Senior Managerial Employees: Their Right to Bargain Collectively and their Right not to be Unfairly Dismissed

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Abbreviations

AP	Arbeitsrechtliche Praxis - Labour Law Practice, official collection of judgements of the German Federal Labour Court
BAG	Bundesarbeitsgericht - German Federal Labour Court
BB	Betriebs-Berater - German Law Journal
BCEA	Basic Conditions of Employment Act
BetrVG	Betriebsverfassungsgesetz - German Work's Constitution Act
BGH	Bundesgerichtshof - German Federal Court of Justice
BLLR	Butterworths Labour Law Reports
CCMA	Commission for Conciliation Mediation and Arbitration
Code	The Code of Good Practice
Conn.Gen.Stats.	General Statutes of Connecticut
DB	Der Betrieb - German Law Journal
eg.	for example
ELJ	Employment Law Journal
Fla.Stats.	Florida Statutes
fn.	footnote
HGB	Handelsgesetzbuch - German Commercial Code
IC	Industrial Court
ie.	that is
ILJ	Industrial Law Journal
ILO	International Labour Organisation
irnet	Industrial Relations Network
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
Nb	Nota bene
NLRA	National Labour Relations Act
NLRB	National Labour Relations Board
NJW	Neue Juristische Wochenschrift - German Law Journal
NUMSA	National Union of Metal Workers of South Africa
NZA	Neue Zeitschrift für Arbeitsrecht - German Law Journal
obo	on behalf of
para	Paragraph
RSA	Republic of South Africa
s/SS/§	section/sections/sections
SACCAWU	South African Commercial, Catering and Allied Workers Union
SAJLR	South African Journal of Labour Relations
Sasbo	South African Society of Bank Officials
SCA	Supreme Court of Appeal
SM	Senior Member
TVG	Tarifvertragsgesetz - German Collective Bargaining Act
T & GWU	Transport and General Workers Union
TWU	Technical Workers Union
Vol.	Volume

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Abstract

This paper addresses a special class of employees in the South African labour law. Senior managerial employees in South African labour law as well as the international jurisprudence have become a matter of controversy. The focal area of this controversy is concerned with their membership in trade unions and to have their wages and working conditions negotiated by these trade unions. The conflicting interests between the employer and the union are then brought to surface. Drawing from the content of current case law, legislation and international jurisprudence, this paper defines senior managerial employees and discusses some of the concerns and issues of their positions within the collective bargaining unit. In this regard, this paper concludes with a standing view point which was deducted from an analytic analysis based on a case study on the positions of Directors and Deputy-Directors of Prosecutions in South Africa. Senior managerial employees are not only treated differently in collective bargaining, but also in the area of dismissal law. Their rights on this aspect are also looked at. This paper concludes with some final remarks.

Introduction

"The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two opposing sides, each of which is organised in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organise themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Some way in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him...in the tug of these two competing forces, management must be assigned to the side of the employer."[1]

There are certain jobs based on job content, conditions of service and levels of responsibility which constitute managerial jobs. There is a distinct difference between what may be termed "ordinary employees" and employees who constitute senior managerial employees. This has been extensively debated in South African labour law.[2] The difference between an "ordinary employee" and a senior managerial employee lies not only in their level of responsibility but also on the duties bestowed upon them.

[1] *Sasbo v Standard Bank (1994) 15 ILJ 332 (IC)* 343B-D, *citing District of Barnaby* (1974) 1 Can LRBR 1(BC).

[2] See for eg, *South African Society of Bank Officials (Sasbo) v Standard Bank of South Africa* (1994) 15 ILJ 332(IC), *South African Society of Bank Officials (Sasbo) v Standard Bank* (1998) 2 BLLR 208(A),*TWU and Transnet Ltd* (1998) 7 ARB 4.5.2., *Airchefs and SACCAWU* (1998) ARB 4.5.3, *North West Star (Pty) Limited and T&GWU* (1995) ARB 4.1.1, and *ZSAS v The Steel Engineering Company Ltd* (pre-1995 LRA judgement-http//www.irnet.co.za).

The Labour Relations Act[3] acknowledges and makes provision for the creation of two parties to the collective bargaining process at bargaining level: the employer and the union.[4] It is basic principle in labour law, that no one person may represent the interests of two opposing sides.[5] Therefore, the distinction between "ordinary employees" and senior managerial employees is important as it gives rise to a "vertical cut-off" point in the issue of whom in the employment hierarchy can be in the bargaining unit.[6] It may be argued that unions have the right to represent all employees in terms of section 23 of the South African Constitution.[7] On the other hand, it may be argued that management, may not form part of the unit as this would result in a conflict of interest. Prima facie, the Labour Relations Act implies that all employees may join and participate in trade union activities. However, this right may be limited in terms of section 36 of the Constitution. The case law[8] has dictated that management may not join a trade union, but should rather align itself to the employer's side. This is also in line with Canadian and American case law.[9] The British Columbia[10] legislator following the path of the labour legislation in North America has decided that in the tug of competing forces, management must be assigned to the side of the employer. The rationale for the decision of the British Columbia legislator is identified by Pienaar SM as obvious as far as the employer is concerned. In this regard, Pienaar SM states that the employer wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and that the terms of collective agreements are adhered to.[11] Their decisions are said to have important effects on the working economic lives of the employees, and the employer does not want management's identification with its interest diluted by participation in the activities in the union.[12]

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[3] Act 66 of 1995 (LRA).
[4] Grogan: *Collective Labour Law* (1993) 6.
[5] *North West Star(Pty) Limited and T&GWU* (1995) ARB 4.1.1 at *13.*

[6] *Sasbo v Standard Bank* (1994) 15 ILJ 332 (IC) 343G.

[7] Act 108 of 1996 (Constitution).

[8] Opcit at 2.

[9] See *Sasbo v Standard Bank* (1998)2 BLLR 208 (A) 212A-F.

[10] *Sasbo v Standard Bank Ltd (*1994) 15 ILJ 332 (IC) 343E-F, citing *District of Barnaby* (1974) 1 Can LRBR 1(BC).
[11] *Sasbo v Standard Bank Ltd* (1994) 15 ILJ 332 (IC) 343E-F.

However, on the flip side of the coin, the right of an employee to join a trade union of his/her choice may be regarded as an intergral part of the right to freedom of association. In general, senior managerial employees are not excluded from the definition of employee in the LRA. Freedom of association in the South African Labour arena is gauranteed by section 4 of the LRA. Section 4(1) provides that every employee has the right to participate in the forming of a trade union or federation of trade unions and to join a trade union.[13] This also implies that trade unions have the right to negotiate for better wages and working conditions of senior employees.

But, in this regard, many conflicting issues come to fore. Senior managerial employees play an important role within the employer's enterprise. They have access to confidential information of the employer which is often important for the employer's bargaining strategy. The union and its right to represent all employees which includes the right to have information disclosed within the bargaining unit, cannot be overlooked. In all of this, senior management find themselves in compromising positions within the collective bargaining unit. In my view, they must align themselves to one side. The major part of this paper will therefore explore the positions of senior managerial employees in the collective bargaining unit. In this regard, the position of Directors and Deputy-Directors of Prosecutions will be examined as a case study.

Whilst managerial employees find themselves in a lucrative position within the collective bargaining unit, they are also treated differently in the arena of unfair dismissal law. Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed. This right prima facie also applies to senior managerial employees. However, according to Le Roux and Van Niekerk, senior managerial employees have been dismissed differently than "ordinary employees," and their dismissals may be justified in circumstances where the dismissal of an "ordinary employee" would not be justified.[14] From this point of view, this paper will examine their rights in unfair dismissal law and will see whether they enjoy the same protection as "ordinary employees" do.

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[12] *Sasbo v Standard Bank Ltd* (1994) 15 ILJ 332 (IC) 343E-F.
[13] Chapter 2 of the LRA.

Chapter One: Managerial employees and their right to collective bargaining

Case study: Directors and Deputy Directors of Public Prosecutions (the public sector).

1. Introduction

The rights underlying collective labour legislation may be seen as based on the basic political freedom of association of individuals which can be compared to the freedoms of speech, assembly and religion found in most Constitutions of the world today. At the base of this freedom of association is the right of employees to extend their personal freedom and improve their positions by joining trade unions and deal "collectively" through representatives with their employers.

In South Africa, the right to form and join trade unions and to participate in the activities and programmes of those trade unions is enshrined in section 23[15] of the final Constitution.[16] The rights in section 23 provide a framework of values within which the Act must be interpreted. These values promoted under section 23 are industrial fairness, the right to strike,[17] collective bargaining, freedom of association and the right to organise.[18]

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[14] Le Roux and Van Niekerk: *The South African Law of Unfair Dismissal* (1994) 75-79.

[15] Section 23 and its complete definition are discussed in chapter two.

[16] On May 1996, the Consitutional Assembly adopted a final Constitution. Chapter two of the Constitution contains a Bill of Rights which enshrines most of the fundamental human rights and freedoms. These rights may be identified as political, socio-economic, cultural and civil rights. The socio-economic rights contain what may termed as the 'labour relations rights.' This is set out in section 23 of the Constitution. This Constitutional protection shields trade union and employer organisations from legislative and executive interference in their affairs, and in turn, the victimisation and interference by either party is prohibited.

[17] The employer's recourse to lock-out was guaranteed in the interim Constitution of South Africa but had been abandoned in the final Constitution of South Africa. This however needs no further clarfication or argument as it has no relevance to this dissertation.

[18] See Du Toit *et al*: *The Labour Relations Act of 1995* (1998) 49.

A concern both internationally and nationally is that labour relations do not always enjoy the same recognition in the public service as in the private sector. The International Labour Organisation (ILO) recognised that an effective public service is a prerequisite for economic and social development. In 1978, the ILO adopted specific labour standards for the public service.[19] One of the areas addressed by the ILO, was the freedom of association standards and principles relevant to the public service. In this regard, the ILO recognised the rights of public service workers to include Freedom of Association, and the Right to Organise and Bargain collectively.[20]

In South Africa, the passing of the new Labour Relations Act 66 of 1995 together with the new Constitution has seen the inclusion of public sector employees in the mainstream of collective bargaining. Public sector employees now find themselves in the position to bargain collectively in the same way as private sector employees, gaining victory after decades of struggle for higher wages and better working conditions.

The main provisions of the LRA of 1995 can therefore be seen as the creation of one Act which covers both the public and private sector.[21] The LRA is an important step to improving collective bargaining both in the private and public sector. Collective bargaining has also gained acceptance in the public sector and it is envisaged that it will be a well-established feature of public resources management in the future.[22] Whilst South African legislation does not have an express provision excluding certain categories of employees from the right to bargain collectively, bargaining has been said to be less appropriate in respect of employees vested with discretionary powers, whose remuneration are determined by results rather than obedience to

[19] The Labour Relations Public Service Convention (No.151) and Recommendation (No.159).

[20] See: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), the Right to Organise and Collective Bargaining Convention, 1949 (No.98).

[21] The Act does not however apply to those in the Defence force, the National Intelligence Agency and the Secret Service.

[22] Shear and Sirkot 1996:11 '*White Paper on the Transformation of the Public Service*' (1995), 70-71.

instructions, where circumstances are highly individualised and where these employees are faced with conflicts between the interests of the employer and the union.[23]

The public sector like the private sector has employees, who fall higher up in hierarchy *(e.g. Directors and Deputy Directors of Prosecutions)*. These employees (*senior managerial employees)* may find themselves torn between the lines of management and the union within the collective bargaining unit.

The issue of managerial employees has been an ongoing debate since the 1956 Labour Relations Act.[24] The 1956 Act did not expressly impose a duty on employers to engage in collective bargaining, and did not exclude managerial employees from the definition of "employee." Although employees' right to collective bargaining had been acknowledged as fundamental to industrial relations, it has come under scrutiny where management was concerned. The right whilst fundamental is not absolute. The *Standard Bank* case recognised the fact that if an employer had to bargain with all its employees irrespective of their status or rank, collective bargaining would in the case of companies not be between management and workers, but among all employees on the one hand, and stockholders on the other hand.[25]

The position under the 1956 Labour Relations Act[26] was whether an employer was obliged to bargain with particular employees depending on the circumstances, the need for efficient management and the interests of the employer and non-union members. Therefore: "where the bargaining unit comprises of employees at the lower end of the employer's organisational hierarchy, a refusal by the employer would constitute an unfair labour practice. But, where the bargaining unit consists of employees higher up in hierarchy, the position becomes less clear."[27]

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[23] *Sasbo v Standard Bank of South Africa* (1998) 2 BLLR 208 (A) 209C.

[24] Act 28 of 1956.

[25] In *Sasbo v Standard Bank* (1998) 2 BLLR 208 (A) 212D-E: Judge Scott refers to Judge Douglas's finding in the American case of *Packhard Motor Car Co v NLRB* 330 US 485 (1987) 493.

[26] Act 28 of 1956.

[27] *Sasbo v Standard Bank* (1998) 2 BLLR 208 (A) 209B-C.

Prima facie these rights (ie. to belong to a trade union and collective bargaining) extends to all employees, but the issue as to whether these rights extend to senior managerial employees, both in the public and private sector have become questionable.

2. Issue to be decided

Should senior management join a union, negotiate on behalf of employees, have their wages and working conditions be negotiated by a trade union or not, in negotiations "against" the employer within the collective bargaining unit?

In establishing whether senior managerial employees should form part of the bargaining unit, gives rise to a two-fold enquiry: Do they qualify as senior management, and if so, how are their rights in terms of section 23 affected?

Our case study will focus on the position of Directors and Deputy-Directors of Prosecutions, and whether they should participate in trade union activities. In this context, it is then to be established whether management refers to Directors and Deputy Directors of Prosecutions. This gives rise to the two-fold enquiry above: Do Directors and Deputy- Directors qualify as management, and if so, how are their rights in terms of section 23 of the Constitution[28] affected?

3. Enquiry one: Do Directors/Deputy-Directors of Prosecutions qualify as management?

Pienaar SM in the case of Sas*bo v Standard Bank*[29] before passing judgement, stipulated that it is necessary to attempt to define the words "manager," "managerial" and "management." Therefore, the first step in determining whether a senior managerial employee falls within the bargaining unit, is to decide whether he/she does in fact constitute management. The reasons for excluding top managers may be obvious but the question of where one draws the line is by no means easy to determine. In a company, there are managers that are classified as junior managers and then there are those who are classified as senior managers. The criteria for

[28] The Consititution of the Republic of South Africa, Act 108 of 1996.
[29] (1994) 15 ILJ 332 (IC) 339C.

distinguishing between these are not always very clear. It is important to classify a senior managerial employee as there are different levels of hierarchy within which they fall, and not all of them will fall into management as such.

3.1. Method of Determination

In determining whether Directors and Deputy-Directors form part of, or qualify as management, the following factors will be considered: (i) the definition of senior managerial/managerial employee, (ii) a summary of the duties of senior managerial employees, and (iii) the powers invested in Directors and Deputy-Directors of Prosecutions in terms of the relevant legislation which includes: the Constitution, the National Prosecuting Act,[30] the Public Service Act[31] and relevant policy documents.

3.1.1. Defining a senior managerial employee

In labour statutes which focus exclusively on the employment relationship the employee and employer are invariably defined. The terms that the law will imply into the employment relationship are affected by it and similarly are the rights and obligations imposed on the relationship by legislation. The rights and obligations are not only found in terms of the contracts, by collective agreement, but can also be found in the statute.[32] Whilst "employee" is defined, there is no formal definition for senior managerial employee in the Labour Relations Act,[33] except for the one provided for in the section dealing with workplace forums.[34]

A variety of factors must be considered in order to categorise a senior managerial employee. These employees are classified differently in terms of legislation, case law and international jurisprudence[35] where their various functions are spelt out. The legislation, case law, and international jurisprudence not only provide guidance in

[30] Act 32 of 1998.

[31] Act 103 of 1994.

[32] For example, section 1 of the Basic Conditions of Employment Act 75 of 1997, provides that a senior manager has the authority to hire, dismiss and represent the employer internally and externally.

[33] Act 66 of 1995.

[34] See section 78 of the LRA as discussed below.

distinguishing "ordinary employees" from senior managerial employees, but also draw the line where the position between junior and senior managers is not clear. Apart from the statute and case law other factors would include the nature and the size of the organisation, the manner in which it is organised, a person's position in structure, the extent of the manager/manageress' authority over other employees, and the degree and extent of independent decision-making authority.[36]

3.1.1.1. Legislation

It is crucial to identify the employer and the employee in order to establish (a) who is entitled to dismiss and (b) who is entitled to seek a remedy.[37]

(i) *The Labour Relations Act* (LRA)[38]

Section 1 of the LRA defines employee as:

"any person, excluding an independent contractor, who works for another person or for the State and who received, or is entitled to receive, any remuneration and any other person who in any other manner assists in carrying on or conducting the business of the employer."

The above definition of employee in the LRA is very wide and draws no distinction between an "ordinary employee" and a senior managerial employee, as we will see the foreign jurisdictions do. This definition prima facie implies that all employees (financial employees, senior managerial employees, shopstewards) are equally employees and entitled to the remedies and provisions of section 23 of the Constitution, and therefore have the right to join and participate in trade union activities. This right is accorded to all employees, and managerial employees are not excluded from the definition of "employee" in the Act. We will however, later see that this right may be limited in terms of section 36 of the Constitution.

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[35] See also the section on comparative law below.

[36] *Sasbo v Standard Bank* (1994) 15 ILJ 332(IC) 340D; See also Le Roux and Van Niekerk: *The South African Law of Unfair Dismissal* (1994) 75.

[37] Professor du Toit: *LLM (Lecture Notes)* U.W.C 1999.

[38] Act 66 of 1995.

The Act seems to be silent on the issue of bargaining units. It seems that all employees may join and participate in trade union activities. Where trade unions have the authority to represent the majority of employees, they may seek the imposition of an agency shop agreement, and where there is a two-thirds vote in favour, they may impose closed-shop agreements, with the presumption of representing and incorporating all employees, including senior management. Presumably the implication is that trade unions will have the right to bargain the wages and conditions of service of senior management.

Interestingly, the LRA seems to limit the membership of workplace forums by excluding senior managerial employees from representation in workplace forums. By doing so, it mirrors the provisions of the German Work's Constitution Act of 1972, from which the relevant wording has been borrowed .

Chapter V, section 78 (a) of the LRA, defines a senior managerial employee in the following manner: "employee means any person who is employed in a workplace, except senior managerial employees, whose contract of employment or status confers the authority to do the following in the workplace-

(i).....

[sub-para (i) deleted by s23 of the Act 42 of 1996]*

(ii) represent the employer in dealings with the workplace forum, or

(iii) determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace."

This section deals specifically with workplace forums. However, it does provide guidance in determining the status and functions of a senior manager/manageress. From this provision, it is clear that a senior manager/manageress is one who determines policy and takes decions on behalf of the employer.

* Notably, this section made provision for the authority of a senior managerial employee to dismiss and hire an employee, but has now been deleted by the Labour Relations Amendment Act 42 of 1996. The effect of this amendment (deleting the criterion of "hiring and firing") it seems, is to narrow down the definition of senior

managerial employee by excluding a function which, in practice, may also be performed by middle or sometimes junior management. However, the Basic Conditions of Employment Act (BCEA)[39] as well as the international jurisprudence consider the function of a senior managerial employee to hire and dismiss employees, an important one. In my opinion, this is definitely an "inherent" function of a senior managerial employee, who of course has junior and middle management under him/her, who is then responsible for hiring and dismissing the junior and middle management under him/her. Whilst there is inconsistency with regard to the definition of senior managerial employee in the labour legislation, this paper draws on three sources[40] in the determination of the status and characteristic functions of a senior managerial employee.

(ii) *The Basic Conditions of Employment Act (BCEA)*

Section 1 of the BCEA defines senior managerial employee as:

"an employee who has the authority to hire, discipline, dismiss employees and represent the employer internally and externally."

The above BCEA definition clearly spells out five functions of a senior manager/manageress which does not need an extensive interpretation, and is therefore, somewhat clear and concise. It eliminates the process of determining the distinction between managers who fall in different levels of hierarchy.

3.1.1.2. The case law

The case law seem to point to the following key functions of managerial employees, parts of which tie up with the definitions contained in the legislation. The following has been taken from the various case law, indicating the key functions of a senior manager/manageress. Senior managerial employees (1) have the power to retrench,[41]

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[39] Act 75 of 1997.

[40] The legislation, case law and the international jurisprudence.

[41] In the case of *Numsa v Atlantis Diesel Engines (Pty) Ltd* 1994 15 ILJ 1247 (A) 1252F, it was held that: "the duty to consult arises, as a general rule, both in logic and in law, when an employer having forseen the need for it, contemplates retrenchment." From this, it can be inferred that the decision to retrench is management's prerogative.

(2) are employees vested with discretionary powers,[42] (3) are part of the decision making process,[43] and (4) direct the activities which fall under them.[44]

3.1.1.3. International Legislation[45]

Many of the court decisions[46] including the Labour Appeal Court's decision in *Sasbo v Standard Bank*[47] relied on the definitions of managerial employees as founded in the international jurisprudence.

The National Labour Relations Act of the USA defines a managerial employee as: "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.''[48]

Apart from the National Labour Relations Act, there are many other statutes in the USA that make provision for the definition of managerial employee. In terms of the General Statutes of Connecticut[49] a "managerial employee" is defined as: "...(1) any individual in a position in which the principal functions are characterized by not fewer than two of the following, provided for in any position in any unit of the system of higher education, one of such two functions shall be as specified in subparagraph (D) below: (A) Responsibility for direction of a subunit or a facility of a major division of an agency or assignment to an agency's head's staff; (B) development, implementation and evaluation of goals and objectives consistent with

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[42] *Sasbo v Standard Bank* (1998) 2 BLLR 208 (A) 212-213.

[43] *Van Rensburg v Austen Safe Company* (1997) 2 LC 5.1.1.

[44] In *Van Rensburg v Austen Safe Company* (1997) 2 LC 5.1.1, it was held that: "their function is to direct the activities which fall under them and to show initiative in this direction."

[45] See also section on collective bargaining.

[46] Opcit at 2.

[47] (1998) 2 BLLR 208(A).

[48] (61 Stat,152,29 U.S.C. Ch.7 Subsch.1.1.)

[49] Sections 5-270 to 5-280 (Definitions) of the State Employee Collective Bargaining Act-Conn. Gen. Stats., Title5.

agency policy and mission; (C) participation in the formulation of agency policy; (D) a major role in the administration of collective bargaining agreements or major personnel decisions, or both, including staff hiring, firing, evaluation, promotion and training of employees; or (2) Department of correction employees at the level of lieutenant or above."

The term "managerial employee" is defined in the Florida Statutes[50] as: "those employees who perform jobs that are not of routine, clerical or of a ministerial nature and require the exercise of independent judgement in the performance of such jobs, and to whom one or more of the following applies: They formulate or assist in formulating policies which are applicable to bargaining unit employees. They may reasonably be required on behalf of the employer to assist in the preparation for the conduct of collective bargaining negotiations.They have a significant role in personnel administration. They have a significant role in employee relations. They are included in the definition of administrative personnel in Section 228.041 (10) of the Florida Statutes.They have a significant role in the preparation and administration of budgets for any public agency or institution or subdivision thereof..."

In the United States supervisors/managers are excluded from the definition of "employee" in the National Labour Relations Act. The Canadian National Labour Relations Code defines an "employee" as: "any person employed by an employer and includes an independent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations."[51]

In the Labour Relations Code in Britain,[52] "employee" means: "a person employed by an employer, and includes an independent contractor, but does not include a person who, in the board's opinion:

(a) performs the function of a manager or superintendent, or

[50] Sections 447.203 (4)(a) 1-7 of the Public Relations Act-Fla. Stats.

[51] National Labour Relations Code (R.C,c L-1.,s1.2.h.(iii) c).

[52] Labour Relations Code (1996) Chapter 224.

(b) is employed in a confidential capacity in matters relating to labour relations or personnel."

German labour law recognises various classifications of employees to which the law may be applied. Amongst other classifications, there is also a distinction between an "ordinary employee" and a senior managerial employee. An employee is generally defined as a person who works for another person not only for a short time, is not self-determining with regard to the place and time of his work and is subject to the directions of the employer. The main feature of an employee is considered by the German jurisdiction as his/her personal dependence on the employer.[53]

Senior managerial employees are also considered employees according to the German law. Due to their special functions and special interests, however, their interests are often contrary to the interests of "ordinary employees." For this reason some special features are applied by law and jurisdiction to define senior managerial employees. In this context, the term *senior managerial employees* is not used uniformly, but it is restricted and extended by different features in the different acts and judgements.[54]

Generally, a senior managerial employee (leitender Angestellter) is defined as employees who have key positions in the employer's enterprise. They are employees who govern independently and responsible for the business. Senior managerial employees are an essential part of the business or play a special role within an essential area of the business (Tatgruppe). Furthermore, senior managerial employees are employees who perform highly-qualified work for leading, proving, designing, exploring or advertising. For this reason, and for the significance of the business they enjoy a special trust with the employer (Ratgruppe).[55]

[53] See e.g. The judgements of the German Federal Labour Court (Bundesarbeitsgericht [BAG]), 14.02.1974 and 13.01.1983 in: DB 1974, p.1487 and BB 1983, p.1855.
[54] Halbach/Paland/Schewedes & Wlotzke in: *Übersicht über das Arbeitsrecht* (1997) 46.
[55] An interpretation from Halbach/Paland/Schewedes & Wlotzke in: *Übersicht über das Arbeitsrecht* (1997) 46.

The German Work's Constitution Act (Betriebsverfassungsgesetz - BetrVG) defines senior managerial employees in section 5(3) and (4).[56] According to section 5(3) and (4) of the BetrVG a leading employee has the following features:[57] In terms of sections 5(3)(1) and (2) a senior managerial employee is characterised by formal features. In this regard, he/she is entitled to employ and dismiss employees independently and then generally said to have power of attorney or Prokura.[58] If sections 5(3)(1) and (2) are not applicable, section 5(3)(3) is applicable and a senior managerial employee is then characterised by functional features. From this point of view, he/she is said to regulary fulfil duties which are of importance for the existence and the development of the enterprise or business, and in order to fulfil these duties, paricular experience and knowledge is required. The decisions he/she makes must be substantially free from outside influences. If section 5(3)(3) is not applicable, section 5 (4)(1)-(3) BetrVG offers rules of interpretation that tie - according to the German legislator - to formal and quickly ascertainable features or characteristics[59]: In terms of section 5(4)(1) an employee is considered a senior managerial employee if he/she has been determined by a final court's decision to be such. Section 5(4)(2) requires participation at management level, and in this regard, predominantly, senior managerial employees are represented. According to section 5(4)(3) senior managerial employees are those who receive an annual remuneration which is common for senior managerial employees of an enterprise to receive or, if doubts remain, section 5(4)(4), provides that they are employees who receive a regular annual remuneration of more than three times the average amount of the

[56] This section was introduced in 1989. Before 1989, the BetrVG did not have any definition for senior managerial employees. The reason for this, stems from the early seventies of the last century. The coalition partners in the German Federal government, the Social Democratic Party (SPD) and the Liberal Party (FDP), could not find a compromise for the definition of senior managerial employees for the new Works Constitution Act, passed in 1972. The SPD and the trade unions wanted senior managerial employees to be included in the BetrVG, whereas the FDP wanted them to be left out (*See* Hoyningen-Heunen in: *Betriebsverfassungsrecht (*1998) p.40). However, due to the lack of a clear definition of senior managerial employees and because of the pressure of several judgements of the German Federal Labour Court (eg. Bundesarbeitsgericht(BAG) 17.12.1974,AP, No.4 to§5 BetrVG,29.01.1980 in: AP No. 22 to§ 5 BetrVG.) on this issue, led to a new attempt by the German legislator to define more clearly who shall be considered a senior managerial employee. Since 01.01.1989 the new section 5 (3) and (4) BetrVG has tried to precisely define the term *senior managerial employee* (leitender Angestellter)-*See* section 5 BetrVG.

[57] An interpretation from Hoyningen-Huene in: *Betriebsverfassungsrecht* (1998*) p.*40ff.

[58] That is, a joint or sole power or representation for the company in daily business (sections 48ff of the German Commercial Code, Handelsgesetzbuch - HGB).

[59] Hoyningen-Huene in: *Betriebsverfassungsrecht* (1998) 41.

national annual remuneration.[60] In this regard, senior managerial employee's salaries are also a factor taken into account when distinguishing them from "ordinary employees." Their salary-scales are higher than those of "ordinary employees."

3.1.2. Summary of the functions / responsibilities of senior managerial employees

The Labour Appeal Court in *Sasbo v Standard Bank*[61] held that an employer cannot simply refuse to bargain with managers, but whether his/her refusal to do so is unfair, can only be decided with a full understanding of the functions and responsibilities of the managers concerned. There are several key functions from the legislation, the case law and the international jurisprudence which seem to indicate that a senior manager/manageress is one who has:

- control over and is accountable for their subordinates,
- the authority to discipline subordinates,
- the authority to formulate and implement policy,
- the authority to take discretionary decisions,
- the authority to appoint and dismiss employees, and
- the capacity to represent the employer's interest.

In assessing the status of Directors/Deputy-Directors of Prosecutions and whether they qualify as senior management, the above factors will be taken into account. The various legislation[62] containing the powers, duties and functions of Directors/Deputy-Directors of Prosecutions will also be utilised.

3.1.3. The powers and duties of Directors and Deputy-Directors of Prosecutions

In my opinion, Directors and Deputy- Directors fall under the same umbrella, based on the factors mentioned below. In defining a Director's power, we will also be defining the powers of Deputy-Directors.

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[60] In 1998 three times the average remuneration equalled DM 156.240.- in the Western States of Germany and DM 131.040.- in the Eastern States.

[61] (1998) 2 BLLR 208 (A) 213F.

Section 24(9)(a) of the National Prosecuting Act,[63] provides that: "subject to section 20(4) and under the controls and directions of a Director, a Deputy-Director at the office of a Director, referred to in section 13(1), has all the powers, duties and functions of a Director."

Section 24(9)(a) further provides that: "a power, duty or function which is exercised, carried out or performed by a Deputy-Director is construed for the purposes of this Act, to have been exercised, carried out or performed by the Director concerned."

The Prosecution office may be established by either a Director or a Deputy-Director, who shall control the office.[64]This section equates Deputy-Directors to the rank of Directors.

Deputy-Directors fall "second in line" in the hierarchy (ie. directly under Directors). It is important to determine their hierarchal status, as this plays an important role: "where the bargaining unit comprises employees at the lower end of the organisation's hierarchy a refusal on the part of the employer (represented by its management) would ordinarily constitute an unfair labour practice. Where the bargaining unit comprises employees higher-up in the hierarchy, the position becomes less clear.",[65]

Deputy-Directors "fall" under Directors, their level of responsibility therefore, reflects that of a Director. We will see that when a Director is unable to perform his/her functions and duties, the Minister may appoint a Deputy-Director as an acting Director.[66]

A Deputy-Director may be appointed as head of Department.[67] Directors/Deputy-Directors of Prosecutions are departmental heads based on the following: Chapter 4, section 24(b) of the National Prosecuting Act, provides that: "Directors have the

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[62] For example, the National Prosecuting Act 32 of 1998 and the Public Service Act 103 of 1994.
[63] Act 32 of 1998(National Prosecuting Act).
[64] Chapter 2, section 6(1) of the National Prosecuting Act 32 of 1998.
[65] *Twu and Transnet Ltd* (1998) 7 A.R.B. 4.5.2.

[66] Chapter 3, section 3 of the National Prosecuting Act.

power to...in the office of which he/she is head." It is important to note that both cannot be heads at the same time, but in this regard, the relevant delegation authority needs to be taken into account. When a Director is unable to perform his/her functions, then a Deputy-Director will be called upon to do so.[68]

What are their powers and do they qualify as senior management? A Director of Prosecutions performs a variety of functions and makes different types of decisions. The most important are those authorised by statute.[69]

3.1.3.1. Do they have control over and are they accountable for the actions of their subordinates?

Section 24(b) of the National Prosecuting Act, provides that Directors have the power to: "supervise, direct and co-ordinate the work and activities of all Deputy-Directors and prosecutors, in the office of which he/she is the head."

The usage of the words "supervise", "direct" and "co-ordinate" indicates that Directors are in a controlling position and placed with an authority above their sub-ordinates. This authority is also conferred upon Deputy-Directors when a Director is unable to perform his/her functions and duties. Directors not only have supervision control but are also accountable for the actions of their subordinates. In this regard, they are responsible for the submission of reports to the Minister in relation to their duties, powers, functions and any other matter relating to their prosecuting authority.[70]

3.1.3.2. Do they have authority to discipline their subordinates?

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[67] Chapter 3, section 3 of the National Prosecuting Act.
[68] Chapter 3 of the National Prosecuting Act.
[69] The Constitution of the Republic of South Africa, has created a single National Prosecuting Authority consisting of a National Director as head of public prosecutions and Prosecutors. In terms of section 179(2) of the Constitution, the prosecuting authority has the power to (i) institute criminal proceedings on behalf of the State, and to (ii) carry out the necessary functions incidental to instituting criminal proceedings.
[70] §33, 34 and 35 of the National Prosecuting Act.

The Public Service Act 103 of 1994, further provides for the powers, functions and conditions of service of Directors, Deputy-Directors and Prosecutors who form part of the public service. Section 19 of the National Prosecuting Act provides that: "subject to the provisions of this Act, the other conditions of service of a Deputy-Director or Prosecutor, shall be determined in terms of the provisions of the Public Service Act."

We have established that Directors/Deputy-Directors qualify as departmental heads.[71] The functions of departmental heads are contained in section 7(3)(b) of the Public Service Act, which provides that: "A head of department shall be responsible for the efficient management and administration of his or her department, including the effective utilisation and training of staff, maintenance of discipline, the promotion of sound labour relations, and the proper use and care of State property and he or she shall perform the functions that may be prescribed."

The usage of the words "maintenance of discipline" is indicative of the fact that Directors have the authority to discipline their subordinates. Discipline by its very nature is said to be the prerogative of the employer.[72] It is the employer who has to set disciplinary rules and procedures and the authority to discipline.[73] Discipline may take the form of suspensions, formal and written warnings, and the sanction of dismissal as a last resort.

In conclusion to this enquiry, Directors have the authority to discipline their subordinates, thus, meeting the requirement of section 1 of the BCEA which provides that a senior mangerial employee has the authority to discipline.

3.1.3.3. Do they have the authority to take discretionary decisions which includes having the authority to make appointments?

The prosecuting authority has been given a wide discretionary duty which concerns the broad discretion to make important decisions (*eg.* decisions whether or not to

[71] Section 24 (b) of the National Prosecuting Act.

[72] Le Roux and Van Niekerk: *The South African Law of Unfair Dismissal* (1994) 75.

[73] (1995) 7 ARB.4.5.3.

institute criminal proceedings, to withdraw charges, and the type of charges that need to be put to the accused) affecting the criminal process. However, there are certain policy documents which relate to internal office management which includes a staff appointment policy. Bulelani Thandabantu Ncuka, the National Director of Public Prosecutions recently authorised all Directors, Deputy-Directors of Public Prosecutions to recommend the appointment of Public Prosecutors. This designation was in compliance with section 16(1) of the National Prosecuting Act. The Labour Appeal Court in *Sasbo v Standard Bank*[74] draws out a distinct function of a senior manager/manageress and that concerns the discretionary power he/she possesses. The more discretion he is given to exercise, the more he/she leans towards senior management.[75] Thus, it seems that Directors have been conferred with an important discretion. This discretion, enables them to recommend the appointment of prosecutors. In my opinion, this would require a high level of accuracy and assessment of situations, and provided where this is the case, employees exercising these decisions constitute senior management.

3.1.3.4. Do they have authority to formulate or implement policy?

The authority to formulate or implement policy is seen as an important function of the employer. It is said that an employee in the class of "manager" or "executive" is a person who directly or indirectly controls or has authority over, or is accountable for the actions of his/her subordinates, and is charged with the duty of overseeing and implementing employer policy.[76]

In terms of section 21(1)(a) and (b) of the National Prosecuting Act, the National Director must in consultation with the Directors determine prosecution policy and issue policy directives. Thus, though indirectly, Directors do play a role in the implementation of staff policy.

3.1.3.5. Do they have the authority to dismiss?

[74] (1998) 2 BLLR (A).
[75] (1998) 2 BLLR (A) 213B. See also *Air Chefs and SACCAWU* (1995) ARB.4.5.3.
[76] Le Roux and Van Nieker: *The South African Law of Unfair Dismissal* (1994) 75.

The Public Service Act bestows on departmental heads the authority to discharge an officer. Section 17 provides that the decision to discharge an officer or employee shall vest in the relevant executing authority who in turn may delegate that authority to an officer. Section 17 (b) further provides that the power to discharge vests in the head of department. Therefore, because Directors are considered heads of departments, they have the authority to dismiss in terms of the definition of senior managerial employee,[77] and where they are unable to perform this function, they may delegate such powers to Deputy-Directors in terms of this section.

3.1.3.6. Can they represent the employer's interest?[78]

A senior managerial employee is one entrusted with confidential and delegate information within the employer's enterprise. The Public Service Act further provides that an officer shall be guilty of misconduct if he or she causes or permits an act which causes prejudice to the administration, discipline and efficiency of any department.[79] Directors and Deputy-Directors are carriers of private and confidential information. The fact that they have the authority to appoint and make recommendations about prosecutors is indicative of this.

In conclusion to enquiry one, it is my submission based on all the above factors, Directors and Deputy-Directors of Prosecutions form part of the senior managerial staff.

4. Enquiry two: Collective Bargaining: How are the rights of Directors/Deputy Directors (ie. senior management) in terms of section 23 affected?

Once it has been established that senior managerial employees do in fact constitute management, their rights in terms of section 23 must be considered which includes looking at their positions in the collective bargaining unit.

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[77] Section 1 of the BCEA.

[78] See also section on *conflict of interest* as discussed below.

[79] Section 20(b).

Collective bargaining can be seen as a method/means of settling issues relating to terms and conditions of employment. De Silva[80] identifies collective bargaining as a method used to restore the unequal bargaining position between the employer and the employee. Du Toit *et al*[81] provides that collective bargaining is a preferred means of securing labour peace, social justice, economic development and that employee equity remains essential. Collective bargaining may also be regarded as the most basic method of settling disputes about wages, hours, job security and other matters.[82]

The Labour Relations Act of 1995 has made significant headway in improving collective bargaining and protecting the rights of employees both in the private and public sector. The LRA not only lays down basic organisational rights for employees and employers, but also establishes mechanisms for collective bargaining and the necessary resolution disputes.

A sufficiently representative trade union, acting alone or together has claim to a number of statutory rights in the LRA. These include access to the employer's premises, meetings, leave for shop stewards (trade union representatives) and stop-order facilities.[83] In South African industrial relations, collective agreements are legally binding and enforceable by arbitration.[84] In most cases, the LRA makes allowance for the form and content of collective bargaining to be arrived at voluntarily. However, the LRA does impose certain obligations.[85] The case law also places limitations. These limitations relate to the position of senior managerial/managerial employees in the collective bargaining unit.

[80] S.R. De Silva: '*Elements of a Sound Industrial Relations*' (1998) 8-24.

[81] Du Toit *et al* : *The Labour Relations Act of 1995* (1998) 131.

[82] *The Concise Columbia Encyclopedia* (3ed) 1994 pp.1-2.

[83] A union/unions representing a majority of employees can aquire further rights which may include the election of a trade union representative-s/ss 11-16 of the LRA 66 of 1995.

[84] Sections 23 - 24 of the LRA 66 of 1995.

[85] The creation of workplace forums and the exercise of organisational rights for example.

In establishing the rights of Directors and Deputy-Directors of Prosecutions, a general enquiry into the rights of senior management and whether they form part of the collective bargaining unit or not, will be looked at.

The leading judgement on this entire issue is found in the Industrial and Labour Appeal Courts decisions of *Sasbo v Standard Bank*.[86] In assessing the judgements and drawing a conclusion to the above enquiry, the following factors will be considered:

- the meaning of collective bargaining,
- the "right" to collective bargaining,
- the limitation clause,
- the *Sasbo v Standard Bank* judgements,[87] and
  - industrial and Labour Appeal Court judgements
  - conflict of interest
  - comparative law.

4.1. The meaning of collective bargaining

The ILO Convention No.98 of 1949 relating to the Right to Organise and to Bargain Collectively defines collective bargaining as: "voluntary negotiations between employers' organizations and workers organizations, with a view to the regulation of terms and condition of employments by collective agreements."

The LRA as well as the Constitution provides no formal definition for the term collective bargaining, but collective bargaining can be defined as: "those social structures whereby employers...bargain with representatives of their employees about terms and conditions of employment (substantive agreement), about rules governing the working environment, about procedures that should govern the relations between unions and employer (procedural agreement) or other issues, *eg.* the reinstatement of

[86] (1998) 2 BLLR 208 (A).
[87] (1998) 2 BLLR 208 (A), (1994) 15 ILJ 332 (IC).

dismissed workers. Such bargaining is called "collective bargaining," because the representatives of the employees act on behalf of a group of employees." [88]

Whilst no formal definition for collective bargaining is provided for, the LRA does define "collective agreement." Section 213 defines it as: "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and on the other hand-

(a) one or more employers,

(b) one or more registered employers' organisations, or

(c) one or more employers and one or more registered employers' organisations."

4.2. The right to collective bargaining

The Constitution of the Republic of South Africa, 1996, gives trade unions and employer organisations the right to bargain collectively. Section 23 specifically states that: "(1) Every one has the right to fair labour practices

(2) Every worker has the right-

(a) to form and join a trade union,

(b) to participate in the activities and programmes of a trade union and

(c) to strike...

(3) Every employer has the right-

(a) to form and join an employer's organisation, and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right-

(a) to determine its own administration, programmes and activities,

(b) to organise, and

(c) to form and join a federation.

[88] Barker and Holtzhausen: *South African Labour Glossary* (1996) 25.

(5) The provision of the Bill of Rights do not prevent legislation recognising union security arrangements contained in the collective agreements."

The provisions in the LRA[89] that govern an employee's right to join a trade union and participate in its affairs are contained in Chapter 2, section 4. Section 4 dealing with freedom of association, bestows on every employee the right to join a trade union,[90] and every union member the right to participate in its lawful activities.[91] Section 5 of the LRA sets out the effect of the these rights by explaining the precise scope of the protection. Section 5(1) provides that: "No person may discriminate against an employee for exercising any right conferred by this Act." This section prohibits an employer from discriminating against an employee.[92] It further prohibits an employer from requiring an employee not to become a member of a trade union[93] and precludes an employer from acting to the detriment of an employee because of past, present or anticipated membership of a trade union or workplace forum or the participation of the lawful activities of a trade union or workplace forum.[94] An employer is further prohibited from the giving of a benefit in exchange for an employee's agreement to refrain from exercising his/her rights under the Act.[95]

Prima facie, the right to collective bargaining has been conferred on all employees. The usage of the word "every worker" is indicative of this. Traditionally, this right has been acknowledged by "blue collar workers," but in recent years those of the white collar variety have turned increasingly to trade unions to represent their interests.[96]

[89] Act 66 of 1995.
[90] Section 4(1)(b).
[91] Section 4 (2)(a). Section 4(2)(c) further provides that an employee may stand for election and be eligible for appointment as an office bearer, or official and if elected or appointed, to hold office.
[92] See also section 5(2)(b).
[93] Sections 5 (2)(a)(i) and (ii).
[94] Sections 5 (2)(c)(i) and (iii).
[95] Section 5 (3) provides that: "No person may advantage, or promise advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act...."
[96] *Sasbo v Standard Bank* (1994) 15 ILJ 332 (IC) 336 C-D.

We have established that public sector employees may bargain collectively in the same manner as private sector employees. But, where these employees constitute senior management, the matter becomes complicated. The Constitution and the Labour Relations Act of 1995 extend the right to collective bargaining to all employees, but neither draw a distinction between the class of employees that may benefit from the fruits of collective bargaining. This specific right to engage in collective bargaining, prima facie applies to senior management.

Section 39(2) of the Constitution provides that the Courts in interpreting any legislation must promote the spirit, purport, and the objects of the Bill of Rights. The Labour Relations Act in terms of section 3(b) stipulates that any person applying the LRA must interpret its provision in compliance with the Constitution. The Bill of Rights which includes the rights contained in section 23 may be limited. Thus, the rights in the Bill of Rights whilst fundamental, are not absolute and may be limited by section 36 of the final Constitution.

4.3. The Limitation clause

Some countries have restricted the right to organise for public servants to certain categories within the public service. For example, the 1991 Consitution of Bulgaria makes provision for the right of all workers to form and join trade unions of their choice,[97] but their 1992 Labour Code which makes provision for collective bargaining, have excluded certain sectors of the public sector from its scope.[98]

[97] Statistics taken from: *EI Barometer Europe, 1998* - http//www.ei-ie.org/pub/english/Barometre Europe.html.

[98] Statistics taken from: *EI Barometer Europe, 1998*- http//www.ei.ie.org/pub/english/Barometre Europe.html.

Similar courses are chartered in countries such Croatia,[99] Chezch Republic,[100] Canada[101] and the USA.[102]

In some countries such as Canada and the USA, a distinction is drawn between personnel and management in the public sector, with the view to limiting the right to organise of senior officials and public servants placed in a position of manager or supervisor. These officials are seen as holding positions of trusts and therefore, the limitation placed on the right to organise is seen as justifiable.

The Right to Organise and Collective Bargaining Convention[103] has made allowance for certain categories of public servants engaged in the administration of the State to be excluded from its scope. This Convention has adopted a restrictive approach concerning those who may be exempted from the right to collective bargaining.

The Labour Relations Public Service Convention and the accompanying Recommendation[104] have excluded certain categories of employees from its scope. A distinction was also drawn.[105] These include "high level of employees" whose functions are normally considered as policy making or managerial,...or employees whose duties are of a highly confidential nature.[106] The ILO has excluded senior management from the scope of collective bargaining.

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[99] Statistics taken from: *EI Barometer Europe, 1998*- http//www.ei.ie.org/pub/english/Barometre Europe.html.

[100] Statistics taken from: *EI Barometer Europe, 1998*- http//www.ei.ie.org/pub/english/Barometre Europe.html.

[101] *Sasbo v Standard Bank* (1998) 2 BLLR 208 (A) 212A-D and *Sasbo v Standard Bank* (1994) 15 ILJ 332(IC) 211I- 212F.

[102] *Sasbo v Standard Bank* (1998) 2 BLLR 208 (A) 212 E-F and *Sasbo v Standard Bank* (1994) 15 ILJ 332(IC)211I-212F.

[103]International Labour Organisation (ILO) Convention No.98 of 1949.

[104] The Labour Relations (Public Service) Convention No. 151 of 1978 and its accompanying Recommendation No.159.

[105]International Labour Organisation (ILO) *Freedom of Association and Collective Bargaining,* International Labour Conference, 81st session, Geneva (1994) 25.

[106] The Labour Relations (Public Service) Convention No 151 of 1978 and its accompanying Recommendation (No.159).

We have established that the right to collective bargaining in South Africa has been acknowledged as fundamental to industrial relations, but this does not mean that this right is absolute. Section 36 (1) of the Constitution provides that: "the rights in the bill of rights may be limited only in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and the extent of the limitation, (d) the relation between the limitation and its purpose, and (e) less restrictive means to achieve this purpose."

The limitation clause[107] in the issue of senior managerial employees first received acknowledgement in the Appeal Court decision of *Mutual and Federal Insurance Co Ltd v Banking Insurance, Finance and Assurance Workers Union.*[108] Vivier JA in this case at 404 C-E stated the position as follows:

"The right to bargain collectively is, however, not absolute as the court a quo seemed to suggest. In saying that it is axiomatic that once employees have decided to bargain collectively would be unfair for an employer to refuse to do so, the court a quo adopted too dogmatic an approach. In this Court counsel for the union did not contend for an absolute right to bargain collectively regardless of the circumstances. He conceded, correctly in my view, that in determining whether a refusal to bargain collectively amounted to an unfair practice, factors other than the interests of the union members, such as the interests of the employer and non union employees and the need for efficient management also have to be taken into account."

Under the governance of the interim Constitution[109] but before the coming into operation of the final Constitution, the case of *North West Star (Pty) Limited and*

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[107] Section 33 of the interim Constitution of the RSA.
[108] 1993 (3) SA 3954 (A).

[109] The interim Constitution of the RSA. The case been decided before the coming into operation of the final Constitution of South Africa does not affect the point at issue. The limitation clause is in section 33 of the interim Constitution.

GWU[110] faced similar challenges as the Industrial Court in the case of *Sasbo v Standard Bank.*[111] The legal question in *North West Star* was whether managerial employees had a "right" to be part of the bargaining unit, or whether this right may be limited in terms of section 33 of the interim Constitution of South Africa. In this case, the employer refused to include employees listed in Annexure "A" in the bargaining unit. The employees listed in Annexure "A" included: material managers, assistant managers, superintendants, senior managers and accountants. The union, on the other hand, insisted that these employees formed part of the bargaining unit and that they had the right to negotiate better working conditions and wages of these employees. The Arbitrator's role in this case was to determine whether the refusal by the company to recognise these employees as part of the bargaining unit was unfair. The union relied on section 27 of the interim Constitution, which provided that every person is entitled to fair labour practices and this included the right of management to form and join trade unions, and to exercise their right to organise and bargain collectively.

The Arbitrator concluded that the fundamental rights in chapter three of the Bill of Rights in the interim Constitution are not absolute rights.[112] This principle was in line with the Appeal Court's decision in *Mutual and Federal Insurance Co Ltd v Banking, Insurance, Finance and Workers Union.*[113] The Arbitrator added that possible conflicts between certain rights would come to the fore, *eg.* there may well be a conflict between section 27[114] and 26[115] which deals with the right to freely engage in economic activity. Thus, no right should be seen as absolute.

In arriving at a conclusion the Arbitrator went into a three-fold enquiry: (i) whether there was a right, and (ii) whether it may be limited, and if so, (iii) whether such limitation was a fair and reasonable one.

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[110] 1995 (4) ARB 4.1.1.

[111] 1994 (15) ILJ 332 (IC).

[112] Para.10.

[113] (1993) 3 SA 3954 (A).

[114] See the interim Constitution of RSA.

[115] See the interim Constitution of RSA.

The Arbitrator held that there definitely was a right, but that it was permissable to limit the union's right as this limitation was a fair and reasonable one. The Arbitrator concluded that: There may be a conflict of loyalty between the position of a shop steward and some of the managerial employees and therefore, in reality there must be a "vertical cut -off point, in the issue of whom in the employment hierarchy can be in the bargaining unit.[116] It is clear that a senior manager/manageress or a managing director/directress cannot be part of the bargaining unit as every bargaining unit extends to a level of seniority. A managerial employee could not be part of a bargaining unit in respect of which a trade union negotiates, even if he was a member of a trade union.[117]

The very idea of bargaining implies that there must be a party with "opposing interests" with whom workers can bargain and negotiate towards agreement. In practice, such interests are represented by management and labour. From this perspective, the Arbitrator held that senior managerial employees should fall outside of the bargaining unit.[118] This case recognises the restrictions placed upon an employee's right and ability to be an office bearer of the union and to participate actively in the decision making by the union. These limitations placed upon senior mangerial employees are seen as justifiable, also taking into account the normal good faith/common law duties[119] that he/she has to comply with.[120]

The Arbitrator concluded that there is a limitation on the level at which the union can represent members in the bargaining unit, that this is in line with some overseas jurisdiction and it is practical, necessary and sensible to make a distinction between a senior managerial employee and an "ordinary employee," and this, for the proper execution of collective bargaining promoted by the Labour Relations Act.[121] The following principle came to fore: "In principle, the trade union that negotiates for the workforce should not negotiate for management, neither should the trade union that

[116] Para. 11.

[117] Para. 12.

[118] Para. 13.

[119] Para. 16.

[120] See discussion on conflict of interest.

represents the broad mass of members represent management in rights disputes. Since management has the duty to lead and direct, which includes the duty to discipline and dismiss, to hear grievances, to retrench when necessary, and often to be involved in the determination of the remuneration of employees, it would lead to a conflict of loyalties...[122]"

4.3.1. *Sasbo v Standard Bank of South Africa*

The issue of senior managerial employees in the collective bargaining unit began in the 1991 Industrial Court's decision of *Sasbo v Standard Bank,*[123] and 7 years later the same issue surfaced in the 1998 Labour Appeal Court's decision of *Sasbo v Standard Bank,*[124] the applicants hoping for a different outcome than that of 7 years ago.

In 1991, the union (Sasbo) made an application to the Industrial Court for an order declaring the employer's refusal to negotiate with them concerning the conditions of service and higher wages for senior managerial employees an unfair labour practice. The union relied on section 46(9) of the Labour Relations Act 28 of 1956. From this perspective, the union wanted the employer to allow it to engage in negotiations in respect of all terms and conditions of employment of senior managerial employees. These employees were categorised in grades M1 to M7 of the employer's enterprise. The union vigorously argued that its mandate from the concerned senior managerial employees, entitled it to make representations on behalf of these employees.[125]The union stipulated that their decisions may bind a dissenting minority of members and that the employer is estopped from denying that the union had authority to conclude a settlement on behalf of the managerial employees. Moreover, the union argued that no third party had any right or locus standi in law to dwell in such matters.[126]The employer on the other hand argued that whilst the union and these managerial employees had a special relationship, it was not to be construed as the coinciding of

[121] Para. 17.

[122] Para. 12.
[123] (1994) 15 ILJ 332 (IC).
[124] (1998) 2 BLLR 208 (A).
[125] 336C-D
[126] 336H.

membership and mandate.[127] The employer stipulated that in terms of the recognition agreement, these employees (senior managerial employees) were excluded from collective bargaining. The employer was also of the opinion that whether the union had sufficient representativity of the majority of employees in grades M1 to M7 or not, was irrelevant. In this regard, the employer provided that it was inappropriate for management to "negotiate with itself,"[128] and in this regard, senior managerial employees should not form part of the collective bargaining unit.

Pienaar SM, provided that it was not necessary for the union to prove that it had a mandate from its members. To do so would undermine the union's ability to act as spokesman of its members.[129] However, Pienaar SM decided that it was inappropriate for senior managerial employees to be part of the collective bargaining process. His *ratio decidendi* was based on some of the following:

The trade union has a right to bargain collectively on behalf of its members in grades M1 to M7, but the exercise of this right could lead to an unacceptable conflict of interest between the manager as employee on the one hand, and as a member of the bargaining unit on the other. It was held that: "An employer has a duty to bargain collectively with a representative of a union, it follows that a union has a right to bargain collectively on behalf of its members who are employees in the eyes of that employer. However, circumstances may arise, which, in the eyes of the court, may lead to the exercise of that right being unfair towards the employer. Under such circumstances the court may deem it equitable to curtail the exercise of the union's right to bargain collectively on behalf of its members. An employee should be excluded from collective bargaining in cases where his or her inclusion in such bargaining could lead to a conflict of interest which would render the proper performance of the duties entrusted to him or her impossible or extremely difficult..."[130]

[127] 337A.
[128] 334A.
[129] 338I.
[130] 332-333 H-J.

In the Labour Appeal Court decision 7 years later, the applicant Sasbo came before the court with the very same plea. Judge Scott writing for an unanimous bench posed the question as to whether it would be appropriate for a manager/manageress to engage in collective bargaining. But, moreover, which was a further consideration by the Court was the extent to which these employees may be faced with a conflict of interest of the union and those of the employee.[131] The Labour Appeal Court applied a conflict of interest test and said that the duty to bargain is not absolute. Moreover, whether the employer is obliged to bargain, depends on a number of circumstances which also entails weighing up the the conflicting of interest of the employer and the employee. The employer's decision to exclude managerial employees from collective bargaining with the trade union was not ruled unfair taking into consideration the functions of these employees.[132]

From this perspective, both the Industrial and the Labour Appeal Court identify a clash of interest that comes into existence when a senior managerial employee belongs to a trade union. In my opinion, conflict of interests needs further expansion and clarification.

4.3.2. Conflict of interests

In the judgement of *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler,*[133] it was held that: "There can be no doubt that during the currency of his employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests. An employee can therefore commit a breach of duty by encouraging other employees to leave the employer and take up work elsewhere, by moonlighting for a competitor and when he discloses confidential information.

In most cases conflict of interests is concerned with the duty to avoid or disclose actual or possible conflict of interest with the employer. It is in itself difficult to determine but conflict of interest is also more than the duty to disclose. It also arises

[131] 213B-D.
[132] 208D-F.
[133] 1971 (3) SA 866 (W) 867 H-I.

from the employee's common law duties of good faith. Therefore, conflict of interest may be concermed with:

- disclosure of information in the realm of negotations,
- the principle of loyalty, and
- failing to report the wrong-doing by co-employees.

4.3.2.1. Disclosure of information in the realm of negotiations

Many crucial issues arise in the realm of negotiations between the employer and the trade union. Section 16 of the LRA 66 of 1995 not only places an obligation upon the employer to disclose all relevant information enabling a trade union representative to perform his/her duties effectively, but also directs the facilitation of effective collective bargaining and consultation between the union and the employer. But, whilst the LRA makes an allowance for disclosure of information, it also places limitations upon the right to disclosure.[134]

The contention between trade unions and employers arise because trade unions believe that all relevant information should be disclosed. In this regard, employers regard the demand for greater disclosure an intrusion upon managerial prerogative and an unjustifiable invasion of privacy rights. The above situation presents us with an overview of the differences that exist between a trade union and an employer, especially in the ambit of negotiations and disclosure of information, which includes the handling of confidential information. The problem in this regard, is that in most cases senior management possesses certain confidential information relevant to the employer's enterprise and the employer's bargaining strategy.

In the recent case of *Imatu & others v Rustenburg Transitional Council,*[135] Brassey AJ ruled that senior managers have an unfettered right to join and hold office in trade unions, but that they are still bound to perform duties for the employer - and employees that breach the fidelity towards their employers in the course of trade

[134] See du Toit *et al* (1998) 149 for respective arguments.

[135] (1999) 12 BLLR 1299 (LC).

union activities may still be disciplined.[136] A local council operating under the Local Government Transition Act 209 of 1993, adopted a resolution in terms of which it determined that employees on job level 1-3 are not allowed to serve in executive positions of trade unions or be involved in trade union activities. The union brought an application in terms of section 158(1) of the LRA declaring that this was a contravention of section 5 of the LRA 66 of 1995 and Section 23 of the Bill of Rights in the Constitution.

The employees listed in level 1-3 included senior executives and managerial officials of the council. These employees performed functions traditionally assigned to the top management of the organisation. Their duties included giving advice and making recommendations to the council, formulating policy, ensuring that the council's resolutions are carried out properly, to direct and motivate where necessary, and discipline staff.[137] The council contended that these senior officials cannot simultaneously discharge their obligations as employees and sit on the branch of the union. One of the three reasons that the employer gave for excluding these particular officials was based on the fact that these officials have access to confidential information such as levels of maximum increases to which the employer might agree in wage negotiations, which they would be duty bound to disclose to the first applicant if they served on its executive.

Judge Brassey had unfortunately decided for the union but this decision in the light of the limitation clause,[138] the decided case law, the existance of a conflict of interest, employees common law duty of fidelity towards their employers, and the factors discussed below, is open to much criticism.

Judge Brassey held that all a senior official needs to do when he becomes a union leader is to tread carefully in the handling of confidential information.[139] Moreover, that it is simply enough that these senior officials keep the information secret, and

[136] 1299D and 1306H.

[137] 1300-1301J-A.

[138] See discussion on the limitation clause.

[139] 1306G-I.

"all he needs to do is recuse himself from every discussion within the union to which such information might be of relevance directly or indirectly."[140] This in my opinion may be easily said in theory, but can or does it work in practice?

Judge Brassey identifies the conflict of interest that may exist when a managerial employee joins a union or holds office in that union, but the Judge decides that the common law no longer applies. This is open to much debate in light of the Labour Appeal Court's decision of *Sasbo v Standard Bank* as discussed above. Both the Industrial and Labour Appeal Courts decisions of *Sasbo v Standard Bank* identify the possible conflict that exists. Pienaar SM[141] makes reference to *Keshwar v SANCA*[142] in which De Kock SM states that there are restrictions on an employee's right and ability to be an office bearer of the union and to participate in the activities of that union. He stipulates that these restrictions flow from a servant's duty to perform the work for which he was engaged and not to reveal his master's secrets or confidential information to any person whomsoever.

Moreover, De Kock SM stipulated that a person cannot disabuse his mind of knowledge which he already has. Some servants have information which is of vital concern to both parties such as bargaining tactics, the limit of any offers that the employer is prepared to make or that which the union is willing to accept. Thus, servants who have acquired knowledge in the course of their duties would place themselves in unentenable positions and subject themselves to severe pressures of disclosure if they had to take part in those activities of the union. De Kock SM went further to state that a master would be entitled to take disciplinary action against any servant who breaches this duty.[143] In *Ms Gayle Colyer and Drager South Africa,*[144] an employee in this case had failed to disclose certain relevant information to the

[140] 1306G-I.
[141] 341C-J.
[142] 819A-I.
[143] This was acknowledged by Judge Brassey in *Imatu&Others v Rustenburg Transitional Council* (1999) 12 BLLR 1299 (LC)1300A-C -1303J. The Judge stated that when an employee goes over to the opposition, this employee, under the common law, would be dismissed. Judge Brassey further stated that an employee could commit a breach of fidelity by joining a union. Therefore, at common law it was permissable to take action against such employees.
[144] (1997)1 CCMA1.8.1.

employer. The information was alleged to be used against the employer by the senior manageress. The information was said to be similar to trade secrets and highly confidential and private. The Commission for Conciliation Mediation and Arbitration (CCMA) identified that where trade secrets are stolen, the usefulness of such information to a competition could cause great damage to the employer.

Judge Brassey further held that the Constitution as well as the LRA granted every employee the right to join and hold office of the union and that these were unequivocal an unconditional.[145] He held that the protection conferred by the organisational rights contained in the Act gave all employees an absolute right to join and hold office in the unions.[146] It is submitted that in light of the decided cases above, no right is absolute and may be limited. These rights may be limited in section 36 of the Constitution.[147]

The finding of the Labour Court's decision in *Imatu & others v Rustenburg Transitional Council*[148] not only gave regard for, but is inconsistent with the Labour Appeal Court's decision in *Sasbo v Standard* where the Court identified the possible conflicts that might be added. The Labour Appeal Court in *Sasbo* observed that such a conflict would obviously exist when a manager negotiates with a union on behalf of his or her employer and stands to benefit from the union's endeavours. The Labour Appeal Court identified the possible conflicts that can be added. This would include for eg, access of information that may be crucial and essential to the employer's bargaining strategy. From this perspective, the adversarial nature between the trade union and the employer should not be undermined. Kahn-Freund[149] states that:
"Any approach to the relations between management and labour is fruitless unless the divergency of their interests is plainly recognised and articulated ...It was (Mr Justice Higgins, *'the principal Founding Father of the Australian system of arbitration and conciliation')* who said that the 'war between the profit-maker and the wage-earner is always with us.' "

[145] 1303 C.
[146] 1300 D.
[147] See discussion on the limitation clause above.
[148] (1999) 12 BLLR 1299 (LC).
[149] *Imatu & Others v Rustenburg Transitional Council* (1999) 12 BLLR 1299(LC) 1302A-B, *citing Labur and the Law* (1977) 6-17.

Brassey AJ[150] referring to Khan-Freund above, also confirmed that, whilst employers and unions are obliged to live together, their natural adversarial natures cannot be overlooked.[151] Therefore, the Industrial Court's Judgement in *Sasbo v Standard Bank*[152] in which it was held that the position of managerial employees in the collective bargaining unit would undoubtedly consitute a conflict of loyalties, was reaffirmed by the Labour Appeal Court in *Sasbo v Standard Bank.*[153]

4.3.2.2. The principle of loyalty

"A battle in the global warefare between Coca-Cola, and Pepsi Cola styled 'the Cola War' has been fought on South African soil through surrogates. The local battle took place between Amalgamated Beverage Incorporated (ABI), bottling Coca-Cola products and new age beverage (New Age), a black empowerment company, bottling Pepsi Cola products from 1994-1997. Pepsi-Cola lost out to Coke and New Age ceased production in 1997, was provisionally liquidated and taken over."[154]

The above passage taken from a South African case addresses amongst others, the fundamental principle of loyalty owed by employees to its employers. In the case above, between Coca-Cola and Pepsi, the battle was rooted on the principle of loyalty. In this case, the applicant was a sales representative of New Age selling products. When he lost his job he was ready to transfer his allegiance to Coke and applied for a job in a similiar capacity to ABI. ABI rejected his application. The applicant then took the case to the Labour Court declaring that ABI's decision not to consider him for the job, was an unfair labour practice in terms of item 2(1)(a) read with item 2(2) of the 7th Schedule of the Labour Relations Act 66 of 1995. ABI believed that their decision was ethical and above board. The need to maintain the

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[150] 1303 A-E.

[151] In collective bargaining it is said that the relationship between management and the union is adversarial, and that each side knows that they may be compelled by circumstances and law to recognise mutual advantage in agreeing with each other and that the gain for one may be a loss for another- See Benjamin C. Roberts , George C. Lodge and Hideaki Okamoto in: *Collective Bargaining and Employee Participation in Western Europe (1981) p.*3 http//www.trilateral.org/sitemap.htm.

[152] (1994) 15 ILJ 332 (IC).

[153] (1998) 2 BLLR 208 (A) 213B-D.

[154] *Kadiaka v Almagated Beverage Industries* (1999) 8 LC 6.12.1.

morale of ABI was stressed. In this case, the Court found that no unfair labour practice had been committed. Judge Landman at 49 held that:

"It is not an arbitrary refusal, for there is a *bona fide* commercial or operational reason for it being put in place. It does not perpetuate any of the historical grounds of discrimination which cry out for a remedy. I do not regard it as unfair or inamicable to the values of our society as expressed in the Constitution. It does not infringe the dignity of the applicant to be told that his services are not required on account of his being an active member of a former rival, a rival which I might add, had not been decisively vanquished at the stage the ban was imposed. The labour practice, although contrary to the interest of the applicant, is not grossly unfair towards him, he is a casuality of the commercial war. It is fair to the employer. It is not unfair to society at large."

The finding of the Judge above in light of the position of senior managerial employees to be part of a trade union has profounding affect to our enquiry. The employer can then be said to have a *bona fide* commercial reason (*for eg.* over access of information) not to allow senior managerial employees to align themselves to trade union activities. In terms of this case, all employees are therefore encouraged to maintain loyalty towards their employers. The right of the employer to demand loyalty from the work force represents an undefined and nebulous area of management rights.[155] It is said that as part of the complex of rights and duties comprising the employment relationship, the duty of loyalty of an employee to an employer must certainly be reckoned as an important aspect of the common enterprise.[156]The dismissal of employees based on disloyalty has been justified.[157]

[155] Hill and Sinicropt: *Management Rights* (1994) 234, fn.170.
[156] Hill and Sinicropt: *Management Rights* (1994) 235.
[157] See *for eg* the American case of *Jacksonville Shipyards Incorparation* 74 1066 (1980). In this case two-hourly paid supervisors started a ship-decking company.The employees violated a rule which provided that disloyalty to the government and the employer was prohibited. These employees had formed a company in competition with the employer and had contracted to do work for a competitor that had been the successful bidder on the work that their employer had lost in the bidding process.The Arbitrator therefore upheld their discharge.

This principle should be held steadfast by senior managerial employees, especially when they have obtained access to plans and strategies of the employer's enterprise. Brassey AJ [158] acknowledges that the more senior the employee is, the greater loyalty is expected of him. He stipulates that:

"... by joining the union he visibly betrays these expectations and deprives the employer of his support. The betrayal is all the more accute when, as in this case, the member of management takes a leadership role in the union. As an ordinary member he can say that his submission to the union's decisions is merely nominal, but the argument is no longer open to him once he accepts a leadership position in the union. ... At common law it would have, moreover, be neither unreasonable nor unlawful to make the rule that the respondent made in the present case and thus force members of management to choose between the union and their managerial status."

The rationale for the decision founded in the case of District of Barnaby is identified as obvious as far as the employer is concerned.[159] It is said that this decision seeks the undivided loyalty of its senior people who are responsible for seeing that the work gets done and that the terms of collective agreements are adhered to.[160]

4.3.2.3. Failing to report wrong-doing by co-employees

Failing to report the wrong-doing by co-employees often surfaces where an employee knows, or has reason to believe that theft of company property has taken place or is currently taking place, but for whatever reason chooses to remain silent. Senior managerial employees have a duty to expose the wrong-doing committed against the company by fellow employees.

In my opinion, in this regard, senior managerial employees have to set the standard and should tread lightly in these type of matters. In this case, managerial employees find themselves facing dismissal where they have not disclosed the wrong-doing of co-employees, whether they have actual or implied knowledge of the deed

[158] *Imatu & Others v Rustenburg Transitional Council* (1999) 12 BLLR 1299 (LC)1302-1303J-C.
[159] *Sasbo v Standard Bank* (1994) 15 ILJ 332 (IC) 343C.
[160] *Sasbo v Standard Bank* (1994) 15 ILJ 332 (IC) 343E.

committed. In the American case of *C&P Telephone*,[161] a senior managerial employee was dismissed on the basis that he had actual and implied knowledge that materials were being stolen from a store room over which he exercised responsibility. He had failed to inform the company and was dismissed. The Arbitrator in this case held that:

"That the grievant did not benefit, directly or indirectly from the theft of the company's property is of no significance in my opinion. While his failure to act was not motivated by material gains, it was equally inexcusable for him to be acting out of a misguided sense of loyalty to fellow employees engaged in stealing from the company. If he desired to be "stool pigeon" (despite his obligation to report the misconduct of which he was aware), he undertook a course of action for which he had to be prepared to meet the consequences."

In this case, the Arbitrator held that the size of the loss involved was great and that the senior employee was justifiably dismissed.

4.4. Comparative law

Collective bargaining is said to be strongly established in most countries in the world.[162] Collective bargaining first developed in Britain in the 19th century and may have received impetus in the U.S in the 19th century through legislation which created the National Labour Relations Board (NLRB).[163] The process of collective bargaining is now accepted in most industrialized countries as the basic method of settling disputes and seen as an important feature in industrial relations. This importance may be seen by the evidence of its advantages as a process to reconcile conflicting interests in employment relations throughout the world.

However, in some countries like the USA and Canada the limitations to bargain collectively have also become apparent. More specifically, the limitations placed on

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[161] 151 LA 457 (1968).

[162] Benjamin C. Roberts, George C. Lodge and Hideaki Okamoto in: *Collective Bargaining and Employee Participation in Western Europe*(1981)pp.4-5-http//www.trilateral.org.sitemap.htm.

[163] The *Concise Columbia Electronic Encyclopedia* (1994) pp.1-2 .

senior managerial employees and their right to be part of the collective bargaining unit. Most of the South African cases[164] including the Labour Appeal court in *Sasbo v Standard Bank* relied on the international jurisprudence in determining whether senior managerial employees may be part of the collective bargaining unit or not.

It is said that American unions rely on collective bargaining as the principal means of advancing the interests of their members.[165] In respect to our enquiry, American legislation has placed further limitations on managerial employees to participate in trade union activities. Managerial employees are not considered "employees under the National Labour Relations Act (NLRA).[166] The Supreme Court in *NLRB v Bell Aerospace Co*[167] held that all managerial employees and not only those whose participation in union activities would create a conflict of interest with their job responsibilities, were excluded from the NLRB. The United States National Labour Relations Board has therefore formulated what Pienaar SM in the *Standard Bank case* refers to as "a fundamental touchstone."[168] Accordingly, the fundamental touchstone is concerned with whether the duties and responsibilities of any managerial employee or group of employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organisation. This test was regarded by the Industrial court as a useful one.[169]

Interestingly, apart from the National Labour Relations Act, other statutes, *for example,* the General Statutes of Connecticut,[170] the Pennsylvannia Consolidated and Unconsolidated Statutes,[171] and the the Florida Statutes,[172] have also identified this

[164] For *eg. Sasbo v Standard Bank* (1998) 2 BLLR 208 (A), *Sasbo v Standard Bank of South Africa* (1994) 15 ILJ 332 (IC) and *TWU and Transnet Ltd* (1998) 7 ARB 4.5.2.

[165] Benjamin C Roberts, George C, Lodge and Hideaki Okamoto: *Collective Bargaining and Employee Participation in Western Europe* (1981) p.4- http//www.trilateral.org.sitemap.htm.

[166] *Sasbo v Standard Bank* (1994) 15 ILJ 332(IC) 344F.

[167] 146 US 267 (1974).

[168] See *Sasbo v Standard Bank* (1994) 15 ILJ 332 (IC) 344A-B.

[169] See *Sasbo v Standard Bank* (1994) 15 ILJ 332 (IC) 342B.

[170] The State Employee Collective Bargaining Act-Conn.Gen. Stats., (1997) Title 5.

[171] Pennsylvania Labor Relations Act (PL1168. No. 294) 1937.

[172] The Public Relations Act-Fla.Stats.,Ch.447 (1996),§44.203 (4) et seq.

conflict of interest that may exist when managerial employees participate in the activities of trade unions. In terms of these statutes, managerial employees are excluded from the bargaining unit.

In terms of the General Statutes of Connecticut, employees have the right to self-organisation, to form, join, and to bargain collectively through representatives of their own choosing on questions of wages, hours and working conditions. They also have the right to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, free from actual constraint or concern. This right to bargain collectively is seen as fundamental and extends to all employees, but managerial employees do not enjoy this same right. In this regard, they have excluded managerial employees from the definition of employee. Employee is defined as "any employee of the employer, whether or not in the classified service of the employer, except elected or appointed officials, board and commission members, managerial employees and confidential employees."[173]

The Unconsolidated Pennsylvania Statutes define collective bargaining as the mutual obligation of the employer or his/her representatives and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or negotiation of an agreement or any question arising under the execution of a written contract incorporating any agreement reached, but such obligation does not compel either party to agree to a proposal or require the making of a concession.[174] In terms of our enquiry, managerial employees are excluded from the definition of employee.[175]

Public employees in the State of Florida have the right to self-organisation, to form, join or assist labour organisations or labour unions. They also have the right to bargain collectively through representatives of their own choosing and engage in activities for the purpose of collective bargaining, other mutual aid or protection. They may also refrain from such activities as they want to. The Florida Statutes have

[173] § 5-270 to 5-280 (Definitions).

[174] See §11-111-A (Scope of Bargaining).

[175] §11-1101-A (Definitions).

implemented many rights and responsibilities on the part of public employees and their employees. It seems that they require stricter standards from their managerial and supervisory staff. The Florida Statutes have placed many restrictions on the public employers, their representatives and their agents. For the purposes of the collective bargaining, representatives and agents of public employers include managerial personnel and may also include supervisory personnel.

In the Florida Statutes under the provisions of Chapter 447, the Governor is designated as the Public Employer for all career service and selected exempt service employees. The division of personnel management services and the department of management services represents the Governor in the process of collective bargaining. Managerial personnel employees are requested to direct the Chief Negotiator on the following: requests for recognition by an employee organisation to represent employees employed within their particular agency, requests by an employee organisation for further information concerning names, addresses, classification numbers and organisational structures of the employees within their organisation, and all information from any employee organisation seeking to represent them within their agency.[176] Managerial employees as defined in the Florida Statutes[177] are excluded from collective bargaining.

The Canadian system of industrial relations is firmly rooted in collective bargaining and said to be significantly influenced by the United States model. Its philosophy and practice have also been influenced by strong Canadian attachments and affinities to Europe, eg. Britian and France.[178] In the United Kingdom, the extent to which managerial employees participate in collective bargaining on their own behalf is determined largely by agreement,[179] but persons employed to exercise managerial functions are not included in the notion of "employee" as defined by collective

[176] The Public Relations Act -Fla.Stats.§ 447.

[177] Sections 447.203 (4)(a) 1-7.

[178] Benjamin C Roberts,George c Lodge and Hideaki Okamoto in: '*Collective Bargaining and employee Participation in Western Europe'* (1981)p.5-http//www.trilateral.org.sitemap.htm.

[179] *Sasbo v Standard v Standard Bank* (1998) 2 BLLR 208 (A) 212A-B.

bargaining legislation in the Canadian Labour Relations Code.[180] They are therefore prevented from bargaining collectively on their own behalf. A distinction is drawn between persons in an organisation who exercise control and authority over employees and those persons who participate in an organisational's decision-making process in determining whether these employees may exercise the right to bargain collectively.[181] Managerial employees are not included in collective bargaining. This is also in line with Canadian case law.[182]

In Germany,[183] apart from the exclusion of senior managerial employees in the Works Constitutions Act (BetrVG)[184] in section 5 (3),[185] the German jurisdiction recognises more substantial differences between "ordinary" and senior managerial employees. The reason for these differences lies in the fact that senior managerial employees possess combining interests of "ordinary employees" as well as the employer. In Germany, senior managerial employees definitely constitute a distinct interest group in the employer's enterprise. For example, the act that regulates the working hours of employees (Arbeitszeitgesetz) is not applicable to senior managerial employees.[186]Their duty to protect the interests of the employer are much higher than those of "ordinary employees." [187] Senior managerial employees are usually not paid over-time.[188] The German Labour Courts in dealing with their dismissals are more lenient in comparism to the dismissal of "ordinary employees."[189]

Collective bargaining is governed by the German Collective Bargaining Agreement Act (Tarifvertragsgesetz - TVG). The TVG draws no distinction between "ordinary employees" and senior managerial employees.[190] Therefore, all employees can be

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[180] See section 3.1.1.3. above.
[181] *Sasbo v Standard Bank* (1994) 15 ILJ 332 (IC) 340B-E.
[182] *District of Barnaby* (1974)1 Can LRBR 1 (BC).
[183] See section 3.1.1.3. above.
[184] The Works Constitution Act of 1972.
[185] See section 3.1.1.3. above.
[186] Section 18(1).
[187] BAG, 12.05.1958 in: BB 1958, p.415.
[188] BAG, 16.11.1961 in: DB 1962, p.243.
[189] BAG, 22.11.1962 and 26.11.1964, AP Nr. 49 and 53 to § 626 BGB.
[190] Section 12a. TVG also states that free lancers can be part of collective bargaining and that they are in similar positions as employees and therefore need the same protection like employees.

part of collective bargaining. In practice, however, senior managerial employees are often excluded from the collective bargaining. Because of their special status, there are normally separate collective bargaining agreements made for senior managerial employees.[191] Senior managerial employees can be members of trade unions.[192] However, trade unions can refuse to accept or exclude employees who do not share the union's interests or have a hostile attitude towards the trade union.[193]

5. Conclusion to enquiries one and two of chapter one

Our system of industrial relations is rooted firmly in collective bargaining between the employer and the union. However, there are limitations placed on senior managerial employees to engage in collective bargaining. Judge Scott in the Labour Appeal Court[194] stipulated that: "there is no express duty on employers to engage in collective bargaining....clearly there must be a limit to the employer's obligation to engage in collective bargaining...."

Moreover, senior officials should not similtaneously discharge their obligations as employees and sit on the branch of the executive of the union.[195] They are employees as discussed above, who have access to confidential information who would be duty bound to disclose such, if they belonged to or served on its executive.[196] In suit of their objective, unions extract what they can from the employer to the benefit of its members. When an employee commits him/herself, he/she ultimately makes a commitment to a body whose primary objective is to maximise the benefit of its members, either through peaceful negotiations or by industrial action.[197]

A senior managerial employee by joining a union commits him/herself to a body that stands in opposition to his/her employer.[198] As carriers of confidential information of

[191] Halbach/Paland/Schwedes & Wlotzke in: *Übersicht über das Arbeitsrecht* (1997) 55.
[192] Judgement of the German Federal Court of Justice, the Bundesgerichtshof (BGH), 10.12.1984, in: NZA 1985, *p.* 540.
[193] See for eg. the Bundesgerichtshof (BGH), 27.09.1993, in: NJW 1994, p.43.
[194] *Sasbo v Standard Bank* (1998) 2 BLLR 208 (A).
[195] *Imatu& Others v Rustenburg Transitional Council* (1999) 12 BLLR 1299 (LC) 1301A.
[196] *Imatu& Others v Rustenburg Transitional Council* (1999) 12 BLLR 1299 (LC) 1301B.
[197] *Imatu&Others v Rustenburg Transitional Council* (1999) 12 BLLR 1299 (LC)1301G-H.
[198] *Imatu& Others v Rustenburg Transitional Council* (1999) 12 BLLR 1299 (LC) 1302E-F.

the employer, they should tread carefully. Just like the union would like to shield their body from the revelation of prejudicial facts by its members, similarly the employer pursues the same. The undeniable fact is that senior managerial employees have access to private and confidential information and represent the employer not only internally but externally. Their positions definitely create a conflict of interest when they align themselves to union activities and negotiations. Their functions embody an employee who represents his/her employer and one who stands in the gap for his/her employer in his/her absence. The case law has decided this and rightfully so. Senior managerial employees are not "ordinary employees" in light of the collective bargaining unit. In compliance with their duty of good faith as well as their loyalty owed to the employer, and especially because of the valuable and delicate information entrusted to them, across the barrier line of collective bargaining, they should be seen on the side of the employer.

In conclusion to this enquiry, based on the above factors, Directors and Deputy-Directors of Prosecutions should not be part of the collective bargaining unit.

Thus, senior managerial employees should not join unions, represent employees and have their wages and working conditions negotiated by trade unions in negotiation "against" the employer within the bargaining unit. The delicacy of their discretion makes their position an unenviable one.[199]

Chapter Two: The dismissal of senior managerial employees

1. Introduction

The right not to be unfairly dismissed is proclaimed in section 185 of the LRA.[200] This is in accordance with section 23 of the Constitution which provides that every employee has the right to fair labour practices. However, the role of discipline is said

[199] *Imatu & Others v Rustenburg Transitional Council* (1999) 12 BLLR 1299 (LC) 1306 I.

[200] Act 66 of 1995.

to be the prerogative of the employer.[201] An employer may dismiss an employee for reasons related to the employee's conduct, the employee's capacity and finally, the operational requirements of the employer.[202] This is also in accordance with the provisions of the Termination of Employment Convention of the ILO which provides that: "the employment of a worker shall not be terminated unless their is a valid reason for such termination connected with the capacity or conduct of the worker based on the operational requirements of the undertaking, establishment, or service.''[203]

The LRA requires that a dismissal will only be fair if the employer can prove that the dismissal was for a fair reason (substantive fairness), and that the dismissal was carried out in accordance with a fair procedure (procedural fairness).[204]

Whilst every employee has been accorded the right not to be unfairly dismissed, and to have their dismissal preceded by a fair hearing, there is much debate as to whether senior managerial employees enjoy this same protection. The fact that a person is a senior manager/manageress may have the result that different standards may be required of him/her than in the case of an "ordinary employee'' and his/her dismissal may be justified in circumstances where the dismissal of an "ordinary employee'' is not justified.[205] It was found that senior managers do not enjoy the same treatment as "ordinary employees'' when it comes to collective bargaining.[206] The pertinent question in this enquiry is to see whether they are treated differently in the law of unfair dismissal. Chapter one of this paper outlined the distinctions between an ''ordinary employee'' and a senior managerial employee.

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[201] Le Roux and Van Niekerk*: The South African Law of Unfair Dismissal* (1994) 75.

[202] Section 188 of the LRA 66 of 1995. In terms of section 26(6) of the LRA, there is one other recognised reason for dismissal. This arises where the employee refuses to join a trade union in terms of a closed shop agreement in the workplace, or refused membership, or expelled from such a union.

[203] Article 4 of the Termination of Employment (ILO) Convention 158 of 1981.

[204] Section 188(1)and (2)of the LRA 66 of 1995.

[205] Le Roux and Van Niekerk*: The South African Law of Unfair Dismissal* (1994) 75-79.

[206] See chapter one of this paper.

In essence, the reciprocal duties between an employer and employee also have to be considered. An employer expects satisfactory work performance from his/her employees. Both the employee and the employer are required to discharge their respective obligations, subject of course to the right of either party to a remedy for non performance. An employer's general duties are to receive the employer in service, pay the employee's wage and ensure that working conditions are safe and healthy. The employee is expected to enter and remain in service, maintain reasonable efficiency and further the employer's business interests. Furthermore, the common law requires an employee to exercise his/her duties diligently and skillfully. Where an employee's competence is investigated by the employer before taking him/her into service, the employee is bound by representations that he/she makes regarding his/her competence. In general, higher standards of competence and performance are expected from senior managerial employees[207] and their dismissals have been justified in circumstances where the dismissal of "ordinary employees" are not justified.

2. The content of fairness in relation to managerial dismissals

Senior managerial employees have been dismissed based on reasons that may be questionable if the dismissed was an "ordinary employee" and even where the dismissed is a shop steward (trade union representative). The courts have been willing to extend a measure of protection to shop stewards also occuping dual roles in the employer enterprise but based on the discussion below, it is evident that no measure of protection has been lended to senior managerial employees. From this perspective, in assessing the fairness of senior managerial employees' dismissals, a comparative analysis between shop stewards and managerial employees will also be discussed.

2.1. Comparative dismissals between managerial employees and shop stewards

Senior managerial employees and shop stewards (trade union representatives) both occupy difficult roles in industrial relations. Shop stewards are not only said to have difficult roles in industrial relations but may occupy ambigious positions as well.[208]

[207] Grogan: *Workplace Law* (1998) 154.

[208] See Le Roux and Van Niekerk: '*Discipline and Shop Stewards' (1992)* 1:6 63-70.

On the one hand, shop stewards are employees and subject to the discipline and managerial prerogative of the employer. On the other hand, shop stewards play an important role in union structures.

2.1.1. Common principles

Whilst managerial and shop steward employees find themselves at opposite poles in the employer's enterprise, a common basis may be associated with their responsibilities and the manner in which the court has dealt with their dismissals or disciplinary action being taken against them. The status of an employee often affects his/her rights. Both managerial employees and shop stewards have functions and responsibilities unlike "ordinary employees." They both have added responsibilities[209] and functions not possessed by "ordinary" employees. They are for example both important spokepersons (either for the employee and/or the employer) conferred with the duty to take discretionary decisions within the employer's enterprise. Thus, the dual roles that senior managerial employees and shop stewards play, as well as the differing perceptions concerning their functions which may exist, can give rise to obvious difficulties when it comes to disciplinary action being taken against them. But, the labour courts in disciplining shop stewards have extended a measure of protection to them unlike some managerial employees. The dimissal of managerial employees in which the courts have indicated that their dismissals need not be preceded by a formal hearing will be examined later.

The general rule is that shop stewards are regarded as "ordinary employees" subject to the same standards relating to poor work performance and discipline. However, in exercising their functions they will be entitled to some measure of protection.[210] The Labour Relations Act provides that: "discipline of a trade union representative or an employee who is an office bearer should not be instituted without first informing and

[209] Added responsibility would include the attendance of meetings, representing employees interests, and accountability to their respective superiors.

[210] Le Roux and Van Niekerk: *The South African Law of Unfair Dismissal* (1994) 196-207.

consulting the trade union.[211] This measure of protection is also contained in the ILO Convention.''[212]

The Courts have encountered difficulties in the situation where an employer attempts to discipline a shop steward for an act of misconduct committed while exercising his/her functions as a shop steward. Le Roux and Van Niekerk[213] identify the conflicting functions of a shop steward which come to fore. The Industrial Court in *Ngubo v Hermes Works CC*[214] had to consider whether a shop steward who assaults or threatens be protected from disciplinary action. This case unfortunately makes this implication, but does not go without critism.[215]

The Abitrator in *FAWU v Harvenhinie Incorporation*[216] held that discipinary rules may be limited, but not to an unlimited extent. In this case, a shop steward was dismissed for insolence (*ie.* swearing a foreman while attending to the grievance of certain employees). It was however found that the dismissal was unfair and that the words of the shopsteward did not amount to insubordination. Whilst this case recognises that the conduct of a shop steward should not exceed certain unspecified bounds,[217] and that this decision was not to be interpreted as a licence to rudeness, the ordinary rules of the employment relationship was relaxed. In the *Mondi Paper case*,[218] the employer took disciplinary actions against certain employees who

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[211] Section 4 (2), Schedule 8 of the Code of Good Practice.

[212] The Worker's Representative (ILO) Convention No.135 of 1971 provides that: "workers representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers representatives or union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.''

[213] Le Roux and Van Niekerk: *The South African Law of Unfair Dismissal* (1994) 196-207.

[214] (1990) 11 ILJ 591 (IC) 594F.

[215] Le Roux and Van Niekerk:*The South African Law of Unfair Dismissal* (1994) 196-207.

[216] (1987) 1 ARB 5.1.1.

[217] See *Enterprise Foods and Fawu* (1990) 1 ARB 6.3.5, where certain shop stewards were justifiably dismissed for insulting members of the disciplinary panel, threatening them with violence, and tearing up disciplinary records.

[218] *Mondi Paper Company Ltd v Paper Printing Wood & Allied Workers Union & Another* (1994) 15 ILJ 778 (LAC).

participated in an unlawful action. One of the employees (Mr. Motho) had been given notice on two occasions to attend a disciplinary enquiry in this regard, which he ignored. The employer then issued a final written warning to Mr. Motho in his absence. Shortly, after the production manager summoned Mr. Motho, he arrived at the manager's office with a shop steward. The shop steward confronted the production manager and took matters into his own hands. He informed the manager that the meeting was irregular and unauthorised and left taking the employees with him. The shop steward was later dismissed. The Industrial Court in terms of s46(9) of the LRA 28 of 1956, found that the dismissal constituted an unfair labour practice. The Labour Appeal Court considered the relative arguments and said that the proper enquiry was to see whether the employment relationship could continue. The finding of the Labour Appeal Court was that the dismissal was not an appropriate action, but that a warning should be entered on his record.

The Labour Courts have therefore been "lenient" when it comes to the dismissal of shop stewards on the basis that they play an important role both within the employer's enterprise as well as within union structures. In terms of the Mondi Paper case discussed above, there has not only been a recognition of the importance of the positions held by shopstewards, but there has also been a willingness on the part of the court to extend a measure of protection to them. Managerial employees have been treated differently by the courts and no measure of protection has been extended to them, rather stricter standards have been implemented. This is so, despite the dual and important roles they also have within the employer's enterprise.

The courts in dealing with the dismissal of senior managerial employees, based on incapacity have expressed the opinion that there may be no obligation on an employer to follow the generally applied guidelines.Thus, pressupposing that a managerial employee does not have to be informed that he/she is meeting the required standards, or that he/she be given the opportunity to improve. In some cases,[219] the dismissal of senior managerial employees need not be preceded by a formal disciplinary hearing. It is therefore vital to look at the more common reasons

[219] See below the case of *Somyo P. v Ross Poultry Breeders* (1997) 1 LAC 8.1.1.

related to the dismissal of senior managerial employees, as well as the fairness of the various court decisions.

2.2. Dismissal for incapacity (*ie.* incompetence and poor work performance)

In many cases, senior managerial employees have been dismissed for reasons related to subordination, theft, unauthorised conduct, insolence (misconduct). They have however, been more commonly dismissed on the basis that they have not performed their duties in a satisfactory manner (*ie.* incapacity based on poor work performance).

The courts have found the dismissals of senior managerial employees based on incapacity justifiable and fair.[220] The LRA does not define "incapacity. However, in contractual terms it is said to amount to a "supervening impossibility which might be permanent or temporary, partial or absolute."[221] In terms of the common law, permanent incapacity of the employee, automatically brought the contract to the end, without dismissal taking place. Dismissal for incapacity as contained in the LRA of 1995, provides that an employer may dismiss an employee for a fair reason related to the employee's capacity.[222] Thus, where an employee is not performing or is unable to perform his/her work according to the standards expected of him/her, then the possibility of the employee being dismissed for incapacity arises.[223]

The Code of Good Practice[224] distinguishes between two types of incapacity. The first is poor work performance or incompetence. Poor work performance occurs where an employee does not meet the performance standards or the level of competence required by an employer. The second type of incapacity is ill-health or injury. In the case of senior managerial employees, employers have dismissed them for incapacity based on the following reasons:

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[220] See *for* eg *Salstaff and Metrorial Braamfontein* (1998) 7 ARB 8.1.4.and *SACCAWU obo Groeneveldt and Price'Pride* (2000) 9 ARB 7.2.1.

[221] See Du Toit et al: *The Labour Relations Act of 1995* (1998) 388.

[222] Section 188 (1)(a)(i) of the LRA 66 of 1995.

[223] These types of dismissals (ie incapacity) are generally known as "no fault dismissals because these dismissals generally arise from circumstances for which the employee is not to blame."

[224] Schedule 8 of the LRA 66 of 1995.

2.2.1. A manager's/manageress' incompatibility with staff[225]

The concept of compatibility is defined as an "inability (on the part of the employee) to work in harmony either within the "corporate culture of the business or with fellow employees."[226] The appropriate criterion for dismissal based on the grounds of incompatibility is said to be "the failure to or the inability of the employees concerned to maintain the standard of relationship with peers, subordinates and superiors set by the employer and that, in the absence of bad faith, these standards should not be open to legal challenge."[227]

In *Lubke IJS v Protective Packaging*[228] the court referred to the meaning of incompatibility and commented that incompatibility often arises from personal differences. The court held that incompatibility must result in the breaking down of the working relationship which must be irremediable. Incompatiblity can occur in the situation (1) where the manager/manageress does not fit in with staff or fellow colleagues, or (2) where the manager/manageress does not have the ability to manager his/her subordinates.

In the case of (1) above, the guidelines for incapacity as a result of poor work performance will also apply in cases where an employee is not suited to his/her work because of his/her personality. This type of situation occurs where the employee does not fit into his/her work environment and relates poorly to his/her colleagues.[229] The employee is then said to be incompatible with his/her colleagues. In *Larcombe v*

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[225] Incapacity is not limited to the two forms contained in the Code of Good Practice. Incompatibility is a form of incapacity as there are many situations which are not related to the employer's operational requirements and contains no element of misconduct, but where the employee is unable to perform his/her functions properly, the employer is entitled to dismiss him/her for example incompatibility. There is much debate as to whether the concept of incompatibility is a species of unsatisfactory work performance or incapacity- see Du Toit *et al*: *The Labour Relations Act of 1995* (1998) 397-399.

[226] Du Toit *et al*: *The Labour Relations Act of 1995 (*1998) 397.

[227] Ibid.

[228] http//www.irnet.co.za-LRA Judgements (pre-1995).

[229] See *Smithkline Beecham (Pty) Ltd v CCMA & others* (2000) 9 LC 6.13.1.

Antal Industries(Pty) Ltd Pietermaritzburg[230] an employee was dismissed on the grounds of incompatibility. Whilst the employer did not meet with procedural requirements the court accepted that incompatibility with fellow staff is a ground for fair dismissal.

In the case of (2) a manager/manageress may have the specific technical and other skills relevant to his/her job, but simply does not have the ability to manage his/her subordinates in the required manner. In *Blue Circle Materials (Pty) Ltd v Haskins,*[231] the employee was an accountant but in a managerial capacity. She was in charge of a department where several employees reported to her. Whilst she possessed the necesssary skills to perform the accounting functions, she was unable to relate to her subordinates and did not have the necessary skills to manage her department.

2.2.2. The competence of a senior managerial employee to fulfill his/her functions

At common law, whether the employer could dismiss an employee for incompetence in the course of his/her employment depended on the facts of each case. The labour courts have been strict in upholding the dismissal of managerial employees based on incompetence. In *Taylor v Edgars* Trading,[232] the fairness of a decision to transfer a manageress to a different store on the grounds of incompetence was looked at. The applicant was a sales manageress at a Sandton Store, and was transferred to another store (Westgate) as sales manageress. The transfer did not result in any loss of income for the applicant. She however submitted that she was unfairly demoted to the Westgate store she was transferred to (this store was a grade two store on the employer's rating system). The rating system is usually based on the size of the store, the turnover, and the number of staff employed. She also submitted that the demotion was substantially and procedurally unfair based on a number of factors.

The employer on the other hand, contended that the dismissal was not unfair as the applicant was unable to cope with her responsibilities at the Sandton store. She had

[230] (1986) 7 ILJ 326 (IC).

[231] (1992) 1 LCD 6 (LAC).

[232] (1992) 12 ILJ 1239 (IC).

been counselled but was unable to fulfill the duties required of her. The key issue in this case was whether her transfer constituted a demotion and whether her poor work performance (incompetence) constituted a valid ground for the transfer to the Westgate store.

The Industrial Court found that the employee had not been unfairly demoted. The reasoning of the Industrial Court was that management's level of functioning at the Sandton store was an awesome task in comparism to other stores. The Industrial Court stipulated that in this case, the level of stress under which management functioned at the Sandton store, was greater than in any other store, and the applicant was unable to cope with this kind of stress. The Court stipulated that it was the employer's prerogative to set the standards for employees (including management).[233] The applicant in this case was not competent to perform her functions adequately and did not meet the required standards.

The Industrial Court in *Van Aarde v Sanlam*[234] also found the dismissal of a branch manager based on incompetence justifiable. The employer had identified several shortcomings and requested the managerial employee on a number of occasions to attend to these shortcomings and implement the necessary corrective action. The employee failed to do what was required of him and it was evident that no improvement had taken place. The managerial employee, after a final written warning faced dismissal. The Industrial Court was satisfied that the employee being a senior executive had different requirements and duties from employees who are non-managerial. In this case, the employee was not competent to perform the tasks given to him and to rectify his shortcomings. From this point of view, the Industrial Court stated that where an employee is dismissed on the grounds of incompetence, the Court will not lightly interfere with the standards set by the employer.[235]

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[233] 1239 H.

[234] See http//www.irnet.co.za-LRA Judgements (pre-1995).

[235] The Court relied on the definition defined by Paul Pretorius in : '*Executive Dismissals for Incompetence and Incompatibility'* (March 1993) 2 : 8 2. In terms of this definition executive dismissals on the grounds of incompetence should be defined as a failure to meet the standards of ability and skill set by the employer, and in the absence of bad faith, the Industrial Court should not

A similar course (which is open to much criticism) was chartered in the 1997 Labour Appeal Court's decision of *Somyo P v Ross Poultry Breeders*.[236] The applicant was a manager of a chicken farm. He worked for the employer from 1974 and was promoted over a period of time from supervisor to manager. He was responsible for the management of the employer's farm house as well as the general administration of the farm as a whole. The employee was said to have a high degree of professional skill but was dismissed for incapacity based on poor work performance. The employee had failed to vaccinate the chickens timeously, order the required feed, adhere to the feeding schedule, and complete tasks with diligence. These four charges brought against the employee were proved at the disciplinary hearing and the employee was subsequently dismissed. He then instituted proceedings at the Industrial Court. The Industrial Court accepting that all four charges against the accused were proved, found the sanction of dismissal to severe. The employee was then given a final written warning and the employer was directed to pay the employee his wages from the date of the dismissal to the date of order. The employer not satisfied with the decision appealed to the Labour Appeal Court.

The Labour Appeal Court had to decide whether the dismissal of the managerial employee was an unfair labour practice. According to this Court, an employer who is concerned about the poor work performance of an employee, is normally required to appraise the employee's work performance and to likewise warn the employee that he might face dismissal where his/her performance does not improve. In this regard, the employer is required to advise the employee that he might face dismissal where his/her performance does not improve. He must also allow the employee a reasonable opportunity to improve his/her performance.

The Court whilst identifying that an employer is required to warn a manager/manageress of his/her poor work performance as well give him/her an

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question those standards. See also *Gustily v Datakor Holdings (Pty) Ltd T/A Corporate Copilith* (1993) 14 ILJ 171 (IC), and *JvM* (1989) 10 ILJ 755 (IC).

[236] (1997) 1 LAC 8.1.1.

opportunity to improve, found that these requirements would not apply in the following two cases:

"(a) where a manager or senior manager whose knowledge and experience qualify him/her to judge for him/herself whether he/she is meeting the required standards set by the employer, and (b) the degree of professional skill which must be required is so high and the smallest departure from that standard, are so serious, that one failure to perform in accordance with that standard is enough to justify dismissal." [237]

The Labour Appeal Court therefore found the dismissal of the employee justified based on the above exceptions as well as because of the fact that he constituted senior management. Their finding was final despite the fact that the employer did not inform the employee of his poor work performance, satisfy the requirements of an appraisal or a warning, or give the employee an opportunity to improve.

In my opinion, this decision is open to much criticism. It (1) does not take into account the Code of Good Practice,[238] (2) is now inconsistent with the Supreme Court of Appeal's decision in *Unilong Freight Distributors v Muller,*[239] and (3) it might be laid to rest in the recent Labour Appeal Court's decision in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon.*[240]

2.2.2.1. The Code of Good Practice[241] and the *Somyo v Ross case*[242]

We have established that senior mangerial employees have been more commonly dismissed for reasons related to incompetence and poor work performance. Dismissal

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[237] See *Taylor v Alidiar Ltd* (1978) IRLR 82, where a pilot was dismissed after making a faulty landing and causing considerable damage to the aircraft. The English Court stated that: "*In our judgement there are activities in which the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that standard are so serious, that one failure to peform according to those standards is enough to justify dismissal.*"

[238] Schedule 8 of the LRA 66 of 1995 (herein referred to as the 'Code').

[239] (1998) 19 ILJ 229(SCA).

[240] (1999) 8 LAC 7.2.1.

[241] Schedule 8 of the LRA 66 of 1995.

[242] *Somyo v Ross* (1997) 1 LAC 8.1.1.

for incompetence/poor work performance must satisfy the tests of substantive and procedural fairness. It is therefore incumbent that the employer provide sufficient proof of incompetence.

(i) Substantive criteria

According to Du Toit et al,[243] substantive fairness for dismissal based on poor work performance under the previous LRA[244] depended on whether the employer could fairly expect to continue with the relationship, bearing in mind its own interest, those of the employee, and the circumstance of each case. Substantive proof of poor work performance is validated best on the basis of an assessment or appraisal conducted by the employer. The employer is therefore, generally required to conduct an appraisal/assessment of the employee's performance.[245]

The reasons for conducting an assessment or an appraisal is based on establishing the reasons related to the employee's shortcomings, and thereby applying a value judgement of his/her performance which is both objective and reasonable. The Courts have therefore emphasised that it is the duty of the employer to set the required standards and to assess whether or not the standards have been met. In this regard, the Courts will not substitute their own assessment for that of the employer unless the employer's judgement is shown to have been clearly unreasonable in the circumstance pertaining to the work situation and a particular industry.

Somyo v Ross falls short of the above. The employer did not really inform the employee of his poor work performance. An once-off general meeting was held in which the employer only laid out the various grievances. The employer neither satisfied the requirements of an appraisal nor a warning. The employee's actions were serious and there were undeniable consequences which were attached to his negligence. However, if the employer regarded the actions of the employee so serious as well as the fact that the vaccinations were not carried out timeously. My next logical question would be concerned with why the employer waited so long (5-

[243] Du Toit *et al* 389.
[244] Act 28 of 1956.
[245] See Le Roux and Van Niekerk: *The South African Law of unfair dismissal (*1994) *76-78.*

6weeks) before dismissing the employee? While the employer is not a "watch-dog," effective checks and balances with regard to vaccination procedures must surely be carried out. There is no evidence in the case as to when the employer discovered that the managerial employee was negligent . If he was aware of the manager's negligence and personal circumstances as we are told (at the first meeting), why not double check especially where the vaccinations procedures in the employer's enterprise are as important as stated. Furthermore, no counselling and warnings were embarked on.

In my opinion, the Labour Appeal Court erred in their judgement by not taking into account the Code of Good Practice. Whilst the Code is not to be applied mechanically, it must be taken into account by any person (ie. disciplinary chairperson; labour Court, Judge etc.), when dealing with the dismissal of an employee.

The Code of Good Practice provides that: "any person determining whether a dismissal for poor work performance is unfair should consider- (a) whether or not the employee failed to meet a performance standard, and (b) if the employee did not meet a required performance standard whether or not- (i) the employee was aware or could reasonably be expected to have been aware, of the required performance standard, (ii) the employee was given an opportunity to meet the required performance standard, and (iii) dismissal was an appropriate sanction for not meeting the required performance standard. ''[246]

The Code further provides that employers should where appropriate, give employees any evaluation, instruction, training, guidance or counselling that is needed to render satisfactory service. [247] They should ensure that newly appointed staff as well as employees with long service records are aware of the required performance standards for their jobs.[248] In the case of non-probationary employees, employers must allow

[246] Schedule 8 item 9 of the LRA 66 of 1995.

[247] Schedule 8 item 8 (1) and (2).

[248] Schedule 8 item 9 (b) (i).

the employee a reasonable opportunity for improvement before dismissing him/her for unsatisfactory performance.[249]

In light of the above, the *Somyo* decision falls short especially if one takes into account the number of years the employee worked for the employer. The employee worked for over 30 years and still the employer used dismissal as an immediate resort, not taking into account the mechanisms provided for in the Code of Good Practice. Moreover, the employee not only had an excellent track record but the service he perfomed throughout the years was unquestionable.[250] At the very least, the employee should have been given the opportunity to improve considering his long and good service record.

Thus, where an employee, including a senior managerial employee, has been dismissed for incapacity based on incompetence or poor work and the person charged with determing whether the dismissal is fair does not take the above guidelines into account, will render the dismissal substantively unfair.

(ii) Procedural fairness

There has been a strong contention on behalf of companies which had dismissed senior managerial employees and executive level employees that they were not entitled to pre-dismissal fairness either because the LRA did not apply to them or because it would be inappropriate for the court to lend assistance to high-level employees.[251]The Industrial Courts including the Labour Appeal Court in *Somyo v Ross* have declined to exercise its powers in favour of a wronged executive or senior managerial employee on the ground that to do so would be unfair to the company. However, in *Oak Industries (SA) (Pty) Ltd v Johnson No & Another,*[252] it was for the first time authoritatively established that there exists no jurisdictional bar preventing

[249] Schedule 8 item 8 (2).

[250] Para. 2.

[251] See Cameron: *'The Right to a hearing before Dismissal-Problems and Puzzles'* (1988) 9:2 147-186.

[252] (1987) 8 ILJ 756 (N).

the Industrial Court from adjudicating the claims of unfairly dismissed senior executives including directors of companies.

Procedural fairness is concerned with giving the employee an opportunity to state his/her case, to call for witnessses and to account for his/her version of the events. This is line with the rules of natural justice, for example, the *audi alterem partem* rule. The *audi alterem partem* rule[253] is concerned with giving the employee the opportunity to present his/her side of the story. He/she may present his/her version of the events that took place. He/she may lead evidence by calling in witnesses and also have the right to cross exam the employer's witnesses. The *audi alterem partem* rule is moreover concerned with the employee's right to a hearing before the dismissal. This common law doctrine was established primarily in the public sector and then extended to the private sector.[254]

The Code further provides that a fair hearing is the primary procedural instrument for processing a disciplinary offence. Procedural fairness which includes the opportunity for improvement in the case of managerial employees was not addressed in the *Somyo* decision. A senior managerial employee has a right to respond to a charge of poor work peformance. Moreover, the Code prescribes that the employer should consider ways short of dismissal to remedy the employees' poor work performance.[255]

Bearing this in mind, in my opinion, senior managerial employees' dismissals must be assessed in the same way as "ordinary employees." It is said that their claims to procedural fairness before dismissal be assessed in the same way as those of other employees, namely, with due consideration of all the relevant circumstances.[256] This is in line with international jurisprudence, for example, the ILO Convention. The International Labour Organisation (ILO) mandates a hearing before a dismissal, in consequences of either disciplinary hearings or reasons related to poor work

[253] See *Administrator, Transvaal vTraub* (1989) 10 ILJ 823 (A).
[254] See Du Toit *et al (*1998) 369 fn.4.
[255] Schedule 8 item 8 (3) and 9 (b) (iii).
[256] Du Toit *et al* (1998*)* 92.

performance. In terms of Article 7 of the ILO Convention,[257] the right to procedural fairness extends, where appropriate, to all employees irrespective of status or seniority.

Senior managerial employees are also employees with life concerns *for eg*, they have family responsibilities, financial commitments and a court cannot overlook their personal circumstances. This is in line with the Code of Good Practice, which provides that an employer must take into account the personal circumstances of an employee. Thus, where an employer dismisses a senior managerial employee for incompetence, the tests for substantive and procedural fairness must be satisfied. Fortunately, this has been decided by recent case law.

2.2.2.2. *Unilong Freight Distributors v Muller*[258] and *Somyo v Ross*[259]

The Labour Appeal Court's decision in *Somyo* is open to much criticism in light of the above Supreme Court of Appeal decision of *Unilong Freight v Muller*. Both courts dealing with dismissal of senior managerial employees based on poor work performance, find themselves at different poles.

In *Unilong*, a managerial employee was employed by a road transportation company. He held the position of branch manager for two months. He was dismissed by the company on grounds of poor work performance. He stipulated that he had been constructively dismissed and that his dismissal was an unfair labour practice. The company on the other hand contended that he accepted "voluntary retrenchment." The Industrial Court was unable to settle the dispute and the case then reached the Labour Appeal Court.

The Labour Appeal Court accepted the Industrial Court's reasoning that the company had sufficient reason to be dissatisfied with the employee's performance. However, it reached the conclusion that the manager's dismissal was constructively and

[257] Termination of Employment Convention 158 of 1981.

[258] (1998) 19 ILJ 229 (SCA).

[259] *Somyo v Ross* (1997) 1 LAC 8.1.1.

procedurally unfair. The matter then came before the Supreme Court of Appeal, who had to decide whether the Labour Appeal's Court finding was just or not.

The background and events that led to the dismissal were as follows: The company was in need of a branch manager and considered various candidates. The employee had no experience in the transportation business but had managerial skills and experience. He was also academically qualified for the position. He underwent various training programmes for the first three weeks. During the following six weeks, certain incidents took place which convinced management that he was incapable of performing the work required of him. According to the company, the employee was not sufficiently prepared, he had on an occasion embarassed the company, acted without authority and his conduct was unbecoming to that of a manager. It then transpired that the managerial employee was forced to take "voluntary retrenchment." It was clear that the company had decided that the employee's employment at their business be terminated.

The Supreme Court of Appeal held that whilst the employee had not met with the required standards, his dismissal was procedurally unfair based on the following:
- the employer had not given the employee any guidance or advice in order to make him understand what was required of him,
- he was not given an opportunity to improve,
- he was never warned nor given a reasonable ultimatum, and
- at no specific time was he warned that unless his peformance improved was he running the risk of dismissal.

The Company contended that he was a senior manager and should have known what was required of him, and for this reason alone should be capable of judging for himself whether or not he was meeting those requirements. The Supreme Court of Appeal was not of the same opinion and held that "fairness demands that in general he should be given a warning and an opportunity..in all circumstances, fairness and good sense required that the employee should have been given an ultimatum which was reasonable and explicit."

2.2.2.3. *JD Trading (Pty) Ltd t/a Price'n Pride v Brunsdon*[260] and *Somyo v Ross*[261]

Interestingly, the Labour Appeal Court in *JD Trading* also deals with the dismissal of a managerial employee and its finding may lay the *Somyo* case to rest. In this case, the employee commenced employment as a salesperson. He was subsequently promoted to the position of sales manager, general manager and then branch manager. But before his final appointment to branch manager he was dismissed based on unsatisfactory performance. The events leading to his dismissal were as follows:

The operational manager had called the managerial employee to inform him that his performance was not satisfactory. The managerial employee was also told that he has five months to ensure improvement in the areas falling under him. The managerial employee was further informed that he was not the right person to solve the problems which fell under his jurisdiction and furthermore, that top management has reached the conclusion that he was not able to work with people. He was offered another position and then removed from the office of branch manager. The operations manager informed him that the new position was a more specialised position which demanded the same skills as the position of a general manager. Subsequently, this senior employee was called to a meeting held by the Company Executive Officer (CEO) and various other managerial members of the company. At this meeting, the employee was informed that the company no longer had a position for him. According to the company, it was faced with certain problems arising out of the employee's failure to perform his duties properly[262] and based on this, the

[260] (1999) 8 LAC 7.2.1.

[261] *Somyo v Ross* (1997) 1 LAC 8.1.1.

[262] The company had apparently visited certain stores. They found that many of the goods were damaged and that the vehicles were not in a good condition at all. Other employees apparently informed senior management that the condition of the stores were in a bad condition, but that the managerial employee in charge of the store did nothing to solve the problems. See para 40, p.8 where it is stated that: *"Na 'n besoek deur Mnr Hall en Mnr Nel in die Noord Transvaal was hulle baie ongelukkig oor die toestand van sekere winkels onder andere die Louis Trichardt pakhuis waar hulle gevind het dat baie van die vorraad beskadig is en dat die voertuie nie in 'n goeie toestand was nie.*

company informed the employee that he did not possesss the necessary skills and abilities required for the performance of his current duties.

The employee was therefore, not given the opportunity to perform his current functions. The employee was also however not given the opportunity to prepare himself for the meeting with the CEO and other managerial members of the company, and could therefore not defend himself. His employment was terminated and he was also not given the opportunity to serve his notice period. He then instituted proceedings in the Industrial Court declaring that his dismissal was an unfair labour practice. The Industrial Court declared that the employee's dismissal was without a valid reason.However, it seems that the Industrial Court had not given reasons for its decision and the employer not satisfied with the outcome, appealed to the Labour Appeal Court. The Labour Appeal Court had to determine whether there was a valid reason for the dismissal.

The Labour Appeal Court's finding makes important points about the treatment of senior managerial employees in unfair dismissal law and from this point of view, lays to rest the views of *Somyo*.[263] The two-bench judgement holding different views in respect to some issues, reached the same conclusion:

Judge Zondo held that for the appellant to remove the employee from the position of general manager on the basis that he lacked interpersonal skills and appoint him to another position, which also required the same skills to the same extent would not only be nonsense, but would also be illogical. Furthermore, the Judge stated that the employer should have waited until it completed its investigations into the employee's performance as general manager. This should have been done before it could be decided whether to offer the employee another position or whether it would appropriate to dismiss him, because, if the results of the investigation showed him not suitable for any other position in the company, the employer would have been fully justified in dismissing him. Judge Zondo made it clear that when it is

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Daar is vir hulle gese dat hierdie probleme by die Applikant aangemeld was, maar dat die Applikant niks getoen het om die probleme op te los nie...was."

[263] *Somyo v Ross (*1997) 1 LAC.8.1.1.

contemplated that an employee may lose his job because of poor work performance, he is entitled to be afforded an opportunity to be heard before the decision is taken to terminate his services.[264] The decision to dismiss the employee was taken prior to him being given the opportunity to state his case. In light of this, the employer had constituted a failure to observe the *audi alteram partem rule* which would render the dismissal unfair.[265]

As a general rule, where the *audi alteram partem rule* applies, it must be complied with prior to the decision being taken (except in exceptional circumstances).[266] Judge Zondo held that there were no exceptional circumstances justifying the employee's dismissal.[267] The no-difference rule applied by the employer was rejected. In this case, the employer argues that in light of the poor performance of the employee, even if he had been given the opportunity of improvement, it would have made no difference and the result would be the same.[268]

The employer argued that the employee was a senior manager and that he knew what his shortcomings were. However, Judge Zondo held that the fact that an employee is a senior manager/manageress does not give the employer the licence to dispense with the observance of the *audi alteram partem rule.*[269]

The Judge held that : "the opportunity which is given to a senior employee must still meet at least two of the basic requirements of the *audi alteram partem* rule, namely, he must be given the notice of the contemplated action and a proper opportunity to be heard."[270] In this case, the opportunity to be heard which the appellant purported to give the respondent did not meet any of the basic requirements. Judge Zondo found that the dismissal was unfair.

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[264] Para 56.
[265] Para 57.
[266] Judge Zondo made reference to the case of *Administrator of the TCL and others v Frau and Others* (1989) 10 ILJ 823 (A)828J - 829C.
[267] Para. 58.
[268] Para. 59.
[269] Para. 61.
[270] Para. 62.

Judge Conradie had taken a more restrictive view with regard to senior managerial employees. He however concluded that: "... in the case of all employees whose poor work performance is a problem...the incumbent whose work is under scrutiny must be allowed to contribute. In the present case the respondent was, as regards his new job, not given that opportunity."[271]

3. Conclusion to chapter two

In examining the positions of senior managerial employees in the law of unfair dismissal law, it is clear that senior managerial employees should be given the same opportunity of improvement as "ordinary employees." This was not only confirmed by the Labour Appeal Court in *JD Trading(Pty) Ltd v Brunsdon* as discussed above, but also by the progressive dismissal labour law legislation, which provides that no employee shall be unfairly dismissed.[272] This is also in line with section 23 of the Constitution which provides that every employee has the right to fair labour practices. From this perspective, senior managerial employees must not only be given the same opportunity of improvement as "ordinary employees," but their dismissals must be assessed in the same way as "ordinary employees." In keeping with the Code of Good Practice, their dismissals must be both substantially and procedurally fair. Whilst they are treated differently in collective bargaining, their differential treatment within the collective bargaining unit and their differential treatment in the law of dismissal cannot be equated.

[271] Para 76.

[272] Section 185 of the LRA 66 of 1995.

Conclusion

Senior managerial employees constitute a distinct interest group within the employer's enterprise. This paper examined their positions not only in the collective bargaining unit, but also their respective dismissals.

It is my submission that in the collective bargaining unit, senior managerial employees' proper place is with the employer based on the reasons outlined in this dissertation. Where they seek to hold office in trade unions or the right to have trade unions negotiate their wages and conditions of service, it undoubtedly creates a conflict of interest. The positions of Directors and Deputy-Directors were examined as a case study and it is clear not only from this case study, but also from the international jurisprudence that their proper place is with the employer within the collective bargaining unit. This was the decision arrived at by the British Columbia legislator in the case of *District of Barnaby*[273] where the legislator stated that: "... in the tug of these two competing forces, management must be assigned to the side of the employer." This was also the position taken by Labour Appeal Court in *Sasbo v Standard Bank* as discussed in this paper. The right to bargain collectively is not absolute and may be limited.

However, whilst senior managerial employees are treated differently from "ordinary employees" in this respect, when it comes to the law of unfair dismissal, they should be given the same opportunity of improvement as "ordinary employees," which includes the right to procedural fairness, not only based on the reasons mentioned, but moreover, because fairness demands this.Their right not to be unfairly dismissed is proclaimed in section 185 of the LRA.

Unfortunately, our labour law does not adequately or consistently[274] define senior managerial employees as the international jurisprudence does. In the USA for example, as was discussed, senior managerial employees are separately defined. There must be a seperate and consistent definition of senior managerial employee in

[273] See fn.1.
[274] See defintions as defined in the BCEA and LRA.

the relevant South African labour legislation. In this regard, obvious problems (*eg.* distinguishing between junior and senior managers) may be eliminated.

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