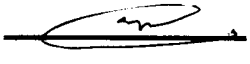
Remedies for unfair dismissal under the Labour Relations Act 66 of 1995

Joycell Ormonde Abrahams

DECLARATION

I, JOYCELL ORMONDE ABRAHAMS, hereby declare that the work contained in this mini-dissertation is my own, unaided work and that all the sources I have quoted have been indicated and acknowledged by means of complete references. It is being submitted for the degree **Magister Legum** (Labour Law) in the Faculty of Law at the University of the Western Cape.

I further testify that it has not been submitted for any other degree or at any other university or institution of higher learning.



J.O ABRAHAMS

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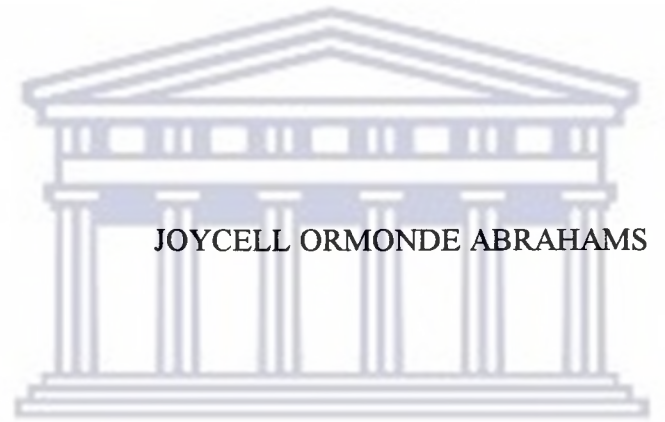
LLM IN LABOUR LAW

A. Title **REMEDIES FOR UNFAIR DISMISSAL UNDER THE LABOUR RELATIONS ACT 66 OF 1995**



B. By JOYCELL ORMONDE ABRAHAMS

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D. Supervisor Professor Darcy Du Toit

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CONTENTS:

SUMMARY

1. REINSTATEMENT OR RE-EMPLOYMENT

The formulations of section 193 of the Labour Relations Act 66 of 1995 raise the question whether the remedies of reinstatement, re-employment or compensation conferred by subsection (1) are mutually exclusive. Although the terms "reinstate" or "re-employ" are not defined in the Act, the language employed by the legislature in section 193 is unambiguous. Reinstatement is the primary remedy for unfair dismissal.

Reinstatement from a date later than the dismissal date is effectively a suspension of the employment contract between the date of dismissal and the date from which the reinstatement order is to be implimented. Should re-employment be ordered from a date later than the date of dismissal, the period between these two dates effectively mean that the employee is unemployed for that period.

An unfairly dismissed employee cannot demand to be reinstated into a previously held position under the same or similar terms and conditions of employment. Similarly, a re-employment order may be made on any terms and conditions of employment either in work that was previously performed employee or in other reasonably suitable work, provided the order for re-employment clearly stipulates the terms which would regulate the employment relationship. The order for re-

employment should thus be directed to an existing position and not to a future one. The Labour Court or an arbitrator can also order a variation of either reinstatement or re-employment and compensation, or impose any penalty on an employee or employer, other than to order or award conditional reinstatement or re-employment.

It is not competent for the Labour Court or an arbitrator to order reinstatement or re-employment if the employee elected not to be reinstated or re-employed. In the absence of such an election, the reasonableness of the employer's offer of reinstatement or re-employment must be judged against remuneration, responsibility, location, status and suitability of the employee, in the light of his training and other qualifications. Once that has been established, the reasonableness of the employee's refusal of such offer must be considered to determine both the clarity and the timing of the employer's offer. An unfairly dismissed employee can however not raise an interest dispute about objectionable terms and conditions of employment when an offer of reinstatement is made.

The requirement of reasonable practicability of an order for reinstatement or re-employement primarily entails a factual question to be approached with a broad common-sense view of what is reasonably capable of being put into practice successfully. Practicability should therefore not be construed as reasonable, fair, equitable or possible.

In assessing intolerability, it must be established whether the continued

employment relationship between the employer and the dismissed employee is so bad, difficult or painful to be tolerated that the employer can no longer be expected to endure it. The conduct of both the employer and the employee is therefore of critical importance during this factual enquiry.

2. COMPETENCY OF AN ORDER FOR BOTH REINSTATEMENT AND COMPENSATION

Under section 158 (1) (a) (v) and (vi), read with section 158 (2) of the Act, compensation is only one of the general kinds of appropriate orders that the Labour Court may make. Section 193 (1) is not prescriptive and confers by necessary implication, in terms of sections 138 (9) (b) and 158 (1) (a) (iii) of the Act, the power upon the Labour Court or arbitrator to vary the orders permitted there, or to combine compensation with reinstatement or re-employment.

3. COMPENSATION.

Section 194 (1) seeks both to introduce certainty and uniformity as well as to limit claims for compensation to a prescribed maximum. It, therefore, follows that if the Labour Court or an arbitrator elects to exercise the discretion to award compensation for a procedurally defective dismissal, then the formula expressed in section 194 (1) subject to a maximum of compensation equal to twelve months' remuneration must be adhered to.

Section 194 (1) does not involves a comparison of what the court or an arbitrator considers the dismissed employee should have received had there been no statutory maximum of compensation with what the dismissed employee must receive in terms of the statutory maximum. Compensation is a solatium for the loss of the right to a fair hearing or procedure prior to the dismissal.

The provisions in section 194 (2), that compensation must be just and equitable in all the circumstances, reinforces the need for a careful examination of all the relevant factors, before the Labour Court or an arbitrator exercise its discretion whether compensation should be awarded. Thereafter the quantum of the compensation must be determined in terms of section 194 of the Act. Severance pay or pension or provident fund entitlements is therefore irrelevant for determining the compensation to be awarded.

Since the Act itself gave no guidance by not defining the factors to be considered when arriving at just and equitable compensation, the arbitrator or Labour Court must be guided by what is morally right or fair and impartial.

What is to be assessed is the position the unfairly dismissed employee is in when the dismissal is finally arbitrated or adjudicated, with what position he or she would have been in had the unfair dismissal not been committed. In addition the unfairly dismissed employee must provide evidence that reasonable steps were taken to mitigate the losses, whether patrimonial or non-patrimonial, suffered as a result of the dismissal.

4. DATE OF ASSESSMENT

The formula in section 194 (1) of the Act prescribe the effective date of dismissal as either the date on which the contract of employment is terminated or the date on which the employee left the service of the employer, in terms of section 190 (1) (a) and (b). The importance of adhering strictly to the section 194 (1) compensatory formula is that both the date of dismissal and the date when the matter is finally arbitrated or adjudicated must be considered by the Labour Court or an arbitrator.

A. INTRODUCTION

The Labour Relations Act 66 of 1995 (the Act) is primarily aimed at the advancement of economic development, social justice, labour peace and the democratisation of the workplace. This is principally done through collective bargaining to give effect to the fundamental right of everyone to fair labour practices. (1)

The approaches of both the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court in their interpretation of the remedies for unfair dismissal under sections 193 and 194 of the Act, will by analysed to establish the nature and extent of these remedies. A comparative analysis of the 1956 Labour Relations Act with sections 158 and 138 (9) of the Act will be undertaken to ascertain the powers of the Labour Court or an arbitrator to order or award re-instatement or re-employment, and the conditions under which such orders or awards should be given or refused. (2)

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1. Section 1 of the Labour Relations Act 66 of 1995

2. *Chotia v Hall Longmore & Co (Pty) Ltd* [1997] 6 BLLR 739 (LC) at 745A-746F; *Steynberg v Coin Security Group (Pty) Ltd* (1998) 19 ILJ 304 (LC) at 312B-F; *NUMSA & Others v Precious Metal Chains (Pty) Ltd* [1997] 8 BLLR 1068 (LC) at 1073G-1075J; *CWIU v Johnson & Johnson (Pty) Ltd* [1997] 9 BLLR 1186 (LC) at 1213E-1216G; *Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC) at 100 A-B

The aim of this analysis is to determine whether or not there is any consistent principle or policy that animates and directs jurisprudence in the area of remedies for unfair dismissals. The second part of this analysis is directed to isolate the various rights and interests which should be taken into account when the Labour Court or arbitrators consider the appropriate remedy in unfair dismissal cases, focusing particularly on ways to reconcile the competing interests of employers and employees.

Consideration will also be given to the factors the Labour Court or arbitrators have regarded as relevant when it is determined under which circumstance compensation is to be denied. The jurisprudence that has emerged from the Labour Court on whether or not any amount received by an unfairly dismissed employee in terms of any law should be considered in addition to or as a substitute for compensation for an unfair dismissal, will also be analysed.

I have stated the law in accordance with materials available to me as at 17 January 2001, since there are presently proposed amendments to section 194 of the Act. Section 46 of the Labour Relations Amendment Bill, 2000 (3) encapsulates the proposed amendments to section 194 in the following terms:

> 46 "Section 194 of the principal Act is hereby amended –
>
> (a) by the substitution for subsection (1) of the following subsection:

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3. Published in Government Gazette no 21407 of 27 July 2000

'(1)(a) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation **[must be equal to]** may not exceed the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of the dismissal. (b) Despite paragraph (a), compensation for procedural unfairness may **[Compensation may however]** not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim, nor may any amount of compensation exceed the amount of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."; and

(b) by the insertion for subsection (2) of the following subsection:

"(2) The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason related to the employee's conduct, capacity or based on the employer's operational requirements, whether or not the dismissal was also procedurally unfair, must be just and equitable in all the circumstances, but not less than the amount specified in subsection (1), and not more than the equivalent of 12

> months' remuneration calculated at the employee's rate of remuneration on the date of the dismissal." [Emphasis is in the original]

If these proposed amendments to section 194 be promulgated into law, the position relating to the award of compensation for unfair dismissals will substantially be affected. These proposed amendments will empower the Labour Court or an arbitrator to award compensation under section 194 (1) of the Act that is fair and equitable in all the prevailing circumstances. The rigidity of awarding compensation under section 194 (1) will therefore no longer apply if the proposed amendments are enacted.

B. THE POWERS OF THE LABOUR COURT OR ARBITRATOR

If any dismissal has been found to be unfair, the employer may be ordered to -

(i) reinstate the employee with effect from a date on or after the date of dismissal in terms of section 193(l)(a);

(ii) re-employ the employee 'on any terms' with effect from a date on or after the date of dismissal, either in the work that he or she had been doing prior to dismissal or in other reasonably suitable work under section 193(l)(b); or

(iii) pay compensation to the employee as provided for in section 194.

The Act provides [4] that reinstatement or re-employment must be ordered in all cases where an employee has been unfairly dismissed unless -

(i) the employee does not wish to be reinstated or re-employed;

(ii) continuation of the employment relationship would, in the circumstances, be intolerable;

(iii) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(iv) the dismissal had only been procedurally unfair,

reinstatement may still be ordered in these cases.

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4. Section 193 (2) of the Labour Relations Act 66 of 1995

Strict time limits for the prosecution of unfair dismissal claims are imposed. (5) There is no right to strike on unfair dismissal disputes, but the Act holds out the promise of a resolution of disputes within a period that renders the substantive right conferred by the Act meaningful. (6) This is a reversal of the situation that prevailed under the Labour Relations Act 28 of 1956 (the 1956 Act) where reinstatement, as a remedy for unfair dismissal, became increasingly impractical as an option for both the employee and the employer because of the long periods between dismissal and adjudication.

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5. *Van Tonder v International Tobacco Co* [1997] 2 BLLR 254 (CCMA); *CWIU v Johnson & Johnson* [1997] 9 BLLR 1186 (LC) at 1209H-I; Mlaba *v Masonite (Africa) Ltd & Others* [1998] 3 BLLR 291 (LC) at 303H.

6. André van Niekerk "Remedies for unfair dismissal" *Contemporary Labour Law* (1996) 6 (4) 31 at 33

(i) THE POSITION UNDER THE 1956 ACT.

Section 46 (9) (c) of the Labour Relations Act 28 of 1956 (1956 Act), provided that:

> "the Industrial Court shall as soon as possible after the receipt of the reference in par (b) determine the dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation, ... :Provided that such determination may include any alleged unfair labour practice which is substantially contemplated by the referral to the industrial court or with the terms of reference of the conciliation board, determined in terms of section 35 (3) (b)".

This provision implied open-ended compensatory awards for unfair dismissal, calculated on a basis not dissimilar to that applicable in personal injury cases and introduced an unacceptable degree of uncertainty into the outcome of dismissal disputes. The approach of the Labour Appeal Court was that compensation as intended by section 46 (9) (c) was to compensate unfairly dismissed employees for the actual financial loss caused by the decision to dismiss.

In *Ferodo (Pty) Ltd v De Ruiter* (7) Combrink J, in determining compensation, took into account that:

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7. (1993) 14 ILJ 974 (LAC) at 981C-D; 981D-H

"(a) there must be evidence before the Court of actual financial loss suffered by the person claiming compensation;

(b) there must be proof that the loss was caused by the unfair labour practice;

(c) the loss must be foreseeable, i.e. not too remote or speculative;

(d) the award must endeavour to place the applicant in monetary terms in the position in which he would have been had the unfair labour practice not been committed;

(e) in making the award the Court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party;

(f) there is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment;

(g) any benefit which the applicant receives e.g. by way of a severance package must be taken into account."

In *Camdons Realty (Pty) Ltd & Another v Hart* (8) it was ruled that section 46 (9) (c) gave the Industrial Court a judicial discretion to award compensation which was not the equivalent of caprice and not synonymous with a gratuity. The primary enquiry must, therefore, be to determine what that loss is, which must be causally related to the particular unfair act.

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8. (1993) 14 ILJ 1008 (LAC) at 1018D-F; 1018G-1019A; *Alert Employment Personnel (Pty) Ltd v Leech* (1993) 14 ILJ 655 (LAC) at 661A-G

The Court then went on to say that the Industrial Court was required to award compensation which it deemed reasonable and had to have regard to the interests of the employee as well as those of the employer. The only exception was that, in deciding to award compensation of three months' pay, there seemed to be no particular reason why the court chose three months and not two or four months. The factors the court took into account did not deal with this aspect.

The Labour Appeal Court in *Reckitt & Coleman (SA) (Pty) Ltd v Bales* (9) endorsed the view adopted in *Camdons Realty (Pty) Ltd & Another v Hart* (supra) that emphasised that an unfairly dismissed employee is entitled to be compensated for the financial loss caused by the dismissal. It pointed out, however, that the latter case intended to convey that a claim for compensation in proceedings was more like a delictual damages claim than a claim for damages for breach of contract.

The Labour Appeal Court added that the question of reasonableness was also important and that while there might be cases in which it would be reasonable to compensate an employee to the full extent of his loss, this was not inevitably so. If there is little or no prospect of obtaining other employment, the starting point ought to be the employee's actual financial loss as caused by the termination of his employment.

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9. [1994] 3 LCD 327 (LAC) at 330–331

Brassey (10) argued that reinstatement was the primary remedy for an unfair labour practice because the unfair labour practice jurisdiction placed a duty to act fairly on parties to the employment relationship. This was so because reinstatement was the way in which a dismissal is reversed and, other things being equal, it was the prima facie remedy that should be granted when the dismissal was unfair. Goldstone JA, however, held in *PACT* v *PPWAWU & others* (11) that there could be no presumption either way. According to Brassey (supra) this is illogical because there must, at least in adversarial proceedings, always be a mechanism to act as tie-breaker when the case on a particular point is in equipoise. A complete undoing of an unfair dismissal requires the restoration of the employment relationship as it existed before the dismissal and only reinstatement with retrospective effect can achieve this goal. There can seldom, if ever, be a warrant for reinstatement without some back pay because the effect of such an award is to saddle the blameless employee with the consequences of the law's delays. (12)

That reinstatement is an important factor to be considered when deciding what consequential relief should be granted which can fully alleviate the consequences of an unfair dismissal, but it is not conclusive. The conduct of an unfairly dismissed employee is likewise a relevant and important consideration when deciding whether

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10. Brassey, M "Negative impact - *PACT v PPWAWU*" (1994) (3) Employment Law 50 at 54

11. (1994) 15 ILJ 65 (A)

12. See Brassey, M "Negative impact - *PACT v PPWAWU*" note 10 at 54

reinstatement or compensation was the suitable remedy. (13)

Furthermore, undue weight should not be attached to the serious consequences reinstatement would have on the employer, without having regard to the adverse consequences that a refusal to reinstate would have on the employees. (14)

The following criteria must be considered, namely:

1. The effect of reinstatement on the financial position of the employer who has unilaterally (caused) the state of affairs that was found to be unfair, should not be allowed to suppress justice to the employees.
2. Justice to the employees should be decisive where reinstatement is considered in the matter where the employer has acted substantively and procedurally unfairly.
3. That the employer has replaced appellants with other employees should not be allowed to become an absolute defence to an application for reinstatement, particularly where the employer has acted unfairly.

This is of particular importance where the employees had acted expeditiously and

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13. *NUMSA* v *Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) at 462 H-I at 137; *NCBAWU & another v MF Woodcraft (Pty) Ltd* (1997) 18 ILJ 165 (LAC) at 172E-173G

14. *SACCAWU & others v Steers Fast Foods* [1993] 2 LCD 125 (LAC); *SACCAWU & others v Steers Fast Foods* (1994) 15 ILJ (IC) at 296G-J; 298; *Mondi Paper Company Ltd v PPWAWU & Dlamini* (1993) 14 ILJ 1231 (LAC)

any lapse in time since the dismissal could be attributed to the employer's persistence not to reinstate them. (15) The distress of the unfairly treated employees in permanently losing their jobs and having had to survive, often for months, without income, are therefore very important considerations in the pursuit of justice and equity regarding the determination of an unfair labour practice.

The disruption of the enterprise must thus be seen in this context, because an order for reinstatement is not an order sanctioning the dismissal of the replacement employees. They remain in the employ of the employer, but are faced with redundancy. The employer must thus follow a proper retrenchment procedure. The law and equity require that the interests of the worker should be taken into account alongside the business interests of the employer. Accordingly, when exercising its discretion to reinstate an unfair dismissed employee, consideration should be given to the harsh effects the remedy may have on the employer, but also to the interests that the dismissed employee might have in safeguarding a job. (16)

In *Wright* v *St Mary's Hospital* (17) it was held that it would be intrusively

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15. *Black Allied Workers Union & Others v Prestige Hotels t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) at 975D-F; Campbell & Brassey "Raw deal reinstatement" (1992) 8 (4) *Employment Law* 81 at 82; Cf. *Trident Steel (Pty) Ltd v John NO & Others* (1987) 77 ILJ 27 (W)

16. Verloren van Themaat, A "*Reinstatement & Security of Employment*" (1989) 10 (2) ILJ 210; *East Rand Proprietary Mines Ltd v UPS & Others* [1997] 1 BLLR 10 (LAC) at 33B-C

17. (1992) 13 ILJ 987 (IC) at 1011A; 1006A

paternalistic to deny reinstatement because the Industrial Court feared that the applicant may be treated shabbily, in particular where the conduct of the employer can be branded as reprehensible. However, the Industrial Court remarked that because the applicant had accepted temporary employment, but then decided to resign therefrom from the date that this case commenced, he had failed to mitigate his loss for that period for which the Labour Court awarded reinstatement, but no compensation. There was thus no room to limit the Court's determination to grant either reinstatement or compensation, since the legislature intended compensation to bear its normal meaning to make good a loss resulting from an unfair labour practice, and it is incorrect to say that an award is compensation and vice versa. (18)

Whether the reinstatement will be made retrospective or not is determined with reference to the seriousness of the unfairness as well as the nature of the employee's conduct. If retrospective reinstatement is granted, the effect thereof on the loss sustained by the dismissed employee must be taken into account both when deciding whether or not to award compensation in addition to reinstatement and if it is decided to award compensation, then to determine the amount of compensation.

The basis of awarding compensation as outlined above was questioned, but

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18. *Cremark a Division of Triple P - Chemical Ventures (Pty) Ltd* v *SACCAWU & Others* (1992) 13 ILJ 987 (IC) at 1006A; 1011A; *Amalgamated Beverages Industries (Pty) Ltd v Jonker & others* (1993) 14 ILJ 1231 (IC); *National Union of Metal Workers of South Africa & Others v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) at 462I-463A

neither endorsed nor overruled, by Viviers JA writing for a unanimous court, in *Unilong Freight Distributors (Pty) Ltd v Muller* (19) by stating that:

> "I do not propose... to examine whether the approach (to awarding compensation), which is derived from English law where it is squarely based on damages for breach of contract, is necessarily correct in South African context, with its emphasis is on the broader concept of an unfair labour practice."

The position under the 1956 Act was thus that what an unfairly dismissed employee has to prove is loss, which must not be too remote and speculative. The industrial court was required to award compensation which it deemed reasonable and had to have regard to the interests of both the employee as well as those of the employer. No specific formula was enacted under section 46(9)(c) of the Act, which resulted therein that compensatory awards were speculative, uncertain and chaotic, often subject to the identity and the mood of the trier of fact.

19. (1998) 19 ILJ 229 (SCA) at 239C-D

(ii) THE POSITION UNDER THE 1995 ACT.

In unfair dismissal cases in terms of the Act, it is necessary for employers to establish a valid and fair reason for dismissal. (20) Having established a valid and fair reason for dismissal, the Labour Court or arbitrator must be satisfied that the employer acted fairly in dismissing the employee.

The formulations of section 193 of the Act raise the question whether the three remedies conferred by subsection (1) are mutually exclusive. The three remedies are:

1. Reinstatement of an unfairly dismissed employee from any date not earlier than the date of dismissal;
2. Re-employment of an unfairly dismissed employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
3. Compensation.

20. Section 188 (1) (a) of the Labour Relations Act 66 of 1995

C. REINSTATEMENT OR RE-EMPLOYMENT ORDERS.

The terms "reinstate" and "re-employ" are not defined in the Act. According to the Concise Oxford Dictionary "*reinstate*" means "to re-establish in former position or privilege". *Re-employment*, in turn, implies that the employee is to be employed in terms of a new contract of employment. It is submitted that the language employed by the legislature in section 193 (1) (a) is plain and does not lend itself to a wider discretion other than that reinstatement can be ordered from any date not earlier than the date of dismissal.

That the remedy of reinstatement is the statutory preference in cases of unfair dismissal as provided for in section 193 (2), was reiterated in *CWIU v Johnson & Johnson* (21). The Court, however, did not consider the remedy of reinstatement because the applicants only sought reinstatement if the Court came to the conclusion that the dismissal was unfair on grounds other than that there was no need to retrench. An award of reinstatement would, however, be imprudent where the dismissal is unfair because the employer had aborted the mediation proceedings the outcome of which could not be predicted. (22)

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21. [1997] 9 BLLR 1186 (LC) at 1209H-I; See also *Van Tonder* v *International Tobacco Co* [1997] 2 BLLR 254 (CCMA); See also *NUMSA & Others v Henred Fruehauf Trailers (Pty) Ltd* note 17 above; *Mlaba v Masonite (Africa) Ltd & others* [1998) 3 BLLR 291 (LC) at 303H; *Hoffman v South African Airways* [2000] 12 BLLR 1365 (CC) at para 52 and footnote 45

22. *East Rand Proprietary Mines Ltd v UPUSA & Others* [1997] 1 BLLR 10 (LAC)

The Act does not expressly provide that the employer's financial situation should be taken into account when deciding whether or not to reinstate, but it is a relevant factor to consider especially where the employer no longer has any employees left. (23) The correct approach thus seems to be to consider the relevant conduct of the parties and in that light, to decide the appropriate relief. (24)

The Labour Court or an arbitrator must therefore fully set out reasons why reinstatement or re-employment should not be granted. In *Reutech Defence Industries (Pty) Ltd t/a Reutech Defence Industries v Govender and others* (25) the Labour Court held that the commissioner should have awarded the reinstatement of the unfairly dismissed employee from the date of his dismissal, after it was found that the dismissal was substantively unfair, because the employee was not guilty of any wrongdoing.

In *NETU v Meadow Feeds* (26), when turning to the relief to be afforded to the unfairly dismissed employee, the commissioner found no compelling reasons why reinstatement should not be granted. The commissioner, however, ruled that the

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23. Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D & Christie S "*Labour Relations Law: A Comprehensive Guide*" Third Edition, Butterworths (2000) at 417

24. *PACT* v *PPWAWU & others* (1994) 15 ILJ 65 (A) at 78A-B; *NUMSA & v Fibre Flair CC t/a Kango Canopies* (Unreported LAC Case No JA 56/99); *Hoffman v South African Airways* note 21 at para 43

25. [2000] 9 BLLR 1101 (LC) at 1104C-D; *Flex-o-thene Plastics (Pty) Ltd v CWIU* [1999] 2 BLLR 99 (LAC)

26. [1998] 1 BLLR 99 (CCMA); *NUMSA obo Muller and Grosvenor Ford* (CCMA WE 15500)

reinstatement order would not be made fully retrospective because the employee must share part of the blame in blindly accepting the veracity of the false information conveyed to him. In this case the employee was a factory manager, who received a 'counselling letter' from the employer in which his alleged poor performance was addressed.

The reasoning adopted by the learned commissioner was that, as factory manager, the applicant should have had some independent insight as to whether the situation had improved. As an adjunct to this, the commissioner also considered the applicant's persistence in his allegation that he had been dismissed and wrongly placed the employer's contention that he had resigned in dispute, as a factor to be considered. It is respectfully submitted that the conclusion reached by the commissioner, that the applicant actually resigned, is flawed because the commissioner ultimately found that the employee have been misled by the employer which resulted in a constructive dismissal.

The Labour Court should exercise its discretion not to reinstate an employee only in very exceptional circumstances, such as where the reinstatement would so seriously affect the business of a company that one of its branches would have to close down. Where consequences would be less serious, there is generally no justification for not reinstating the worker, because payment of wages and other benefits for a limited period is not proportional to the loss which a worker experiences when he is unfairly deprived of his employment.

The Labour Court or an arbitrator may reinstate or re-employ the employee from any date not earlier than the date of dismissal. Reinstatement from a date later than the date of dismissal would have the effect of a suspension of the employment contract between the date of dismissal and the date from which reinstatement is ordered. If re-employment is ordered from a date later than the date of dismissal, the period between the date of dismissal and the date of re-employment will effectively mean that the employee is unemployed.

According to Van Niekerk (27) this distinction may seem trivial, but it may have profound implications for individual employees, particularly concerning the rules of benefit funds. A reinstatement order under section 193 (1) (b) thus requires an employer to treat the unfairly dismissed employee in all respects as if he had not been unfairly dismissed, which the celebrated authors Du Toit et al (28) describe as

> "a complete continuity of the employment relationship notwithstanding the attempt by the employer to terminate it".

No statutory provision is made which obliges the employer to reinstate the successful applicant into his or her previous position under the same or similar conditions in the sense that the successful applicant should not suffer any prejudice in that regard. Similarly, an order for re-employment, which can be

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27. See André van Niekerk "*Remedies for unfair dismissal*" note 5 at 33; *NUMSA & others v Fibre Flair CC t/a Kango Canopies* (1999) 20 ILJ 1859 (LC) at 1861A-B; 1866H; *Toyota South Africa Motors (Pty) Ltd v Radebe & others* (2000) 21 ILJ 340 (LAC) at pars 28-30; *NUMSA obo Sadick & Donaldson Filtration Systems (Pty) Ltd* (CCMA case no WE 17326)

28. See Du Toit et al note 23 at 416

made either against the employer, its successor or an associated employer, requires the ex-employee to be employed on any terms. That can either be in the work that was done prior to dismissal or in other reasonably suitable work, provided the order for re-employment clearly stipulates the terms which would regulate the employment relationship. It is, however, incompetent for the Labour Court or an arbitrator to award re-employment into the same or a similar post where a vacancy might only become available in the future. (29)

Considered in isolation, section 193 (1) (a) is expressed in clear and plain language, and does not bestow on the Labour Court or an arbitrator a wider discretion other than that reinstatement can only be ordered from any date not earlier than the date of dismissal. It is, however, submitted that section 193 (1) (a) must be read with sections 138 (9) (b) and 158 (1) (a) (iii) of the Act. These sections empower an arbitrator or the Labour Court respectively to make an award of reinstatement that, when implimented, will not only remedy a wrong but also give effect to the primary objects of the Labour Relations Act, as provided for in section 1 of the Act.

It is, therefore, submitted that the view expressed by Du Toit et al (30) is both logical and correct that an arbitrator or the Labour Court has a discretion to award a variation of either reinstatement or re-employment and compensation.

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29. *Standard Bank of South Africa Ltd v CCMA & Others* [1998] 6 BLLR 622 (LC); *Polifin Ltd v Sibeko NO & another* [1999] 3 BLLR 266 (LC)

30. Du Toit et al note 23 at 416

The Labour Court or an arbitrator can therefore, by necessary implication, consider any terms on which an order or award of re-instatement or re-employment, as contemplated by section 193 (1) (a) and (b) of the Act, is to be made.

When the Labour Appeal Court in *NUMSA & others v Fibre Flair CC t/a Kango Canopies* (31) had occasion to consider whether or not section 193 (1) (a) of the Act confers upon the Labour Court or an arbitrator a discretion to, amongst other things, order or award conditional reinstatement, it expressed itself as follows:

> "Clearly, section 193 (1) (a) of the LRA gives the Labour Court (and an arbitrator) the power to follow any one of a number of available courses. It may select as the date of reinstatement any date not earlier than the date of dismissal. It seems.... to be clear that section 193 (1) (a) confers upon the Labour Court a true discretion"

when deciding not to award retrospective reinstatement by reason of the employee's conduct. It will, therefore, be competent for the Labour Court or an arbitrator to impose any penalty on an employee or employer, other than to order or award conditional reinstatement or re-employment.

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31. (Unreported LAC case no JA 56/99); See also *Pep Stores (Pty) Ltd (Silverton) v South African Commercial Catering & Allied Workers Union* (Unreported LAC case no JA 105/97 at par 23); *NUMSA v John Thompson Africa (Pty) Ltd* [1997] 7 BLLR 932 (CCMA) at 943E-G; *Oranje Toyota (Kimberley) v Van Der Walt* (Unreported LC case no J 3313/99); *Strydom v USKO Limited* [1997] 3 BLLR 343 (CCMA) at 353A-B;

The result could be that a re-employment order might even include a restoration to a lesser post, provided that the employment relationship and the contract of employment substantially contemplate such a post.

Grogan (32), in direct contradiction to the view expressed by the Labour Appeal Court in *NUMSA & others v Fibre Flair CC t/a Kango Canopies* (supra), is of the opinion that

> "an order for reinstatement may not be conditional or coupled with an other qualification, like a final warning. Nor may it be in a post different from that in which the employee was employed at the time of dismissal".

It is respectfully submitted that the weight of judicial and academic opinion expressed on the interpretation of section 193 (1) clearly suggests that the view expounded by Grogan (supra) and the Labour Court in *County Fair v CCMA & others* (33) is wrong and should not be followed.

32. "*Workplace Law*" (5th Edition) Juta (2000) at 116

33. [1998] 5 BLLR 577 (LC) at 589G-H

D. CONDITIONS FOR REINSTATEMENT OR RE-EMPLOYMENT

(i). WISHES OF THE EMPLOYEE NOT TO BE REINSTATED OR RE-EMPLOYED.

It is not competent for the Labour Court or an arbitrator to make an order or award of reinstatement or re-employment if the employee elects not to be reinstated or re-employed. (34) In the event that the unfairly dismissed employee exercise the option to be reinstated, any failure or refusal to accept reinstatement will be considered against the reasonableness of that failure or refusal.

The position adopted by the Labour Court is that any unreasonable failure or refusal to accept reinstatement must have consequences that will have a bearing on the issue of compensation. The employer's offer of reinstatement can thus only be ignored, if the offer was not made in good faith and is therefore without any merit or foundation. (35)

It is submitted that the reasoning of the commissioner in *Franco v Linvar* (infra) is flawed because the Act does not impose any onus on the applicant employee to accept an offer of reinstatement. It seems that the commissioner, though claiming to make 'no judgement', was of the opinion that the applicant must be penalised for relying on the provisions of section 193 (2) (a) of the Act, which afford him

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34. Section 193 (2) (a) of the Labour Relations Act 66 of 1995

35. *Franco v Linvar* [1998] 1 Labour Law Digest 42 (CCMA)

the choice whether to accept reinstatement or not.

The Labour Appeal Court in the now celebrated case of *Johnson & Johnson v CWIU* (36), however, cautioned that, if:

> "(an employee) simply went through the entire formal process (of consultation for purposes of dismissal for operational reasons) with no intention of ever genuinely reaching agreement on the issues discussed"

no consequential relief may be granted.

Although it is important to consider the circumstances surrounding the unfair dismissal when deciding whether an order of reinstatement or re-employment is inappropriate, it is submitted that reinstatement or re-employment should be granted if it is still reasonably practicable and the unfairly dismissed employee has elected to be either reinstated or re-employed. (37)

36. (1998) 20 ILJ 89 (LAC) at 96I

37. cf. *Puren v Victorian Express* (1998) 19 ILJ 404 (CCMA) at 406H; 411E

(ii). REASONABLENESS OF THE EMPLOYER'S OFFER.

Where the employer offers re-employment, the Labour Court or arbitrator will first consider the fairness of the employer's offer. It is submitted that the test applied is similar to that used to determine whether alternative employment is suitable in redundancy dismissals by considering remuneration, responsibility, location, status and suitability of the employee, in the light of his training and other qualifications. However, this does not mean that employees have to accept the first job offered to them. (38)

In *Heigers v UPC Retail Services* (39) Revelas J ruled that the alternative position offered to the applicant in the employer's accounting division was a settlement offer whereby the employer attempted to correct its failure to consult with the applicant. That led the Court to conclude that the degree of substantive unfairness in this case did not warrant compensation for the full amount of compensation of twelve months' remuneration.

However, in *Raju & others v Scotts / Select-A-Shoe, a Division of South African Breweries Limited* (40), the Labour Court held that it would be unreasonable to expect the dismissed employees to apply for re-employment where no offers of re-

38. *Cyster & others v Ciba Speciality Chemicals (Pty) Ltd* (LC case number C 551/98) at para 11

39. [1998] 1 BLLR 45 (LC) at 49G-H

40. (Unreported LC case number J 1440/98) at paras 34; 37

employment were made or vacancies directly communicated to them. The learned Judge concluded that to exercise the Court's discretion against the dismissed employees in these circumstances would be wrong, and awarded twelve months' compensation.

(iii). REASONABLENESS OF THE EMPLOYEE'S REFUSAL

If the employer's offer is considered reasonable, the Labour Court or arbitrator must then proceed to consider the reasons for the employee's refusal of the employer's offer. These may relate to the terms of the offer or the idea of being re-employed by the employer considering the circumstances surrounding the dismissal. In *Opperman v Speck Pumps SA Ltd* (41) the Labour Court accepted the argument by the respondent that:

> "there should be a limit to the extent to which a down-graded position can be offered as an alternative position to a managerial position which has been identified for retrenchment."

As a rule of thumb, applicants will not be re-employed if it involves significant changes in the terms of their employment. However, where the job is virtually the same, the Labour Court or arbitrator can consider the:

(a) Timing of the offer.

An employee is more likely to be found to have acted reasonably if the offer is made just before the hearing, than if it is made shortly after the dismissal, since in the latter situation the employee might be found to

41. [1998] 4 BLLR 414 (LC) at 417E-F; *Singh & others v Mondi Paper* [2000] 4 BLLR 446 (LC); See also *Heigers v UPC Retail Services* note 39 at 49I

have closed his mind to the employer's offer. (42)

(b) Clarity of the offer.

It is submitted that an unfairly dismissed employee might not be unreasonable in rejecting an offer to be reinstated or re-employed that is vague or unclear as to its terms. It would, however, be unreasonable for an unfairly dismissed employee to reject an offer of reinstatement that is unconditional.

When the Labour Court had the occasion to determine whether or not the unfairly dismissed employee's rejection of an offer of reinstatement, Jammy AJ in *Maloba v Minaco Stone Germiston (Pty) Ltd & another* (43) correctly ruled that:

> "the applicant was offered exactly what he asked for and he was not legally in a position, in those circumstances, either to reject that tender or to accept it conditionally as he purported to do. If the applicant believed that his reinstatement was *mala fide* in that it was a contrived ploy to procure his immediate repeated dismissal on a remedied procedural basis... his right to

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42. *Heigers v UPC Retail Services* note 39 at 49I-J

43. [2000] 10 BLLR 1191 (LC) at 1201G-I; See also *Fourie & another v Iscor Ltd* [2000] 11 BLLR 1269 (LC) at 1289C-D

challenged any subsequent alleged unfair conduct on the part of his employer, was preserved."

In *Van Zyl v Plasticafrica (Pty) Ltd* (44) the Labour Court was dealing with the peculiar situation where the unfairly dismissed employee rejected an offer of reinstatement, because the employer had unilaterally changed the terms and conditions of employment. Revelas J was emphatic in finding that the unfairly dismissed employee had acted unreasonably by rejecting the employer's offer of employment, by stating that:

> "It can hardly be argued that it is open to an employee to raise an interest dispute about terms and conditions of employment in circumstances where an offer of reinstatement is made. In terms of the LRA 66 of 1995 interest disputes such as this one about unacceptable terms and conditions of employment, however objectionable such conditions may be, must be referred to the CCMA. That is the remedy that the legislature has provided inter alia in section 64 (4) and item 2 schedule 7 to the Act." (45)

It seems that the overriding factor that Revelas J took into account in this case, before rejecting the unfairly dismissed employee's refusal as

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44. (1999) 20 ILJ 212 (LC) at 217H-I; 218F-H

45. *Op cit* fn 44 at 217D-F

unreasonable, was premised on the employer's assurances, given through its attorneys, that it would not victimise her if she accepted the reinstatement offer.

In *La Vita v Booymans Clothiers (Pty) Ltd* (46) an alternative position became available, which carried with it a diminished status although at the same salary, was rejected by the unfairly dismissed employee. The dismissed employee argued that his rejection of the offer of alternative employment was reasonable, because he believed that his pride and dignity would have been severely damaged. This belief was premised on his fear that he would not be in a position to lead, inspire, supervise and discipline staff, which in turn could have led to his victimisation by other members of staff. The Labour Court rejected this contention by the employee not to accept the alternative position as unreasonable.

The reasonableness of the employee's refusal is therefore to be judged against all the prevailing circumstances, with particular emphasis is being placed on the ability and willingness of the employer to redress the wrong visited upon the unfairly dismissed employee.

Where an unfairly dismissed employee demanded an assurance from the employer that he will not be retrenched in the future, coupled with his belief that there was a breach of trust because the employer acted

46. [2000] 10 BLLR 1179 (LC) at 1189E

procedurally unfair towards him, the Labour Court ruled that such conduct of the employee was unreasonable. That is what happened in *Burger v Alert Engine Parts (Pty) Ltd* (47) where the employee refused the employer's unconditional offer of reinstatement. The opinion of Pooe AJ is instructive where it is stated that:

> "The applicant was informed that subsequent to his dismissal an employee who occupied a position on the same grade as the one previously occupied by the applicant had resigned. The position had been held vacant in order to offer it to the applicant. This position was indeed offered to the applicant on the basis that he would be reinstated retrospective to the date of dismissal.'
>
> 'He would be back paid to the date of the termination of his service and his service record and entitlement would remain as if there had been no break in service. The response given on behalf of the applicant by his representative at the meeting... was that the applicant would not consider reinstatement owing to the fact that 'in his opinion, the matter concerning the redundancy had been badly handled.' ... The applicant did not respond to the offer and the position was then filled by another person."(48)

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47. [1999] 1 BLLR 18 (LC)

48. *Op cit* fn 47 at 24G-25H

(iv). REASONABLE PRACTICABILITY OF COMPLIANCE.

The requirement of reasonable practicability must be considered both in relation to the ordering of reinstatement or re-employment, although it can also be raised as a defence where the employer fails to comply with such an order. (49) An arbitrator or the Labour Court must thus consider the issue on its merits at each stage, and should not postpone the consideration of reasonable practicability until the enforcement stage of the hearing. The issue of practicability is primarily a question of fact and arbitrators or the Labour Court should adopt a broad common-sense view of the question and avoid trying to analyse the word "practicable" in too much detail.

In deciding whether a reinstatement or re-employment order is reasonably practicable, an arbitrator or Labour Court should consider whether, having regard to the industrial relations realities of the situation, the act of compliance is reasonably capable of being put into practice successfully. What is practicable should therefore not be construed as meaning reasonable, fair or equitable. (50)

49. Section 193 (2) (a) of the Labour Relations Act 66 of 1995;

50. *CWIU v Johnson & Johnson* [1997] 9 BLLR 1186 (LC) at 1209H; *Re Farquhar* [1943] 2 ALL ER 781 (CA) at 783B; Okpaluba, C "*Reinstatement in Contemporary SA Law of Unfair Dismissal: The Statutory Guidelines*" 1999 (116) 4 SALJ 818 at 823; 833

In *NUMSA & others v Fibre Flair CC t/a Kango Canopies* (51) the Labour Court ruled that although participation in a demonstration was an act of misconduct it was not in itself a reason not to order reinstatement.In this case the employer's managing director's concession that he believed at the time that the employment relationship could improve indicated that a continued employment relationship would not be intolerable. That indicated that an order of reinstatement or re-employment was still reasonably practicable. The Court considered that merely because two years have lapsed since the date of dismissal does not mean that an order involving a restoration of the employment relationship was not reasonably practicable.

Similarly, the fact that the Respondent is a small employer did not convinced the Labour Court in this case that an order of reinstatement was not reasonably capable of being successfully implimented. After considering the practical realities prevailing at the workplace, the possible need for the employer to retrench employees engaged since the strike was accommodated by a delay in the order of reinstatement from coming into effect.

Thus, what is practicable should not be equated with what is possible. It is, therefore, submitted that what should guide the Labour Court or an arbitrator is

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51. (1999) 20 ILJ 1859 (LC) at 1866B; 1866E-G; *NUMSA & another v Fibre Flair CC t/a Kango Canopies* (Unreported LAC case no JA 56/99); *Concorde Plastics (Pty) Ltd v NUMSA & others* [1998] 2 BLLR 107 (LAC) at 131C; Cf. *Steyn & others v Driefontein Consolidated Limited t/a West Driefontein* (Unreported LC case number J 1568/99) at para 45

what is reasonably capable of being done when the question of the practicability of a reinstatement or re-employment order or award is being considered. It is thus a weighing up of the feasibility of an order or award of reinstatement or re-employment that is capable of reasonably being effected, done or executed by an employer. The Labour Court or arbitrator may, however, take into account that its order or award of reinstatement or re-employment may lead to serious industrial strife or cause resentment amongst the workforce. However, mere inexpediency should not be a bar to an order or award of reinstatement or re-employment.

It should also be remembered that the Labour Court or an arbitrator is only required to consider the question of reasonable impracticability if it is raised by the employer and may test whether an employer's claim of impracticability is justified. The Labour Court or arbitrator may therefore order reinstatement or re-employment even where the employer claims that there is no existing vacancy, or where the employee was originally dismissed for redundancy, desertion or absenteeism. (52) The mere *ipse dixit* of the employer that reinstatement or re-employment is impracticable would not suffice as a defence against such an order, and evidence to that effect has to be led. (53)

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52. Section 193 (2) (c) of the Labour Relations Act 66 of 1995; *Jarvis* v *Med Africa* (1997) 18 ILJ 779 (CCMA) at 787F-G; See *CWIU* note 44 at 1215D-E

53. *Seabelo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA) at 832E-833A; *East Rand Gold and Uranium Company Limited v NUM* [1997] 6 BLLR 781 (CCMA) at 783H-784C; *Strydom v USKO Limited* [1997] 3 BLLR 343 (CCMA) at 352C-G

Likewise where an employee was suspected of misconduct, further investigation might be required to put the employee's conduct in context. (54)

54. See *NUMSA v John Thompson Africa (Pty) Ltd* note 31 at 942D-E; *National Construction & Building Workers Union & another v MF Woodcraft* (1997) 18 ILJ 165 (LAC); *SACCAWU v Discom Discount Stores* [1997] 6 BLLR 819 (CCMA) at 821F-J; *NACBAWU and Betta Sanitaryware* (CCMA GA 32458)

v. INTOLERABILITY OF CONTINUED EMPLOYMENT RELATIONSHIP OR IMPRACTICABILITY OF COMPLIANCE WITH REINSTATEMENT OR RE-EMPLOYMENT ORDER.

It is submitted that in determining whether it will be intolerable or impracticable to comply with an order of reinstatement or re-employment, the Labour Court or the arbitrator may take account of all the relevant facts both before and after the date of the order. In assessing whether a continued employment relationship will be intolerable for an employer, it must be established whether the employment relationship between the employer and the employee is so bad, difficult or painful to be put up with that the employer can no longer be expected to endure it.

In *Buthelezi v Amalgamated Beverage Industries* (55) the Labour Court cautioned that an order of reinstatement might be denied to an unfairly dismissed employee who had criticised the employer in the public media after the dismissal. The Court was of the opinion that while employees have the right to express grievances about employers in the media, they do so at the risk of the Court, or an arbitrator for that matter, finding that the employment relationship has been severed and denying reinstatement. In this matter De Villiers AJ, after finding that the dismissed employee had only been subjected to procedural unfairness when she was dismissed for incapacity, remarked that:

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55. [1999] 9 BLLR 907 (LC); See also *De Beers Consolidated Mines Ltd v CCMA & others* [2001] 1 BLLR 72 (LC) at 73J

> "had the applicant [employee] been entitled to reinstatement or re-employment (the evidence of an article in the *City Press* newspaper concerning the applicant's dismissal) would have been material. Both the tone and appearance of the article, which goes out of its way to soil the respondent's public image, indicates an active and willing participation by the applicant (despite her denial of this in evidence). Hence I would have been persuaded by it that, by participating in it, the applicant had made continued employment intolerable and denied her reinstatement or re-employment." (56) [Emphasis is in original]

It seems that the Labour Court in this matter attach substantial weight to the potential negative economic impact the article could engender for the employer, because of the high profile mud-slinging by the dismissed employee especially where an employer's business depends on a positive public image. This view expressed by the Court seems to be apposite and correct when it considered whether the conduct of the dismissed employee had made her continued employment intolerable.

The conduct of both the employer and the employee will therefore be of critical importance during this factual enquiry. It is submitted that section 193 (2) (c) gives the employer practically a second bite at the cherry since the employer is entitled to raise the same argument twice, namely both at the time the order is made and at the enforcement stage. The employer can thus argue that it was either not reasonably practicable to comply with the order for reinstatement or

56. *Op cit* fn 49 at 913H-J

re-employment in the light of what happened subsequent to the order being made, or that the continued employment relationship can no longer be sustained. A relevant instance thereof would be a full or partial closure of the employer's business or where the employer no longer has any staff. (57)

Employers are thus under no duty to create a special job for the unfairly dismissed employee. Replacement employees will be entitled to retain their employment provided that a situation of redundancy does not arise which will grant the employer the opportunity to dismiss them in order to enable the employer to re-employ or re-instate the unfairly dismissed applicant. The dismissal of such replacement employees must, however, be subject to full and proper consultations to be held with them in order to avoid or minimise the impending dismissals based on operational requirements. (58)

Reinstatement or re-employment should therefore not be considered impracticable simply because the employer has taken on a permanent replacement (59) unless the employer shows that:

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57. See *Jarvis* v *Med Africa* note 39 at 796G-I; *Mathabela* v *Potgietersrus Platinum Mine Ltd* (1997) 18 ILJ 788 (CCMA); *Elias v Germiston Uitgewers (Pty) Ltd t/a Evalulab* (1997) 12 BLLR 1571 (LC)

58. Section 189 of the Labour Relations Act 66 of 1995

59. *Manyaka v Van de Wetering Engineering (Pty) Ltd* [1997] 11 BLLR 1458 (LC); See also *Sentraal-Wes (Kooperatief) Bpk v Food & Allied Workers Union* (1990) 11 ILJ 977 (LAC) at 994F

(a) it was not practicable to arrange for the dismissed employee' s work to be done without engaging a permanent replacement; or

(b) it engaged the replacement after the lapse of a reasonable period without having heard from the dismissed employee that he wishes to be reinstated or re-employed, and that when the employer employed the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

E. CAN BOTH REINSTATEMENT AND COMPENSATION BE AWARDED?

Grogan (60) propagates the view that reinstatement or re-employment cannot be ordered in conjunction with an order for compensation. This view militates against the equitable objectives provided under section 1 of the Act. That section emphasised that the purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace, by fulfilling the primary objectives of the Act, which are, amongst other things, the effective resolution of labour disputes. Grogan's argument effectively mean that any employee who is reinstated or re-employed will be precluded from being compensated over and above arrear earnings as from the date of reinstatement or re-employment, and irrespective of the substantive unfairness of the dismissal.

When the learned author André van Niekerk (61) expressed himself on the interpretation of section 193 of the Act, by revisiting the jurisprudence on compensation under the 1956 Labour Relations Act, it was said that:

> "section 193 appears to use '*or*' in a disjunctive sense – the use of paragraphs in the subsection (1) supports that interpretation. But the matter is not entirely free from doubt."

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60. "*Workplace Law*" Juta (2000) at 116; Halton Cheadle, PAK Le Roux, Clive Thompson & André van Niekerk "*Developments in Individual Labour Law*" Current Labour Law (1995) 1 at 19

61. "Remedies for unfair dismissal" *Contemporary Labour Law* (1996) 6 (4) 31 at 36

This seems to be a reversal of the learned author's opinion from the one that he earlier expressed with the learned authors Cheadle, Le Roux and Thompson (62) that reinstatement or re-employment cannot be ordered in conjunction with an order for compensation. It is, however, respectfully submitted that the approach advocated by Du Toit et al (63) seems more authoritative, logical and practical. They state that while reinstatement and re-employment are mutually exclusive, neither of these two remedies by definition precludes the payment of compensation over and above salary nor wages for the period since dismissal. Basson J seems to share this view by expressing the opinion in *Market Toyota & others v Field & others* (64) that it was not inherently contradictory to grant an award that provide for both reinstatement and compensation.

It is submitted that the Labour Court is indeed empowered to make any order, including an award of compensation and damages under section 158 (l) (a) (v) and (vi), read with section 158 (2), of the Act. That section clearly states that a compensation order is only one of the general kinds of appropriate orders that the Labour Court may make. (65) By necessary implication an arbitrator should, subject to the exclusive powers of the Labour Court, also be able to combine

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62. See note 60 at 19

63. See Du Toit D et al note 23 at 424; See also Grogan J note 60 at 116; *Foodgro (a division of Leisurenet) Ltd v Keil* [1999] 9 BLLR 857 (LAC) at 878

64. [2000] 5 BLLR 588 (LC) at 592A-B; Cf. *Seabelo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA) at 833E

65. *Johnson & Johnson (Pty) Ltd* v *CWIU* (1999) 20 ILJ 89 (LAC) at 99H

compensation with an order of reinstatement or re-employment. It has moreover been accepted that, in exceptional cases, sentimental damages may be awarded over and above patrimonial loss. (66) Section 193 (1) is not prescriptive and confers by necessary implication, in terms of sections 138 (9) (b) and 158 (1) (a) (iii) of the Act, the power upon the Labour Court or arbitrator to vary the orders permitted there, or to combine compensation with reinstatement or re-employment, where this is appropriate in giving effect to the objectives of the Act. The unqualified language of section 193 (3) will also enable the Labour Court in cases of serious unfairness to order an employer to pay compensation to an employee in addition to reinstatement or re-employment in terms of section 193 (2).

In *NUMSA & others v Precious Metal Chains (Pty) Ltd* (67) the applicants wanted both reinstatement and compensation, save for the third applicant who did not seek reinstatement but only compensation. The Labour Court, however, concluded that the dismissals were only procedurally unfair, whereby it followed that in terms of section 193 (2) (d), the Court was not required to reinstate the individual applicants. Compensation was therefore the only issue that remained to be decided. It is respectfully submitted that although the learned judge was correct to state that for procedurally unfair dismissals the Court is not required to reinstate the individual applicants, that does not mean that the enquiry into the practicability of reinstatement has ended.

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66. *Harmony Furnishers v Prinsloo* (1993) 14 ILJ 1466 (LAC) at 1468A-C; 1472H

67. [1997] 8 BLLR 1068 (LC)

The view expressed by Du Toit et al (68) is to be preferred where they state that the Labour Court or a commissioner has a discretion, in respect of substantively unfair dismissals, by necessary implication under section 193 (1) to allow an award of compensation with reinstatement or re-employment. This discretion must, however, be exercised judicially.

In *Selepe and Potlako Transport Services* (69) the Commissioner ruled that compensation for an unfair dismissal can be made cumulatively both in terms of sections 193 (1) (c), 194 (1) and 194 (2) of the Labour Relations Act of 1995. Although the commissioner accepted that the dismissal was procedurally unfair, reinstatement as the primary remedy was not considered, and awarded compensation. In terms of section 194 (2) because the dismissal was found not to be for a fair reason additional compensation was awarded to the applicant. The effect of this ruling by the Commissioner was that compensation could be awarded in a staggered fashion where a dismissal has been found to be both substantively and procedurally unfair. It is, however, respectfully submitted that the Commissioner erred by failing to consider reinstatement, more particularly so since the dismissed applicant did not exercise his election not to be reinstated in terms of section 193 (1) (a) of the Act.

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68. See Du Toit et al note 23 at 424; See also *Shoprite Checkers (Pty) Ltd v CCMA & others* (Unreported LC case number J 2228/99) at para 6

69. [1997] 2 (3) Labour Law Digest 105 (CCMA) at 106

F. COMPENSATION

The award of a compensatory order is dealt with in terms of section 194 of the Act, which provides that:

(1) "If a *dismissal* is unfair only because the employer did not follow a fair procedure, compensation must be equal to the *remuneration* that the *employee* would have been paid between the date of *dismissal* and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the *employee's* rate of *remuneration* on the date of the *dismissal*. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the *employee* in initiating or prosecuting a claim.

(2) The compensation awarded to an *employee* whose *dismissal* is found to be unfair because the employer did not prove that the reason for *dismissal* was a fair reason related to the *employee's* conduct, capacity or based on the employer's *operational requirements*, must be just and equitable in all the circumstances, but not less than the amount specified in subsection (1), and not more than the equivalent of 12 months' *remuneration* calculated at the *employee's* rate of remuneration on the date of the *dismissal*.

(3) The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' *remuneration* calculated at the

employee's rate of *remuneration* on the date of the *dismissal*." [emphasis is in original]

i. NATURE AND SCOPE OF SECTION 194 (1)

In *NUMSA & others v Precious Metal Chains (Pty) Ltd* (70) the Court considered the following factors to be relevant when interpreting section 194 (1), namely:

1. The wording in section 194 (1) introduces certainty into a determination of compensation, because to hold otherwise is to revert to the confusion and chaos that prevailed under the 1956 Act.
2. The subsection is clearly couched in peremptory language setting out an exact formula of how the amount of compensation is to be calculated, and obliges the arbitrator or the Labour Court to order payment of compensation in the prescribed amount, save that a lesser amount may be payable where the unfairly dismissed employee unreasonably delayed the institution or prosecution of his or her unfair dismissal dispute, otherwise the proviso becomes superfluous and meaningless.
3. Section 194 (1) seeks both to introduce certainty and uniformity as well as to limit claims for compensation to a prescribed maximum.
4. Although the subsection may well create a burden for an employer whose only fault is non-compliance with a fair procedure, the punitive element inherent in the subsection was intended. An employer who is ordered to pay compensation to an employee whose dismissal is procedurally unfair, pays not so much for the damages or losses suffered by the employee as a result of the dismissal, but for the breach of the

70. See note 2 at 1073G-H

hearing or procedure before dismissal.

5. Subsection 2 does not make any sense if subsection 1 is not prescriptive of the amount of compensation payable in that subsection.
6. The indisputable fact that the intention of the legislature in passing the new Act was to ensure the speedy resolution of disputes.
7. Finally, if the employee applicant still has to prove his (or) her losses, it means that section 194 is superfluous and can be substituted by a section which empowers the Court or an arbitrator to award compensation for losses actually suffered by the employee.

The Labour Court in *Scribante v Avgold Ltd: Hartebeesfontein Division* (71) expressed the following instructive caveat in relation to section 194 (1) by saying that:

> "It should be borne in mind that procedural fairness is not an obligation to be lightly undertaken by an employer. It is a material requirement of a fair dismissal. It is material because it affords an employee an opportunity to be heard. It not only has the effect of preventing industrial unrest by ensuring that decisions are transparent and rationally made but, in some cases, will prevent a dismissal from occurring altogether. ... The legislature in giving effect to this has determined that procedural fairness, where an employee loses his employment, is a material requirement. The legislature has an interest in requiring fair process,

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71. [2000] 11 BLLR 1342 (LC) at 1353E-H

inter alia, to reduce levels of industrial conflict. The legislature has chosen to put a high premium on non-compliance with fair procedures. This should not be lightly ignored in deciding whether or not to award compensation." [Emphasis is in original]

What is therefore to be compensated is the unfairly dismissed employee's remuneration as envisaged in section 194. '*Remuneration*' is defined in section 213 of the Act as:

"any payment in money or kind, or both in money or in kind, made or owing to any person in return for that person working for any other person, including the State, and 'remunerate' has a corresponding meaning."

Grogan (72) argues that:

"Compensation is calculated in terms of multiples of remuneration, and not simply of cash wages. ... Compensation must thus be determined according to the (unfairly dismissed) employee's overall remuneration, including all contractual benefits additional to the cash wage. The cash equivalent of payments in kind must be included, but not gratuities, allowances paid to enable the employees to work ... and any discretionary payments not related to the employee's hours of work or work

72. "*Workplace Law*" Juta (2000) at 117-8; Darcy et al note 23 at 419

performed."

Section 194 (1) of the Act entitles an unfairly dismissed employee to be compensated for the employer's non-compliance with his or her right to a fair hearing or procedure prior to dismissal, and not necessarily for the actual losses suffered as a result of the dismissal. The express terms in sections 193 (1) and 158 (l) (a) (v), relating to compensation, are permissive in nature and cloth the Labour Court or an arbitrator with a judicial discretion whether or not to award compensation for a procedurally unfair dismissal.

Section 194 deals with *how* compensation must be calculated in different circumstances, not with *when* and *why* compensation must be awarded. If compensation is awarded it must be in accordance with the formula set out in section 194 (1) which requires that the amount of compensation awarded must be equal to the remuneration the unfairly dismissed employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication. According to *Mamabolo v Manchu Consulting CC* (73) compensation for a procedurally unfair dismissal is not based on patrimonial or actual loss.

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73. [1999] 6 BLLR 562 (LC) at 569I-J; *Louw v Micor Shipping* [1999] 12 BLLR 1308 (LC) at 1315B; *Fletcher v Elna Sewing Machine Centres (Pty) Ltd* [2000] 3 BLLR 280 (LC) at 290G-I; *De Bruin v Sunnyside Locksmith Suppliers (Pty) Ltd* (1999) 20 ILJ 1753 (LC) at 1762D-F; *Burger v Alert Engine Parts (Pty) Ltd* [1999] 1 BLLR 18 (LC) at 24G-25H: *Singh & others v Mondi Paper* [2000] 4 BLLR 446 (LC) at 465G-466H; *Louis Alberto Fernandes v HM Leibowitz (Propriety) Limited t/a The Auto Industrial Centre Group of Companies* (Unreported LC case no D 687/98) at para 127

The compensation is in the nature of a solatium for the loss of the right to a fair hearing or procedure prior to dismissal. It is punitive to the extent that an employer who breached that right must pay a fixed penalty for causing that loss, and should generally not be allowed to benefit from external factors, which might have ameliorated the wrong in some way or another. (74)

Compensation was denied to the employee whose dismissal was held to be procedurally unfair in *Buthelezi v Amalgamated Beverages Industries*. (75) In this matter De Villiers AJ was of the opinion that compensation under section 194 (1) of the Act, should be denied to the employee because she had unreasonably refused alternative position of customer care clerk. The employee's unreasonableness was premised on the fact that she omitted to inform the employer that she had accepted the alternative position offered to her. What also seems to have weighted heavily with the learned judge was that the employer would have appointed the employee to the position offered to her, had she only informed it of her decision to accept that position.

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74. *Johnson & Johnson (Pty) Ltd v CWIU* note 65 at 100B; *Kasrachi v Porter Motor Group* (Unreported LC case no C 635/99 at para 38); *Boksburg Town Council & Gauteng Association v SAMWU obo Silas* [1999] 12 BALR 1428 (IMSSA); *Entertainment Catering & Allied Workers Union of South Africa & others v Shoprite Checkers t/a OK Krugersdorp* (2000) 21 ILJ 1347 (LC) at paras 28; 29; 35; 40 and 46

75. [1999] 9 BLLR 907 (LC) at 915D-H; See also *Maloba v Minaco Stone Germiston (Pty) Ltd & another* [2000] 10 BLLR 1191 (LC) at 1201G-I; *La Vita v Booymans Clothiers (Pty) Ltd* [2000] 10 BLLR 1179 (LC) at 1189E; *Fourie & another v Iscor Ltd* [2000] 11 BLLR 1269 (LC) at 1289C-D

Section 194 (1) prescribes that the discretion not to award compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress, or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee. Where a substantial period of time has already lapsed between the procedurally unfair dismissal and the final date of arbitration, an arbitrator or the Labour Court can decide not to award compensation. (76)

The peremptory, but also limited, entitlement to compensation in the case of dismissals that are only procedurally unfair can be justified on the basis of the relatively minimal procedural requirements introduced by the Code of Good Practice: Dismissal in schedule 8 of the Act. However, if an employer does not observe those requirements in the workplace, the elements of fair procedure are applied for the first time when the dispute reaches the Commission Conciliation Mediation and Arbitration (the CCMA) or the Labour Court, and it is fair, at that point, to tax the employer for its shortcomings.

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76. See *Johnson & Johnson (Pty) Ltd v CWIU* note 32 at 99H-J; Du Toit et al note 23 at 426; *Visser v South African Institute for Medical Research* [1998] 9 BLLR 979 (LC); *Moloi v Aviprint Consulting CC t/a Sir Speedy Instant Print* [1998] 2 BLLR 147 (LC) at 148I-149A; *Auf der Heyde v University of Cape Town* [2000] 8 BLLR 877 (LC) at 898E-G; *Mandla v LAD Brokers (Pty) Ltd* [2000] 9 BLLR 1047 (LC) at 1058C-H; *Louis Alberto Fernandes v HM Leibowitz (Pty) Ltd* note 73 at par a 130; *Wheeler v Pretoria Propshaft Centre CC* [1999] 11 BLLR 1213 (LC); *Alpha Plant & Services (Pty) Ltd v Simmonds & others* [2001] 3 BLLR 261 (LAC) at 285J-289D

That actual loss should be proved, for purposes of section 194 (1), would be a futile exercise. Whatever actual loss the employee may ultimately prove he suffered will not influence the amount of compensation, because in all situations, the Labour Court or an arbitrator can only award compensation, which must be equal to the remuneration therein, described. In *Whall v Brandadd Marketing (Pty) Ltd* (77) Grogan AJ dealt with the criteria to be taken into account whether or not to grant compensation. The Labour Court (78) held that

> "as section 194 (1) prescribes a minimum, establishing what fairness in this context requires must entail comparing what the court considers the employee should have received had there been no statutory minimum with that what the employee must receive in terms of that statutory minimum. If there is a substantial difference between the two figures, the court must decide whether denying compensation would be fairer to the applicant than granting the prescribed compensation would be to the respondent. The assessment of what the employee should have received must, in turn, require the court to examine factors such as the actual patrimonial loss suffered by the applicant in consequence of his or her dismissal, his or her length of service with the employer, his or her prospects of finding alternative employment, the financial position

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77. (1999) 6 BLLR 626 (LC)

78. *Op cit* fn 77 at 636C-D; See also "*Workplace Law*" note 60 at 121 footnote 78; Grant, B "*The Nature of Compensation in Cases of Procedurally Unfair Dismissals*" (1999) 20 ILJ 45 at 49; *LA Vita v Booymans Clothiers (Pty) Ltd* [2000] 10 BLLR 1179 (LC) at 1188G-1189C

of the employer, and so on."

By requiring that the unfairly dismissed employee should prove actual patrimonial loss, the learned judge erred by reiterating the view expressed by Basson J in *Chothia* v *Hall Longmore & Co (Pty) Ltd* (79) which was emphatically rejected by the Labour Appeal Court in *Johnson & Johnson (Pty) Ltd* v *CWIU.* (80)

In *NEHAWU obo Lekay v St Mary's Private Hospital* (81) the learned Commissioner followed and applied the reasoning of Grogan AJ in *Whall v Brandadd Marketing (Pty) Ltd* (supra) that the unfairly dismissed employee should have mitigated her loss. Factors considered relevant by the learned Commissioner when deciding how much compensation the applicant employee would have been entitled to had there been no statutory minimum in terms of section 194 (1) of the Act, were expressed to be that:

> "she [the employee] was a councillor at the time (of her dismissal) and received a monetary allowance. She is certainly a person with a lot of potential and being a senior professional nurse she must have good prospects of finding alternative employment. In terms of the common law principle an unlawfully dismissed employee is obliged to mitigate his loss.

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79. [1997] 6 BLLR 739 (LC) at 745A-746F *Heigers v UPC Retail Services* [1998] 1 BLLR 45 (LC) at 50E; *Hlatswayo v Birkholz* [1998] 19 ILJ 645 (CCMA) at 648H-I; 650F-G; 651G

80. See *Johnson & Johnson (Pty) Ltd* v *CWIU* note 65 at 99D-F

81. [2000] 4 BALR 387 (CCMA)

> So, if the applicant failed to do that, the respondent should not be penalised to pay for the entire loss.... Finally, the applicant was afforded a hearing and the degree of departure from the right to a fair procedure was not a breach which in my view calls for the ultimate amount of compensation." (82)

It is respectfully submitted that the factors the learned commissioner considered to be relevant, in the determination of whether or not to award compensation under section 194 (1), seems wholly arbitrary and irrelevant. It is arbitrary to deny an unfairly dismissed employee full compensation simply because of his or her status, seniority and employability. It seems unfair to penalise an unfairly dismissed employee for having attained certain status and by necessary implication a particular standard of living, or has made great sacrifices to obtain certain academic qualifications.

It is the employer who should be penalised for having breached the dismissed employee's right to a fair procedure. To consider the state of the market in relation to the question whether or not good prospects exists for the unfairly dismissed employee to secure alternative employment, in the absence of any evidence been led, seems likewise arbitrary and irrelevant. Although the learned commissioner considered all these factors as relevant in the exercise of the judicial discretion not to award full compensation, two months compensation was awarded based on the employer's degree of non-compliance with a fair procedure in the dismissal.

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82. *Op cit* fn 81 at 392F; 392H-393A

As stated in *Insurance and Banking Staff Association (ABSA) & others v The Southern Life Association Limited* (83) it is a *solatium* that the Labour Court is awarding and the Court therefore need not investigate whether the unfairly dismissed employees should have mitigated their losses. Basson J in this matter continues (84) to state that:

> "In terms of (*Johnson & Johnson (Pty) Ltd* v *CWIU* (1999) 20 ILJ 89 (LAC)) I only have a discretion to award the maximum compensation allowed or nothing. In my view, this fettering of the discretion of the Labour Court which is, after all, also a Court of equity, is undesirable. Parliament should therefore consider amending the Act in this regard for a discretion to award compensation that must be just and equitable in the circumstances of every individual matter."

Grogan AJ in *Whall v Brandadd Marketing (Pty) Ltd* (85) reasoned that:

> "to refuse compensation on the ground ..... that the employee immediately obtained alternative employment at a salary higher than he was previously earning would , in my view, be consistent with the

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83. [2000] 3 BLLR 298 (LC) at 308C-E; See also *Scribante v Avgold Ltd: Hartebeesfontein Division* [2000] 11 BLLR 1342 (LC) at 1348F-H

84. See *Insurance & Banking Staff Association (ABSA) & others v The Southern Life Association* note 83 at 309E; *Vickers v Aquahydro Projects (Pty) Ltd* [1999] 6 BLLR 620 (LC) at 624G-H; 624I-J

85. See note 77 at 635H

examples provided by Froneman DJP (in *Johnson and Johnson v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC))".

This view was rejected in *Auf der Heyde v University of Cape Town* (86) as being in direct contradiction of the Labour Appeal Court's determination in *Johnson &Johnson (Pty) Ltd* v *CWIU* (87) that patrimonial or actual loss is not a factor to be considered in the exercise of the Labour Court's discretion whether or not to award compensation for a procedurally unfair dismissal. That the unfairly dismissed employee did not suffer patrimonial loss is therefore irrelevant, as is the absence of *mala fides* on the part of an employer who disregards fair and prescribed procedures.

In rejection of the employer's argument that the unfairly dismissed employee should have mitigated his loss, the learned Ngwenya AJ in *Simmonds & others v Alpha Plant Services (Pty) Ltd* (88) opined that:

"I am not persuaded that the employee need necessarily prove loss before the court would exercise its discretion (to award compensation)

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86. [2000] 8 BLLR 877 (LC) at 896B-E; *Neuwenhuis v Group Five Roads & others* [2000] 12 BLLR 1467 (LC) at 1486H-1487A; 1489H; *Scribante v Avgold Ltd: Hartebeesfontein Division* note 71 at 1348F-H; 1349H-J; *Alpha Plant & Services (Pty) Ltd v Simmonds & others* [2001] 3 BLLR 261 (LAC) at 291H-J

87. (1999) 20 ILJ 89 (LAC)

88. [2000] 8 BLLR 966 (LC) at 986D

in his or her favour. In my view there are other considerations which would persuade the court one way or the other. One such consideration would be the employee's length of service. And the other consideration perhaps may be to what extend is the degree of fault by the employer regarding compliance with the provisions of section 189."

What is thus clear is that patrimonial or actual loss need not be proved by an unfairly dismissed employee when either the Labour Court or an arbitrator considers to award compensation in terms of section 194 (1). The Labour Court in *CWIU v Johnson & Johnson (Pty) Ltd* (89) authoritatively addressed this question, which was confirmed to be correct on appeal, that:

"(The legislature) made a policy choice that, for better or for worse, the nature of the relief will be compensation. It also decided to statutorily determine the extent and formula to arrive at the actual compensation to be awarded. It fixed the extent of the compensation to be awarded - no less and no more than compensation arrived at by applying the statutory formula therein set out. It must have realised that in some cases the amount that has to be awarded would be too little and that in other cases it would be too much but, nevertheless, proceeded to make the provision in section 194 (1) because it brought about certainty on this issue. Certainty and a speedy finalisation of disputes were considered more important than all the other considerations. In those

89. [1997] 9 BLLR 1186 (LC) at 1220E-G

circumstances this Court must give effect to the policy choice of the legislature ... where that choice is not in conflict with the Constitution."

What must also be considered as a relevant factor when considering not to award compensation is what the celebrated authors Du Toit et al (90) identify, amongst other things, as circumstances where the procedural unfairness of a dismissal for misconduct is outweighed by the gravity of the misconduct itself.

It is, therefore, respectfully submitted that the learned judge erred in *Louw v Micor Shipping* (91) by awarding compensation of fourteen months for a dismissal, which was held only to be procedurally unfair. Although the learned Judge did consider that in terms of *Johnson & Johnson v Chemical Workers Industrial Union* (92) the Labour Court is empowered to consider whether or not to award compensation,

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90. See Du Toit et al note 23 at 422; *SACTWU & others v Discreto - A Division of Trump & Springbok Holdings* (1998) 19 ILJ 1451 (LAC)

91. [1999] 12 BLLR 1308 (LC) at 1316E; *Masondo v Bhamjee, Bhana, Nkosi CC t/a Baragwanath Pharmacy & another* (1999) 20 ILJ 1066 (LC)

92. (1999) 20 ILJ 89 (LAC) at 99I; *Vickers v Aquahydro Projects (Pty) Ltd* [1999] 6 BLLR 620 (LC) at 624D-625H; *Eyre v Hough t/a Miller Eyre Travel* (1999) 20 ILJ 1047 (LC); *Raju & others v Scotts / Select-A-Shoe, a Division of South African Breweries Limited* note 40 at para 37; *Ensign Brickford SA (Pty) Ltd v Shongwe NO & others* [2000] 12 BLLR 1421 (LC) at 1427C-D

the Court seems to have failed to consider that

> "if compensation is awarded it must be in accordance with the formula set out in section 194 (1): nothing more, nothing less".

An additional factor that was considered by the Labour Court to deny compensation for an unfair dismissal, was whether or not the unfairly dismissed employee had received severance pay. The payment of severance pay was regulated by, the now repealed, section 196 (1) and (3) of the Act that provided that:

> (1) "an employer must pay an *employee* who is dismissed for reasons based on *operational requirements* severance pay equal to at least one week's *remuneration* for each completed year of continuous service with that employer, unless the employer has been exempted from the provisions of this subsection.
>
> (2) ...
>
> (3) An *employee* who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay in terms of subsection (1)." (93) [Emphasis is in the original]

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93. Section 196 (1) and (3) of the Labour Relations Act 66 of 1995 was repealed by section 41 (2) and (4) of the Basic Conditions of Employment Act 75 of 1997 which now regulates the payment of severance pay where a dismissal is based on the employer's operational requirements.

Three requirements must therefore be satisfied for an unfairly dismissed employee to forfeit the statutory right to severance pay. These prerequisites are

1. There must be an offer of alternative employment with the retrenching employer or another employer;
2. The offer must be made by the retrenching employer; and
3. The unfairly dismissed employee must unreasonably refuse the offer.

In turn section 195 of the Act provides that:

> "an order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the *employee* is entitled in terms of any law, *collective agreement* or contract of employment." [Emphasis is in the original]

It is submitted that the employment of the phrases "in addition to" and "not a substitute for" in section 195 of the Act are mutually exclusive. It is also submitted that these words are not synonymous. The meaning ascribed to the word '*addition*' in the *Concise Oxford Dictionary* is "the act or process of adding or being added." The word '*addition*' therefore clearly refers to something extra or supplementary to that what is already possessed or to be given. In contrast thereto the word '*substitute*' is in turn defined as "a ... thing acting or serving in place of another; put or serve in exchange; replace (a... thing) with another."

It is, respectfully, submitted that the correct approach to the question of whether or

not severance pay is to be considered when determining compensation for an unfair dismissal, was authoritatively stated by Basson J in *Chotia v Hall Longmore & Co.* (94) The opinion of the learned judge is lucid and particularly instructive where it was said that:

> "In terms of section 195 of the LRA, an award of compensation made in terms of the Chapter in the LRA which deals with unfair dismissals (such as the dismissal *in casu*), is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law. The phrase 'any law' clearly includes the provisions of section 196 (1) of the LRA (*supra*) according to which the applicant is entitled to severance pay. In the event, the award of compensation is in addition to the severance pay which the applicant has received in terms of section 196(1) of the LRA'. [Emphasis is in the original]
>
> 'Moreover, the provisions contained in section 196 (10) of the LRA prove to be conclusive in this regard. This section states that, if the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements, the Court may inquire into and determine the amount of any severance pay to which the employee may be entitled and the Court may make an order directing the employer to

94. [1997] 6 BLLR 739 (LC) at 746I-747C; *Purefresh Foods (Pty) Ltd v Dayal & another* (1999) 20 ILJ 1590 (LC) at 1596F; *Baatjies v Dekro Paints (Pty) Ltd* (1999) 20 ILJ 112 (LC) at 118A

> pay that amount. Clearly, such order is additional to any other order (such as an award of compensation) that the Court may make in such matter. After all, such order is clearly not intended to compensate an employee for something lost but such relief is granted on the basis that a retrenched employee is statutorily entitled to severance pay".

The legislature's intention to have the payment of severance pay separately determined from the award of compensation for unfair dismissals, is restated in section 41 (5) of the Basic Conditions of Employment Act, (95) which provides that:

> "The payment of severance pay in compliance with this section does not affect an employee's right to any other amount payable according to law."

The line of reasoning of Basson J in *Chotia v Hall Longmore & Co* (supra) was followed and applied by the Labour Court in *Neuwenhuis v Group Five Roads & others.* (96) In this case it was held that the payment of a substantial ex gratia amount of money after an unfair dismissal and that alternative employment was obtained, are irrelevant factors when considering compensation under section 194 (2) of the Act. The Court was of the opinion that the employer did not make the substantial *ex gratia* payment because it perceived that it had committed a procedural wrong. The payment was premised on the unfairly dismissed

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95. Act 75 of 1997

96. [2000] 12 BLLR 1467 (LC) at 1489D-E

employee's accrued right to share in the bonus scheme. In addition thereto the unfairly dismissed employee was awarded compensation for eleven months, which was the period from the date of dismissal to the last day of hearing. It is submitted that the approach adopted by the Labour Court in this matter is correct and clearly in line with the provisions of section 195 of the Act.

In direct contrast to the express and unambiguous provisions of section 196 of the Act, which are definitive of the unfair dismissed employee's right to severance pay, and the weight of judicial comment to that effect, the Labour Court in *La Vita v Booymans Clothiers (Pty) Ltd* (97), however, ruled that:

> "the applicant was paid the minimum severance pay. It has been generally accepted, too, that the purpose of severance pay is to cushion the shock of retrenchment and to serve as a gratuity for services rendered. In other words, *severance pay is a form of compensation* for employees who fall victim to economic forces and the loss of employment." (Emphasis is added)

It is respectfully submitted that the Labour Court seems to have erred in equating severance pay with compensation. The words "*is a form of*" clearly refers to something that is of a similar kind of or types to that what is under consideration or use. If the words "*is a form of*" are removed from consideration in the phrase "*severance pay is a form of compensation*" as pronounced by Francis AJ in *La Vita*

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97. [2000] 10 BLLR 1179 (LC) at 1189D

v Booymans Clothiers (Pty) Ltd (supra), it would seems to mean that severance pay is compensation. In addition thereto severance pay is governed in a separate and distinct section, whether under the Labour Relations Act or the Basic Conditions of Employment Act, to that of compensation. The meaning ascribed by *La Vita* (supra) to section 194 would necessarily make the provisions of section 195 of the Act superfluous.

It is further submitted that the language employed by the legislature in both section 195 and, the now repealed, section 196 is plain and unambiguous. By ruling that severance pay is a form of compensation, it is respectfully submitted that the reasoning of Francis AJ in *La Vita* (supra) seems flawed because it would mean that compensation is a substitute for compensation for purposes of section 194 (1) read with section 195 of the Act. It thus follows that if severance pay is a form of compensation, then clearly the legislature employed language that is tautologuous and that would amount to an absurdity that could not have been contemplated by the legislature.

There is, generally speaking, a presumption that the same words and expressions in the same Act are intended to bear the same meaning. It is also a well-established canon of construction that a statute should be so construed that, if it can be prevented, no clause, sentence or word should be superfluous, void or insignificant. (98)

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98. *Consolidated Textile Mills Ltd v President, Industrial Court* 1989(1) SA 302 (A) at 307I-308D

Furthermore, the erroneous reasoning of the learned judge is borne out by the fact that the legislature clearly prescribes that severance pay is not a substitute for compensation. Given the plain language employed by the legislature in section 195 of the Act, it begs the question of how it is in law and in logic to be understood that compensation is not a substitute for compensation, when reliance is placed on the reasoning of Francis AJ? It is, therefore, respectfully submitted that the reasoning of the Labour Court in this case is circuitous and wrong. The Labour Court denied the unfairly dismissed employee any compensation for having not only received a severance benefit but also that alternative employment was unreasonably refused by the unfairly dismissed employee.

Similar reasoning to that of Francis AJ in *La Vita* (supra) was followed by the Labour Court in *Cyster & others v Ciba Speciality Chemicals (Pty) Ltd.* (99) In this matter the Labour Court refused to award compensation. It found that the employees, with the exception of one, frustrated the employer's efforts to redress the procedural unfairness by rejecting the employer's offer of money for purposes of settling the matter. The Labour Court also considered the payment of severance benefits as a relevant factor when exercising its discretion not to award any compensation for the procedurally unfair dismissal. It is respectfully submitted that what is of particular concern is that the Labour Court, denied the second applicant compensation although it found that he did not unreasonably rejected the employer's offer of alternative employment, by saying that:

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99. (Unreported LC case number C 551/98) at para 11

> "in regard to Petersen, the Court finds that his refusal not to accept the alternative job offer was not unreasonable and clearly that what he had in mind when he applied for the job was that he would get a higher salary. It was also made clear to him that because the job was not in the management echelon, he would not be paid relocation expenses. This then meant that his wife would have to terminate her employment in Cape Town to move with him to Gauteng. In the circumstances, his refusal could hardly be regarded as unreasonable. In any event, Petersen collected his severance pay and in addition he was paid his provident or pension fund monies."

In this case the Labour Court went a step further than Francis AJ in *La Vita* v *Booymans Clothiers (Pty) Ltd* (supra) did. In addition to the payment of severance pay the Labour Court considered as a relevant factor, in its consideration whether or not to award compensation under section 194 (1) of the Act, that all the dismissed employees received their pension fund monies. The reasoning of the Labour Court, in this case, seems to be also in direct contradiction with the clear provisions of section 195 of the Act, especially after it was found that:

> "the offer made on 19 February was a generous one and ought to have been accepted by all the applicants, except Petersen. There is no evidence before me that had an offer been made to Petersen, he would either have accepted it or rejected (it) ... It does appear, however, that the company, through its consultants, had erred in not making an offer to Petersen on 19

> February. It also seems to me that as far as Petersen is concerned, the discussion on 11 June centred around the alternative job that he had applied for and that neither he nor Poole (who represented the employer) intended to discuss any of the items referred to in the section 189 letter. However, Petersen, like the other applicants, received his severance pay as discussed with Poole during his consultation on 9 June and subsequently on the telephone. The Act requires an employer to pay severance pay in the event of retrenchment in that regard the company complied. In the circumstances, the application is dismissed." (100)

It is submitted that the reasoning of the Labour Court in the exercise of its discretion not to award any compensation to Petersen, who was not made any offer of settlement and did all that he reasonably could to secure the alternative employment offer to him and never frustrated or delayed the employer's attempts to redress the wrong committed on him, was erroneous. Although the Labour Court found that Petersen suffered a procedurally unfair dismissal, the denial of any compensation seems particularly harsh on him. It seems that Petersen is being penalised for the employer's lack of compliance with a fair procedure, since the only qualification not to pay him his statutorily entitled severance pay was where he unreasonably refused alternative employment, which in Petersen's case the Labour Court held was not borne out by the evidence led by the employer.

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100. *Op cit* fn 99 at pars 23-26

It seems that, by denying Petersen any compensation, the Labour Court have allowed the employer to benefit from the payment of severance pay and pension to the employee as external factors which might have ameliorated the procedural unfairness which the Labour Appeal Court in *Johnson & Johnson v Chemical Workers Industrial Union* (101) has cautioned against. It is submitted that employers might now raise the additional argument against the granting of a compensatory award for an unfair dismissal where the unfairly dismissed employee's pension or provident payments exceed the compensatory amount in terms of section 194 of the Act.

By taking into account both severance pay or pension payment, the Labour Court in *Cyster & others v Ciba Speciality Chemicals (Pty) Ltd* (supra) seems to have substituted compensation with severance pay and pension. This finding by the Labour Court, it is respectfully submitted, was in direct contradiction to the provisions of section 195 of the Act. An additional consequence of this ruling by the Labour Court seems to be that unfairly dismissed employees with longer service records and larger pension or provident entitlements than those employees with shorter employment service, are unjustly and unfairly being penalised for a wrong perpetrated by the employer.

The effect of that seemed to be that the more completed years of continuous service for purposes of calculating severance pay and the larger the unfairly dismissed employee's pension or provident fund payout are, the less likely it seems that the

101. (1999) 20 ILJ 89 (LAC) at 100B

Labour Court or an arbitrator would award compensation as redress for the unfair dismissal. It is further submitted that it seems that the Labour Court, although differently constituted, in both *Cyster & others v Ciba Speciality Chemicals (Pty) Ltd* and *La Vita v Booymans Clothiers (Pty) Ltd* (supra) might have relied on the pronouncement of Combrink J in *Ferodo (Pty) Ltd v De Ruiter* (102).

There it was stated, amongst other things, that severance pay is a relevant factor to be considered when compensation is determined for an unfair dismissal. It should, however, firstly be noted that the *Ferodo* (supra) matter was dealt with under the Labour Relations Act of 1956. Secondly, this judgement stands in clear contradiction, as far as severance pay is concerned, to the unambiguous provisions of section 195 of the Act as well as section 41 (5) of the Basic Conditions of Employment Act (103) which presently regulates severance pay.

In addition to the above, it is submitted that section 158 (1) (a) (v) of the Act cannot be relied upon by the Labour Court when considering severance pay or pension fund payments for purposes of awarding compensation. Section 158 (1) (a) can therefore only be relied upon by the Labour Court in the exercise of its inherent powers where its discretion has not specifically been tempered as is the case under section 195 of the Act, and section 41 (5) of the Basic Conditions of Employment Act (supra). It is submitted that section 158 (1) (a) (v) of the Act clearly limits the awarding of compensation by the Labour Court to circumstances that are

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102. (1993) 14 ILJ 974 (LAC) at 981C-D; 981D-H

103. Act 75 of 1997

contemplated in section 194, read with section 195 of the Act, which exclude, inter alia, severance pay and pension payments.

Although an arbitrator does not enjoy inherent powers, since the Commission for Conciliation, Mediation and Arbitration is a creature of statute, section 138 (9) of the Act can also not be relied upon when severance pay or pension fund payments are factored into the consideration of whether or not compensation is to be awarded. Both the Labour Court and an arbitrator are therefore not empowered to substitute, amongst other things, severance pay or pension or provident fund payments for compensation for an unfair dismissal. Since section 41 (5) of the Basic Conditions of Employment Act (supra) has repealed section 196 (1) of the Act, it is submitted that the mere repeal of section 196 (1) does not mean that section 41 (5) conflicts with the provisions of section 195 of the Act.

It is submitted that by repealing section 196 (1) of the Act and to mirror the contents of that section in section 41 (5) of the Basic Conditions of Employment Act (supra), the intention of the legislature could only have been that the entitlement to severance pay is to be understood within the confines of section 195 of the Act. If that was not the intention of the legislature, it is difficult to comprehend why the provisions of section 195 have been left intact by the legislature. Since there is no conflict between the provisions of section 195 of the Act and section 41 (5) of the Basic Conditions of Employment Act (supra), it is submitted that section 210 of the Act is not applicable when dealing with severance pay or pension or provident fund payment when compensation is being considered.

It is important to note that section 210 of the Act prescribe that:

> 210 "If any conflict, relating to the matters dealt with in this *Act*, arises between *this Act* and the provisions of any other law save the Constitution or any Act expressly amending *this Act*, the provisions of *this Act* will prevail.'(My emphasis)

When considering compensation for a procedurally unfair dismissal, the Labour Court (104) has pronounced that an arbitrator or the Labour Court will have to consider substantive fairness, because it can never be that an arbitrator or the Labour Court can only come to that conclusion having only looked at procedural fairness. An arbitrator or the Labour Court would normally have to satisfy him- or herself whether the dismissal was procedurally or substantively unfair. That also means that it must be considered whether the sanction of dismissal was warranted in the circumstances.

It is, however, respectfully submitted that the consideration of substantive fairness does not automatically follow the resolution of an unfair dismissal dispute whether by arbitration or adjudication. Once the parties to the labour dispute have agreed that the alleged unfair dismissal will only be challenged on its merits and not procedure and vice versa, the jurisdiction of the CCMA or the Labour Court will be confined to that issue because:

> "a party is entitled to restrict the ambit or scope of arbitration and

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104. *Gibb v Nedcor* (1998) 19 ILJ 364 (LC) at 380H-381B

statutory proceedings. ... One way of doing this is to agree... that procedural unfairness need not be considered by not challenging it. (105)

105. *Reunert Industries (Pty) Ltd t/a Reunert Defence Industries v Naicker & others* [1998] 3 BLLR 305 (LC) at 311B-E; *NUMSA v Driveline Technologies (Pty) Ltd* [2000] 1 BLLR 20 (LAC) at 26C-D; 40E-G

ii. NATURE AND SCOPE OF SECTION 194 (2) AND (3)

Compensation, being a rather blunt remedy (106), necessitates an arbitrator or the Labour Court when making a determination of compensation to set out clearly the basis upon which it has done so, including the facts upon which it relies. (107) Such an award would then have the effect of compensating loss that extends into the future incurred as a result of the unfair dismissal. (108)

Section 194 (2) and (3) gives the Labour Court or an arbitrator a wide discretion over the assessment of the compensatory award to the extend what the Labour Court or arbitrator considers just and equitable subject to the statutory maximum. Since the Act itself gave no guidance by not defining the factors to be considered when arriving at just and equitable compensation, it is submitted that an arbitrator or the Labour Court can be guided by the lexicon meaning of the terms 'just' and 'equitable'.

'*Just*', according to the Concise Oxford Dictionary, meant 'morally right or fair; appropriate'. In turn '*equitable*' and '*equity*', has respectively been defined as

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106. *Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union & Others* (1994) 15 ILJ 61 (A) at 78A-B

107. *Reutech Defence Industries (Pty) Ltd t/a Reutech Defence Industries v Govender & others* [2000] 9 BLLR 1101 (LC) at 1104C-D

108. *Russell NO & Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A) at 145D-E; *Mphosi v Central Board for the Co-operative Insurance Ltd* 1974 (4) SA 633 (A) at 642

'fair and impartial; valid in equity as distinct from law' and 'the quality to be fair and impartial'. Being guided by these definitions, it is submitted, places an arbitrator and the Labour Court in a position to apply the general principles of justice to correct or supplement the law, when awarding compensation for substantively unfair dismissals. When considering what would be just and equitable as compensation in all the circumstances, it is submitted that an arbitrator or the Labour Court has to act in accordance with what is morally right or fair.

Once the decision to compensate has been made, it is submitted that the amount of compensation must be appropriate in all the circumstances to redress the substantive unfairness of the dismissal. The Labour Court or arbitrator must, however, exercise its discretion judicially and upon the basis of principle and must set out its reasons in sufficient detail to reflect the principles used in the assessment. In considering what would be just and equitable in all the circumstances the Labour Court in *Rugnath v Timber Freight (Pty) Ltd & another* (109) held that the applicant had not only been treated poorly, but that his treatment had been atrocious, insensitive and irrational. That conclusion was reached by the Labour Court after finding that the employer did its best to get rid of the employee by bringing various charges of misconduct against him. None of these

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109. (Unreported LC case number D345/97) at paras 37, 39; *Kansinger v Doornbosch Restaurant CC* (LC case number C295/98) at para 27; *Bekker v Nationwide Airlines (Pty) Ltd* [1998] 2 BLLR 139 (LC) at 141J-142A; See also Du Toit et al note 23 at 423

charges were, however, brought to finality. The employer then opted to declare the employee redundant, which was proved not to exist as well as that no proper consultations were held with the affected employee. Due to that treatment the Labour Court awarded the maximum twelve months' compensation under section 194 (2).

What is to be assessed is the position the unfairly dismissed employee is in when the dismissal is finally arbitrated or adjudicated, with that position he or she would have been in had the unfair dismissal not been committed. It is submitted that the principles of the 1956 Act, relating to the award of compensation for unfair dismissal, continue to be relevant for purposes of interpreting section 194 (2), since they offer some criteria that are relevant to a determination of what is fair in the circumstances. McCall J in *Alert Employment Personnel* v *Leech* (110) explained the nature of an order for compensation in the following terms:

> "What the legislature contemplated was that there should be compensation for the loss caused by an unfair dismissal, which need not necessarily be a breach of contract. .... The Labour Relations Act makes unfair conduct, as distinct from unlawful conduct, wrongful and authorises the payment of

110. (1993) 14 ILJ 655 (LAC) at 661A; *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC); *Cargo Motors Ltd v Hamilton* (1996) 17 ILJ 113 (LAC) at 115G-116D; *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC) at 657B-C; *Unilong Freight Distributors (Pty) Ltd v Muller* (1998) 19 ILJ 229 (SCA) at 239B; Cf. *Simmonds & others v Alpha Plant Services (Pty) Ltd* [2000] 8 BLLR 966 (LC) at 968D where *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC) was held not to apply in the Labour Relations Act 66 of 1995

compensation for it."

Losses already suffered and future losses may be compensated, provided there is sufficient evidence to substantiate the loss under section 194 (2) and (3). (111) In calculating future losses, the Labour Court will assess the:

i. nature of the breach of duty to act fairly towards the unfairly dismissed employee;
ii. period for which the employee would have remained in the employer's employment;
iii. adequacy of a retrenchment package, if any;
iv. failure to accommodate the unfairly dismissed employee in the new structure, if any;
v. the employee's period of employment; and
vi. age of the unfairly dismissed employee. (112)

Although circumstances may exist where it would be fair to compensate an employee to the full extent of his or her losses, that will not always be the case. The interests of both the employee and employer must be taken into account in

111. See *Rugnath v Timber Freight (Pty) Ltd & another* note 109 at paras 35-38; *Market Toyota & others v Field & others* [2000] 5 BLLR 588 (LC) at 590E-F

112. *Imperial Transport Services (Pty) Ltd v Stirling* [1999] 3 BLLR 201 (LAC) at 206F-G

deciding whether it would be just and equitable to do so. (113)

Although the Act sets out the method that should be used to calculate compensation, it requires that a compensatory award must be just and equitable in all the circumstances. Within the limits imposed by the statutory caps, the arbitrator or the Labour Court must exercise a judicial discretion.

The Act is, however, silent on the method that should be used to calculate compensation. It requires only that the amount awarded be just and equitable in all the circumstances. Within the limits imposed by the statutory caps, the arbitrator or the Labour Court must exercise a judicial discretion. The industrial court and the previous Labour Appeal Court developed a fairly substantial and consistent jurisprudence under the 1956 Act on the determination of compensation for unfair dismissal. The guidelines developed by those courts remain influential in the new dispensation, since they offer some criteria that are relevant to a determination of what is fair in the circumstances. The courts developed the view that compensation should be equated with damages. In terms of section 158 (1) (v) and (vi) of the Act the Labour Court may order both compensation and damages. (114)

Considerations such as future loss and mitigation of loss should be taken into

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113. *Le Roux v CCMA & others* [2000] 6 BLLR 680 (LC) at 684B-J

114. See *Johnson & Johnson v CWIU* note 65 at 99E-F; Cf. *Goosen* v *Wiese* (1997) 18 ILJ 784 (CCMA) at 783B-D; *Gordon* v *St John's Ambulance Foundation* [1996] 7 (3) SALLR 8 (CCMA) at 11I-K

account, and evidence on these issues will have to be led to enable the Court to arrive at a fair and equitable amount. However, the awarding of compensation is not restricted to financial loss but also covers non- patrimonial loss. (115)

In *Sebako and Parking Strategies* (116) the dismissal of four employees was found to have been substantively unfair. The commissioner found reinstatement to be the preferred remedy and was willing to reinstate the employees but they indicated that they did not wish to be reinstated and the employer also indicated that it would find reinstatement problematic. The commissioner therefore found it fair instead to award compensation, and the arbitrator therefore looked at various factors that had been taken into account under the 1956 Act.

The commissioner did not consider either length of past service or the time likely to be needed to find further employment to be relevant factors in arriving at an equitable figure. The likely future security of the employee's employment was also not considered relevant. Should the employee alone be unwilling to continue the employment relationship, whilst the employer was willing to countenance reinstatement, this could be a mitigating factor, but only if the facts were such that they did not remove the reasonable possibility of rebuilding the relationship.

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115. See *Johnson & Johnson v CWIU* note 65 at 99H; Cf. *Maartens v Van Leer SA (Pty) Ltd* (1998) 19 ILJ 182 (CCMA) at 185E; 186B-D; *Phillips & others v Tedelex* (Unreported LC case numbers P22/97 and P23/97) at para 36

116. [1997] 2 (3) Labour Law Digest at 53; 54-55; *Dally and Davmark (Pty) Ltd* [1997] 2 (2) Labour Law Digest at 48

The commissioner considered the relative reasonableness of the employer and the employee in their participation in the events leading up to dismissal as the most relevant factor when considering whether to award compensation or not. The learned commissioner concluded that compensation should not be awarded with the aim of punishing the employer, because the motivation for an award must be solely to mitigate the adverse effect of the unfair dismissal on the employee. (117)

It is submitted that the employee must particularise his or her claim in terms of section 194 (3) for any loss suffered which means that applicants should come to the Labour Court or arbitration proceedings well prepared with evidence to show what their loss is. (118) Once the unfairly dismissed employee has provided evidence of loss suffered, the evidential burden of proof will shift to the employers to show that the unfairly dismissed employee did not take reasonable steps to mitigate his or her patrimonial or loss. (119)

When the Labour Court in *Singh and others v Mondi Paper* (120) had an opportunity to consider how an employer is to discharge the onus that an unfairly dismissed employee had not reasonably mitigated his or her losses, it concluded

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117. Cf. *Johnson & Johnson v CWIU* note 65 at 100B; *Swart v Mr Video (Pty) Ltd* [1997] 2 BLLR 249 (CCMA)

118. *Hunt v ICC Car Importers services Company (Pty) Ltd* (1999) 20 ILJ (LC) at 367D-F; 367G

119. See *Market Toyota & others v Field & others* note 64 at 591D

120. [2000] 4 BLLR 446 (LC) at 465G; 466G

> "in order to convince me that the employer had made adequate redress by virtue of the offer made to an employee during the course of the consultation process, the employer would have to show more than that the reason for refusing the offer or not taking up the offer was not good. It would have to show that, if the employee had taken up the offer, she stood to gain as much as she stands to gain from an order for compensation calculated according to the statutory formula. .... The respondent in order to make redress for a wrong had to offer something more than an entitlement (to the unfairly dismissed employee to approach the respondent and or apply for suitable vacancies and to be considered for employment)."

What is thus required of the unfairly dismissed employee is to provide sufficient evidence to the Labour Court or an arbitrator that reasonable steps were taken to mitigate his or her losses that flow from the unfair dismissal. In turn the employer must discharge the onus of proof that the unfairly dismissed employee acted unreasonably when attempting to mitigate his or her loss. In the absence of discharging that onus, the unfairly dismissed employee will become entitled to be fully compensated, subject to the statutory limits.

It is therefore, respectfully, submitted that the learned judge in *Le Roux v CCMA & others* (121) did not err by ordering compensation of eight months' salary after it

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121. [2000] 6 BLLR 680 (LC) at 683C; 684B-F; Cf. *Puren v Victorian Express* (1998) 19 ILJ 404 (CCMA) at 411E-F

was ruled that a relationship clearly exists between section 194 (1) and (2). That is so because the permissive language employed in sections 193 (1) and 158 (1) (a) (v) read together, entrusts the Labour Court with a judicial discretion to make any order it deems fit, which equally apply to section 194. The consequence must therefore be that the Labour Court or an arbitrator, under section 194 (2) enjoys a judicial discretion not to make any award of compensation at all for a substantively unfair dismissal, if it would be just and equitable in all the circumstances to do so.

The learned Judge continued: (122)

> "the most important effect of the decision in *Johnson and Johnson v Chemical Workers Industrial Union* (supra) on the interpretation of section 194 (1) is (that) the formula under section 194 (1) is absolute and simply a matter of calculation. It has no discretionary element. Accordingly when translated to the situation in section 194 (2) it has the effect of restricting the discretion to award compensation which is just and equitable in all the circumstances. Once the decision to award compensation is made that compensation may not be less than an amount equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication as the case may be".

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122. See note 121 at 684E-F

It is therefore respectfully submitted that the phrase "*in all the circumstances*" in section 194 (2) and (3) clearly qualify the terms '*just and equitable*". That would mean that the Labour Court or an arbitrator enjoys a discretion, to be exercised judicially, to deny the awarding of compensation for a substantively unfair dismissal, even where the dismissed employee had proved loss suffered. It is submitted that the qualification of "*in all the circumstances*" in section 194 (2) and (3) when it is considered by the Labour Court or an arbitrator whether or not to award compensation, is of an overriding nature in the determination of what might be just and equitable. The applicability of section 194 (1) to section 194 (2) of the Act is that it only prescribes the minimum compensation to be awarded by the Labour Court or an arbitrator. (123)

What is required of the unfairly dismissed employee is to provide evidence that patrimonial or actual loss was suffered due to the unfair dismissal. The Labour Court or an arbitrator would then have a judicial discretion to deny any compensatory award if it is found that, taking into account all the circumstances, it would be just and equitable to do so. If compensation is awarded for an automatically unfair dismissal, the employee will be entitled to compensation in excess of the statutory maximum compensation provided for in cases of

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123. Du Toit et al note 23 at 423; *Adams & others v Coin Security Group (Pty) Ltd* [1998] 12 BLLR 1238 (LC)

procedurally and substantively unfair dismissals. (124)

In *Loubser and PM Freight Forwarding* (125) it was, however, decided that the provisions of section 194 (2) are not peremptory and that it is only a guideline, albeit an important one. It is respectfully submitted that the reasoning of the learned commissioner is erroneous, because the object of the compensatory award is to compensate fully, but not to award a bonus. Thus in broad terms, an employee may claim compensation for any loss suffered because of the unfair dismissal provided it is attributable to the employer, and the Labour Court or arbitrator considers it just and equitable to compensate that loss.

The learned authors Visser & Potgieter (126) define damages as follows

> "In a narrow sense compensation denotes damages. In a general sense it means that the process of reparation of any patrimonial or non-patrimonial loss."

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124. Cf. *Mandla v LAD Brokers (Pty) Ltd* [2000] 9 BLLR 1047 (LC) at 1058H; See *Louis Alberto Fernandes v HM Leibowitz (Propriety) Limited t/a The Auto Industrial Centre Group of Companies* note 73 at paras 129-131

125. (1998) 7 (CCMA) 6.13.13

126. "*Law of Damages*" Juta, Cape Town (1993) at 18

In turn the celebrated author Joubert (127) ascribe the following meaning to damages, namely

> "Damages have been defined as "the diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved."

It is, therefore, inevitable that in assessing damages there must be elements of estimates and to some extent conjecture. All the chances and the changes of the future must be assessed. They must be weighed not only with sympathy but also with fairness for the interests of all concerned and at all times with a sense of proportion. It is submitted that the assessment of any compensation must always involve a comparison between what was, is and will be and what would or should have been between the actual past, present and future and the hypothetical past, present and future.

The discretion regarding compensation for an unfair dismissal is of a statutory nature and should be exercised within the confines of the unfair dismissal definition. However, lack of detailed provisions about the extent of the Labour Court or arbitrator's powers and the scope of the unfair dismissal definition leaves a wide margin of discretion. (128)

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127. W.A Joubert (Ed) "*The Law of South Africa*" First reissue Vol. 7 para 10

128. See *Hunt v ICC Car Importers Services Company (Pty) Ltd* note 117 at 367G

Compensation contemplated in section 194 (2) and (3) is, therefore, compensation in the normal sense of word, namely compensation for something lost. (129) The Labour Court or arbitrator must thus decide what amounts would be just and equitable to compensate the unfairly dismissed employee's for actual financial losses and even non-patrimonial loss suffered.

129. *Le Roux v CCMA & others* [2000] 6 BLLR 680 (LC) at 684E-F

iii. PATRIMONIAL AND NON-PATRIMONIAL LOSS

In *Obery v Retitron (Pty)* (130) it was ruled that both patrimonial and non-patrimonial loss could be awarded in terms of sections 193 and 194. Under the 1956 Act the Industrial Court in *Prinsloo v Harmony Furnishers (Pty) Ltd* (131) held that although

> "the employee had not suffered any patrimonial loss as a result of (t)his treatment, compensation has been awarded for the manner in which he had been treated during the investigation of the charges where he had been subjected to improper, unscrupulous and intimidating interrogation. He was furthermore, humiliated in front of his family, subsequently arrested and held overnight."

In dismissing the appeal (132) Foxcroft J held that the legislature intended damages to be ordered by the Industrial Court which include compensation as well as non-patrimonial loss, because there is no reason why the loss should be limited to patrimonial loss. The approach of the Industrial Court and the Labour Appeal Court under the 1956 Act seems to be endorsed by the Labour Appeal Court

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130. (1997) 18 ILJ 834 (CCMA) at 839E-G

131. [1993] 2 LCD 82 (IC) at 83; *Botha & Another v Comet Electrical* [1997] 18 ILJ 821(CCMA) at 822H; *Gontshi v Harmony Mining Co* [1997] 18 ILJ 823 (CCMA) at 824H

132. *Harmony Furnishers v Prinsloo* [1993] 14 ILJ at 1466 (LAC) at 1468A-C; 1472H; See also *Johnson & Johnson v CWIU* note 65 at 99D-E; Cf. *Swart v Mr Video (Pty) Ltd* [1997] 2 BLLR 249 (CCMA) at 253A

when it interpreted section 194 (3).

Section 194 (3) is in the following terms:

> "The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' *remuneration* calculated at the *employee's* rate of *remuneration* on the date of *dismissal*." (Emphasis is in the original)

In turn an automatically unfair dismissal is defined in section 187 of the Act as follows:

(a) "A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is –

(b) that the *employee* participated in or supported, or indicated an intention to participate in or support, a *strike* or protest action that complies with the provisions of Chapter IV;

(c) that the *employee* refused, or indicated an intention to refuse, to do any work normally done by an *employee* who at the time was taking part in a *strike* that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;

(d) to compel the *employee* to accept a demand in respect of any

matter of mutual interest between the employer and *employee*;

(i) that the *employee* took action, or indicated an intention to take action, against the employer by –

exercising any right conferred by *this Act*; or

(ii) participating in any proceedings in terms of *this Act*;

(e) the *employee's* pregnancy, intended pregnancy, or any reason related to her pregnancy;

(f) that the employer unfairly discriminates against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

(2) Despite subsection (1) (*f*) –

a *dismissal* may be fair if the reason for *dismissal* is based on an inherent requirement of the particular job;

a *dismissal* based on age is fair if the *employee* has reached the normal or agreed retirement age for persons employed in that capacity." (Emphasis is in the original)

In the now celebrated case of *Woolworths (Pty) Ltd v Whitehead* (133) the Labour Appeal Court dealt with the question firstly whether the applicant was unfairly

133. [2000] 6 BLLR 640 (LAC); See also Cheadle H, Le Roux PAK, Thompson C & Van Niekerk A "Employment Equity" *Current Labour Law* (2000) at 22-23

discriminated against due to her pregnancy as contemplated in section 197 (1) (e) and/or (f). Secondly, the Labour Appeal Court grappled with the question whether it was an inherent requirement of the position of human resources: information and technology generalist. Zondo JP and Willis JA upheld the applicant's appeal, but for different reasons. Zondo JP held that no causal link was established by the employee between the employer's decision not to appoint her and her pregnancy. Willis JA, however, opined that the continuity requirement was a sufficient ground of its own to justify the decision not to appoint the respondent." (134)

Writing the dissenting judgement, Conradie JA (135) reasoned that under section 194 (3) an unfairly dismissed employee will only become entitled to compensation for sentimental damages suffered where an iniuria has been proved. What is thus required is for an unfairly dismissed employee to prove an infringement of his or her personality rights. In addition thereto an unfairly dismissed employee claiming compensation for actual patrimonial loss must mitigate his or her losses.

The Labour Court will then consider, amongst other things, failure by the unfairly dismissed employee to accept alternative employment and the salary the unfairly dismissed employee would have earned, if the alternative employment were accepted. In addition thereto, all earnings that the unfairly dismissed employee had earned during the period in question must then be deducted from the patrimonial or actual losses suffered.

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134. See *Woolworths (Pty) Ltd v Whitehead* note 133 at 667G-J

135. *Op cit* fn 134 at 657B-D

iv. DATE OF ASSESSMENT

The formula in section 194 (1) of the Act prescribe the effective date of dismissal as either the date on which the contract of employment is terminated or the date on which the employee left the service of the employer, in terms of section 190 (1) (a) and (b). The importance of adhering strictly to the compensatory formula set out in section 194 (1) is that both the date of dismissal and the date when the matter is finally arbitrated or adjudicated must be considered by the Labour Court or an arbitrator. Any failure to do so will have the effect that an employer is penalised to recompense an employee for the period beyond the date when he or she receives a proper hearing in the Labour Court or on arbitration. (136)

Pretorius AJ correctly ruled in *Northam v Unet Internet Africa (Pty) Ltd & others* (137) that:

> "to determine the date of dismissal as defined under the LRA requires a consideration of the facts and circumstances surrounding the dismissal in order to determine the precise date upon which the contract of employment is terminated. Of course, consideration also has to be given to the issue, if relevant, as to when the employee left his employment. Only after due consideration is given to the facts can the relevant provisions of the LRA be properly applied to those facts."

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136. *Johnson & Johnson (Pty) Ltd v CWIU* (1998) 20 ILJ 89 (LC) at 100E-F

137. (1998) 5 BLLR 492 (LC) at 496 D-E

G. CONCLUSION

The new dispensation introduced by the 1995 Labour Relations Act indeed offers both employees and employers alike new rights and reciprocal obligations in the quest for stable, yet fair, labour practices. When the Labour Court or an arbitrator considers what remedy to apply to an unfair dismissal, it must be an evaluation of fairness, which requires that the situation be looked at from both the employer and the employee's perspective. Since fairness is an elastic and organic concept, it cannot be defined with exact precision. As such the Labour Court or an arbitrator has to take account of societal norms, values and realities in a multi-dimensional manner.

(a) REINSTATEMENT OR RE-EMPLOYMENT

That reinstatement is the most expedient way to remedy a substantively unfair dismissal has been recognised by the legislature in enacting section 193 (1) (a) of the Act. This section clearly gives the Labour Court or an arbitrator the power to select as the date for reinstatement any date not earlier than the date of dismissal. Section 193 thus clearly confers a true discretion, to be exercised judicially, on the Labour Court or an arbitrator. In terms of section 193 (2) (a) no order of reinstatement or re-employment may however be made if the unfairly dismissed employee elects not to be reinstated or re-employed. The nature of an order for reinstatement is, therefore, that it can only occur by consensus, because it not only depends upon the wish of an unfairly dismissed employee to be reinstated, but also

on whether a continued employment relationship would be intolerable given the circumstances surrounding the dismissal, as well as on the reasonable practicability of the employer to comply with such an order.

The assessment of whether a continued employment relationship is intolerable for purposes of determining the appropriateness of reinstatement or re-employment is largely dependent upon the conduct of the employer. It is normally the employer that will argue that, because of the conduct of the employee, the prospects of continuing with the employment relationship is either slim or irretrievably broken down. Section 193, therefore, require the Labour Court or an arbitrator to assess all the circumstances surrounding the dismissal.

The enquiry would include, amongst other things, the nature of the relationship between the employer and employee, the impact of the misconduct on the workforce as a whole, the nature of the work performed by the employee and the nature and size of the employer's business. What the Labour Court or an arbitrator ultimately has to determine is whether the conduct of the employee had destroyed or seriously damaged the employment relationship, to the extent that it would be intolerable to continue with it.

The Labour Court or an arbitrator, with reference to what is capable of being done, must consider the question of whether an order or award of reinstatement or re-employment is reasonably practicable. The enquiry about what is practicable should therefore not be equated with what is possible, reasonable, fair or equitable. Mere inexpediency should therefore be no bar to an order of reinstatement or re-

employment. Since the enquiry into the practicability of an order of reinstatement or re-employment is a factual one, each case has to be considered on its own merits which involves a moral or value judgement taking into account all the circumstances. An arbitrator or the Labour Court must therefore adopt a broad common-sense approach to what might qualify as reasonably practicable.

Once the employer's offer of reinstatement or re-employment is considered reasonable, the Labour Court or arbitrator must then proceed to consider the reasons why the employee refused or rejected the employer's offer. Factors that can be considered may relate to the terms of the offer or the idea of being re-employed by the employer in the light of the circumstances surrounding the dismissal. As a rule of thumb, applicants will not be expected to accept re-employment if it involves significant changes in the terms of their employment. However, where the job is virtually the same, the Labour Court or arbitrator can consider the timing of the offer and the clarity thereof. An unfairly dismissed employee might therefore not be unreasonable in rejecting an offer that is vague or unclear as to its terms or made in bad faith.

Although the Act does not impose any onus on the unfairly dismissed employee to accept an offer of reinstatement, the conduct of an unfairly dismissed employee is relevant in the enquiry whether the offer of reinstatement is reasonable or not. The employer bears the onus to prove that the unfairly dismissed employee was unreasonable to reject an offer of reinstatement or re-employment.

That can be done by proving that the unfairly dismissed employee acted

unreasonably by rejecting a genuine and unconditional offer of reinstatement or re-employment in its quest to redress the wrong or unfairness visited upon the employee. Not only must the employer prove that the unfairly dismissed employee had no good reason to reject an offer of reinstatement or re-employment, but also that if the unfairly dismissed employee stood to gain as much as he or she stands to gain from a compensatory order or award. Not to be mindful of this aspect would be to ignore the interests of both parties and indeed industrial justice.

The effect of a reinstatement order therefore implies a complete continuity of the employment relationship notwithstanding the unfair attempt by the employer to terminate it. No statutory provision, however, exists which obliges the employer to reinstate the successful applicant into his or her previous position under the same or similar conditions in the sense that the successful applicant should not suffer any prejudice in that regard. Similarly an order for re-employment made either against the employer, its successor in title or an associated employer, requires the ex-employee to be employed on any terms either in the work that was done prior to dismissal or in other reasonably suitable work.

In determining whether reinstatement or re-employment is impracticable at the subsequent hearing, the Labour Court or the arbitrator is not restricted to considering the events which have taken place since the order was made, but must consider all the relevant facts both before and after the date of the order. An employer can therefore raise the question of impracticability twice, namely both at the time the order is made and at the enforcement stage.

Employers are thus under no duty to create a special job for the unfairly dismissed employee. Replacement employees will be entitled to retain their employment provided that a situation of redundancy does not arise which will grant the employer the opportunity to dismiss them in order to enable the employer to re-employ or reinstate the unfairly dismissed applicant. The Labour Court or arbitrator may therefore order re-employment even where the employer claims that there is no vacancy, or where the employee was originally dismissed for redundancy. The mere *ipse dixit* of the employer that reinstatement or re-employment is impracticable does not qualify as a sufficient reason why an order or award of re-employment or reinstatement can not be complied with and evidence to that effect has to be led.

A further relevant factor to be considered against an order or award of re-employment or reinstatement, would be where an unfairly dismissed employee secured permanent new employment. An order is also unlikely where there has been fundamental loss of trust between the parties. The employer must, however, adduce evidence to the effect that a continued employment relationship has become intolerable. The mere fact that an unfairly dismissed employee was guilty of misconduct does not necessarily imply that a continued employment relationship is no longer tolerable. Similarly, it cannot be said that an employment relationship has become intolerable or reasonably impracticable simply because a period of time has elapsed since the date of dismissal and when the order of reinstatement or re-employment has been made. Everything will depend on the merits and circumstances of each particular matter.

(b) REINSTATEMENT AND COMPENSATION ORDERS

Given the wide discretion that the Labour Court or an arbitrator enjoys under section 193 and 194 of the Act, the weight of judicial and academic commentary subscribes to the view that both reinstatement and compensation can be awarded. The language employed by the legislature in section 194, read with section 193, of the Act does not lend itself to the conclusion that an award of reinstatement and compensation is inherently contradictory.

Since the Labour Court can make any appropriate order under section 158(1) (a), read with sections 193 and 194, no other provision of the Act suggests that the Labour Court is not empowered to award both reinstatement and compensation. It is submitted that the fact that the Labour Court is not only a court of law, but also a court of equity, further strengthens the inference that the legislature did not intent to restrict the Labour Court's or an arbitrator's discretion to award only reinstatement or compensation, but not both. Such a restriction in the exercise of the judicial discretion would unjustifiably restrict the Labour Court or an arbitrator in the exercise of its statutory duty to promote the effective resolution of labour disputes and achieve employment equity. Section 158 (1) (a) (v) and (vi), read with section 138 (9) (b), of the Act clearly empowers both the Labour Court and an arbitrator to award either reinstatement or re-employment coupled with compensation in the exercise of its judicial discretion to give effect to the provisions and primary objects of the Act.

The Labour Court or an arbitrator can therefore by necessary implication consider

any terms on which an order or award of re-instatement or re-employment as contemplated by section 193 (1) (a) and (b) of the Act is to be made. As such the Labour Court or an arbitrator is competent to impose any penalty on the unfairly dismissed employee, other than conditional reinstatement or re-employment. This would also accord with the primary object of the Act to effectively resolve labour disputes.

(c) COMPENSATION

i. COMPENSATION UNDER SECTION 194 (1)

Where an arbitrator or the Labour Court has found that a dismissal is procedurally unfair, compensation can only be granted in terms of section 194 (1) of the Act, which set an absolute formula. It is, therefore, simply a matter of calculation that does not contain any discretionary element.

Once the decision is made to award compensation, that compensation must be equal to the employee's remuneration between the date of dismissal and the date when the matter is finally arbitrated or adjudicated, as the case may be. The formula in section 194 (1) introduces certainty and uniformity into a determination of compensation, save that a lesser amount may be payable where the unfairly dismissed employee unreasonably delayed the institution or prosecution of his or her unfair dismissal dispute.

Given the rigidity of the compensatory order or award under section 194 (1), it is

irrelevant whether the unfairly dismissed employee has suffer no patrimonial loss, that the employer has acted in a bona-fide manner or that the actual or patrimonial loss has not been mitigated.

The only discretion, which is to be exercised judicially in terms of section 194 (1), that an arbitrator or the Labour Court enjoys, is whether or not to order or award compensation. Details on which the Labour Court or an arbitrator premised its finding not to order or award compensation should fully be set out. In the absence thereof, it would be impossible to ascertain the reasons considered by a judicial officer or an arbitrator.

When it is considered whether or not to award or order compensation, the Labour Court or an arbitrator can consider the length of service of the dismissed employee with the employer, steps taken to redress the unfairness visited upon the dismissed employee, and the conduct of the dismissed employee to frustrate or reject the employer's endeavours to correct the wrong inflicted. It is, however, submitted that the age, status, seniority, potential and employability of an unfairly dismissed employee are irrelevant considerations. Should these factors have been considered as relevant it would effectively mean that the employer who committed the wrong is allowed to benefit from these external factors which might have lessened the unfairness in some way or another.

Section 194 (1) thus punishes an employer by requiring it to pay compensation to an employee for breaching the employee's right to a fair hearing or procedure before dismissal. The importance of the rigidity of the formula under section 194

(1) clearly underscores the importance the legislature has attached to procedural fairness, which does not necessarily imply that an employee's procedural rights should be subordinated to an employer's right to dismiss for a valid reason.

It is, however, not competent for the Labour Court or an arbitrator to rely on either section 158 (1) (a) (v) or section 138 (9) (b) of the Act, to justify that severance pay or pension or provident fund payments should be considered when compensation for an unfair dismissal is determined. It is submitted that section 195 of the Act, read with section 41 (5) of the Basic Conditions of Employment Act of 1997 clearly restricts the Labour Court or an arbitrator in the exercise of its judicial discretion in this regard. The legislature's intention is thus clear and unambiguous that all statutorily entitlements that falls due to an unfairly dismissed employee should be in addition to and not a substitute for compensation under section 194 of the Act.

ii. COMPENSATION UNDER SECTION 194 (2) AND (3)

In the exercise of its discretion to award compensation under section 194 (2) and (3) of the Act, the Labour Court or an arbitrator must award compensation that is just and equitable in all the circumstances. Societal values and workplace realities must, therefore, be considered before the Labour Court or an arbitrator can arrive at a decision as to what may be just and equitable in all the circumstances. The compensation awarded must therefore be morally right or appropriate. The determination of a compensatory award under section 194 (2), therefore, requires

an arbitrator or the Labour Court to balance the various interests between the employer and the dismissed employee that might be affected by the remedy. That clearly implies that the award must have the quality of being fair and impartial to both the employer and the employee.

These interests require a consideration that the balancing process must at least be guided by the objective to address the wrong occasioned by the substantive unfairness, to deter future encroachments as well as to be fair to all those who might be affected by the relief. The appropriateness of the remedy of compensation in this context, therefore, clearly imports the elements of justice and fairness in the determination of what constitutes just and equitable compensation in all the circumstances. It is still open for the Labour Court or an arbitrator to consider compensation for a substantively unfair dismissal that is to be added to compensation awarded in the event of the dismissal being proved procedurally unfair.

Once the decision to award compensation has been made, it must be compensation not less than the amount equal to the remuneration that the dismissed employee would have been paid between the date of dismissal and the last day of arbitration or adjudication. The formula employed in section 194 (1) is, therefore, equally applicable to the provisions of section 194 (2) of the Act, which affords an unfairly dismissed employee a right to compensation equivalent to back-pay when a dismissal is procedurally and/or substantively unfair.

It thus follows that the Labour Court or an arbitrator is clothed with a judicial

discretion not to award any compensation at all for a substantively unfair dismissal. In this regard it is submitted that the judicial comment expressed by the Labour Appeal Court in Johnson and Johnson v CWIU concerning section 194 (1) equally applies to section 194 (2) and (3) regarding the exercise of the Labour Court's or an arbitrator's discretion whether or not to award compensation.

The unfairly dismissed employee must however prove that he or she has suffered any patrimonial or non-patrimonial loss. Relevant factors the Labour Court or an arbitrator can consider may be the dismissed employee's length of service with the employer and the extent of the unfairness. Whether the employer took steps to substantially redress the unfairness it has caused and the conduct of the employee in either refusing or frustrating attempts to redress the wrong, will also be relevant when the Labour Court or an arbitrator decides not to award compensation.

Compensation must, therefore, not be dependent upon the identity and mood of the trier of fact. Although certainty has been achieved by enacting section 194 of the Act, the important policy consideration should always be to be fair to both parties to an unfair dismissal dispute.

Compensation under section 194 (2) is, however, substantially different to that of section 194 (3). The Labour Court has exclusive jurisdiction, in terms of section 191 (5) (b), to award compensation for automatically unfair dismissals, as enumerated under section 187 of the Act. To succeed with an award of compensation, the unfairly dismissed employee must particularise the claim for any loss suffered. The financial losses will generally consists of both past and future

losses, not only for loss of salary but can include the diminution of pension contributions or the loss of other assets due to the dismissed employee's inability to pay debts as a result of the unfair dismissal. The manner of dismissal will determine whether the Labour Court will also award a solatium for any losses suffered for shock in losing his or her employment, loss of self-esteem and confidence, as well as for being treated shabbily and where the reason to dismiss was irrational or insensitive.

Although the maximum compensation that can be awarded is capped at twenty-four months' remuneration, the Labour Court has a wide discretion to award compensation that is considered just and equitable in all the circumstances. That might include an additional amount of compensation being awarded as a solatium for the substantively unfair dismissal. What the Labour Court has to weigh up is what would be fair and equitable to both the employer and the employee with particular emphasis is being placed on the respective conduct of the parties. Since no minimum compensation is prescribed, it is submitted that although loss could be proved the Labour Court still has the discretion not to award any compensation. The Labour Court must, therefore, make a moral or value judgement to arrive at its conclusion of what will be fair in all the circumstances.

However, it is inevitable that estimates and conjecture will be used when assessing compensation that is just and equitable in all the circumstances. All the chances and changes of the future must be assessed, not only with sympathy but also with fairness to the interests of all concerned and at all times. The compensation must, therefore, be proportional to the loss occasioned by the automatically unfair

dismissal by comparing what was is and what would or should have been between the actual past, present and future and the hypothetical past, present and future.

It is submitted that what is thus required of the dismissed employee is to prove that all reasonable steps were taken to mitigate the loss caused by the employer's unfair conduct. This implies that the unfairly dismissed employee cannot recover compensation or damages for losses that could have been prevented by taking reasonable steps. Under section 194 (2) and (3) the employer will thus be liable for actual or non-patrimonial loss or damages suffered by the unfairly dismissed employee.

Sections 193 and 194 of the Act have, therefore, introduced not only certainty in the computation of compensation for unfair dismissals, but also directed the mind of employers to adhere to procedures in the workplace which ensures fair and efficient decision-making. To follow proper procedural norms, reduces industrial conflict and provides opportunities for rational decision making. Observance of process is fundamental to the question of whether its decision to do so was fair and cannot otherwise be divorced from the process by which it was arrived at. It is only through fair process that fair decisions are generally reached. It is for that reason that compensation should be full, because only full compensation is the only deterrence against employers committing procedural impropriety against employees.

Neither employer nor employee benefits form a static employment concept where their respective rights nor obligations are cast in stone at the commencement of

the employment relationship. What the employer bargains for is the flexibility to make decisions in a dynamic work environment in order to meet the needs of the labour process. What the employee exacts in return is not only a wage, but also a continuing obligation of fairness towards the employee by the employer when decisions are made which affects the employee in his work. The nature of fairness is therefore that it has both a formal procedural as well as a substantive aspect to it. The former manifests itself in the requirements of consultation on decisions that affect employees in their working relationship, whilst the latter seeks to ensure that the formal process is not a sham and produces a fair result.

What is required from arbitrators and the Labour Courts are that a purposive approach should be applied when interpreting the Act. By following a purposive approach to the interpretation of sections 193 and 194 of the Act, the objective concept of purpose is adopted by the Labour Court or an arbitrator who would ensure that where the legislative purpose is manifest, the legislative goals would transcend a particular meaning or application.

What the Labour Court or an arbitrator has to consider when determining whether or not an employer had made any redress for the procedural unfairness visited upon the dismissed employee, is whether the redress is substantial. In this regard any arbitrary amount of money which is offered to an employee to remedy a procedural wrong on a with prejudice basis, while it may be a relevant factor will not constitute substantial redress as required by section 194 of the Act. To hold otherwise would result in employers flouting the procedural requirements proposed by the law and thereafter at arbitrary dates offering compensation to

make good the procedural wrong.

The remedial powers that the Labour Court or an arbitrator enjoys under the Labour Relations Act are substantive and being guided by the criteria of fairness it can act as a catalyst for the effective resolution of labour disputes and enhance industrial peace in the workplace.

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