Africa" (1988) 2(3) LLB 17 at 20).

¹⁹Picketers may, for example, be guilty of *public violence*. Public violence is defined as the unlawful and intentional commission, together with a number of people, of an act which assumes serious dimensions and which is intended forcibly to disturb public peace and tranquility, or to invade the rights of others (see CR Snyman *Criminal Law* 2 ed (1986) at 321). Picketers, who by their conduct or by the content of their appeal or message to the public, demonstrate defiance against the authority of the State, could commit the common law offence of *sedition* (see CR Snyman *Criminal Law* 2 ed (1986) at 316). A picketer may also be guilty of *assault*. Even where he merely threatens to assault, he may be guilty of this offence provided that it leads to the threatened person believing that the picketer has the intention and ability to carry out the threat (see CR Snyman *Criminal Law* 2 ed (1986) at 438). Picketers may be guilty of *malicious damage to property* where they unlawfully and intentionally damage property belonging to another person, such as the employer's (see CR Snyman *Criminal Law* 2 ed (1986) at 519). They may be guilty of *crimen iniuria*. This offence involves the unlawful and intentional violation of the dignity or privacy of another person. The physical presence of picketers at their workplace may violate the privacy of their employer. Moreover, the content of their appeal, or their conduct, may violate the *dignitas* of their employer's *persona*. For a discussion of common law offences and picketing, see Cronje van Zyl *An Analysis of Picketing in the South African Labour Law Context* LLM dissertation University of South Africa (1993).

²⁰Picketers convey their message or grievance either verbally or in writing through, for example, placards, posters and advertisements. Should these messages or grievances contain defamatory statements, they may be guilty of defamation. For a discussion on defamation, see Anon "Defamation in Industrial Relations" (1988) 2(2) LLB 9.

This could also lead to civil²² or criminal liability.²³

Although the act of going on strike will not normally, per se, lead to criminal liability,²⁴ civil liability may flow therefrom. Strikers may, for example, incur delictual liability²⁵ or

²¹This will be the case irrespective of whether the employer is a natural or a legal person.

²²Defamation is a delict in respect of which the defamed person may claim *solatium* and, where economic loss was suffered, damages. He may also obtain an interdict. A company may be defamed. Although the legal basis for this claim is subject to uncertainty, it seems that the courts are willing to grant an order for the payment of *solatium* to a legal entity if its reputation has been infringed (see "Defamation in Industrial Relations" (1988) 2(2) *LLB* 9 at 11). Where it has suffered economic loss, it may claim damages. A legal entity may also obtain an interdict.

²³They may be guilty of *crimen iniuria*. This offence, inter alia, involves the unlawful and intentional violation of the dignity of another person. The content of picketers' appeal, or their conduct, may violate the *dignitas* of their employer's *persona*. Picketers may also commit *criminal defamation* where their demands or messages injure the reputation and good name or *fama* of a member or members of management or the employer (see CR Snyman *Criminal Law* 2 ed (1986) at 456). For a discussion of these common law offences, see Cronje van Zyl *An Analysis of Picketing in the South African Labour Law Context* LLM dissertation University of South Africa (1993).

²⁴In terms of s 65(3) of the Labour Relations Act, 1956, however, strikers could be guilty of an offence if their actions were contrary to the provisions of the section. Although such criminal liability does not exist in terms of the Labour Relations Act, 1995, the possibility nevertheless exists that strikers may commit common law offences such as *public violence*, *assault* and *malicious damage to property* whilst striking.

²⁵There appears to be some debate as to whether or not trade union officials and strikers would be committing a delict where they incite other employees to breach their contracts of employment and to go on strike. Some writers (see, for example, John Grogan *Collective Labour Law* (1993) at 82 and John Grogan *Workplace Law* (1996) 176) hold the view that trade union officials and strikers may be committing a delict should they convince other employees to go on strike. This also appears to have been the view of the supreme court in *Jumbo Products CC v National Union of Metalworkers of SA* (1996) 17 *ILJ* 859 (W) at 876A. They may also commit a delict where they convince employees to lawfully terminate their contracts of employment by giving the required notice. Where the court is satisfied that a delict has been committed or is to be committed, it may grant an interdict. Also, where economic losses have been suffered, it may award delictual damages. However, in *Tramway & Omnibus Workers Union (Cape) v Heading* 1937 AD 47 at 54 and *R v Givantoni* 1934 CPD 1 at 4 the courts left the question of whether it did in fact constitute a common law delict unanswered. Although the industrial court also did not consider this in *National Union of Metalworkers of SA & Others v Jumbo Products CC* (1991) 12 *ILJ* 1048 (IC) at 1052, it was prepared to grant an interdict against the trade union and its members participating in an illegal strike which ordered them to desist from their industrial action. Edwin Cameron, Halton Cheadle and Clive Thompson *The New Labour Relations Act: The Law after the 1988 Amendments* (1989) 80-81 ask whether inciting breach of contract of employment in the furtherance of a strike is a wrongful action which constitutes a delict. They point out that the Labour Relations Act, 1956 provided for strike action and ask on what basis the incitement thereof could be treated as behaviour which offends the legal convictions of a modern industrial society (ie could be considered as a wrongful action). Although they based their argument on the Labour Relations Act, 1956, their argument also has merit in terms of the Labour Relations Act, 1995 as this Act also makes provision for strike action. It is submitted that, from a common law perspective, these officials and strikers would be committing a delict. The fact that the legislature deemed it necessary to specifically provide them with immunity against civil liability in s 79(1) of the Labour Relations Act, 1956 and s 67(2) of the Labour Relations Act, 1995, supports this view. In *Jumbo Products CC v National Union of Metalworkers of SA* (1996) 17 *ILJ* 859 at 876J-877A the supreme court distinguished between legal and illegal strikes and intimated that trade unions and their officials could be delictually liable for inciting breach of contract where the strike was statutorily illegal.

commit a breach of their employment contracts²⁶ or a collective agreement²⁷ or they may even be in breach of a statutory duty.²⁸

From the above it is clear that common law principles do not recognise the legitimacy of collective action to enforce employee demands.²⁹ The idea that employees should have the right to exert collective economic pressure to rectify the imbalance inherent in the individual employment relationship finds little favour in common law principles.

As has been the case in many countries, South African law has been adapted to meet this need for the right to exert collective pressure. This was primarily achieved through the introduction of legislation.³⁰ The first major innovation in this regard was the Industrial Conciliation Act 11 of 1924.³¹ Two reasons appear to be motives for this legislation. The first was to make provision for collective bargaining and collective action, namely

²⁶It is submitted that most of the actions and omissions stipulated in the definition of a strike in s 214 of the Labour Relations Act, 1995 amount to breach of contract. The most important exception is the refusal to do voluntary overtime work. All the actions and omissions stipulated in the definition constitute serious breaches. The employer has a number of options. It could hold the employee to the contract and obtain an order for specific performance (see *National Union of Textile Workers & Others v Stag Packings (Pty) Ltd & Another* (1982) 3 ILJ 39 (W) at 45A-C). Or, it could cancel the contract, in other words, dismiss the employee (see John Grogan *Workplace Law* (1996) 176; Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) 274 and Edwin Cameron, Halton Cheadle and Clive Thompson *The New Labour Relations Act: The Law after the 1988 Amendments* (1989) 80). See also *R v Smit* 1955 (1) SA 239 (C) at 241H-142C; *Ngewu & Others v Union Co-operative Bark & Sugar Co Ltd; Masondo & Others v Union Co-operative Bark & Sugar Co Ltd* 1982 (4) SA 390 (N) at 405E-F; (1983) 4 ILJ 41 (N); *Egbep Ltd v Black Allied Mining & Construction Workers' Union & Others* 1985 (2) SA 402 (T) and *Marievale Consolidated Mines Ltd v National Union of Mineworkers & Others* (1986) 7 ILJ 108 (W) at 115E-I; 117H-118A and 120C-D). The employer is also entitled to claim damages, irrespective of whether it elects to hold the employee to the contract or to dismiss him.

²⁷This will be the case where the employees strike in breach of the collective agreement between the employer and the trade union or where they breach the so-called strike rules set out in such an agreement (see par 5.2.3 of chapter 5 in this regard).

²⁸An example of such a breach is where an employee, in contravention of the Occupational Health and Safety Act and its regulations, leaves dangerous machinery unattended in order to participate in a strike.

²⁹See JY Claasen "Die Regsposisie van Werknemers by 'n Staking in die Arbeidsreg" (1984) 47 *THRHR* 83 at 87 as well as John Grogan *Collective Labour Law* (1993) 65 who both point out that the common law is geared to regulate the individual employment relationship - not the collective dimension of employment relations.

³⁰As was the case in the United Kingdom. In a number of other countries, such as Belgium and the Netherlands, it was achieved mainly through judicial intervention. In France this was achieved through a combination of provisions in its constitution and court decisions (see R Blanpain (ed) *International Encyclopaedia for Labour Law and Industrial Relations* (1987)).

³¹See John Grogan *Workplace Law* (1996) 144-145; Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 77-103 and Alan Rycroft and Barney B Jordaan *A Guide to South African Labour Law* 2 ed (1992) 114-115 for an historical account of the legislation introduced in South Africa to deal with the collective dimension of industrial relations. See also par 3.1 of chapter 3 where this Act is referred to.

strike action. The second was to control or regulate such action. At present, the Constitution and the Labour Relations Act, 1995 are the principal statutes which regulate the exercising of collective action. The Constitution specifically affords every trade union, employers' organisation and employer the right to engage in collective bargaining.³² In addition, it affords every worker the right to strike.³³ The Labour Relations Act, 1995, gives effect to these constitutional rights.³⁴ It makes provision for collective bargaining³⁵ and affords employees the right to strike.³⁶ It also controls and regulates strike action.³⁷

6.3 THE LABOUR RELATIONS ACT, 1995

6.3.1 Introduction

The cornerstone of the legislature's approach to strikes is the definition of a strike. The reason for this is that, should the actions or omissions of employees fall within the definition of a strike, s 64 of the Labour Relations Act, 1995, which affords employees a right to strike³⁸ and s 65, which limits the right, will apply. Where ss 64 and 65 have not been complied with, the act of going on strike, or any conduct in contemplation or furtherance

³²See s 23(5).

³³See s 23(2)(c).

³⁴See s 1 of the Act which lists as one of the Act's purposes the giving of effect to the fundamental rights conferred by the Constitution.

³⁵See the discussion on the statutory provisions regarding collective bargaining in chapter 4.

³⁶See s 64 which makes specific provision for a right to strike.

³⁷Although the legislature accepts that there is constant conflict between employers and their employees and that strike action is the most effective way for employees to enforce their demands, it nevertheless wants to ensure that employees first endeavour to negotiate with their employers over their demands (see s 64(1)(a) of the Labour Relations Act, 1995). It also wants to ensure that strike action takes place according to a regulated process and that employers are not taken by surprise (see s 64(1)(a) as well as s 64(1)(b) and (d) of the Labour Relations Act, 1995). In addition, it wants to restrict its sanctioning of strikes to those which do not jeopardise the well-being of the community at large (see s 65(1)(d) as well as ss 70-75 of the Labour Relations Act, 1995). It also does not want to afford protection to strikes that amount to a re-opening of a dispute which has been settled through either collective bargaining, a determination made in terms of the Wage Act or s 44 of the Labour Relations Act, 1995 or arbitration (see s 65(3)(a) and (b) of the Labour Relations Act, 1995). For a discussion of these various motivations of the legislature, see Craig Tanner "Strikes and Lock-outs" In Michael Robertson (general ed) *South African Human Rights and Labour Law Yearbook 1991 Volume 2* (1992) 354. (It is submitted that, although Tanner's article was written while the Labour Relations Act, 1956 was in force, the motivation for similar provisions in the Labour Relations Act, 1995 remain the same.)

³⁸This provision of the Labour Relations Act, 1995 is in accordance with s 23(2)(c) of the Constitution which affords employees a right to strike.

thereof, does *not* constitute a criminal offence.³⁹ However, such a strike will be unprotected in terms of the Labour Relations Act, 1995 and may form the basis of an interdict by the labour court⁴⁰ and/or an order by it for the payment of compensation for any loss attributable to such a strike.⁴¹ In addition, such strikers do not enjoy much statutory protection against dismissal.⁴²

Where the requirements of ss 64 and 65 have been complied with the strike will become a protected strike.⁴³ Strikers participating in such strikes, are protected against civil liability by s 67(2), read with s 67(6) of the Labour Relations Act, 1995.⁴⁴ In addition, they are also protected against dismissal based on their participation in such a strike.⁴⁵

There are, however, various forms of economic pressure which can be used by employees to enforce their demands against the employer that do not fall within the definition of a strike such as picketing, boycotts and the mobilisation of public opinion through press

³⁹Contra s 65(1) read with s 65(3) of the Labour Relations Act, 1956, which provided that non-compliance with s 65 of that Act, which regulated the legality of strike action, constituted a criminal offence. In practice, contraventions of s 65 seldom lead to the institution of criminal proceedings (see Craig Tanner "Strikes and Lock-outs" in Michael Robertson (general ed) *South African Human Rights and Labour Law Yearbook 1991 Volume 2* (1992) 354 at 355 as well as Halton Cheadle, Adolph Landman, PAK le Roux and Clive Thompson *Current Labour Law: A Juta Seminar May-June 1991: Workbook for Delegates* (1991) at 31).

⁴⁰In terms of s 68(1)(a) of the Labour Relations Act, 1995. During the operation of the Labour Relations Act, 1956, the industrial court (see, for example, *White & Others v Neill Tools (Pty) Ltd* (1991) 12 ILJ 368 (IC) at 370), as well as ordinary courts (see, for instance, *Dunlop SA Ltd v Metal & Allied Workers Union & Another* (1985) 6 ILJ 167 (D) and *Firestone SA (Pty) Ltd v National Union of Metalworkers of SA & Others* (1992) 13 ILJ 345 (T)) could interdict illegal strikes.

⁴¹See s 68(1)(b) of the Labour Relations Act, 1995.

⁴²See clause 6 of the Code which brands participation in an unprotected strike as misconduct. It, however, also stipulates that such strike action does not always deserve dismissal and sets out requirements for a substantively and procedurally fair dismissal under such circumstances.

⁴³See s 67 which refers to a strike which complies with the provisions of the Labour Relations Act, 1995 as a "protected strike".

⁴⁴In terms of the Labour Relations Act, 1956, a strike which complied with s 65 thereof was a legal strike in the sense that no criminal offence was committed, and employees and their trade unions enjoyed protection from civil liability in terms of s 79(1) of the Act. In addition, strikes as defined did not constitute unfair labour practices and could therefore not be judged on the grounds of fairness by the industrial court.

⁴⁵See s 67(4) of the Labour Relations Act, 1995 as well as par 6.3.5.2 below. In terms of s 67(5), s 67(4) does not preclude an employer from fairly dismissing such strikers for misconduct during the strike (see par 3.4.3.3.2 of chapter 3 where dismissal for this reason is discussed as well as par 6.3.5.2 below where dismissal of protected strikers for this reason is discussed) or for a reason based on the employer's operational requirements (see par 3.4.3.3.4 of chapter 3 where dismissal for this reason is discussed as well as par 6.3.6.2 below where dismissal of protected strikers for this reason is discussed).

statements, advertisements, television interviews and the distribution of pamphlets.⁴⁶ If this is the case, ss 64 and 65 do not apply. By the same token, however, if these forms of economic pressure are exerted in contemplation or in furtherance of a protected strike, the strikers may enjoy protection against civil liability provided for in s 67 of the Labour Relations Act, 1995.⁴⁷ However, such strikers will not be afforded protection if the actions in contemplation or in furtherance of a protected strike constitute an offence.⁴⁸

6.3.2 The Definition of a Strike

A strike is defined in s 213 of the Labour Relations Act, 1995. It reads as follows

"strike" means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory.

The fact that a strike is defined is in itself a limiting factor. Not every form of industrial action amounts to a strike which may enjoy statutory protection. Nevertheless, the range of actions and omissions which fall within the definition are broadly stated and cover most forms of industrial action.⁴⁹ The definition covers actions and omissions which amount to a breach of the contract of employment such as work stoppages, go-slows and the obstruction of work. It also covers actions and omissions which do not neces-

⁴⁶During the operation of the Labour Relations Act, 1956, the refusal to work voluntary overtime also did not fall within the definition of a strike (see *SA Breweries Ltd v Food & Allied Workers Union & Others* (1989) 10 ILJ 844 (A) at 849 and 851E-F; *National Automobile & Allied Workers' Union v CHT Manufacturing Co (Pty) Ltd* (1984) 5 ILJ 186 (IC) at 190A and *National Union of Textile Workers & Others v Jaguar Shoes (Pty) Ltd* (1986) 7 ILJ 359 (IC) at 365H). However, such a refusal is included in the definition of a strike in s 213 of the Labour Relations Act, 1995.

⁴⁷See s 67(6)(b). In the case of a picket, this protection is expressly provided in s 69(7) read with s 67 of the Labour Relations Act, 1995. In terms of the Labour Relations Act, 1956 participants in boycotts and pickets also enjoyed protection against civil liability in terms of s 79(1) thereof. Perhaps of the greatest import, however, was the fact that such actions and omissions could constitute unfair labour practices and that their fairness could therefore be judged by the industrial court (see, for example, *MacSteel (Pty) Ltd v National Union of Metalworkers of SA & Others* (1989) 10 ILJ 285 (IC) at 289 and *Langeberg Foods Ltd (Boksburg) v Food & Allied Workers Union & Others* (1989) 10 ILJ 1093 (IC) at 1102 where it was held that the refusal to work voluntary overtime could constitute an unfair labour practice).

⁴⁸See s 67(8) of the Labour Relations Act, 1995.

⁴⁹For a discussion of the various actions and omissions which are covered by the definition, see D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 174-176.

sarily constitute a breach such as the refusal to work voluntary overtime.⁵⁰ It furthermore covers full blown strikes such as complete work stoppages as well as partial strikes where production is not halted altogether. The definition also covers sympathy strikes.⁵¹

The reason for the definition's broad ambit is to be found in the legislature's appreciation of the disruptive effect of industrial action on economic activity and the threat which it may pose to the well-being of society at large. These economic and social considerations made it imperative for the legislature to regulate strikes. It accordingly made the definition wide so as to be able to regulate most of the various forms of industrial action.⁵²

Although the legislature's primary aim with the broad ambit of the definition was to regulate industrial action, it also created the opportunity for such actions and omissions to become protected in terms of the Labour Relations Act, 1995. Because of the breadth of the definition, those actions and omissions which both employers and the courts have in the past regarded as "unacceptable",⁵³ such as overtime bans, sit-ins and go-slows, can become eligible for protection.

⁵⁰See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 175 where they argue that the specific inclusion of the refusal to work voluntary overtime in the definition favours the contention that "work" in the definition should be construed broadly to include all work, including work which employees are not contractually obliged to perform. This makes the definition broader than the one of the Labour Relations Act, 1956 which was interpreted, inter alia, by the appellate division to cover only "work" that employees were contractually obliged to perform (see *SA Breweries Ltd v Food & Allied Workers Union* (1989) 10 ILJ 844 (A) at 849E-850A; 850F-I and 851C).

⁵¹The words "by persons who are or have been employed by the same employer or by different employers" also cover those workers who strike in sympathy with the striking workers of another employer.

⁵²See John Grogan *Workplace Law* (1996) 176.

⁵³Primarily because the economic harm which they cause the employer is disproportionate to the economic harm which the strikers suffer. For example, in the case of partial strikes such as overtime bans, the strikers still receive their ordinary wages while causing their employer economic harm through their refusal to work overtime (see MSM Brassey "The Dismissal of Strikers" (1990) 11 ILJ 213 at 222). The industrial court has also indicated that it regarded a so-called sit-in as an unacceptable form of strike action (see *Kolatsoeu & Others v Afro-Sun Investment (Pty) Ltd t/a Releke Zezame Supermarket* (1990) 11 ILJ 754 (IC) at 762A). In *National Union of Metalworkers & Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) at 1263H the appellate division referred to a go-slow strike as "a most insidious form of industrial action" as it causes financial loss to the employer while the employees continue to draw their wages. In addition, a go-slow is often difficult to prove. See further Martin Brassey "Partial Strikes" in Paul Benjamin, Reagan Jacobus and Chris Albertyn (eds) *Strikes Lock-outs & Arbitration in South African Labour Law: Proceedings of the Labour Law Conference* (1988) at 63.

The requirement of common purpose in the definition⁵⁴ also does not pose much of a limitation on the right to strike. All that it entails is that employees must act collectively. A single employee, therefore cannot strike.⁵⁵ On the other hand, not all the employees in a particular undertaking need to participate in a strike.⁵⁶

In terms of the definition, the purpose of strike action must be to remedy a grievance or to resolve a dispute in respect of any matter of mutual interest between the employer and employee.⁵⁷ "Mutual interest" is not defined in the Labour Relations Act, 1995. Matters which are of interest to both employers and employees will usually include those dealing with the employment relationship and the workplace.⁵⁸ The most obvious examples of such matters are terms and conditions of employment such as wages, hours of work, overtime, sick leave, ordinary leave and health and safety issues. The supreme court has, however, given an extremely wide interpretation to "mutual interest". In *Rex v Woliak*⁵⁹ it held⁶⁰ that it included those matters that were in the interest of the industry as a whole. In *Rand Tyres and Accessories (Pty) Ltd and Appel v Industrial Council for the Motor Industry (Transvaal), Minister for Labour, and Minister for Justice*⁶¹ the court gave a similar interpretation. It held⁶²

Whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned must be of mutual interest to them; and there is no justification for restricting in any way powers which the Legislature has been at the greatest pains to frame in the widest possible language. Mr *Roper's* construction, which seeks to confine "any matter whatsoever of mutual interest to employers and employees" to conditions of employment, would deprive these words of all effect...

⁵⁴It refers to a "concerted" refusal to work or the retardation or obstruction of work by "persons".

⁵⁵See John Grogan *Workplace Law* (1996) 177 and D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 175.

⁵⁶See John Grogan *Workplace Law* (1996) 177.

⁵⁷See the definition of a strike quoted earlier in this paragraph.

⁵⁸See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 178 where they state that matters of mutual interest "must have an occupational or work-related aim".

⁵⁹1939 TPD 428. It had to interpret the concept as provided for in s 24 of the Industrial Conciliation Act 36 of 1937.

⁶⁰At 431.

⁶¹1941 TPD 108. It had to interpret the concept as provided for in s 24 of the Industrial Conciliation Act 36 of 1937.

⁶²At 115.

It is suggested that the matters listed in s 84 of the Labour Relations Act, 1995 for consultation with a workplace forum⁶³ as well as some of the functions of bargaining councils listed in s 28, may in future also be considered matters of "mutual interest".⁶⁴ The authors of *The Labour Relations Act of 1995*⁶⁵ argue⁶⁶ that

[b]y bringing these matters into the domain of the new employment forums [ie the workplace forum and bargaining council] the legislature has decreed them to be 'of mutual interest between employer and employee' and, by implication, matters over which employees...may strike...

These sections cover a wide range of matters. They cover a number of employment issues such as changes in the organisation of work,⁶⁷ dismissal for operational reasons,⁶⁸ job grading,⁶⁹ and the establishment and administration of pension, provident, medical aid and other funds.⁷⁰ They also cover a number of economic or business issues which may impact on job security such as the restructuring of the workplace,⁷¹ partial or total plant closures,⁷² mergers and transfers of ownership.⁷³ In addition, the sections cover a number of economic or business issues which are not directly linked to job security such as product development⁷⁴ and export promotion.⁷⁵ Section 28 also makes provision for the development of proposals for policy and legislation that may

⁶³See par 4.3.3.1 of chapter 4 where this section is discussed in greater detail.

⁶⁴The matters listed in s 86 of the Labour Relations Act, 1995 for joint decision-making by the employer and the workplace forum may be considered as matters of "mutual interest" by the bargaining parties. However, in terms of s 65(1)(c) read with s 86(7) of the Act, the matters listed in s 86 may not be the focus of the strike. Disputes about any of these matters may be referred to arbitration by the employer.

⁶⁵D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996).

⁶⁶At 179.

⁶⁷See s 84(1)(b).

⁶⁸See s 84(1)(e).

⁶⁹See s 84(1)(g).

⁷⁰See s 28(g).

⁷¹See s 84(1)(a).

⁷²See s 84(1)(c).

⁷³See s 84(1)(d).

⁷⁴See s 84(1)(j).

⁷⁵See s 84(1)(k).

affect the sector and area.⁷⁶ This function of bargaining councils is extremely wide and may include policy proposals regarding trade and investment, the economy and employment.⁷⁷

From the foregoing discussion it is clear that, as in the case of the other two elements of a strike, the purpose element does not play such an important role in limiting the right to strike. "Mutual interest" is a very wide concept and workers are able to engage in strike action about an extremely wide and diverse range of matters.

In conclusion, it appears that the strike definition does not present a far-reaching or extensive restriction of the right to strike. As will appear from the discussion below other statutory provisions, particularly ss 64 and 65 of the Labour Relations Act, 1995, present very real and extensive restrictions on the statutory right to strike.

6.3.3 The Right to Strike

In terms of s 64 of the Labour Relations Act, 1995, employees may acquire a *right to strike*.⁷⁸ Such a right strengthens employees' bargaining power as it forces the employer to bargain in good faith with them and their trade union. The importance of such a right was expressed as follows by the labour appeal court in *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel*⁷⁹

The right to strike is important and necessary to a system of collective bargaining. It underpins the system - it obliges the parties to engage thoughtfully and seriously with each other. It helps to focus their minds on the issues at stake and to weigh up carefully the costs of a failure to reach agreement.⁸⁰

⁷⁶See s 28(h).

⁷⁷See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 179.

⁷⁸See s 64(1). This provision is in accordance with the Constitution which affords every worker the *right to strike* (see s 23(2)(c) thereof). It is also in accordance with the views of the International Labour Organisation (see *Freedom of Association: A Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the International Labour Organisation* 3 ed (1985)). This provision also represents a major diversion from the Labour Relations Act, 1956. The latter Act did not afford employees such a right. In view of the fact that they could be dismissed, strikers enjoyed, at most, a freedom to strike.

⁷⁹(1993) 14 ILJ 963 (LAC) at 972B.

⁸⁰See further at 972D. See also *Perskorporasie van SA Bpk v Media Workers Association of SA* (1993) 14 ILJ 938 (LAC) at 941C; *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) at 1237F-G and *MSM Brassey "The Dismissal of Strikers"* (1990) 11 ILJ 213 at 235.

Employees, however, do not acquire this right automatically when they engage in strike action as defined in the Labour Relations Act, 1995. They must ensure that their strike complies with ss 64 and 65 of the Act. If it does not, they do not acquire the statutory right to strike and their strike will accordingly be unprotected. In the paragraph below, the extent to which these two sections restrict or limit the right to strike will be examined.

6.3.3.1 Limitations on the Right to Strike

Section 65 prohibits employees from striking in a number of instances.⁸¹ In the first instance, and in accordance with its subscribing to voluntarism,⁸² it prohibits strike action in circumstances where the collective bargaining parties themselves have restricted the right to strike. The section prohibits strike action about issues which the collective bargaining parties have agreed will be unfit for strike action.⁸³ It also prohibits strike action about issues which the parties have agreed will be referred to arbitration.⁸⁴

Secondly, s 65 prohibits strike action about any of the issues which have been listed in the Labour Relations Act, 1995 for determination by arbitration or the labour court.⁸⁵ This provision severely restricts employees' right to strike as the list of matters which

⁸¹However, unlike s 65 of the Labour Relations Act, 1956, contravention thereof does not constitute a criminal offence. The statutory limitation will probably not be unconstitutional as s 36 of the Constitution states that the rights entrenched in the Constitution may be limited to the extent that they are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. It is also in accordance with the International Labour Organisation's views (see A Pankert "Freedom of Association" in R Blanpain (ed) *Comparative Labour Law and Industrial Relations* 3 ed (1987) 173 at 190).

⁸²See Carole Cooper and Halton Cheadle "Strikes and Lock-outs" in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 49 at 50.

⁸³See s 65(1)(a).

⁸⁴See s 65(1)(b). See further par 5.2.2 of chapter 5 where dispute-resolution procedures, to which parties have voluntarily agreed, are discussed.

⁸⁵See s 65(1)(c). This prohibition was primarily motivated by the legislature's aim to limit the incidence of strikes. It appreciated the disruptive effect of strikes as well as the disastrous financial consequences which they may hold for the employer and the strikers as well as for society as a whole (see the Ministerial Legal Task Team *Explanatory Memorandum* notice 97 in Government Gazette 16259 of 10 February 1995 at 115 and 128-129). It accordingly endeavoured to limit the incidence of strikes by prescribing dispute-resolution procedures for the effective and speedy resolution of certain disputes.

must be settled in this manner is extensive and includes a number of issues over which employees were entitled to strike in terms of the Labour Relations Act, 1956.⁸⁶

In accordance with this provision, employees are prohibited from striking about the following issues: alleged unfair dismissals,⁸⁷ alleged unfair discrimination⁸⁸ and any other alleged unfair labour practices.⁸⁹ Employees are also prohibited from striking about disputes regarding freedom of association,⁹⁰ the interpretation or application of collective agreements⁹¹ and the interpretation or application of closed shop agreements and agency shop agreements.⁹² In addition, they are prohibited from striking about disputes regarding the admission of parties to bargaining and statutory councils.⁹³ Employees may also not strike about an alleged undermining of the effective use of their right to picket, the venue of the picket and an alleged breach of the agreed picket rules.⁹⁴ Employees are also prohibited from striking about disputes regarding matters which are subject to joint decision-making by workplace forums and employers.⁹⁵

⁸⁶One of the most important examples in this regard was the freedom which employees had to strike concerning the dismissal of employees (see par (ii)(cc) of the definition of a strike in s 1 of the Labour Relations Act, 1956 which listed the employment of (dismissed) workers as one of the purposes of strike action). However, in the context of determining the fairness of the dismissal of such strikers, the industrial court in *Chemical Workers Industrial Union & Others v Bevaloid (Pty) Ltd* (1988) 9 ILJ 447 (IC) at 4511-452F indicated that it regarded this reason for strike action as "less acceptable" since the dismissed employee had recourse to the court in terms of s 46(9) of the Labour Relations Act, 1956.

⁸⁷In terms of s 191(5)(a)(i) of the Labour Relations Act, 1995 alleged unfair dismissals for misconduct and incapacity must be referred to arbitration for settlement. Dismissals which are automatically unfair, those based on the operational requirements of the business, dismissal for participation in an unprotected strike and dismissal for reasons related to a closed shop agreement, in terms of s 191(5)(b)(i), (ii) and (iii) of the Act, must be referred to the labour court for settlement.

⁸⁸In terms of clause 3(4)(a) of Schedule 7, such an alleged unfair labour practice must be referred to the labour court for adjudication.

⁸⁹See clause 3(4)(b) of Schedule 7 in terms of which such matters must be resolved through arbitration.

⁹⁰In terms of s 9(4) of the Labour Relations Act, 1995, disputes about the interpretation or application of any of the provisions in chapter II of the Act dealing with rights of association, may be referred to the labour court.

⁹¹In terms of s 24(5) of the Labour Relations Act, 1995, disputes of this nature may be referred to arbitration.

⁹²See s 24(6) read with s 24(5) of the Labour Relations Act, 1995, in terms of which disputes of this nature may be referred to arbitration.

⁹³See s 56 of the Labour Relations Act, 1995 in terms of which such disputes may be adjudicated by the labour court.

⁹⁴In terms of s 69(11) of the Labour Relations Act, 1995, such a dispute may be referred to the labour court for adjudication.

⁹⁵In terms of s 86(7) of the Labour Relations Act, 1995, such disputes may be referred to arbitration.

In the case of disputes regarding organisational rights,⁹⁶ employees have a choice. They may refer the dispute to arbitration for settlement⁹⁷ or they may strike about it.⁹⁸ However, if employees have elected to strike, they will be unable to refer the dispute to arbitration for a period of 12 months from the date of their notice of the commencement of the strike.⁹⁹ This is to prevent a trade union which has failed to obtain organisational rights through economic pressure to try and obtain it through arbitration.

It is suggested that this exception underpins the legislature's preference for collective bargaining.¹⁰⁰ It enables a trade union to try to compel an employer to grant it organisational rights under circumstances where, if the dispute had been referred to arbitration, the arbitrator may have determined that the union was not representative¹⁰¹ and, by implication, that the employer was not statutorily obliged to grant the union such rights.

Thirdly, section 65 prohibits employees involved in essential¹⁰² and maintenance services¹⁰³ from striking.¹⁰⁴ This prohibition is in accordance with the internationally

⁹⁶Namely the right to access, check-off facilities, the election of shop stewards and leave for trade union activities (see s 65(2)(a) read with ss 12-15 of the Labour Relations Act, 1995). For a discussion of these statutory organisational rights, see par 4.2.3 of chapter 4.

⁹⁷In terms of s 21(7)-(10) of the Labour Relations Act, 1995, disputes regarding the representativeness of a trade union for purposes of the exercising of organisational rights may be settled through arbitration.

⁹⁸See s 65(2)(a) read with s 65(1)(c) of the Labour Relations Act, 1995.

⁹⁹See s 65(2)(b) of the Labour Relations Act, 1995. From the wording of this section, it appears that they will be restricted in this manner even where they have not actually implemented strike action.

¹⁰⁰See par 4.2.1 of chapter 4 where the legislature's preference, and the reasons for it, are discussed.

¹⁰¹See s 21(8) of the Labour Relations Act, 1995 which sets out certain requirements according to which the arbitrator must determine the representativeness of a trade union.

¹⁰²See s 65(1)(d)(i). An essential service is defined in s 214 of the Labour Relations Act, 1995. It includes those services the interruption of which endangers the life, personal safety or health of the whole or any part of the population. This is in accordance with the International Labour Organisation's views of the characteristics of an essential service (see the report of the Fact Finding and Conciliation Commission of Freedom of Association concerning the Republic of South Africa (International Labour Office Geneva 1992) as reproduced in (1992) 13 *ILJ* 739 at 758). In addition, s 214 labels the Parliamentary service and the Police Services as essential services.

¹⁰³See s 65(1)(d)(ii). A maintenance service is not defined in s 214 of the Labour Relations Act, 1995. Section 75(1) nevertheless describes a maintenance service as one the interruption of which "has the effect of material physical destruction to any working area, plant or machinery". Collective bargaining parties may conclude an agreement in terms of which the whole or part of the employer's business is regarded as a maintenance service (see s 75(2)).

¹⁰⁴Members of the National Defence Force, who are excluded from the Labour Relations Act, 1995, are also prohibited from striking in terms of legislation dealing specifically with them (see ss 19 and 20(1)(j) of the Public Service Labour Relations Act 102 of 1993).

accepted principle that strikes should not pose a threat to the physical well-being and safety of society at large.¹⁰⁵

The extent to which this prohibition will restrict employees' right to strike will largely depend on the essential service committee¹⁰⁶ whose function it is to decide whether or not a service should be designated as either an essential¹⁰⁷ or maintenance service.¹⁰⁸

In the fourth instance, s 65 prohibits strike action about matters which are the subject of a collective agreement which binds the parties the agreement.¹⁰⁹ In terms of this section, employees may also not strike about a matter which is regulated by an arbitration award.¹¹⁰ The section further prohibits employees from striking about a matter which is regulated by a determination made in terms of the Wage Act in its first year of operation.¹¹¹

The reason for this prohibition is obvious. Once a matter has been settled, employees should be bound by the terms of settlement. They should not be entitled to try to obtain a more favourable outcome through strike action.¹¹² This prohibition also contains the disruption of economic activity to a certain extent and promotes industrial peace and stability.¹¹³

From the foregoing analysis of s 65, it is clear that the section severely limits the right to strike. However, those strikes which are not prohibited in terms of this section are not

¹⁰⁵See note 85 above.

¹⁰⁶The essential services committee is established in terms of s 70(1) of the Labour Relations Act, 1995.

¹⁰⁷See s 70(2)(a) read with s 71.

¹⁰⁸See s 75(2) read with s 70(2)(c).

¹⁰⁹See s 65(3).

¹¹⁰See s 65(3)(a)(i).

¹¹¹See s 65(3)(a)(ii) and (b).

¹¹²In this regard, however, a distinction can be made between *minimum* and *actual* terms and conditions. (For a discussion of this distinction in collective agreements, see par 5.3.2.4 of chapter 5 and in regard to wage determinations, see *Vereeniging Refractories Ltd v Building Construction & Allied Workers Union* (1989) 10 ILJ 79 (W)). Employees are entitled to strike about *actual* terms and conditions where those contained in a collective agreement or a wage determination represent only *minimum* «MNM» terms and conditions.

¹¹³See s 1 of the Labour Relations Act, 1995 which lists economic development and labour peace as purposes of the Act.

automatically eligible for protection. Section 64 prescribes further procedural requirements with which employees must comply before their strike will be protected.

In the first instance, the dispute must have been referred to either a council¹¹⁴ or the Commission for possible "conciliation".¹¹⁵ This provision differs substantially from s 65 of the Labour Relations Act, 1956 which merely required the industrial council or conciliation board to "consider" the dispute.¹¹⁶ It did not require any actual or real effort to reach settlement. Nor did it make provision for an objective third person to guide the parties to a possible solution. Contrary to this, the Labour Relations Act, 1995 requires a party¹¹⁷ to attempt to resolve the dispute through "conciliation". Although "conciliation" is not defined, it denotes actual or real endeavours on the part of the conciliator to resolve the dispute. The Act allows the conciliator to use any method to achieve his objective including mediation, fact-finding exercises and the making of a recommendation which may be in the form of an advisory arbitration award.¹¹⁸

Once actual and deliberate attempts to settle the dispute have been unsuccessful and strike action remains the only option,¹¹⁹ the Labour Relations Act, 1995 prescribes a second procedural requirement. It requires the employees to give the employer 48 hours'¹²⁰ written notice of the commencement of the strike.¹²¹

¹¹⁴This may be a bargaining or statutory council (see s 64(1)(a) read with s 214 of the Labour Relations Act, 1995 where "council" is defined). See also par 4.2.5 of chapter 4 where the different types of councils are discussed.

¹¹⁵In the case of a council, it must attempt to resolve the dispute in accordance with its constitution's provisions regarding dispute settling (see s 64(1)(a) read with s 51(2)(a) of the Labour Relations Act, 1995). Or, where a party to the dispute is not a party to the council, it must attempt to resolve it through "conciliation" (see s 64(1)(a) read with s 51(3)(a) of the Labour Relations Act, 1995). In the case of the Commission, it must attempt to resolve any dispute referred to it through "conciliation" (see s 64(1)(a) read with s 115(1)(a) of the Labour Relations Act, 1995).

¹¹⁶See s 65(1)(d)(i) and (ii) of the Labour Relations Act, 1956.

¹¹⁷In the case of a referral to the Commission, the Act requires that the Commission must appoint a commissioner to attempt to settle the dispute through conciliation (see s 64(1)(a) read with ss 115(1)(a) and 133(1)(b) of the Labour Relations Act, 1995).

¹¹⁸See s 135(3).

¹¹⁹This will be the case where a certificate stating that the dispute remains unresolved has been issued (see s 64(1)(a)(i) of the Labour Relations Act, 1995) or where a period of 30 days, or any extension of that period agreed to between the parties, has elapsed since the dispute was received by the council or the Commission (see s 64(1)(a)(ii) of the Labour Relations Act, 1995).

¹²⁰Where the State is the employer, at least seven days' notice of the commencement of the strike must have been given (see s 64(1)(d) of the Labour Relations Act, 1995).

¹²¹See s 64(1)(b). Where the dispute relates to a collective agreement to be concluded in a council, notice must have been given to that council (see s 64(1)(b)(i)). And, if the employer is a member of an employers' organisation which is party to the dispute, notice must have been given to that organisation (see s

This requirement is beneficial to the employer. It ensures that the employer has prior knowledge of the strike and enables it to make contingency plans such as arrangements for the temporary employment of persons to do the work of the strikers.¹²²

If the dispute concerns a refusal to bargain,¹²³ employees have an additional procedural requirement to comply with. Before they can give notice of the commencement of their strike, they must be in possession of an advisory award by the commissioner to whom the dispute has been referred for conciliation.¹²⁴ The reason for this requirement is to ensure that a dispute of this nature is, in the words of the Ministerial Legal Task Team¹²⁵

thoroughly conciliated...before the resort to industrial action. The intervention of skilled mediators in these types of disputes has demonstrated that they can often be resolved without the resort to industrial action.

Employees are exempt from compliance with the procedural requirements in a number of instances.¹²⁶ The Labour Relations Act, 1995 subscribes to voluntarism. Thus, where the dispute has been dealt with in accordance with a council's constitution¹²⁷ or there has been compliance with the collectively agreed pre-strike procedures,¹²⁸ the employees do not have to comply with the statutory requirements. Also, employees are exempt

64(1)(b)(ii).

¹²²See Carole Cooper and Halton Cheadle "Strikes and Lock-outs" in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 49 at 57. Note, however, that an employer will not be allowed to arrange replacement labour if the whole or a part of its service has been designated a maintenance service (see s 76(1)(a) of the Labour Relations Act, 1995).

¹²³A refusal to bargain is given a fairly wide interpretation by the Labour Relations Act, 1995 (see s 64(2)(a)-(d)). It goes further that an ordinary refusal by an employer to bargain with a union and also covers the situation where an employer wishes to withdraw from a collective bargaining relationship.

¹²⁴See s 64(2).

¹²⁵In their *Explanatory Memorandum* notice 97 of 1995 in Government Gazette 16259 of 10 February 1995 at 129. See also Carole Cooper and Halton Cheadle "Strikes and Lock-outs" in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 51 where they state that this requirement reflects the legislature's recognition that such issues can often be resolved through dispute resolution processes.

¹²⁶See s 64(3)(a)-(e) of the Labour Relations Act, 1995.

¹²⁷See s 64(3)(a).

¹²⁸See s 64(3)(b). See also par 5.2.3 of chapter 5 where collectively agreed pre-strike procedures are discussed.

where their strike is in reaction to their employer's unprocedural lock-out¹²⁹ or where the employer refuses, despite a request from the employees,¹³⁰ to maintain or restore the status quo pending the expiry of a statutory conciliation period.¹³¹

In conclusion, the fact that the Labour Relations Act, 1995 has abolished the ballot requirement¹³² has undoubtedly made it easier for employees to acquire a right to strike as this requirement presented the biggest obstacle in employees' endeavours to strike legally in terms of the Labour Relations Act, 1956. The Ministerial-Legal Task Team¹³³ explained¹³⁴ the exclusion of the ballot requirement as follows

Ballots provide fertile soil for employers to interdict strikes and to justify the dismissal of strikers in strikes that are technically irregular but otherwise functional to collective bargaining. This has been a recurring feature of South African industrial relations and has prevented the proper conclusion of collective bargaining processes. There is also an anomaly because union members are prohibited from striking unless the union has held a ballot while non-union members are free to strike....

If employees are not prohibited in terms of s 65 to strike and they have complied with the procedural requirements in s 64, they acquire the statutory right to strike. The consequences for employees of such a protected strike are discussed in par 6.3.5 below.

¹²⁹See s 64(3)(c).

¹³⁰In terms of s 64(4).

¹³¹See s 64(3)(e) read with subsecs (4) and (5) of the Labour Relations Act, 1995. These statutory provisions give effect to the decisions of the courts that the unilateral change of conditions of employment is unfair if imposed before the bargaining parties have reached an impasse (see Carole Cooper and Halton Cheadle "Strikes and Lock-outs" in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 49 at 52).

¹³²The Labour Relations Act, 1995 does not require the trade union to hold a ballot on the question of strike action as trade unions were obliged to do in terms of s 65(2)(b) of the Labour Relations Act, 1956. And, even where the trade union's constitution makes provision for a ballot and it has failed to comply with it, the legality of the strike will not be affected (see s 67(7) of the Labour Relations Act, 1995).

¹³³In the *Explanatory Memorandum* notice 97 of 1995 in Government Gazette 16259 of 10 February 1995. Carole Cooper and Halton Cheadle "Strikes and Lock-outs" in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 49 at 51 state that it could also be argued that the balloting requirement is inappropriate where the right to strike vests in the individual, as provided in s 23(2)(c) of the Constitution.

¹³⁴At 129.

6.3.4 The Right to Participate in Secondary Strikes and the Limitations on this Right

Additional pressure can be exerted against an employer whose employees are striking by the employees of another employer when they embark on strike action in support of the primary strikers.

The Labour Relations Act, 1995 entitles employees to embark on such action.¹³⁵ Nevertheless, employees' right to participate in a secondary strike is not unrestricted. The Act stipulates three requirements.¹³⁶

In the first instance, the primary strike must comply with ss 64 and 65 of the Labour Relations Act, 1995.¹³⁷ Cooper and Cheadle¹³⁸ point out that this requirement is in accordance with international jurisprudence which requires that the primary strike must be protected for the secondary strike to be protected.

Secondly, the employees must have given seven days' prior written notice to their employer of their proposed strike.¹³⁹ This affords the secondary employer the opportunity to put pressure on the primary employer to settle its dispute with its striking workers.¹⁴⁰

And, in the third instance, the Labour Relations Act, 1995 requires that the nature and extent of the employees' strike must be reasonable in relation to the possible direct or

¹³⁵See the definition of a strike in s 214 of the Labour Relations Act, 1995 which covers secondary strikes in that it makes provision for strike action by employees who are or have been employed by the same "or by different employers". See also Carole Cooper and Halton Cheadle "Strikes and Lock-outs" in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 49 at 53. See further s 66 of the Labour Relations Act, 1995.

¹³⁶See s 66(2).

¹³⁷See s 66(2)(a).

¹³⁸Carole Cooper and Halton Cheadle "Strikes and Lock-outs" in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 49 at 53.

¹³⁹See s 66(2)(b).

¹⁴⁰It seems appropriate that the notice period should be longer than in the case of a primary strike (see s 64(1)(b)) as the secondary employer will need time to convince the first employer to come to an agreement with its employees.

indirect effect that it may have on the business of the primary employer.¹⁴¹ The aim with this requirement is to prevent secondary strikes which have little or no ability to influence the primary employer while at the same time causing substantial economic loss to the secondary employer.

Although this requirement seriously restricts employees' right to participate in secondary strikes, Cooper and Cheadle¹⁴² are of the view that it will still allow a broad range of secondary strikes. The question of whether or not employees' strike will comply with this requirement is a factual one. It is nevertheless suggested that employees who work in totally unrelated occupations or industries to the primary strikers, may find it difficult to satisfy this requirement¹⁴³ although there may be circumstances where they will be able to do so.¹⁴⁴

6.3.5 The Consequences of a Protected Strike

6.3.5.1 Protection against Civil Liability

A significant benefit which compliance with the statutory requirements for a strike holds for strikers is that they are indemnified against civil liability.¹⁴⁵ They cannot therefore be

¹⁴¹See s 66(2)(c). The Labour Relations Act, 1956 did not contain such a restriction but the supreme court in *Barlows Manufacturing Co Ltd v Metal & Allied Workers Union & Others* (1990) 11 ILJ 35 (T) at 42F endeavoured to introduce one when it, in addition to the three requirements contained in the definition of a strike, required that the evidence had to show that there was a reasonable possibility that its "purpose may reasonably be achieved." See also *Barlows Manufacturing Co v Metal & Allied Workers Union & Others* (1988) 9 ILJ 995 at 1014A.

¹⁴²Carole Cooper and Halton Cheadle "Strikes and Lock-outs" in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 49 at 54.

¹⁴³See also Carole Cooper and Halton Cheadle "Strikes and Lock-outs" in Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law: A Review of Recent Developments in Key Areas of Labour Law* (1995) 49 at 54.

¹⁴⁴See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 202-203 where they give the example of stevedores who refuse to handle goods from a food processing employer whose employees are on strike. Their secondary strike is likely to have a substantial impact on the business of the primary employer notwithstanding that the stevedores and primary strikers work in totally unrelated sectors.

¹⁴⁵See s 67 of the Labour Relations Act, 1995 in terms of which a person who takes part in an ordinary or a sympathy strike which complies with the provisions of the Act, does not commit a delict or a breach of contract (see subsec (2)(a)) and no civil legal proceedings may be instituted against him for participating in the strike (see subsec 6(a)).

interdicted from participating in such a strike¹⁴⁶ and no action for damages can be instituted against them.¹⁴⁷

In common with many other actions, the use of the interdict to prevent strikes has been fairly extensive and has often provided employers with a useful weapon to prevent them. Interdicts break the momentum of a strike, thereby reducing or even eradicating the economic pressure which the strike puts on the employer. In addition, it is often difficult to resume a strike once it has been interdicted. Protection against interdicts will therefore probably be of immense value to protected strikers.

Being protected against claims for damages suffered as a result of a strike is also, in theory at least, of great value to strikers. The loss inflicted by strike action can be substantial. It is not limited to the damages suffered by the strikers' refusal to work, but includes also damages suffered as a result of the subsequent cancellation of contracts by customers and the expense incurred in hiring temporary labourers and subcontracting with competitors in order to complete contracts.¹⁴⁸

In practice, however, being protected against claims for damages is not that important as employers seldom institute such actions.¹⁴⁹ Strikers are so-called "men of straw" and employers accept that it would be a waste of time and money to obtain an order for damages against them. Also, instituting action against strikers may impact negatively on the employer's relationship with the strikers and their trade union.

A further benefit which compliance with the statutory requirements for a strike holds for strikers, is that they are afforded indemnity against civil liability for any conduct in con-

¹⁴⁶See s 68(1)(a)(i) of the Labour Relations Act, 1995 in terms of which the labour court can interdict a person from participating in an unprotected strike.

¹⁴⁷See s 68(1)(b) of the Labour Relations Act, 1995 in terms of which the labour court can order the payment of compensation for any loss attributable to an unprotected strike.

¹⁴⁸In practice, protection against a claim for damages may not be so important as employees participating in an unprotected strike may also be indemnified. When considering whether or not an order for compensation should be made, the labour court must have regard to, inter alia, the financial position of the trade union and the employees (see s 68(1)(b)(iv) of the Labour Relations Act, 1995). John Grogan *Workplace Law* (1996) 186 points out that this requirement, if regarded as conclusive, would in effect indemnify virtually all employees and poor unions.

¹⁴⁹See Craig Tanner "Strikes and Lock-outs" in Michael Robertson (general ed) *South African Human Rights and Labour Law Yearbook 1991 Volume 2* (1992) 354 at 355-356. Keith McCall "Interdicts and Damages Claims in Collective Disputes" in Paul Benjamin, Reagan Jacobus and Chris Albertyn (eds) *Strikes Lock-outs & Arbitration in South African Labour Law: Proceedings of the Labour Law Conference 1988* (1989) 41 points out that employers normally only institute actions for damages against their employees and trade unions where the employment relationship has been terminated.

temptation or in furtherance of such a strike.¹⁵⁰ What this means is not clear but it would probably include picketing,¹⁵¹ boycotts,¹⁵² press statements, advertisements and the distributing of pamphlets¹⁵³ in support of a protected strike.

They are also protected against liability for defamatory statements.¹⁵⁴ This indemnity is of particular importance to picketers and boycotters as their placards and posters may contain such statements.

However, strikers do not enjoy protection against civil liability for acts that constitute *common law offences*.¹⁵⁵ In terms of this exception to civil indemnity, an employer can hold strikers liable for acts such as assault, malicious damage to property and intimidation committed prior to and during a protected strike.¹⁵⁶ It is submitted that statements which violate the dignity of the employer may constitute *crimen iniuria*. Criminal defamation may also be committed where the person's message injures the reputation and good name of the employer. Consequently, although a person is protected in respect of the delict, defamation, he may incur civil liability for defamatory statements which constitute common law offences. Nevertheless, it is possible that the exclusion from protection against these common law offences could have limited effect in view of the constitutional right to strike.¹⁵⁷

Strikers can also be held civilly liable if their ancillary actions constitute *statutory offences*.¹⁵⁸ This provision may restrict their right to picket and/or boycott since they

¹⁵⁰See s 67(2)(b) and (6)(b) of the Labour Relations Act, 1995.

¹⁵¹Special provision is made for pickets (see s 69(1) and (7) read with s 67 of the Labour Relations Act, 1995). This right is in accordance with the Constitution which affords everyone the right to picket, peacefully and unarmed (see s 17) and to freedom of expression (see s 16(1)).

¹⁵²This right is in accordance with the Constitution which affords everyone the right to assemble, to demonstrate, peacefully and unarmed (see s 17) and to freedom of expression (see s 16(1)).

¹⁵³*Ibid.*

¹⁵⁴See also John Grogan *Workplace Law* (1996) 182 note 15. The protection afforded by s 67 of the Labour Relations Act, 1995 in this regard is therefore broader than that afforded by s 79(1) of the Labour Relations Act, 1956.

¹⁵⁵See s 67(8) of the Labour Relations Act, 1995.

¹⁵⁶See par 6.2 and note 19 above for a discussion of the common law offences which may be committed during a strike.

¹⁵⁷See s 23(2)(c) of the Constitution as well as par 6.3.3 above.

¹⁵⁸See s 67(8) of the Labour Relations Act, 1995.

may be committing offences in terms of municipal regulations and Acts such as the Internal Security Act 74 of 1982, the Trespass Act 6 of 1959 or the Intimidation Act 72 of 1982. The legislature appreciated this and afforded picketers indemnity where they assemble in contravention of these Acts.¹⁵⁹ It is also possible that some of these Acts may be branded as unconstitutional.¹⁶⁰

6.3.5.2 Protection against Dismissal

A further and very important benefit which compliance with the statutory requirements for a strike holds for strikers is that they are indemnified against dismissal¹⁶¹ for their participation in the strike and/or actions committed in the furtherance thereof.¹⁶²

In *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel*¹⁶³ the labour appeal court explained the need for strikers to be protected against dismissal as follows

If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no purpose. It would merely jeopardize the rights of employment of the strikers. The strike would cease to be functional to collective bargaining and instead it would be an opportunity for the employer to take punitive action against the employees concerned.

Statutory protection against dismissal ensures that employees' right to strike constitutes an important economic weapon. It will undoubtedly strengthen their bargaining power as employers will be induced to bargain in good faith.

¹⁵⁹See s 69(2) read with ss 69(7) and 67 of the Labour Relations Act, 1995.

¹⁶⁰See, for example, s 17 of the Constitution which affords everyone the right to assemble, to demonstrate, to picket and to present petitions, peacefully and unarmed.

¹⁶¹See s 67(4) of the Labour Relations Act, 1995. This protection is in accordance with employees' statutory (see s 64 as well as par 6.3.3 above) and constitutional (see s 23(2)(c) of the Constitution) right to strike. It is also in accordance with the recommendations made by the International Labour Organisation in its Report entitled "Prelude to Change: Industrial Relations Reform in South Africa: Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa" (1992) reproduced in (1992) 13 *ILJ* 739 at 760-1. The Labour Relations Act, 1956 did not contain such a provision. Statutory protection, or a measure thereof, however, was afforded indirectly by the industrial court. It had the opportunity to consider the *fairness* of strikers' dismissal and laid down guidelines for the *fair* dismissal of strikers. Employers took these guidelines into consideration when they had to decide whether or not to dismiss strikers.

¹⁶²See s 67(4) of the Labour Relations Act, 1995. A dismissal for this reason will be automatically unfair (see s 187(1)(a) and (b) of the Labour Relations Act, 1995 as well as par 3.4.3.2 of chapter 3 where automatically unfair dismissals are discussed.

¹⁶³(1993) 14 *ILJ* 963 (LAC) at 972C. See also *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd* (1995) 16 *ILJ* 1469 (LAC) at 1478I-J.

However, strikers do not enjoy absolute protection against dismissal. Those who participate in a protected strike may be dismissed for misconduct committed during the strike.¹⁶⁴ However, this does not detract from the value of strikers' right not to be dismissed as those who are dismissed under these circumstances are not dismissed *because* they are striking, but because they are guilty of misconduct.¹⁶⁵ An employer who wants to dismiss strikers under such circumstances, must ensure that their dismissal is fair in terms of the Labour Relations Act, 1995.¹⁶⁶

Furthermore, such strikers may be dismissed for a reason based on the operational requirements¹⁶⁷ of the business.¹⁶⁸ What is intended by this formulation is not clear. However, a similar approach was adopted by the courts in terms of their unfair labour practice jurisdiction under the Labour Relations Act, 1956.¹⁶⁹

In terms of the definition of operational requirements in s 213 of the Labour Relations Act, 1995, an employer will be able to dismiss for this reason if the technological or structural or economic or similar needs of the business require it.¹⁷⁰ It appears that the employer will have to prove¹⁷¹ that the harm which it is suffering as a result of the strike

¹⁶⁴See s 67(5) of the Labour Relations Act, 1995.

¹⁶⁵See also John Grogan *Workplace Law* (1996) 183.

¹⁶⁶See par 3.4.3.3.2 of chapter 3 where the statutory requirements for a fair dismissal for misconduct are discussed.

¹⁶⁷For a detailed discussion of the meaning of "operational requirements" as reason for dismissal, see par 3.4.3.3.4.1 of chapter 3.

¹⁶⁸See s 67(5).

¹⁶⁹See *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) at 973B-C where the labour appeal court stated "If the respondent [ie Blue Waters Hotel, the employer] wished to justify dismissing the employees engaged in their lawful strike it might have done so on the basis of the operational requirements of the enterprise,...It would then have done so, not on grounds of misconduct, but for reason of genuine economic necessity after following a fair procedure". This ground for dismissal of strikers was also accepted by arbitrators acting in terms of the Labour Relations Act, 1956. See, for example, *MAN Truck & Bus (SA) (Pty) Ltd and United African Motor & Allied Workers Union* (1991) 12 ILJ 181 (ARB) at 190F where the arbitrator stated "But if the strike is proper, it cannot be treated as a species of misconduct. The employer remains entitled to dismiss, but only for operational reasons...". See further Alan Rycroft "The Employer's 'Level of Tolerance' in a Lawful Strike" (1993) 14 ILJ 285 at 289.

¹⁷⁰See the definition of operational requirements in s 214 of the Labour Relations Act, 1995 as well as par 3.4.3.3.4.1 of chapter 3.

¹⁷¹For a discussion of what an employer that wants to dismiss for operational reasons must prove to ensure that it will be substantively fair, see par 3.4.3.3.4.1 of chapter 3.

is more than it can be expected¹⁷² to suffer and is prejudicing the economic well-being of the business. In other words, the employer must prove that it has exceeded its level of tolerance.¹⁷³

The rationale for this provision is clear. If the employer cannot dismiss strikers when its limit of tolerance has been reached, it will have to close and everyone, including the employees, will suffer.¹⁷⁴

The question of whether or not the harm has become unbearable is a factual one.¹⁷⁵ In order to determine whether the employer's level of tolerance has been reached, the nature and extent of the harm which the employer has suffered because of the strike must be considered.

The harm may take a number of forms.¹⁷⁶ It will primarily be of a financial nature such as loss of profits due to a loss or reduction in sales and the cancellation of orders, the

¹⁷²The causing of harm is one of the accepted objectives of a strike (see *MAN Truck & Bus (SA) (Pty) Ltd and United African Motor & Allied Workers Union* (1991) 12 ILJ 181 (ARB) at 189E-F where the arbitrator stated that "...a strike is...specifically designed to damage the employer.") See also *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) at 972A-D and *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd* (1995) 16 ILJ 1469 (LAC) at 1481A. See further John Grogan *Workplace Law* (1996) 183.

¹⁷³See J Myburgh SC "The Protection of Strikers from Dismissal" in P Benjamin, R Jacobus & C Albertyn (eds) *Strikes, Lock-outs & Arbitration in South African Labour Law: Proceedings of the Labour Law Conference 1988* (1989) 27 at 34 where he states that the extent of the harm required would be "when...the employer's loss of production and concomitant loss of profits become unbearable".

¹⁷⁴See *National Union of Mineworkers v Black Mountain Mineral Development Company (Pty) Limited* (unreported case no 705/94) where the supreme court of appeal of South Africa held, "[t]o protect strike action beyond that point would be detrimental not only to the interests of both sides but also to those of the community at large".

¹⁷⁵The labour appeal court in *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd* (1995) 16 ILJ 1469 (LAC) at 1479D-F stated: "But no universally applicable test can or should be laid down when an employer dismisses for economic reasons. It is the duty of the court to assess those reasons and all other relevant facts...". See also *National Union of Mineworkers v Black Mountain Mineral Development Company (Pty) Limited* (unreported case no 705/94) where the supreme court of appeal of South Africa (at page 30 of the judgment) held that, "The inquiry is not whether one or other course may have been more successful in resolving the dispute or whether the employer could have endured the strike for longer; the inquiry is whether in all the circumstances (including, for example, the duration of the strike and the extent of the measures actually taken by the parties to resolve the dispute) the dismissal can be said to have been unfair".

¹⁷⁶See Alan Rycroft's discussion of the more subjective aspects of tolerance in his article entitled "The Employer's 'Level of Tolerance' in a Lawful Strike" (1993) 14 ILJ 285 at 286-287.

loss of customers,¹⁷⁷ negative press coverage¹⁷⁸ and a negative industrial relations image.¹⁷⁹

To determine the extent of the harm will not normally pose a problem as it will primarily consist of financial losses which can be proved through financial statements and estimates et cetera. Employers will normally also be able to attach a monetary value to most of the other forms of economic harm.

The difficulty, however, is to determine whether the effects of the harm have reached the required level. Some of the courts held that the question of whether or not the employer had reached the required level of tolerance was a factual one.¹⁸⁰ The labour appeal court in *Cobra Watertech v National Union of Metalworkers of SA*¹⁸¹ and *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd*¹⁸² warned against a test or tests to determine this question.

However, the labour appeal court in *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel*¹⁸³ did establish a test. It held that a business will have reached the required level of tolerance where the strike poses a "threat of extinction" to the enterprise or a threat "of irreparable harm" to it.¹⁸⁴

¹⁷⁷Caused by the strike itself but also possibly by acts in contemplation or in furtherance of the protected strike such as pickets and boycotts.

¹⁷⁸Comments made by trade union officials or by strikers during the strike may possibly contribute to such coverage. Ancillary strike action such as placards, advertisements et cetera may also play a role.

¹⁷⁹Strikers' placards shown during pickets or their advertisements may play a role in this regard.

¹⁸⁰See *National Union of Mineworkers v Black Mountain Mineral Development Company (Pty) Limited* (unreported case no 705/94) where the supreme court of appeal of South Africa held (at page 30-31 of the judgment) that it is a question which must be determined on the facts.

¹⁸¹(1995) 16 ILJ 607 (LAC) at 616I.

¹⁸²(1995) 16 ILJ 1469 (LAC) at 1479E.

¹⁸³(1993) 14 ILJ 963 (LAC) at 972F.

¹⁸⁴See also 972J where it used the words "irreparable economic hardship". The court did not, however consider it necessary to give a precise definition of the extent of such hardship as the employer in casu did not present sufficient evidence to establish economic harm. See also *Laeveld Koöperasie Bpk (Tobacco Division) & Others v SA Commercial Catering & Allied Workers Union & Others* (1993) 14 ILJ 1354 (IC) at 1357F where the industrial court also stated that the economic harm must be "irreparable". See further *National Union of Metalworkers of SA & Others v Boart MSA* (1995) 16 ILJ 1098 (IC) at 1103 C. Contra, however, *Hotel Liquor Catering Commercial & Allied Workers Union & Others v Awerbuch's Bargain House (Pty) Ltd* (1995) 16 ILJ 163 (IC) at 173 where the industrial court stated "To have expected respondent to have tolerated the strike until such time as the 'threat of economic extinction' or 'irreparable economic hardship' could be shown, is...grossly unfair and has no justifiable 'commercial rationale'. Generally speaking, surely it speaks for itself that such an approach could result not only in prolonged labour unrest and chaos, but also in economic disaster not only concerning employers but also their employees as well, and on a broader scale the

It is suggested that "threat of extinction" should be equated with a threat of insolvency.¹⁸⁵ Nevertheless, the word "threat" indicates that the insolvency need not be a fait accompli before dismissal would be justified. On the contrary, the object of the dismissal is to end the harm in order to ensure the enterprise's survival.¹⁸⁶ The labour appeal court in *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd*¹⁸⁷ held a similar view. It stated¹⁸⁸

One would obviously not have to wait until [Insolvency]...had already occurred before insisting upon the right to dismiss strikers...

It is suggested that the labour appeal court's other test in the *Blue Waters Hotel* case¹⁸⁹ namely the threat of "irreparable harm", may also be criticised. "Irreparable harm" should not be equated with unbearable or intolerable harm. Harm which cannot be "repaired" or made good does not necessarily constitute a level of harm which has become intolerable for the employer. The object of strike action is to cause harm and often the harm caused cannot be recouped.¹⁹⁰ Only when the irreparable harm has reached proportions or levels which are intolerable for the employer, will it be entitled to dismiss fairly.

In a number of cases the courts have held that the enterprise's financial situation prior to the strike¹⁹¹ as well as the well-being of the trade within which it operates should be taken into consideration when determining whether or not the employer has reached its

national economy".

¹⁸⁵See also Alan Rycroft "The Employer's 'Level of Tolerance' in a Lawful Strike" (1993) 14 *ILJ* 285 at 294.

¹⁸⁶This is in accordance with the legislature's aim to advance economic development (see a 1 of the Labour Relations Act, 1995).

¹⁸⁷(1994) 15 *ILJ* 1005 (LAC).

¹⁸⁸At 1012A.

¹⁸⁹At 972F.

¹⁹⁰See the example given by PAK le Roux "From the Courts: The Dismissal of Strikers: A new approach from the Labour Appeal Court" (1993) 2(11) *CLL* 119 at 126 of a newspaper publishing business which is subjected to a two day strike. It will lead to irreparable harm in the sense that the revenue lost because of the loss of sales and advertising cannot be recouped.

¹⁹¹See, for instance, *Construction & Allied Workers Union v AG Gillies (Pty) Ltd* (1996) 17 *ILJ* 291 (IC) at 300D-E as well as *National Union of Metalworkers of SA & Others v Boart MSA* (1995) 16 *ILJ* 1098 (IC) at 1102H-H where the court stated "It is hard to reject the argument that this did not in itself constitute a threat of extinction to the company. Where it is reasonably foreseeable that the decision could be made that a holding company may close down a subsidiary because of an inability to make profits, that is a threat of extinction". See also *National Union of Metalworkers of SA & Others v Uniross Batteries (Pty) Ltd* (1996) 17 *ILJ* 175 (IC) at 182F.

level of tolerance.¹⁹² It is submitted that these factors should be treated with caution.¹⁹³ They are not indicators of the level of harm caused by the strike. They do, however, play a role in determining the time it will take the employer to reach its level of tolerance. A financially weak business, for instance, will reach its level of tolerance sooner than one which is financially strong at the commencement of the strike.

6.3.5.3 Protection against Eviction and Forfeiture of other Benefits

Although strikers who participate in protected strikes do not breach their contracts of employment in terms of the Labour Relations Act, 1995, the Act specifically provides that their employer does not have to remunerate them.¹⁹⁴ However, the employer may be required to continue making payments in kind should they request it.¹⁹⁵

The fact remains, however, that strikers who receive payment in kind during the strike, are enriched. They can be obliged to repay the monetary value thereof after the strike.¹⁹⁶

6.3.6 Industrial Action which does not Constitute a Strike

There are forms of industrial action which may serve the same purpose as strike action which do not fall within the ambit of the definition of a strike.¹⁹⁷ Pickets and boycotts by

¹⁹²See *National Union of Metalworkers of SA & Others v Uniross Batteries (Pty) Ltd* (1996) 17 ILJ 175 (IC) at 181.

¹⁹³See also the comments of the labour appeal court in *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd* (1995) 16 ILJ 1469 (LAC) at 1479F-H.

¹⁹⁴See s 67(3).

¹⁹⁵See s 67(3)(a). The Labour Relations Act, 1956 did not contain a similar provision. In *National Union of Mineworkers v Black Mountain Mineral Development Company (Pty) Limited* (unreported case no 705/94) the employer provided accommodation and food to its workers. In an attempt to place pressure on the striking workers, the employer cut off the hot water and electricity supply to the hostel which housed the striking workers. It also cut off their meat supply. The supreme court of appeal of South Africa which had to judge the case in terms of the Labour Relations Act, 1956, accepted (at page 18 of the judgment) that the employer was entitled to stop making payment in kind during a strike.

¹⁹⁶See s 67(3)(b).

¹⁹⁷During the operation of the Labour Relations Act, 1956, it was held that overtime bans that were not compulsory in terms of employees' contracts of employment, did not fall within the ambit of the statutory definition of a strike (see *SA Breweries Ltd v Food & Allied Workers Union & Others* (1989) 10 ILJ 844 (A) at 849 and 851E-F and *National Automobile & Allied Workers' Union v CHT Manufacturing Co (Pty) Ltd* (1984) 5 ILJ 186 (IC) at 190A and *National Union of Textile Workers & Others v Jaguar Shoes (Pty) Ltd* (1986) 7 ILJ 359 (IC) at 365H). Contra, however, *Plascon Evans Paint (Natal) Ltd v Chemical Workers Industrial Union & Others* (1988) 9 ILJ 231 (D) at 241 where the supreme court held that a refusal "to continue to work" included a refusal to do voluntary overtime which employees normally did. The court was also of the view that the word "work" was not limited to contractual work (see also *Amalgamated Beverage Industries Ltd v Food &*

employees in order to force their employer to comply with their demands during collective bargaining, constitute such industrial action.¹⁹⁸

Sections 64 and 65 of the Labour Relations Act, 1995 do not apply to such industrial action. By the same token, however, s 67, which provides immunity against civil proceedings, also does not apply to such industrial action. This means that the employer can approach a court of law for civil relief against the employees.

6.4 CONCLUSION

The Labour Relations Act, 1995 plays an extremely important role in the regulation of the use of economic power by employees to counter the employer's decision-making power. It undoubtedly promotes the use of such power and contributes towards its effectiveness.

The definition of a lock-out in s 213 of the Labour Relations Act, 1995 is narrower than the one in terms of the Labour Relations Act, 1956 as it affords employers only one form of action that can constitute a lock-out, namely the exclusion of employees¹⁹⁹ from the workplace.²⁰⁰

Through its broad definition of a strike, the Labour Relations Act, 1995 affords employees a variety of forms of economic pressure which, provided they comply with the other requirements of a strike, may enjoy protected status in terms of the Act.²⁰¹

In addition, the broad ambit of the concept "mutual interest" in the definition affords employees tremendous scope as regards the matters about which they may institute

Allied Workers Union & Others (1988) 9 ILJ 252 (IC) at 262G-I and *Bebel Investments (Pty) Ltd v Paper Printing Wood & Allied Workers Union & Others* (1989) 9 ILJ 572 (E) at 577G- H). This dispute is no longer relevant as the definition of a strike in s 213 of the Labour Relations Act, 1995 includes a refusal to do overtime work, whether it is voluntary or compulsory.

¹⁹⁸Such pickets and boycotts must be distinguished from pickets and boycotts engaged in contemplation or in furtherance of a strike.

¹⁹⁹In terms of the definition, an employer cannot lock a single employee out. The definition refers to "the exclusion by an employer of employees from the employer's workplace...". See also John Grogan *Workplace Law* (1996) 198.

²⁰⁰John Grogan *Workplace Law* (1996) 198 submits that it would include a partial exclusion such as a withdrawal of overtime.

²⁰¹See par 6.3.2 above.

strike action.²⁰² Should they comply with the other requirements of a strike, the issues about which they have instituted strike action may enjoy statutory protection.

Section 65, however, constitutes a significant limitation of the right to strike, particularly subsec (1)(c) thereof which prohibits strike action about matters which must be referred to arbitration or adjudication by the labour court in terms of the Labour Relations Act, 1995.²⁰³ The number of matters which, in terms of the Act, must be settled in one of these ways, is extensive.²⁰⁴ It includes issues which employees may have been able to strike about due to the breadth of the concept "mutual interest" in the definition of a strike.²⁰⁵ It also covers a number of issues which employees used to be able to strike about in terms of the Labour Relations Act, 1956 such as unfair dismissals, unfair discrimination, other unfair labour practices and disputes about freedom of association.²⁰⁶

Although s 65 severely restricts the right to strike, those strikes which are not prohibited by it can attain legitimacy fairly easily because of the few and relatively simple procedural requirements which such strikes must comply with for statutory protection.²⁰⁷

The protection afforded by the Labour Relations Act, 1995 to strikes which comply with the provisions of ss 64 and 65 is far-reaching and promotes the effectiveness of a strike. In addition, the fact that this protection is also afforded to any conduct in contemplation or in furtherance of a protected strike, further promotes the effectiveness of such a strike.²⁰⁸ The Act also affords employees unlimited scope with regard to the type of ancillary action that they may resort to as it requires only that such action may not constitute an offence.²⁰⁹ Picketing, undoubtedly one of the most effective forms of pressure

²⁰²Ibid.

²⁰³See par 6.3.3.1 above where s 65(1)(c) as well as the disputes which must be referred to either arbitration or adjudication by the labour court in terms of the Labour Relations Act, 1995, are discussed.

²⁰⁴Ibid.

²⁰⁵See, for instance, the matters listed in s 86 of the Labour Relations Act, 1995 for joint decision-making by the employer and the workplace forum. In terms of s 65(1)(c) read with s 86(7), these matters may not be the focus of a strike as the employer has the choice to refer a dispute in respect of any of these matters to arbitration.

²⁰⁶See par 6.3.3.1 above in this regard.

²⁰⁷See par 6.3.3.1 above.

²⁰⁸See par 6.3.5.1 above in this regard.

²⁰⁹See s 67(8) of the Labour Relations Act, 1995 as well as par 6.3.5.1 above.

in the furtherance of a strike, is not only allowed but statutorily promoted and protected.²¹⁰

That a protected strike and conduct in contemplation or in furtherance thereof cannot be interdicted is of great importance as interdicts, even interim ones, usually spell the end of the dispute.²¹¹ The protection against an action for damages, however, is of less value as employers seldom institute proceedings for such relief²¹² and it may also be afforded to strikers participating in unprotected strikes.²¹³

However, statutory protection against dismissal is an extremely important benefit afforded to employees participating in a protected strike.²¹⁴ Grogan²¹⁵ explains the effect of this protection as follows²¹⁶

The ultimate strike-breaking weapon, dismissal or the threat thereof, is all but ruled out. The aim of the Act is plainly to make a protected strike a simple endurance contest: to measure whether the employer can do without the services of the strikers for longer than they can do without their wages.

Although protection against dismissal goes a long way in making a strike a valuable economic weapon, the effectiveness thereof may be lessened by a number of factors. The fact that the Labour Relations Act, 1995 allows an employer to employ temporary labour²¹⁷ lessens the effectiveness of a strike, particularly as the employer does not have to remunerate the strikers for the duration of the strike.²¹⁸ And, of great importance, strikers' protection against dismissal is not absolute. The employer retains the

²¹⁰See par 6.3.5.1 above.

²¹¹See par 6.3.5.1 above.

²¹²See, however, *Jumbo Products CC v National Union of Metalworkers of SA* (1996) 7 ILJ 859 (W) where the employer instituted an action for damages against a trade union which had instigated a strike that was illegal in terms of the Labour Relations Act, 1956.

²¹³*Ibid.*

²¹⁴See par 6.3.5.2 above.

²¹⁵John Grogan *Workplace Law* (1996).

²¹⁶At 184.

²¹⁷See s 76 of the Labour Relations Act, 1995.

²¹⁸See par 6.3.5.3 above. See also *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd* (1995) 16 ILJ 1469 (LAC) at 1479 and *Cobra Watertech v National Union of Metalworkers of SA* (1995) 16 ILJ 607 (LAC) at 615C-D.

right to dismiss them if the operational requirements of the business necessitate this.²¹⁹ However, it may not be that easy for the employer to comply with the statutory requirements for a fair dismissal for this reason,²²⁰ particularly where it had been able to keep production going with the help of non-striking workers and temporary labour.²²¹ Nevertheless, the fact remains that the employer's most powerful economic weapon namely dismissal, is still available to it.

Apart from dismissal, the employer also has a number of other forms of economic pressure at its disposal. In the next chapter, the different forms of economic pressure which may be implemented by the employer in order to force employees to drop their demands or to agree to its demands, will be examined.

²¹⁹See par 6.3.5.2 above.

²²⁰See par 3.4.3.3.4 of chapter 3.

²²¹See *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd* (1995) 16 ILJ 1469 (LAC) at 1479H where the labour appeal court, in assessing the substantive fairness of a dismissal for alleged operational requirements, took these factors into account.

CHAPTER 7

THE MAINTENANCE AND FURTHERANCE OF EMPLOYER PREROGATIVE THROUGH ECONOMIC POWER

7.1 INTRODUCTION

The exertion of economic pressure as a means to enforce demands is not restricted to employees and their trade unions. Employers may also resort to economic pressure against their employees and their trade unions. They may do so for a number of reasons. Employers may, for example, apply economic pressure to compel their employees to submit to their demands or proposals concerning terms and conditions of employment.¹ If the economic pressure takes the form of a lock-out, it is referred to as an "offensive" or "aggressive" lock-out.²

Employers may also exert economic pressure in order to foil or pre-empt their employees' plans to exercise economic pressure against them.³ If the economic pressure takes the form of a lock-out, it is labelled a "pre-emptive lock-out".⁴

Economic power may also be used by employers to counter their employees' economic power which they may be exerting through, for example, strike action.⁵ If employers' economic pressure takes the form of a lock-out, it is referred to as a "defensive lock-out".⁶

¹ See Alan Rycroft and Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) at 290.

² See Inthiran Moodley "The Key to Unlocking the 'Lock-out'?" (1990) 11 *ILJ* 1 at 3 and Marius Olivier "Lock-outs (Final)" (1992) *De Rebus* 626. See also the facts of *NTE Ltd v Ngubane & Others* (1992) 13 *ILJ* 910 (LAC) at 914E-F.

³ See John Grogan *Collective Labour Law* (1993) at 106.

⁴ See Marius Olivier "Lock-outs (Final)" (1992) *De Rebus* 626. AT Trollip in his article entitled "Lock-outs in South African Law" in Paul Benjamin, Reagan Jacobus and Chris Albertyn (eds) *Strikes Lock-outs & Arbitration in South African Labour Law: Proceedings of the Labour Law Conference 1988* (1989) 83 at 84 states that a pre-emptive lock-out can have a psychological effect on a workforce as the employer, by adopting this tactic, is suggesting that it is not concerned by a disruption in production.

⁵ See, for example, the facts of *Satchwell Controls Paarl and Steel Engineering & Allied Workers Union of SA* (1992) 13 *ILJ* 1044 (ARB) at 1046J-1047A-D as well as *SA Chemical Workers Union v Plascon Inks & Packaging Coatings (Pty) Ltd* (1991) 12 *ILJ* 353 (IC) at 356.

⁶ See Inthiran Moodley "The Key to Unlocking the 'Lock-out'?" (1990) 11 *ILJ* 1 at 3 as well as Marius Olivier "Lock-outs (Final)" (1992) *De Rebus* 626. A strike and (defensive) lock-out may run concurrently (see JY Claasen "Die Regsposisie van Werknemers by 'n Staking in die Arbeidsreg" 1984 (47) *THRHR* 83 at 85; MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 114-116; *Ngubane & Others v NTE Ltd* (1991) 12 *ILJ* 138 (IC) at 144D; *SA Chemical Workers Union v Plascon Inks & Packaging Coatings (Pty) Ltd* (1991) 12 *ILJ* 353 (IC) at 360 and *National Union of Metalworkers of SA v Cobra Watertech* (1994) 15 *ILJ* 832 (IC) at 838D-E) although, where the employer introduces the lock-out after the employees have gone on strike, the lock-out may be branded as "notional" or "ineffective" by the courts as there would not be much pur-

Lock-outs are not the only form of economic pressure used by employers. They may mobilise public opinion against employees and their trade unions through advertisements, television interviews, press statements⁷ and the distribution of pamphlets. Although these forms of economic pressure are relatively rare and are usually linked to lock-outs, they may be exerted independently.

In this chapter, the way in which the law prohibits or regulates the use of economic power by employers as a method to maintain or further their decision-making power, will be discussed.

7.2 COMMON LAW PRINCIPLES

As is the case with employees who embark on strike action, employers which use economic power against their employees may, depending on the form which the pressure takes, incur civil and/or criminal liability on the basis of common law principles. They, for example, may incur civil liability in the form of delictual liability or breach of contract. They may also incur criminal liability in terms of certain common law offences.

Employers which, during a television interview or through press statements or advertisements, defame their employees and/or their trade union,⁸ may be interdicted and/or be held liable for damages on the ground that their actions amount to a delict. They may also be held criminally liable.⁹

pose in preventing employees from working who are in any event refusing to work (see *SA Chemical Workers Union v Plascon Inks & Packaging Coatings (Pty) Ltd* (1991) 12 ILJ 353 (IC) at 361F-G). Contra, however, AT Trollip "Lock-outs in South African Law" in Paul Benjamin, Reagan Jacobus and Chris Albertyn (eds) *Strikes Lock-outs & Arbitration in South African Labour Law: Proceedings of the Labour Law Conference 1988* (1989) 83 at 88 and *Ngewu & Others v Union Co-operative Bark & Sugar Co Ltd; Masondo & Others v Union Co-operative Bark & Sugar Co Ltd* (1983) 4 ILJ 41 (N).

⁷See, for example, the facts of *Commercial Catering & Allied Workers Union of SA & Others v Game Discount World Ltd* (1990) 11 ILJ 162 (IC) at 165A.

⁸It was argued in the previous chapter that a legal person such as a company can also be defamed (see note 22 of chapter 6). It is submitted that, in accordance with this argument, a trade union which is registered in terms of s 96 of the Labour Relations Act, 1995 and is accordingly a body corporate (see s 97 of the Labour Relations Act, 1995), can also be defamed.

⁹Such employers may be guilty of *crimen iniuria* where it is proved that they have unlawfully and intentionally violated the dignity of their employees or their trade union. Employers may also commit *criminal defamation* where their messages injure the reputation and good name or *fama* of the employees or an official or office-bearer of the employees' trade union or even the trade union itself.

The act of locking employees out will not normally lead to criminal liability, but may lead to civil liability. Employers may incur civil liability on the ground of breach of contract for prohibiting employees from doing their work and refusing to pay them.¹⁰

From the above it is clear that the common law does not recognise the legitimacy of the exercise of economic pressure by an employer as a means to enforce its demands against employees and their trade union.¹¹

The law has, however, been adapted to allow an employer to enforce its demands in this manner. As in the case of collective action by employees and their trade unions, this adaptation has been brought about through the Labour Relations Act, 1995.¹² The Act makes provision for the exertion of economic power by an employer to enforce its demands in that it provides for lock-outs¹³ and conduct in contemplation or furtherance thereof.¹⁴ The Labour Relations Act, 1995 however, also controls and regulates the exercise of such economic power.¹⁵

¹⁰In terms of the common law, an employer must pay employees their agreed wages where they offer their services (see par 2.4.2.2 of chapter 2). See also Marius Olivier "Uitsluitings" (1992) *De Rebus* 555; Marius Olivier "Lock-outs (Final)" (1992) *De Rebus* 626 at 627 and John Grogan *Collective Labour Law* (1993) at 106. Generally speaking, in terms of the common law, an employer may only terminate its employees' contracts of employment unilaterally where they are guilty of a material breach. Where this is not the case, it would be guilty of breach of contract (see *Food & Allied Workers Union v Middevrystaatse Suiwel Koöperasie Bpk* (1990) 11 *ILJ* 776 (IC) at 790D-E as well as *Gubb & Inggs Ltd and SA Clothing & Textile Workers Union of SA* (1991) 12 *ILJ* 415 (ARB) at 427J-428A where the arbitrator held that the employer's exclusion of its employees in response to their breach, did not constitute breach of contract on the part of the employer).

¹¹See Marius Olivier "Lock-outs (Final)" (1992) *De Rebus* 626 at 627 where he states "...it should be evident that it would rid legitimate collective power play of its essential character and effectiveness if the normal common law and law of contract principles, consequences and remedies were to be applied to lock-outs...". See also JY Claasen "Die Regsposisie van Werknemers by 'n Staking in die Arbeidsreg" 1984 (47) *THRHR* 83 at 86 and MSM Brassey, E Cameron, MH Cheadle and MP Olivier *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 6-7.

¹²See note 31 in par 6.2 of chapter 6 where some of the sources which give an historical account of the development of South African legislation with regard to strikes and lock-outs are given. See also par 3.1 of chapter 3.

¹³See s 213 of the Labour Relations Act, 1995.

¹⁴See s 67(2)(b) and (6)(b) as well as par 7.3.1 below in this regard.

¹⁵Although the legislature accepts that there is constant conflict between employers and employees and that a lock-out is an effective method through which employers may enforce their demands, it nevertheless wants to ensure that employers first endeavour to negotiate with their employees about their demands (see s 64(1)(a) of the Labour Relations Act, 1995). It also wants to ensure that lock-outs take place according to a regulated process and that employees are not taken by surprise (see s 64(1)(c) and (d) of the Labour Relations Act, 1995). In addition, it wants to restrict its permission of lock-outs to ones which do not jeopardise the well-being of the community at large (see s 65(1)(d) of the Labour Relations Act, 1995). It also does not want to allow lock-outs which amount to a re-opening of a dispute which has been settled through either collective bargaining (see s 65(3)(a)(i)), a determination made in terms of the Wage Act (see s 65(3)(b)) or arbitration (see s 65(3)(a)(ii)) of the Labour Relations Act, 1995). For a discussion of these

7.3 THE LABOUR RELATIONS ACT, 1995

7.3.1 Introduction

The Labour Relations Act, 1995 affords employers a "recourse"¹⁶ to lock-out as opposed to employees' "right"¹⁷ to strike. This is in accordance with the provisions of the interim Constitution which afforded employers a "recourse" to lock-out and employees a "right" to strike.¹⁸ These provisions were the result of a compromise reached during negotiations concerning the interim Constitution.¹⁹ Trade unions were of the view that strikes and lock-outs should not be treated as countervailing forces. They argued that a right to strike was employees' only means for effective bargaining²⁰ whereas employers' superior economic strength ensured the effectiveness of their bargaining. According to them, affording employers a right to lock-out would disturb the balance in bargaining power in their favour.

The contents of the labour relations clause in the interim Constitution were hotly debated in the Constitutional Assembly.²¹ A compromise produced a "right" to strike²² but no right or recourse to a lock-out in the (final) Constitution. The specific exclusion of the recourse to lock-out in the Constitution lead employers to argue that the balance provided by the Labour Relations Act, 1995 has been disturbed. The main ground for objection raised by employers for the constitutional court²³ to consider was based on constitutional principle XXVIII which provides that

considerations of the legislature, see Craig Tanner "Strikes and Lock-outs" in Michael Robertson (general ed) *South African Human Rights and Labour Law Yearbook 1991 Volume 2* (1992) 354. (It is submitted that, although Tanner's article was written while the Labour Relations Act, 1956 was in force, the considerations for similar provisions in the Labour Relations Act, 1995, remain the same.)

¹⁶See s 64(1) of the Labour Relations Act, 1995.

¹⁷*Ibid.*

¹⁸See s 27 of the interim Constitution.

¹⁹See Pieter de Waal "Deadlock on the Lock-out" (1996) 4(3) *Juta's Business Law* 131.

²⁰See par 6.3.3 of chapter 6.

²¹See Pieter de Waal "Deadlock on the Lock-out" (1996) 4(3) *Juta's Business Law* 131.

²²See s 23(2)(c) of the Constitution.

²³See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) 17 ILJ 821 (CC). This is an excerpt from the judgment in which only those paragraphs of the judgment which explain the certification process and which directly affect labour law have been excerpted.

Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.

The employers argued that in order to engage effectively in collective bargaining, bargaining parties must have the right to exercise economic power against each other. Accordingly, the right to lock-out should be expressly recognised in the Constitution. The court held that although it is correct that collective bargaining implied a right to exercise economic power, constitutional principle XXVIII did not require that the Constitution expressly recognise the mechanisms for the exercise of economic power: it sufficed that the right to bargain collectively was specifically protected.²⁴

The employers further argued that, by including the right to strike but omitting the right to lock-out, employers' right to bargain collectively was accorded less status than the right of workers to bargain collectively. This argument was also rejected by the court. It pointed out that employers' right to bargain collectively was expressly recognised in the Constitution.²⁵

The employers also argued that the constitutional principle of equality²⁶ requires that, if the right to strike is included in the Constitution, so should the right to lock-out. The argument was based on the proposition that the right to lock-out was the necessary equivalent of the right to strike and that therefore, in order to treat employers and workers equally, both these rights should be recognised in the Constitution.²⁷ The court rejected this argument. It pointed out that strike action was workers' primary economic weapon whereas employers exercised power through a range of weapons such as dismissal, the employment of replacement labour, the unilateral implementation of new terms and conditions of employment and the lock-out.²⁸

²⁴See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) 17 ILJ 821 (CC) at 840C-E.

²⁵See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) 17 ILJ 821 (CC) 840F-G. See also s 23(5) of the Constitution which provides that every employers' organisation and employer has the right to engage in collective bargaining.

²⁶Contained in constitutional principle II.

²⁷See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) 17 ILJ 821 (CC) at 841A.

²⁸See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) 17 ILJ 821 (CC) at 841A-C.

It was also argued by the employers that the exclusion of the right to lock-out necessarily implied that the Labour Relations Act, 1995, which protected the right, would be unconstitutional.²⁹ This argument was also rejected. The court held that the effect of s 23 of the Constitution was that the right of employers to use economic power against workers would be regulated by the Labour Relations Act, 1995 within the framework of the Constitution.³⁰

Although the Labour Relations Act, 1995 affords employers a "recourse" to lock-out as opposed to employees' "right" to strike, it regulates the two forms of economic pressure in the same manner.³¹ As in the case of strikes, the cornerstone of the Act's approach to a lock-out is its definition thereof in s 213. The reason for this is that, should the employer's actions fall within the definition, s 64 of the Labour Relations Act, 1995, which affords employers a recourse to lock-out, and s 65, which limits the recourse, will apply. If an employer fails to comply with the provisions of ss 64 and 65 of the Labour Relations Act, 1995, the act of instituting a lock-out, or any conduct in contemplation or furtherance thereof, does *not* constitute a criminal offence.³² However, non-compliance with these two sections may lead to civil proceedings in the form of an application for an interdict in the labour court³³ and/or an order by it for compensation for losses attributable to such a lock-out.³⁴

²⁹See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (1996) 17 ILJ 821 (CC) at 841E.

³⁰See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (1996) 17 ILJ 821 (CC) at 841F-G.

³¹See par 6.3 of chapter 6 where the manner in which the Labour Relations Act, 1995 regulates strikes is set out.

³²Contra s 65(1) read with s 65(3) of the Labour Relations Act, 1995. As in the case of strikes (see note 39 of chapter 6), contraventions by employers of s 65 seldom lead to criminal proceedings. However, a lock-out which does comply with ss 64 and 65 of the Labour Relations Act, 1995 may constitute a criminal offence in terms of other labour legislation such as the Basic Conditions of Employment Act and the Wage Act. Consider, for example, where the employer contravenes s 19(1)(b) of the Basic Conditions of Employment Act when it does not pay excluded employees their wages. The legislature has nevertheless indemnified employers by providing in s 67(9) of the Labour Relations Act, 1995 that such a contravention will not constitute a criminal offence (see par 7.3.5 below in this regard).

³³In terms of s 68(1). During the period when the Labour Relations Act, 1995 was in force, the industrial court (see *Food & Allied Workers Union v Royal Beech-Nut (Pty) Ltd* (1988) 9 ILJ 1033 (IC) at 1033I-1034B and *Sithole & Others v Federated Timbers Ltd* (1989) 10 ILJ 517 (IC) at 520-521) as well as ordinary courts could interdict illegal lock-outs.

³⁴See s 68(1)(b).

If the employer has complied with ss 64 and 65 and the lock-out is a protected one, the employer is protected against civil liability by s 67(2), read with s 67(6) of the Labour Relations Act, 1995.³⁵

However, the employer may also use economic pressure against its employees which does not constitute a lock-out as defined.³⁶ In such a case, ss 64 and 65 do not apply. These forms of economic pressure, however, may enjoy protection against civil liability which is provided for in s 67 of the Labour Relations Act, 1995 if they were implemented in contemplation or in furtherance of a protected lock-out.

7.3.2 The Definition of a Lock-out

Section 213 of the Labour Relations Act, 1995 defines a lock-out as follows

"lock-out" means the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.

In terms of the definition, a lock-out consists of two³⁷ elements, namely a specified act on the part of the employer committed for a specific purpose.

The definition of a lock-out in the Labour Relations Act, 1956 was much broader and the employer had a number of actions and omissions to choose from. Although the legislature's aim with the broad definition was to retain a measure of control over most forms of economic pressure exerted by employers, it arguably had the effect of disturbing the balance in the bargaining power between employers and employees. Employers, for

³⁵In terms of the Labour Relations Act, 1956 a lock-out which complied with s 65 thereof was legal in the sense that no criminal offence was committed and the employer enjoyed protection against civil liability in terms of s 79(1) of the Act. The indemnity provided in terms of s 79(1) was broad and included protection against civil proceedings for orders for specific performance (such as, for example, applications for orders for the payment of notice pay which the employer, in breach of the Basic Conditions of Employment, failed to pay when it instituted a lock-out dismissal against its employees - see *Msongelwa & Others v Zinc Corporation of SA* (1993) 14 ILJ 917 (T)). Furthermore, lock-outs did not constitute unfair labour practices. Consequently, the fairness of lock-outs could not be judged by the industrial court.

³⁶Examples of such economic pressure are the mobilising of public opinion through press statements, advertisements, television interviews and the distribution of pamphlets.

³⁷A strike has an additional element, namely collectivity on the part of the employees instituting strike action (see the definition of a strike in s 213 of the Labour Relations Act, 1995 as well as par 6.3.2 of chapter 6 where the definition is discussed in detail).

instance, could exclude employees from the workplace, breach their contracts of employment and also dismiss them.³⁸

Presumably for this reason, the definition of a lock-out in s 213 of the Labour Relations Act, 1995 affords employers only one form of action which can constitute a lock-out, namely the exclusion of employees³⁹ from the workplace.⁴⁰

However, mere exclusion from the workplace will not really have any effect if the employer continues to pay the employees their wages as it is obliged to do in terms of the common law.⁴¹ The definition accordingly contains the provision that a lock-out occurs "whether or not the employer breaches those [excluded] employees' contracts of employment in the course of or for the purpose of that exclusion".

The act of locking employees out must be linked to the purpose set out in the definition⁴² namely "to accept a demand⁴³ in respect of any matter of mutual interest

³⁸See the definition of a lock-out in s 1 of the Labour Relations Act, 1956. For a dismissal to constitute an act in terms of the definition of a lock-out, it had to be linked to one of the purposes set out in the definition (see *Food & Allied Workers Union v Middevrystaatse Suiwel Koöperasie Bpk* (1990) 11 ILJ 776 (IC) at 788G as well as *Commercial Catering & Allied Workers Union of SA & Others v Game Discount World Ltd* (1990) 11 ILJ 162 (IC) at 165D-F). If no such linkage existed, there was no lock-out. Such a dismissal, however, could constitute an unfair labour practice.

³⁹In terms of the definition, an employer cannot lock a single employee out. The definition refers to "the exclusion by an employer of employees from the employer's workplace...". See also John Grogan *Workplace Law* (1996) 198.

⁴⁰John Grogan *Workplace Law* (1996) 198 submits that it would include a partial exclusion such as a withdrawal of overtime.

⁴¹See par 2.4.2.2 of chapter 2 in this regard.

⁴²If this is not the case, the actions or omissions will not constitute a lock-out as defined. See, for instance, *Satchwell Controls Paarl and Steel Engineering & Allied Workers Union of SA* (1992) 13 ILJ 1044 (ARB) at 1051 where the arbitrator came to the conclusion that the employer's exclusion of its workers from its premises was not a lock-out as defined, as the purpose was to compel them to cease breaching their contracts of employment which was not a purpose stipulated in the lock-out definition in s 1 of the Labour Relations Act, 1956. See also *Commercial Catering & Allied Workers Union of SA & Others v Game Discount World Ltd* (1990) 11 ILJ 162 (IC) at 165D-F; *Sappi Fine Papers (Pty) Ltd v Pienaar NO & Others* (1994) 15 ILJ 137 (LAC) at 140D-F; *SA Chemical Workers Union v Plascon Inks & Packaging Coatings (Pty) Ltd* (1991) 12 ILJ 353 (IC) at 361E-F; *Ngewu & Others v Union Co-operative Bark & Sugar Co Ltd*; *Masondo & Others v Union Co-operative Bark & Sugar Co Ltd* (1983) 4 ILJ 41 (N) at 55H and *National Union of Metalworkers of SA v Cobra Watertech* (1994) 15 ILJ 832 (IC) at 839G-I.

⁴³It could be argued that the reference to a "demand" in the definition suggests that it covers only offensive lock-outs (see Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) 534). It is suggested that this is not the case as the Labour Relations Act, 1995 makes provision for other forms of lock-outs. In s 76(1)(b), for example, the Act clearly refers to a defensive lock-out.

between employer and employee".⁴⁴ The matters about which the employer may lock employees out are the same as those about which employees may strike.⁴⁵ Matters of "mutual interest" is a very wide concept⁴⁶ and employers are accordingly able to lock employees out about an extremely wide and diverse range of matters.

Because of its breadth, the purpose element does not play an important role in limiting employers' recourse to lock employees out. However, as will appear from the discussion below, other statutory provisions, particularly ss 64 and 65 of the Labour Relations Act, 1995, present very real and extensive restrictions on employers' recourse to lock-out.

7.3.3 A Recourse to Lock-out

As was indicated earlier, s 64 of the Labour Relations Act, 1995 does not afford employers a "right" but only a "recourse" to lock-out.⁴⁷

What a "recourse" as opposed to a "right" to lock-out entails in practical terms remains to be seen. An employer which has complied with the statutory requirements for a "recourse" to lock-out is entitled to the same protection against civil claims as strikers who participate in a protected strike.⁴⁸

7.3.3.1 Limitations on a Recourse to Lock-out

Section 65 of the Labour Relations Act, 1995, which prohibits employees from striking in a number of instances,⁴⁹ also applies to lock-outs.⁵⁰ In addition, s 64, which sets out the procedural requirements for strikes which are not prohibited in terms of s 65,⁵¹ also applies to lock-outs.⁵² Accordingly, lock-outs which are not absolutely prohibited by s

⁴⁴See the definition in s 213 of the Labour Relations Act, 1995.

⁴⁵See par 6.3.2 of chapter 6 where the definition of a strike was analysed.

⁴⁶See par 6.3.2 of chapter 6 where the meaning of the concept matters of "mutual interest" was analysed.

⁴⁷See s 64(1) as well as par 7.3.1 above.

⁴⁸See s 67(2)(a) and (6)(a).

⁴⁹See par 6.3.3.1 of chapter 6 where s 65 with regard to strikes is discussed in detail.

⁵⁰See s 65.

⁵¹See par 6.3.3.1 of chapter 6 where s 64 is discussed.

⁵²See s 64.

65 will only acquire statutory protection once the employer has complied with the procedural requirements stipulated in s 64.

7.3.4 The Consequences of a Protected Lock-out

Section 67 of the Labour Relations Act, 1995, which affords indemnity against civil liability for strikers who have complied with ss 64 and 65 of the Act,⁵³ also applies to lock-outs which comply with these two sections.⁵⁴ Consequently, employers cannot be interdicted from instituting a protected lock-out and no action for compensation can be brought against them for any loss suffered as a result of such a lock-out.⁵⁵

Employers also enjoy protection against civil liability for any conduct in contemplation or in furtherance of protected lock-outs.⁵⁶ One of the most effective forms of such conduct is the non-payment of wages. Mere exclusion from the workplace would not really be an effective weapon if the employer continues to remunerate the locked out employees. The Labour Relations Act, 1995 has accordingly specifically released the employer from this obligation during a protected lock-out.⁵⁷ It has also indemnified the employer against criminal liability which it may incur for such non payment in terms of the Basic Conditions of Employment Act⁵⁸ or the Wage Act.⁵⁹

Employees who live in accommodation provided by their employer may be evicted from it upon their dismissal. During the operation of the Labour Relations Act, 1956, employers which locked their employees out by dismissing them, often also evicted them from such accommodation.⁶⁰ However, in terms of the Labour Relations Act,

⁵³See par 6.3.5.1 of chapter 6.

⁵⁴See s 67(2) and (6)(a).

⁵⁵See s 67(2)(a) and (6)(a).

⁵⁶See s 67(2)(b) and (6)(b).

⁵⁷See s 67(3) of the Labour Relations Act, 1995. See also the definition of a lock-out in s 213 of the Labour Relations Act, 1995 where it is provided that a breach of the employees' contracts in the course of such an exclusion would not preclude the exclusion from constituting a statutory lock-out.

⁵⁸Consider, for instance, s 19(1)(b) read with s 25(1) of the Act in terms of which an employer who deprives an employee of his remuneration or part thereof is guilty of an offence. See also *Msongelwa & Others v Zinc Corporation of SA* (1993) 14 ILJ 917 (T) at 922H-923A.

⁵⁹See s 67(9) of the Labour Relations Act, 1995.

⁶⁰See, for example, the facts in *NTE Ltd v Ngubane & Others* (1992) 13 ILJ 910 (LAC) at 914H and 925.

1995, employees can prevent such an eviction by requesting the employer not to discontinue providing payment in kind (ie accommodation) during the lock-out.⁶¹

In terms of s 67, employers are also protected against civil liability for conduct in contemplation or in furtherance of their protected lock-outs such as the issuing of press statements or advertisements or the distribution of pamphlets. The protection afforded by s 67 also covers defamatory statements made during such interviews or in such advertisements and pamphlets.⁶²

However, employers do not enjoy protection against civil liability for conduct in contemplation or in furtherance of a protected lock-out which constitutes an offence.⁶³ Accordingly, employers may not enjoy such protection in respect of statements which, for instance, violate the dignity of a trade union or an official and constitute *crimen injuria*.⁶⁴ Criminal defamation may also be committed where the employer's message injures the reputation and good name of an employee or trade union or an official.⁶⁵ Consequently, although an employer is protected in respect of the delict defamation, it may incur civil liability for defamatory statements which constitute a common law offence.

Being protected against actions for damages is of particular importance to employers. Unlike strikers employers have the financial resources which makes civil proceedings against them for damages or for orders for specific performance⁶⁶ feasible options for employees and their trade unions.

7.3.5 Economic Pressure which does not Constitute a Lock-out

There are a number of forms of economic pressure which employers may exercise against their employees which do not constitute a lock-out as defined. Often, these

⁶¹See s 67(3)(a).

⁶²See also par 6.3.5.1 of chapter 6.

⁶³See s 67(8). See also par 6.3.5.1 of chapter 6.

⁶⁴See note 9 in par 7.2 above where this offence is discussed.

⁶⁵*Ibid.*

⁶⁶Consider, for example, *Msongelwa & Others v Zinc Corporation of SA* (1993) 14 ILJ 917 (T) and *NTE Ltd v Ngubane & Others* (1992) 13 ILJ 910 (LAC) where the employees endeavoured to obtain an order in terms of which their employers had to pay them their wages and/or their notice pay which they forfeited as a result of the lock-out.

forms of economic pressure are exercised in contemplation or in furtherance of a lock-out, but they can be exercised independently.

During the operation of the Labour Relations Act, 1956, an employer was able to circumvent a trade union and to make an offer directly to its employees in order to get them not to resort to strike action. It was able to do this once an impasse had been reached.⁶⁷ If the union had bargained in good faith, the employer could not make a better offer than its final offer to the union.⁶⁸ However, if the trade union had bargained in bad faith, the employer could make a better offer.⁶⁹

By virtue of s 5(3) of the Labour Relations Act, 1995, this form of economic pressure is no longer available to an employer if employees are engaging in a protected strike. It reads as follows

No person may advantage, or promise to advantage, an employee...in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

If an employer acts in contravention of s 5(3), the trade union may refer the dispute to a bargaining council or the Commission.⁷⁰ Should the dispute remain unresolved, the trade union may refer the dispute to the labour court for adjudication.⁷¹

The employer will probably still be able to resort to this form of economic pressure in the case of a threatened unprotected strike as it would not be endeavouring to prevent the employees from exercising a right conferred by the Act. Under such circumstances, however, it would probably elect to approach the labour court for an interdict prohibiting the employees from proceeding with their unprotected strike.⁷²

⁶⁷See *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) at 1237I-J.

⁶⁸See *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) at 1239B-C and *Chemical Workers Industrial Union & Others v Indian Ocean Fertilizer* (1991) 12 ILJ 822 (IC) at 828A-B.

⁶⁹See *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) at 1239E.

⁷⁰See s 9(1).

⁷¹See s 9(4).

⁷²See s 68(1)(a) as well as par 7.3.4 above.

It is suggested that s 5(3) does not prohibit an employer from unilaterally changing employees' terms and conditions of employment if the change is not made in exchange for the employees not resorting to strike action. However, the right of the employer to unilaterally change employees' terms and conditions of employment is restricted by s 64(4) of the Labour Relations Act, 1995. In terms of s 64(4)(a), the trade union may require the employer not to implement the change unilaterally until the bargaining council or the Commission has issued a certificate stating that the dispute regarding the unilateral change remains unresolved or a period of 30 days has elapsed since the referral of the dispute was received by the bargaining council or the Commission.⁷³ Or, if the employer has already implemented the change unilaterally, the trade union may, in terms of s 64(4)(b), require the employer to restore the terms and conditions of employment which applied before the change until the bargaining council or the Commission has issued a certificate stating that the dispute regarding the unilateral change remains unresolved or a period of 30 days has elapsed since the referral of the dispute was received by the bargaining council or the Commission.⁷⁴

The employer must comply with the union's requirement within 48 hours of service of the referral on the employer.⁷⁵ If the employer fails to comply with the union's requirement and the status quo is therefore not maintained or restored, the employees may strike without first having to comply with the requirements of s 64(1).⁷⁶

Employers may furthermore hire temporary workers to lessen the economic harm which they suffer as a result of a strike.⁷⁷ They, however, may not employ temporary labour during an offensive⁷⁸ or a pre-emptive⁷⁹ lock-out.⁸⁰ Employers are nevertheless

⁷³See s 64(4)(a) read with s 64(1)(a).

⁷⁴See s 64(4)(b) read with s 64(1)(a).

⁷⁵See s 64(5).

⁷⁶See s 64(3)(e). For a discussion of the requirements of s 64(1), see par 6.3.3.1 of chapter 6.

⁷⁷See s 76. See also par 6.4 of chapter 6. See further the facts of *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) at 1232C-D.

⁷⁸See par 7.1 above for a discussion of offensive lock-outs.

⁷⁹*ibid.*

⁸⁰See s 76(1)(b).

entitled to hire temporary workers if the lock-out is in response to a strike,⁸¹ in other words, if it is a defensive lock-out.⁸²

Economic pressure may also be exercised through stockpiling.⁸³ Employers utilise their extra stock to lessen the economic harm which their employees' industrial action may cause or to minimise their losses when they lock their employees out.

During the period in which the Labour Relations Act, 1956 was in force, employers could dismiss employees in order to force them to accede to their demands. Such a dismissal could constitute a lock-out as defined in the Act.⁸⁴ If that was the case, the employer could enjoy the protection afforded in s 79 of the Act against civil liability for the lock-out. If, however, the dismissal was not linked to one of the purposes of a lock-out, the fairness of such a dismissal could be judged by the industrial court in terms of its unfair labour practice jurisdiction.⁸⁵

The Labour Relations Act, 1995 has severely restricted dismissal as a form of economic pressure. In terms of the Act, a dismissal to compel employees to accept a demand in respect of any matter about which the parties may bargain collectively, constitutes an automatically unfair dismissal.⁸⁶ In addition, the dismissal of strikers who participate in a protected strike is also branded by the Labour Relations Act, 1995 as an automatically unfair dismissal.⁸⁷ Nevertheless, strikers' protection against dismissal is not absolute. The employer may dismiss them for operational reasons.⁸⁸ However, an employer which wants to dismiss strikers for this reason, must ensure that the dismissal complies

⁸¹See s 76(1)(b).

⁸²See par 7.1 above for a discussion of defensive lock-outs.

⁸³For a discussion of this form of economic pressure, see Neil W Chamberlain and James W Kuhn *Collective Bargaining* 3 ed (1986) 187-188.

⁸⁴That is if the purpose of the dismissal was one of the purposes set out in the definition of a lock-out in s 1 of the Act.

⁸⁵See, for example, the facts of *Chemical Workers Industrial Union & Others v Indian Ocean Fertilizer* (1991) 12 ILJ 822 (IC) as well as *Commercial Catering & Allied Workers Union of SA & Others v Game Discount World Ltd* (1990) 11 ILJ 162 (IC) at 165E-F. See also Inthiran Moodley "The Key to Unlocking the 'Lock-out'?" (1990) 11 ILJ 1 at 17.

⁸⁶See s 187(1)(c). See also par 3.4.3.2 of chapter 3 where automatically unfair dismissals are discussed.

⁸⁷See s 187(1)(a) read with s 67(4). See also par 3.4.3.2 of chapter 3 where automatically unfair dismissals are discussed.

⁸⁸See s 67(5). See also par 6.3.5.2 of chapter 6 in this regard.

with the statutory requirements for a fair dismissal.⁸⁹ This has proved to be a fairly difficult task, especially with regard to the extent of economic harm which the employer must have suffered to make the dismissal substantively fair.⁹⁰

In conclusion, because the forms of economic pressure discussed above do not constitute lock-outs as defined in terms of s 213 of the Labour Relations Act, 1995, they are not covered by ss 64 and 65 of the Act. By the same token, however, employers will only enjoy indemnity in terms of s 67 against civil proceedings in the labour court in respect of such actions and omissions if they are implemented in contemplation or in furtherance of protected lock-outs. If this is not the case, the employer could face civil proceedings in respect of these actions and omissions.

7.4 CONCLUSION

The Labour Relations Act, 1995 plays a very important role in the regulation of the use of economic power by employers.

Although the Act affords employers only a recourse to lock-out,⁹¹ they are accorded the right to utilise a lock-out to enforce their demands or to either pre-empt or counter employees' exercise of economic power.⁹²

The definition of a lock-out in s 213 of the Labour Relations Act, 1995 is narrower than the one in terms of the Labour Relations Act, 1956 as it affords employers only one form of action which can constitute a lock-out, namely the exclusion of employees from the workplace.⁹³

The matters about which an employer may lock employees out are the same as those about which the latter may strike, namely matters of "mutual interest".⁹⁴ The wide ambit of the concept "mutual interest" affords employers tremendous scope as regards the matters about which they may lock employees out.

⁸⁹See par 3.4.3.3.4 of chapter 3.

⁹⁰See par 6.3.5.2 of chapter 6 in this regard.

⁹¹See par 7.3.1 above.

⁹²See par 7.1 above.

⁹³See par 7.3.2 above.

⁹⁴See par 7.3.2 above read with par 6.3.2 of chapter 6.

The prerequisites for a protected lock-out are the same as those for a protected strike.⁹⁵ Accordingly, lock-outs which are not absolutely prohibited by s 65 will only acquire statutory protection once the employer has complied with the procedural requirements stipulated in s 64.⁹⁶ It is reasonably easy to comply with these requirements as they are few in number and relatively simple.⁹⁷

The protection afforded by the Labour Relations Act, 1995 to lock-outs which comply with the provisions of ss 64 and 65 is far-reaching and promotes the effectiveness of a lock-out.⁹⁸ In addition, the fact that this protection is also afforded to any conduct in contemplation or in furtherance of a protected lock-out, further promotes the effectiveness of such a lock-out.⁹⁹ Non-payment of wages, arguably the most effective form of pressure in the furtherance of a lock-out, is specifically regulated in the Act.¹⁰⁰ It releases the employer from this obligation during a protected lock-out and indemnifies the employer against criminal liability which it may incur for such non-payment in terms of the Basic Conditions of Employment Act or the Wage Act.¹⁰¹

It is submitted that employers may make greater use of lock-outs in the future. During the operation of the Labour Relations Act, 1956, they seldom resorted to lock-outs.¹⁰² Apart from owner-related considerations,¹⁰³ employers often had problems ensuring that their economic pressure constituted a statutory lock-out.¹⁰⁴ This was particularly true if the action took the form of dismissal. Frequently, that which an employer thought

⁹⁵See par 7.3.3.1 above read with par 6.3.3.1 of chapter 6.

⁹⁶See par 7.3.3.1 above.

⁹⁷Ibid.

⁹⁸See par 7.3.4 above.

⁹⁹Ibid.

¹⁰⁰See s 67(3) as well as par 7.3.4 above.

¹⁰¹See s 67(9) as well as par 7.3.4 above.

¹⁰²See Andrew Prior "The Luck of the Lock-out: A Brief Examination of the Lock-out Option" (1990) 11 *ILJ* 460; AA Landman "The Right to Strike and the Right to Lock-out in the New Labour Dispensation" (1995) 4(8) *CLL* 85 as well as M Olivier "Uitsluitings" (1992) *De Rebus* 555.

¹⁰³Lock-outs bring either a total halt to or a reduction in production and can cause a loss of customers as well as financial losses. See Sonia Bendix *Industrial Relations in South Africa* 3 ed (1996) at 533 where she states "In practice, lock-outs occur far less frequently than strikes,...because an employer has far more to lose, in total, by closing down his operations than an individual employee loses by engaging in strike action".

¹⁰⁴See M Olivier "Lock-outs (Final)" (1992) *De Rebus* 626 at 628.

was a lock-out, amounted to a dismissal¹⁰⁵ which could be judged by the industrial court.¹⁰⁶ A further reason for employers seldom resorting to lock-outs was that they had another economic weapon namely, dismissal.¹⁰⁷ They often resorted to dismissal to counter industrial action or to rid themselves of employees who refused to work on their terms and conditions. In terms of the Labour Relations Act, 1995, however, dismissal under such circumstances is branded as automatically unfair.¹⁰⁸

It is further submitted that employers will rather resort to protective or defensive lock-outs¹⁰⁹ than to offensive¹¹⁰ or pre-emptive¹¹¹ ones as they are only statutorily entitled to employ temporary labour during the former.¹¹²

¹⁰⁵In *Food Workers Council of SA & Others v Fresh Mark (Pty) Ltd* (1995) 16 ILJ 175 (IC) at 178 the industrial court held that the dismissal was not a lock-out but a dismissal. See also the facts of *SA Chemical Workers Union v Plascon Inks & Packaging Coatings (Pty) Ltd* (1991) 12 ILJ 353 (IC) at 366; *Commercial Catering & Allied Workers Union of SA & Others v Game Discount World Ltd* (1990) 11 ILJ 162 (IC) as well as *National Union of Metalworkers of SA v Cobra Watertech* (1994) 15 ILJ 832 (IC) at 839G-H.

¹⁰⁶This was because a dismissal which was not linked to one of the purposes in the definition of a lock-out did not constitute a lock-out. It constituted a dismissal which could be judged by the court in terms of its unfair labour practice definition jurisdiction (see *Commercial Catering & Allied Workers Union of SA & Others v Game Discount World Ltd* (1990) 11 ILJ 162 (IC) at 165F-I and *National Union of Metalworkers of SA v Cobra Watertech* (1994) 15 ILJ 832 (IC) at 839).

¹⁰⁷See John Grogan *Collective Labour Law* (1993) at 106.

¹⁰⁸See par 7.3.5 above.

¹⁰⁹See par 7.1 where protective lock-outs are discussed.

¹¹⁰See par 7.1 where this type of lock-out is discussed.

¹¹¹*Ibid.*

¹¹²See s 76(1)(b).

CHAPTER 8

SUMMARY AND CONCLUSIONS

8.1 INTRODUCTION

In this chapter, the extent to which employer prerogative is restricted by the law and collective bargaining is summarised and certain conclusions are drawn.

8.2 A SUMMARY OF THE EXTENT TO WHICH EMPLOYERS' PREROGATIVE HAS BEEN RESTRICTED

As was indicated in chapter 1,¹ it is generally accepted by employers and most² trade unions that employers have the right to manage their employees. The legal basis for this right is to be found in the contract of employment which has as one of its elements the subordination of the employee to the authority of the employer. This element affords the employer the legal right to give instructions and creates the legal duty for the employee to obey these instructions.³

Employers' right to manage is neither fixed nor static.⁴ This is because there is a constant struggle between employers and employees about the extent of this right, mainly because of their different objectives. Employers strive to retain as much of their prerogative as possible to ensure that employees' labour potential is converted as effectively as possible into actual productive labour whereas employees strive to improve their terms and conditions of employment.

The main purpose of this thesis was to determine the *extent* of employers' right to manage employees.⁵ This was done by examining the restrictions imposed by the law and collective bargaining in accordance with Storey's⁶ definition of employer prerogative namely

¹See par 1.4.1 of chapter 1.

²Trade unions which hold a radical view of industrial relations (see par 1.7.3 in chapter 1 where this view is discussed) do not hold this view.

³See par 1.4.2 of chapter 1 as well as par 2.3.1 of chapter 2 where subordination as an element of the contract of employment, is discussed.

⁴See par 1.6.1.2 of chapter 1.

⁵See par 1.7 of chapter 1.

⁶John Storey *The Challenge to Management Control* (1980) 41.

[a]s a working definition we...consider managerial prerogatives to be the residue of discretionary powers of decision left to management when the regulative impacts of law and collective agreements have been subtracted.

Essentially, therefore, the examination was focussed on what is left of employer prerogative.⁷

The impact of the common law on employer prerogative was examined first.⁸ The examination showed that the common law favours the employer. It allows the employer to unilaterally impose the terms and conditions of the contract of employment on the employee.⁹ Through the subordination element of the contract of employment, the employer acquires the right to give instructions to the employee.¹⁰ And, through residual terms such as the duty to be respectful,¹¹ to work in a competent manner¹² and to act in good faith,¹³ this right of the employer is strengthened. Furthermore, the fact that these residual terms are phrased in such broad terms,¹⁴ further enhances the employer's prerogative as it allows the employer to give a broad interpretation to these duties.

However, the right to dismiss by giving the required notice undoubtedly represents the common law's most important contribution to enforcing and strengthening the employer's right to manage.¹⁵ The fear of losing their jobs through notice, and with no consideration of the concept of fairness, plays a pivotal role in employees' preparedness to follow instructions and to comply with their other contractual duties. Dismissal by notice also plays a crucial role in employees' preparedness to agree to changes to their original terms and conditions of employment.

⁷See also par 1.8 of chapter 1.

⁸See chapter 2.

⁹See pars 2.2 and 2.5 of chapter 2.

¹⁰See par 2.3.1 of chapter 2.

¹¹See par 2.4.4 of chapter 2.

¹²See par 2.4.6 of chapter 2.

¹³See par 2.4.5 of chapter 2.

¹⁴See pars 2.4.4-2.4.6 of chapter 2.

¹⁵See par 2.4.10.3 of chapter 2.

An examination of South African labour legislation¹⁶ in chapter 3 indicated that legislation has not challenged the basic common law premise that the employment relationship is a contractual one and that the employer has the right to utilise and control the labour potential of the employee.¹⁷ Legislation, however, has taken cognisance of the unequal bargaining relationship between employers and individual employees¹⁸ and is aimed at preventing or limiting the exploitation of employees and at promoting job security.

The statutory limitations take three basic forms. The first set of limitations regulates the ability of the employer to enter into contracts of employment.¹⁹ Employers retain their right to decide whom to employ provided they are not statutorily prohibited from employing applicants and that they do not unfairly discriminate against applicants on arbitrary grounds.²⁰

The second set of limitations restricts employers' decision-making power vis-a-vis persons already in employment.²¹ In this regard, a distinction can be made between the employer's right to give instructions²² and the terms and conditions of employment.²³ With regard to employers' right to give instructions, legislation has not alienated the right but has restricted it by requiring that instructions must be lawful and reasonable and that they must be in accordance with certain statutory measures regarding the work which must be done, the manner in which the work must be done, the place where the work must be done and when the work must be done.²⁴

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.²⁵ The Basic

¹⁶See pars 3.1 and 3.5 of chapter 3.

¹⁷See par 3.1 of chapter 3.

¹⁸See par 2.2 of chapter 2.

¹⁹See par 3.2 of chapter 3.

²⁰*ibid.*

²¹See par 3.3 of chapter 3.

²²See par 3.3.2 of chapter 3.

²³See par 3.3.3 of chapter 3.

²⁴See par 3.3.2 of chapter 3.

²⁵See par 3.3.3 of chapter 3.

Conditions of Employment Act, for example, regulates the minimum remuneration for overtime, work on Sundays and public holidays and sets out the formulae according to which such remuneration must be calculated. It also makes provision for paid annual leave and sick leave.²⁶

However, legislation does not regulate all terms and conditions of employment. It, for instance, only regulates ordinary minimum remuneration in areas and industries where trade unions do not really feature or are not well organised and effective collective bargaining does not therefore exist.²⁷ In addition, terms such as bonuses, increments, training, bursaries, maternity leave,²⁸ paternity leave, study leave, compassionate leave, accommodation, meals, clothing, travel allowances, housing subsidies and other allowances have been left to the parties to bargain about.²⁹ However, the employer's prerogative regarding these terms and conditions is restricted by Schedule 7 in that it must ensure that it does not commit an unfair labour practice as defined in the Schedule when formulating the conditions on which it is prepared to afford these terms to employees.³⁰

The third set of statutory limitations limits or restricts the employer's right to discipline and to dismiss.³¹ Employers have retained the right to discipline. However, the employer's right to decide on rules of conduct has been restricted by the requirement

²⁶Ibid.

²⁷See par 3.3.3 of chapter 3. See also par 5.3.2.4 of chapter 5 where the determination of minimum wages through collective bargaining is discussed.

²⁸The Basic Conditions of Employment Act does not regulate *maternity leave*. Although it stipulates that pregnant employees may not work four weeks prior to their confinement and eight weeks thereafter, this cannot be regarded as maternity leave as these employees are not afforded any form of job security and/or payment for the period which they are prohibited from working. These are accordingly matters for negotiation. The Labour Relations Act, 1995, however, has provided a measure of job security for female employees through its provisions regarding unfair dismissal. It brands the refusal of an employer to allow a female employee to resume work after she took agreed maternity leave or was absent for the compulsory period stipulated in the Basic Conditions of Employment Act, as a dismissal. In addition, it brands a dismissal of a female employee *because* of her pregnancy, or intended pregnancy, or any reason related to her pregnancy, as automatically unfair. For a detailed discussion on these legislative provisions, see pars 3.3.3 and 3.4.3.2 of chapter 3.

²⁹See par 3.3.3 of chapter 3.

³⁰See par 3.3.3 of chapter 3.

³¹See par 3.4 of chapter 3.

that rules must be reasonable or fair.³² The concept of progressive or corrective discipline as established in the Code, restricts the employer's right to elect a penalty. In accordance with this concept, it will have to implement penalties with due regard to the severity of the offence and will only be able to dismiss for a serious offence or for repeated offences.³³

Nevertheless, the common law right to demand respect³⁴ and good faith³⁵ on the part of employees has remained relatively unaffected by legislation and will accordingly continue to play an important role in determining acceptable conduct of employees in the workplace. The right to demand good faith will remain particularly important. Because of its broad connotation, as in the past, it will enable an employer to rely on it in misconduct cases, particularly if the offence the employee is accused of is not listed in the disciplinary code.³⁶

Employers' right to dismiss has been severely restricted by the Labour Relations Act, 1995. Chapter VIII thereof and the Code have essentially eradicated arbitrary dismissals.³⁷ Through these provisions employees, irrespective of whether they are probationary, ordinary or fixed term employees, have been provided with a substantial degree of job security. The statutory restriction of the employer's right to dismiss can be regarded as one of the most far-reaching of all restrictions on its prerogative. As a result of this restriction, the employer can no longer force employees to comply with its instructions or to accept new or altered terms and conditions of employment by threatening dismissal on notice.³⁸

The legislature has not only used minimum standards legislation to prevent exploitation and to promote bargaining equality between an employer and an individual employee. It has also endeavoured to do this through the statutory promotion of collective bargain-

³²See par 3.4.3.3.2.1 of chapter 3 where it was pointed out that the fairness or reasonableness of a rule must be considered when the substantive fairness of a dismissal for misconduct is considered. Also, where a workplace forum exists, an employer must consult and reach consensus with it before implementing any proposal concerning its disciplinary code and procedure (see par 4.3.3.2 of chapter 4).

³³See pars 3.4.1 and 3.4.2 of chapter 3 in regard to the concept of progressive discipline.

³⁴See par 2.4.4 of chapter 2.

³⁵See par 2.4.5 of chapter 2.

³⁶See par 3.3.6 of chapter 3.

³⁷See par 3.4.3 of chapter 3 where these statutory provisions are discussed.

³⁸See pars 3.4.1 and 3.4.3 of chapter 3.

ing.³⁹ In fact, it has clearly indicated that it regards collective bargaining as the preferred method to determine all terms and conditions of employment, including those in respect of which it has stipulated minima.⁴⁰

The Labour Relations Act, 1995 which regulates collective bargaining, however, does not make provision for a statutory duty to bargain.⁴¹ Accordingly, an employer's preparedness to bargain with a trade union about terms and conditions of employment and other matters of mutual interest is principally determined by its bargaining strength vis-à-vis a union. However, through its regulation of a framework for collective bargaining, the Act extends significant rights to trade unions, thereby increasing their bargaining strength.⁴² It provides extensive protection for the right of employees to form, join and participate in the lawful affairs of trade unions.⁴³ It also regulates the acquisition of organisational rights.⁴⁴ In addition, it regulates the establishment of collective bargaining structures such as bargaining councils.⁴⁵ The Act also regulates the legal nature and enforceability of collective agreements.⁴⁶ It furthermore makes provision for the right to strike to enforce collective bargaining rights, subject to the prior requirement of obtaining an advisory award⁴⁷ and the protection of strikers against dismissal.⁴⁸ In addition, the Act also limits unilateral decision-making by the employer.⁴⁹

The effectiveness of collective bargaining as a means of regulating employer prerogative is of course dependent on the topics about which collective bargaining can take place. The Labour Relations Act, 1995 is phrased in very broad terms and does not restrict the

³⁹See par 3.1 of chapter 3 as well as par 4.2 of chapter 4 in this regard.

⁴⁰See par 3.5 of chapter 3.

⁴¹See par 4.2.1 of chapter 4.

⁴²See par 4.2 of chapter 4.

⁴³See par 4.2.2 of chapter 4.

⁴⁴See par 4.2.3 of chapter 4.

⁴⁵See par 4.2.5 of chapter 4.

⁴⁶See pars 4.2.6 and 4.2.7 of chapter 4.

⁴⁷See par 4.2.1 of chapter 4.

⁴⁸See par 6.3.5.2 of chapter 6.

⁴⁹See par 7.3.5 of chapter 7.

collective bargaining parties' freedom in this regard.⁵⁰ In addition, the Basic Conditions of Employment Act affords precedence to collective agreements which regulate terms and conditions of employment also regulated in the Act.⁵¹

From the survey done in chapter 5 of this thesis, it appears that where collective bargaining takes place, most facets of the employment relationship are regulated by collective agreements rather than being the product of unilateral employer decisions. The survey also indicates that the ambit of collective bargaining, in certain cases at least, is being extended to issues beyond the employment relationship. However, matters which have not received much attention from trade unions so far are those related to the business or economic component of enterprises⁵² such as the issuing of shares, investment of surplus funds, the purchasing of a plant or new equipment,⁵³ the relocation of the business,⁵⁴ exporting, customer services, the prices of products and product development. Employers, however, in future may also be challenged by trade unions about these matters, particularly now that the Labour Relations Act, 1995 lists some of these matters for consultation with workplace forums.⁵⁵

Notwithstanding the importance they attached to collective bargaining, the drafters of the Labour Relations Act, 1995 also realised its shortcomings in the South African context. They argued that a second channel of communication was necessary between employers and employees to improve productivity and to ensure greater competitiveness.⁵⁶ The result has been the introduction of provisions which envisage the establishment of workplace forums.⁵⁷ These bodies can be seen as supplementing rather than undermining collective bargaining.⁵⁸ In essence, they are meant to relieve collective bargaining of functions to which it is not well suited.

⁵⁰See par 4.4 of chapter 4.

⁵¹Ibid.

⁵²See par 1.2 of chapter 1 where this sphere of a business is discussed. See also par 5.5 of chapter 5.

⁵³See par 5.5 of chapter 5.

⁵⁴Ibid.

⁵⁵See also par 4.3.3.1 of chapter 4 where the matters listed for consultation with workplace forums are discussed.

⁵⁶See par 4.1 of chapter 4.

⁵⁷See par 4.3 of chapter 4.

⁵⁸See pars 4.1 and 4.3.1 of chapter 4.

Employers' prerogative regarding the matters listed in s 84 of the Labour Relations Act, 1995 for consultation with workplace forums is not severely restricted. An employer must only "attempt" to reach consensus with a workplace forum and, provided the forum's constitution does not contain a deadlock breaking mechanism which includes arbitration, the employer may unilaterally implement its proposal about any of the listed matters.⁵⁹ The range of matters about which a workplace forum can exercise its joint decision-making function is limited compared to that about which it must be consulted, but its joint decision-making function is more restrictive of employer prerogative. Once the employer has initiated the joint decision-making process, it must reach consensus with the workplace forum. If this does not happen, its choices are very limited. It may either decide to risk arbitration or retain the status quo.⁶⁰

The legislature appreciated that collective bargaining without the right to exert economic pressure, such as strike action, to force the employer to comply with employees' collective demands would amount to collective begging.⁶¹ It has accordingly made provision for and regulated strike action and conduct in contemplation or in furtherance of strike action.⁶²

Through its broad definition of a strike, the Labour Relations Act, 1995 affords employees a variety of forms of economic pressure which, provided they comply with the other requirements of a strike, may enjoy protected status in terms of the Act.⁶³ In addition, the broad ambit of the concept "mutual interest" in the definition affords employees tremendous scope as regards the matters about which they may institute strike action.⁶⁴

Section 65 of the Labour Relations Act, 1995, however, constitutes a significant limitation of the right to strike, particularly subsec (1)(c) thereof which prohibits strike action about matters which must be referred to arbitration or adjudication by the labour court in terms of the Act.⁶⁵ The number of matters which must, in terms of the Act, be settled in one of

⁵⁹See pars 4.3.3.1 and 4.4 of chapter 4.

⁶⁰See pars 4.3.3.2 and 4.4 of chapter 4.

⁶¹See par 6.2 of chapter 6.

⁶²See par 6.3 of chapter 6.

⁶³See par 6.3.2 of chapter 6.

⁶⁴Ibid.

⁶⁵See par 6.3.3.1 of chapter 6.

these ways, are extensive.⁶⁶ It includes issues about which employees may have been able to strike due to the breadth of the concept "mutual interest" in the definition of a strike. It also covers a number of issues about which employees used to be able to strike in terms of the Labour Relations Act, 1956 such as unfair dismissals, unfair discrimination, other unfair labour practices and disputes about freedom of association.

Although s 65 severely restricts the right to strike, those strikes which are not prohibited by it can be legitimised fairly easily because of the few and relatively simple procedural requirements with which such strikes must comply in order to obtain statutory protection.⁶⁷

The protection afforded by the Labour Relations Act, 1995 to strikes which comply with the provisions of ss 64 and 65 is far-reaching and promotes the effectiveness of a strike. In addition, the fact that this protection is also afforded to any conduct in contemplation or in furtherance of a protected strike, further promotes the effectiveness of such a strike.⁶⁸ Picketing, undoubtedly one of the most effective forms of pressure in the furtherance of a strike, is not only permitted but statutorily promoted and protected.⁶⁹

The most important form of statutory protection for strikers is protection against dismissal.⁷⁰ However, although protection against dismissal enhances the effectiveness of a strike as a valuable economic weapon, the effectiveness is lessened by a number of factors. The fact that the Labour Relations Act, 1995 allows an employer to employ temporary labour⁷¹ will probably lessen the effectiveness of a strike, particularly as the employer does not have to remunerate the strikers for the duration of the strike.⁷² And, of great importance, strikers' protection against dismissal is not absolute. The employer has retained the right to dismiss them if the operational requirements of the business necessitate this.⁷³ It, however, may not be that easy for the employer to comply with the

⁶⁶Ibid.

⁶⁷See par 6.3.3.1 of chapter 6.

⁶⁸See par 6.3.5.1 of chapter 6.

⁶⁹See par 6.3.5.1 of chapter 6.

⁷⁰See par 6.3.5.2 of chapter 6.

⁷¹See par 6.4 of chapter 6.

⁷²See par 6.3.5.3 of chapter 6.

⁷³See par 6.3.5.2 of chapter 6.

statutory requirements for a fair dismissal for this reason,⁷⁴ particularly where it had been able to keep production going with the help of non-striking workers and temporary labour. Nevertheless, the fact remains that dismissal is still an option available to an employer.

The Labour Relations Act, 1995 also allows employers to use economic power, most importantly lock-outs, to either force employees to accede to their demands, or to pre-empt employees' plans to exert economic power against them or to counter employees' exercise of economic power.⁷⁵

The Labour Relations Act, 1995 affords employers a "recourse" to lock-out as opposed to employees' "right" to strike. This is in accordance with the provisions of the interim Constitution which afforded employers a "recourse" to lock-out and employees a "right" to strike.⁷⁶ It nevertheless regulates the two forms of economic pressure in the same manner.⁷⁷

It is submitted that, although the Labour Relations Act, 1995 does not afford them a right to lock-out and it is uncertain what the legal implications of a "recourse" to a lock-out are, employers may make more use of lock-outs in the future.⁷⁸ They may resort to protective or defensive lock-outs⁷⁹ in order to prevent strikers from damaging company property and intimidating non-striking workers and temporary labour. Also, the fact that they are statutorily entitled to employ temporary labour during such a lock-out, may contribute to their preparedness to implement such a measure. Employers may, however, refrain from resorting to offensive⁸⁰ or pre-emptive⁸¹ lock-outs as they are statutorily prohibited from employing temporary workers in these circumstances.⁸²

⁷⁴See par 3.4.3.3.4 of chapter 3 as well as par 6.3.5.2 of chapter 6.

⁷⁵See par 7.1 of chapter 7.

⁷⁶See par 7.3.1 of chapter 7.

⁷⁷See par 7.3.1 of chapter 7. See also par 6.3 of chapter 6 where the manner in which the Labour Relations Act, 1995 regulates strikes is set out.

⁷⁸See par 7.4 of chapter 7.

⁷⁹See par 7.1 of chapter 7 where protective lock-outs are discussed.

⁸⁰See par 7.1 of chapter 7 where this type of lock-outs is discussed.

⁸¹*ibid.*

⁸²See par 7.4 of chapter 7.

Another reason for employers' possible willingness to utilise lock-outs in the future may be that other forms of economic pressure used in the past, particularly dismissal, have been severely restricted by the Labour Relations Act, 1995. In terms of the Act, a dismissal to compel employees to accept a demand in respect of any matter about which the parties may bargain collectively, constitutes an automatically unfair dismissal.⁸³ In addition, the dismissal of strikers who participate in a protected strike is branded an automatically unfair dismissal by the Labour Relations Act, 1995.⁸⁴ Nevertheless, strikers' protection against dismissal is not absolute. The employer may dismiss them for operational reasons.⁸⁵ However, an employer which wants to dismiss strikers for this reason, must ensure that the dismissal complies with the statutory requirements for a fair dismissal.⁸⁶ This has proved to be a fairly difficult task, especially with regard to the extent of economic harm which must be proven by the employer to make the dismissal substantively fair.⁸⁷

8.3 CONCLUSIONS

From the above summary it appears that most⁸⁸ of an employer's common law decision-making powers have been statutorily regulated. Of great importance, however, is that, although the restrictions may be particularly severe in certain instances,⁸⁹ the statutory provisions have not *rescinded* any of the employer's decision-making powers. Even in the case of the matters listed in s 86 of the Labour Relations Act, 1995 for joint decision-making with workplace forums, the employer has retained a measure of its decision-making power.⁹⁰

⁸³See par 3.4.3.2 of chapter 3.

⁸⁴Ibid.

⁸⁵See par 6.3.5.2 of chapter 6.

⁸⁶See par 3.4.3.3.4 of chapter 3.

⁸⁷See par 6.3.5.2 of chapter 6.

⁸⁸Legislation has not essentially interfered with the employer's right to respect (see par 2.4.4 of chapter 2) and to good faith on the part of its employees (see par 2.4.5 of chapter 2).

⁸⁹It is suggested that even in the case of drastic or far-reaching statutory interference such as with an employer's right to dismiss either summarily or on notice (see par 3.4.3 of chapter 3), employers' have not *lost* these rights. They have *retained* them although in severely restricted forms.

⁹⁰The Act provides the employer with a choice if consensus cannot be reached with the forum. It may risk arbitration or revert to the status quo ante. See pars 4.3.3.2 and 4.4 of chapter 4.

The employer has accordingly *retained* its decision-making power, albeit in a more restricted or limited form.⁹¹ This makes further restriction of its decision-making power through contractual or statutory provisions or collective bargaining⁹² possible. It, however, also makes the lessening or even the total removal of these restrictions through future statutory provisions or collective bargaining⁹³ possible.

Collective bargaining is, from an employer's perspective, possibly the most acceptable method of regulating its decision-making power. Unlike legislation which constitutes the unilateral regulation of matters by the legislature,⁹⁴ collective bargaining is underpinned by voluntarism.⁹⁵ The employer can bargain about the matters which should be included in a collective agreement and the extent to which they should be regulated. It also retains a say in the matters so regulated.

However, collective bargaining as a method to regulate employer prerogative is inextricably linked to the strength of trade unions. Anstey suggests that worldwide, trade

⁹¹In *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) the industrial court also made the point that the employer's decision-making power has not been totally alienated from it but that it has been "eroded or reduced" (at 583B) or "restricted" or "limited" (at 583D).

⁹²See s 1(3) of the Basic Conditions of Employment Act (as amended by clause 1 of schedule 5 to the Labour Relations Act, 1995) in terms of which collective bargaining parties may agree on terms more favourable for employees than those stipulated in the Basic Conditions of Employment Act.

⁹³In terms of s 1(3) of the Basic Conditions of Employment Act (as amended by clause 1 of schedule 5 to the Labour Relations Act, 1995) an employer and trade union may collectively agree to terms less favourable for employees than the minima stated in the Basic Conditions of Employment Act. Clause 1.3 of chapter D of the Green Paper: Policy Proposals for a New Employment Standards Statute published as notice 156 of 1996 in Government Gazette 17002 of 23 February 1996 proposes that a collective agreement may automatically vary any employment standard except a fundamental right (such as the prohibitions on child labour and discrimination, protection against employer abuse through, for instance, the imposition of fines, and automatically unfair dismissals) and a right which requires ratification for variation (such as, for instance, sick pay rights and maternity rights). For a discussion of the Green Paper and its effect on collective bargaining, see Halton Cheadle, PAK le Roux, Clive Thompson and André van Niekerk *Current Labour Law 1996: A Review of Recent Developments in Key Areas of Labour Law* (1996) 5-6.

⁹⁴Strictly speaking, this description of legislation may no longer be correct in view thereof that the Labour Relations Act, 1995 is the result of debate and negotiations by the State, labour and business at NEDLAC (for a discussion of these negotiations, see D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 26-32). In future, all labour legislation will be dealt with in this way (see s 5(1)(b) and (c) of the National Economic, Development and Labour Council Act). Although labour legislation will still be imposed unilaterally by the legislature, it constitutes the results of negotiations by the three main interest groups in industrial relations.

⁹⁵See par 4.2.1 of chapter 4 where it is indicated that the Labour Relations Act, 1995 does not regulate a duty to bargain collectively.

unions seem to be diminishing in numerical strength.⁹⁶ Nevertheless, it appears that this tendency is not evident in South Africa.⁹⁷ It is suggested that trade unions will remain a bargaining force to be reckoned with for the foreseeable future and that their numerical strength may even increase. In its annual report for 1995, the Department of Labour intimated that it expected trade union membership to show more growth, particularly in the Government, agricultural and domestic sectors, as well as in the rural areas, as these sectors are at present relatively unorganised.⁹⁸ Other factors which could have a positive influence on future trade union membership are the Labour Relations Act, 1995 which provides that trade unions can register by following a more simplified registration process⁹⁹ as well as the fact that the Act will apply to a far wider range of workers.¹⁰⁰

It is suggested that workplace forums will not really impact on the role of trade unions and collective bargaining in the restriction of employers' decision-making power. A workplace forum's purpose is not to undermine collective bargaining but rather to supplement it.¹⁰¹ In practice, however, it appears that a workplace forum is actually subordinate to collective bargaining. The establishment of a workplace forum is effected by a representative trade union¹⁰² and its powers and functions are either regulated in a collective agreement or by chapter V of the Labour Relations Act, 1995.¹⁰³ In addition, a

⁹⁶See Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 386-388 where he discusses the decline in trade union membership and collective bargaining in Britain. See further his discussion on the decline of trade unions in the USA (at 391), the Netherlands (at 394-395) and Poland (at 396). Anstey also points out that other European countries such as France and Spain, have low trade union membership figures (at 392). He indicates that in South America, only about 50% of the working population is in formal wage employment of which 30% are unionised (at 400). Trade unionism, however, has grown in Taiwan and South Korea (at 397). In South Korea, the growth can be ascribed to greater political awareness and a push for democracy (at 398). In Taiwan, it is ascribed to a climate of liberalisation (at 398).

⁹⁷See Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 374 where he states that, "...trade union density is high (at least 50 percent) in the engine room of the economy, leaving union strength powerful in a strategic sense although it is relatively weak in terms of representing the whole of the economically active population".

⁹⁸See page 14 of the *Annual Report 1995: Department of Labour* RP 101/1996.

⁹⁹See chapter VI of the Act which regulates the registration of trade unions and employers' organisations.

¹⁰⁰See s 2 in terms of which only members of the Defence Force, the National Intelligence Agency and the South African Secret Service are excluded from the Act.

¹⁰¹See pars 4.3.1 as well as par 4.4 of chapter 4.

¹⁰²See pars 4.3.2 and par 4.4 of chapter 4.

¹⁰³*Ibid.*

representative trade union may effect the dissolution of a workplace forum by requesting a ballot to dissolve the forum.¹⁰⁴ Furthermore, as long as the establishment of workplace forums is statutorily linked to trade union representativeness,¹⁰⁵ their existence is dependent on the strength or bargaining power of trade unions.

It is also foreseen that matters listed in ss 84 and 86 of the Labour Relations Act, 1995 which are regulated in a collective agreement will not be relinquished by a trade union to a workplace forum even though it may effectively control the forum.¹⁰⁶ A representative trade union's bargaining power is stronger than that of a workplace forum. It is not prohibited from invoking agreed dispute resolution procedures as is the workplace forum.¹⁰⁷ The union also has different forms of economic pressure at its disposal.¹⁰⁸ A trade union may, however, consider effecting the establishment of a workplace forum if it is unable to reach consensus with the employer during collective bargaining about the matters listed in ss 84 and 86 or the renegotiation of these matters. This may be a particularly viable option in regard to the matters listed in s 86 for joint decision-making.

Nevertheless, even if no workplace forum is established, it is foreseen that employers may no longer be able to deal unilaterally with any of the matters listed in ss 84 and 86 of the Labour Relations Act, 1995. The statutory listing of these matters for consultation or joint decision-making by workplace forums may cause trade unions to regard them as matters fit for collective bargaining.

Also of importance is that the matters listed for consultation and joint decision-making with workplace forums in ss 84 and 85 respectively are not all employment matters.¹⁰⁹ A number of them actually relate to the business component of an enterprise.¹¹⁰ Their inclusion may be indicative of the legislature's view that essentially all decisions by an employer, including those that do not impact directly on employees and their job security

¹⁰⁴See s 93(1) as well as par 4.4 of chapter 4.

¹⁰⁵See s 80(2) read with the definition of a representative trade union in s 78(b) of the Labour Relations Act, 1995.

¹⁰⁶See pars 4.3.2 and 4.4 of chapter 4.

¹⁰⁷In the case of consultation and matters that must be jointly decided (see ss 85(4) and 86(4) as well as pars 4.3.3.1, 4.3.3.2 and 4.4 of chapter 4).

¹⁰⁸See chapter 6 where the exercising of trade unions' economic power is discussed.

¹⁰⁹See pars 4.3.4 and 4.3.5 of chapter 4.

¹¹⁰See par 1.2 of chapter 1 where the distinction is made between the human resources component and the business component of an enterprise.

should, at the very least, be made subject to consultation with them. The rationale is that increased worker participation in the running of the workplace would increase productivity and so promote the country's competitiveness in the international economic market.¹¹¹ In practice, however, it has resulted in a number of an employer's decision-making powers regarding the business aspect of its enterprise no longer being free from a certain degree of interference by employees operating through workplace forums or by trade unions insisting on bargaining about these matters.

Another factor which may in future play an important role in the restriction of the employer's decision-making power is the proposed introduction of equity legislation aimed at eradicating all forms of discrimination in the labour market.¹¹² Such legislation will be in accordance with the anti-discriminatory¹¹³ and affirmative¹¹⁴ action provisions of the Constitution.¹¹⁵ It will centre in a ban on unfair discrimination in hiring, promotion, training, pay, benefits and retrenchment.¹¹⁶ It will also regulate measures to encourage affirmative action programmes.¹¹⁷

It is foreseen that such equity legislation will have an enormous impact on the employer's decision-making power. For instance, it will impact on its right to select and appoint new employees. In addition, all its decisions regarding a particular employee, including matters such as promotion, training, remuneration and the providing of benefits, will have to be taken after due consideration of the other employees in the establishment in order to

¹¹¹See par 4.3.1 of chapter 4.

¹¹²See the foreword to the Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute published as Notice 804 of 1996 in Government Gazette 17303 of 1 July 1996.

¹¹³See s 9(1) which states that everybody is equal before the law and has the right to equal protection and benefit of the law. See s 9(3) which provides that the State may not unfairly discriminate directly or indirectly against anyone on grounds such as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹¹⁴See s 9(2) which makes provision for affirmative action programmes.

¹¹⁵See s 9(4) of the Constitution which stipulates that national legislation must be enacted to prevent or prohibit unfair discrimination.

¹¹⁶See clause 1.1.5.1 of chapter 1 of the Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute published as Notice 804 of 1996 in Government Gazette 17303 of 1 July 1996.

¹¹⁷See clause 1.1.5.2 of chapter 1 of the Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute published as Notice 804 of 1996 in Government Gazette 17303 of 1 July 1996.

ensure that its decisions do not constitute unfair discrimination against the particular employee or against the other employees.

The manner of enforcement of the provisions of such legislation is not clear. The Green Paper dealing with the proposed equity legislation¹¹⁸ makes provision for a Directorate of Equal Opportunities.¹¹⁹ The Directorate will guide the process of policy formulation and implementation.¹²⁰ It will do this by developing codes of good practice,¹²¹ setting up a system of consultation with stake holders with a view to nurturing social partnership,¹²² examining the practices of employers,¹²³ establishing performance indicators and timetables to assess¹²⁴ and establishing machinery for the collection and collation of data from the relevant employers.¹²⁵ In addition, the Green Paper makes provision for a Labour Inspectorate.¹²⁶ It will undertake monitoring and enforcement activities. In the course of inspections, it will ensure that employers make the required returns of data and plans. It might also ensure that employers have complied with appropriate measures regarding hiring, training, promotion and transfers.¹²⁷ The Green Paper, furthermore, makes provision for the resolution of disputes regarding anti-discrimination and employment equity aspects.¹²⁸ It suggests that the Commission must endeavour to resolve such disputes¹²⁹ and, if it is unsuccessful, the dispute may be referred to the labour court.¹³⁰

¹¹⁸See chapter 5 of the Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute published as Notice 804 of 1996 in Government Gazette 17303 of 1 July 1996.

¹¹⁹See clause 5.3.

¹²⁰See clause 5.3.1.

¹²¹See clause 5.3.2.1.

¹²²See clause 5.3.2.2.

¹²³See clause 5.3.2.3.

¹²⁴See clause 5.3.2.4.

¹²⁵See clause 5.3.2.5.

¹²⁶See clause 5.4.

¹²⁷*Ibid.*

¹²⁸See clauses 5.6 and 5.7.

¹²⁹See clause 5.6.

¹³⁰See clauses 5.6.2 and 5.7.

In the interim, provision has been made in Schedule 7 to the Labour Relations Act, 1995¹³¹ for the protection of employees and even applicants¹³² for positions against unfair discrimination on arbitrary grounds by employers.¹³³ Schedule 7 also brands the unfair conduct of the employer relating to promotion, demotion or training of an employee or relating to the provision of benefits to an employee as an unfair labour practice.¹³⁴ However, it does allow employers to adopt or implement affirmative action programmes¹³⁵ and to discriminate if such discrimination is based on an inherent requirement of the particular job.¹³⁶

The Constitution's impact on an employer's prerogative will be extensive.¹³⁷ This is particularly true with regard to the Bill of Rights contained in chapter 2 of the Constitution. The Bill of Rights binds the legislature¹³⁸ and the latter will accordingly have to take those provisions into consideration when drafting labour legislation.¹³⁹ The Labour Relations Act, 1995 was drafted with due consideration of the Constitution's terms¹⁴⁰

¹³¹During the operation of the Labour Relations Act, 1956, the industrial court had occasion to consider allegations of unfair discrimination in the workplace on a number of occasions. See, for example, *SA Chemical Workers Union & Others v Sentrachem Ltd* (1988) 9 ILJ 410 (IC) at 429F and *Sentrachem Ltd v John NO & Others* (1989) 10 ILJ 249 (W) at 259C-D (discrimination based on race), *George v Western Cape Education Department & Another* (1995) 16 ILJ 1529 (IC) at 1544J-1545B-C and *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) at 1076-1084 and 1090F-G (discrimination based on gender and marital status). Nevertheless, compared to the discriminatory nature of the society within which the industrial court operated, the number of cases which came before it were relatively few.

¹³²See clause 2(1)(a) read with clause 2(2)(a).

¹³³See clause 2(1)(a).

¹³⁴See clause 2(1)(b).

¹³⁵See clause 2(2)(b). The industrial court also indicated in *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) at 591F that one of the values which an employer may fairly take into account is the need for affirmative action.

¹³⁶See clause 2(2)(c).

¹³⁷See s 2 of the Constitution which stipulates that it is the supreme law of South Africa and that law or conduct inconsistent with it will be invalid.

¹³⁸See s 8(1) of the Constitution.

¹³⁹See also par 3.1 of chapter 3.

¹⁴⁰See the long title of the Labour Relations Act, 1995 which lists as one of its aims the changing of the law governing labour relations and for that purpose the giving effect to s 27 of the interim Constitution. See also s 1(a) of the Labour Relations Act, 1995 which lists the effectuation and regulation of the fundamental rights conferred by s 27 of the Interim Constitution as one of the primary objectives of the Labour Relations Act, 1995. Consider, for instance, the provisions of the Labour Relations Act, 1995 regarding organisational rights (see par 4.2.3 of chapter 4), its provisions regarding the right to strike (see par 6.3.3 of chapter 6) and its provisions about unfair dismissals (see par 3.4.3 of chapter 3) and other unfair labour practices.

and, as was mentioned earlier in this paragraph, the proposed equity legislation will also be drafted with due consideration of these terms.¹⁴¹

The Bill of Rights also applies to the common law¹⁴² and will undoubtedly impact on the common law contract of employment principles and the employer's decision-making power in terms of these principles. In addition, the Bill of Rights binds the judiciary¹⁴³ and the Bill specifically states that every court, tribunal or forum will have to promote the spirit, purport and object of the Bill of Rights when interpreting any legislation and when developing the common law.¹⁴⁴ In practice, therefore, the Commission as well as the labour court, the labour appeal court and the ordinary civil courts will exercise their functions with due consideration of the provisions of the Bill of Rights.

It is foreseen that the conventions and recommendations of the International Labour Organisation will continue¹⁴⁵ to influence our labour legislation and our courts¹⁴⁶ and in this manner impact on employer prerogative, particularly now that South Africa has been readmitted to the organisation.¹⁴⁷ Van Niekerk summarises the implications of this as follows

[a]s South Africa ratifies more Conventions, our law will increasingly become subject to scrutiny by the ILO's supervisory mechanisms. The interpretation of important ILO Conventions will acquire an increased significance...as the new Labour Court and Labour Appeal Court begin interpreting the 1995 LRA.

¹⁴¹See also par 3.1 of chapter 3.

¹⁴²See s 8(1) which stipulates that the Bill of Rights applies to "all law".

¹⁴³See s 8(1) of the Constitution which stipulates that the Bill of Rights applies to the judiciary.

¹⁴⁴See s 39(2) of the Constitution. See also s 3(b) of the Labour Relations Act, 1995 which stipulates that any person when applying the Act, must interpret its provisions in compliance with the Constitution. See also par 3.1 of chapter 3.

¹⁴⁵Some of the organisation's conventions and regulations played an important role in South African industrial relations. For instance, the law regarding unfair dismissal as codified in chapter VIII of the Labour Relations Act, 1995 and the Code has its origins in the International Labour Organisation's Recommendation Concerning Termination of Employment at the Initiative of the Employer 119 of 1963 and the Termination of Employment at the Initiative of the Employer Convention 158 of 1982 which the industrial court applied when it had to judge the fairness of dismissals in terms of its unfair labour practice jurisdiction (see par 3.4.3.1 of chapter 3 where the impact of this recommendation and convention on our law of unfair dismissal was discussed).

¹⁴⁶See *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) at 1975 and *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) at 587-588.

¹⁴⁷See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 48 where they discuss South Africa's readmission.

Shortly after South Africa's readmission, it ratified two conventions namely the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the Application of the Principles of the Right to Organise and to Bargain Collectively Convention 98 of 1949.¹⁴⁸ The Labour Relations Act, 1995's provisions regarding the right to freedom of association¹⁴⁹ and organisational rights¹⁵⁰ are in accordance with principles established in these two conventions.¹⁵¹ It also appears that the proposed equity legislation mentioned earlier in this paragraph will have as its basis another important convention of the International Labour Organisation namely, the Discrimination (Employment and Occupation) Convention 111 of 1957.¹⁵²

In view of all the considerations mentioned in this paragraph, it is foreseen that the employer's decision-making power will in future become even more restricted statutorily. However, it is foreseen that, as in the past, the statutory interventions will take the form of restrictions and not alienations or rescissions.

From the employer's perspective, the best method to counter the statutory regulation of its prerogative will be through collective bargaining. The legislature also favours the regulation of workplace matters through collective bargaining and has been actively promoting collective bargaining.¹⁵³ Trade unions also seem to prefer collective bargaining. It is accordingly foreseen that collective bargaining, and not legislation, will be the primary mechanism for the restriction of employer prerogative. This is, of course, based on the assumption that trade unions retain and even increase their membership. Should their membership decline in accordance with international tendencies,¹⁵⁴ legislation will replace collective bargaining as the principal mechanism for the restriction of employer

¹⁴⁸See D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie *The Labour Relations Act of 1995* (1996) 48.

¹⁴⁹See par 4.2.2 of chapter 4.

¹⁵⁰See par 4.2.3 of chapter 4.

¹⁵¹This is in accordance with s 1(b) of the Labour Relations Act, 1995 which provides for the effectuation of obligations incurred by South Africa as a member of the International Labour Organisation.

¹⁵²See the foreword of the Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute published as Notice 804 of 1996 in Government Gazette 17303 of 1 July 1996. See also JV du Plessis, MA Fouché, B Jordaan and MW van Wyk *A Practical Guide to Labour Law 2 ed* (1996) 338-339.

¹⁵³See par 4.2.1 of chapter 4.

¹⁵⁴See the discussion earlier in this paragraph about international tendencies regarding trade union membership.

prerogative. With this possibility in mind, employers' participation in negotiations at NED-LAC about future labour legislation takes on added significance.¹⁵⁵

¹⁵⁵In future, all labour legislation will be debated and negotiated by the State, labour and business at NED-LAC (see s 5(1)(b) and (c) of the National Economic, Development and Labour Council Act). For an evaluation of NEDLAC's future prospects, see Mark Anstey *Corporatism, Collective Bargaining, and Enterprise Participation: A Comparative Analysis of Change in the South African Labour System* PhD thesis University of Port Elizabeth (1997) 359-379.

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LIST OF ABBREVIATIONS

(AA)	appellate division of the supreme court
AJ	Acta Juridica
ANC	African National Congress
Anon	anonymous
(AR)	arbitration
Business LR	Business Law Review
(CC)	constitutional court
CCMA	Commission for Conciliation, Mediation and Arbitration
CLL	Contemporary Labour Law
CLP	Current Legal Problems
Code	Schedule 8: Code of Good Practice: Dismissal
Commission	Commission for Conciliation, Mediation and Arbitration
Constitution	Constitution of the Republic of South Africa 108 of 1996
COSATU	Congress of SA Trade Unions
CWIU	Chemical Workers Industrial Union
EL	Employment Law
FAWU	Food and Allied Workers Union
HastingsLJ	Hastings Law Journal
HWU	Health Workers Union
Interim Constitution	Constitution of the Republic of South Africa 200 of 1993
(IC)	Industrial court
ILJ	Industrial Law Journal
ILJ(UK)	Industrial Law Journal (United Kingdom)
ILO	International Labour Organisation
IRJSA	Industrial Relations Journal of South Africa
(LAC)	labour appeal court
LCD	Labour Court Digest
LIFO	Last in first out
LLB	Labour Law Briefs
LQR	The Law Quarterly Review
MB	Modern Business Law
Michigan LR	Michigan Law Report
Minister	Minister of Labour
MLR	Modern Law Review
NEDLAC	National Economic Development and Labour Council
NEHAWU	The National Education Health and Allied Workers Union
NULW	National Union of Leatherworkers
NUM	National Union of Mineworkers

NUMSA.....	<i>National Union of Metalworkers of South Africa</i>
POTWA.....	<i>Post and Telecommunications Workers Association</i>
PPWAWU.....	<i>Paper Printing Wood and Allied Workers Union</i>
SACCAWU.....	<i>SA Commercial Catering and Allied Workers Union</i>
SACTWU.....	<i>South African Clothing and Textile Workers Union</i>
SA Company LJ.....	<i>SA Company Law Journal</i>
SAJHR.....	<i>South African Journal of Human Rights</i>
SALJ.....	<i>South African Law Journal</i>
SAMWU.....	<i>SA Municipal Workers Association</i>
Schedule 2.....	<i>Schedule 2: Guidelines for Constitution of Workplace Forum</i>
Schedule 7.....	<i>Schedule 7: Transitional Arrangements</i>
SEIFSA.....	<i>Steel & Engineering Industries Federation of South Africa</i>
(T).....	<i>Transvaal provincial division of the supreme court</i>
TGWU.....	<i>Transport and General Workers Union</i>
THRHR.....	<i>Tydskrif vir Hedendaagse Romeins Hollandse Reg</i>
TSAR.....	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
Univ of Chic LR.....	<i>University of Chicago Law Report</i>
USA.....	<i>United States of America</i>
YLJ.....	<i>Yale Law Journal</i>