

Explain the difference between the concepts of “substantive” and “procedural” fairness with reference to dismissals.

- In order for a dismissal to be fair and lawful, such dismissal must be both substantively and procedurally fair.
- Substantive fairness deals with the REASONS for the dismissal. In order for a dismissal to be fair, there must be valid reasons for such conduct by an employer (eg. theft or fraud).
- The reason for the dismissal must not be classified as unfair, or automatically unfair (eg. dismissal based on pregnancy).
- Procedural fairness, on the other hand, deals with the formal PROCEDURES prescribed by the law which are to be followed by an employer before dismissing an employee.
- Dismissals should be effected in a procedurally fair manner, for example, following the disciplinary procedure of a company, allowing the employee to call witnesses, etc.

Lebo works as a web-designer at Incredible Connectors, a company that designs websites for its clients. Incredible Connectors wants to dismiss Lebo because one of their clients was dissatisfied with her work on a particular project.

Explain the procedure which Incredible Connectors must follow before dismissing Lebo, whose work was indeed sub-standard.

(10)

The procedure which Incredible Connectors must follow is as follows:

- The employer must investigate the reasons for the unsatisfactory performance;
- The employer must give the employee appropriate evaluation, instruction, training, guidance or counselling;
- The employer must give the employee a reasonable period of time to improve;
- If the employee continues to perform unsatisfactorily, he or she can be dismissed for poor work performance; and
- During this process of dismissal the employee has the right to be heard and to be assisted by a union representative or a co-employee.

Explain the difference between “employment equity” and “affirmative action”.

- Employment equity relates to the steps that an employer must take to promote equal opportunity and fair treatment in the workplace, by eliminating unfair discrimination in any employment policy or practice. The EEA prohibits both direct and indirect unfair discrimination on any one or more of the specified or unspecified grounds.
- Affirmative action refers to the measures that have to be taken by designated employers to ensure that suitably qualified people from the designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workplace.

Differentiate between direct and indirect discrimination. (6)

- Direct discrimination is the easiest form of discrimination to determine. It occurs if someone is clearly treated differently because of a certain characteristic, for example, race or gender.
- Examples of direct discrimination are an employee being paid less simply because she is female, or an employee not being promoted simply because he is disabled, or of a different religion than the employer, etc.
- Indirect discrimination occurs when criteria that appears to be neutral, negatively affects a certain group disproportionately, for example, women or Hindu people. Such discrimination, in contrast with direct discrimination, is often disguised and hard to detect.
- An example of indirect discrimination would be a requirement that candidates must have a deep bass voice. In such instance, more women than men will qualify. Unless this criterion can be justified by the requirements of the job, it will amount to indirect discrimination.

Explain the interaction between a contract of employment, collective agreement and the Basic conditions of Employment Act, 1997 (6) 1

The contract of employment

- Forms the basis of the relationship between the employer and employee and, consequently, the principles of the law of contract apply to the relationship.
- The contract of employment outlines the agreement between the employer and employee and specifies the terms and conditions in respect thereof.

The Basic Conditions of Employment Act, 1997

- Regulates the minimum terms and conditions of employment, which the contract of employment must comply with.
- These terms and conditions should thus be contained in a contract of employment, except where any other law provides a term more favorable to an employee; the contract of employment provides a more favorable term to the employee; or the basic condition has been replaced, varied or excluded in terms of the Act.

A collective agreement

- Between trade unions and employers may change conditions of work, provided that such collective agreement is consistent with the purposes of the Act.
- It may replace or exclude a basic condition of employment only to the extent permitted by the Basic Conditions of Employment Act or a sectorial determination.

Explain the meaning of “consultation” in the context of dismissal on the basis of operational requirements. (4)

- Consultation in terms of Section 189(2) of the Labour Relations Act means “to attempt to reach consensus”.
- Consultation must take place when the employer contemplates dismissal; in other words, at the stage when the employer has not reached a final decision to dismiss, but has merely foreseen the possibility.
- In *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd (1993) 14 ILJ 642 (LAC)* the Labour Appeal Court interpreted this to mean “at the earliest opportunity”.
- The employer must first consult with the person or group indicated in a collective agreement. In the absence of a collective agreement, a workplace forum must be consulted (if there is such forum).
- Alternatively, the employer must consult with any registered trade union whose members are likely to be affected by the proposed dismissals. If there is no such union, the employer must consult the employees (or their nominated representatives) likely to be affected by the proposed dismissals

Discuss the procedural requirements for a dismissal based on poor work performance of an employee who is on probation. (10)

- For the purposes of poor work performance, the Labour Relations Act distinguishes between employees on probation and employees who have completed their probationary period.
- Since one of the purposes of probation is to determine whether an employee can perform the job to which he/she has been appointed, the LRA still requires the employer to act fairly towards a probationary employee.
- In order to do this, The Code: Dismissal, however, compels an employer to give the employee on probation the following assistance before he/she can be dismissed for poor work performance: - Evaluation, instruction, training, guidance or counseling needed to perform his/her duties during this period. - The employer must make clear to the employee what the performance standard is, and where he/she falls short. - The employer must give the employee assistance and an opportunity to improve. - The employer should measure the progress of the employee and give feedback.
- The required assistance and the period of probation will be determined by the nature of the job.
- If an employee is dismissed during the probationary period, the employee should have an opportunity to respond to the allegations, and he/she may also be assisted by a union representative or fellow-employee.
- Some employers believe that a probationary employee can be dismissed with 24 hours’ notice and without regard to procedure. That is a fallacy.
- A probationary employee is protected against unfair dismissal and enjoys the protection of the Basic Conditions of Employment Act (BCEA) and the Labour Relations Act (LRA).
- To address poor work performance in cases of probation is problematic. The purpose of probation is to see if the employee can do the work. If the employee cannot, the question is to what extent the employer must help the employee.

- (b) **Company A decides to restructure its truck rental business by closing down its workshops and agree with Company B to service and repair its trucks. The employees employed in Company A's workshops were offered jobs with Company B but on less favourable terms and conditions than those they had with Company A. Those employees refused to accept the new terms offered by their new employer (Company B). Their old employer (Company A) then threatened them with retrenchment if they refused to accept the new terms. The affected employees are of the view that the transactions between Company A and Company B amounted to a sale of business "as a going concern" and therefore that their contracts with the old employer were transferred to the new employer on the same terms and conditions by virtue of section 197 of the Labour Relations Act of 1995.**

Which factors will the court take into account in determining whether a business is transferred "as a going concern" and which approach will the court take in determining whether the company is being transferred as a going concern? (5)

- The phrase 'going concern' is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise.
- What is transferred must be a business in operation 'so that the business remains the same but in different hands'.
- Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction.
- In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction.
- A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer.
- What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation.

- (a) **During a disciplinary hearing an independent chairperson finds employee A guilty of misconduct. The charge against A, a security guard at a gold mine, was that he omitted to do a proper body search for stolen goods on a miner after the completion of his shift.**

- (i) **Assume employee A is dismissed and he refers an unfair dismissal case to the Commission for Conciliation, Mediation and Arbitration (CCMA). Explain whether A is entitled to be represented by an attorney during conciliation and arbitration proceedings respectively. (3)**

- The involvement of legal representatives (attorneys/advocates) at the CCMA is limited. During the state of conciliation, legal representation is not allowed under any circumstances.
- During arbitration, A will only be entitled to having representation by an attorney if the Commissioner and all other parties agree or if the Commissioner decides that it would be unreasonable for A to proceed without such representation.

(11) **During the arbitration proceedings before the CCMA, the employee argues that the employer should have followed a formal court-like procedure. Is this the correct approach? Explain (2)**

- The employee is to some degree correct in arguing that the employer should have followed a formal court-like procedure in view of the fact that, even in cases of dismissal due to misconduct, both substantial and procedural fairness must be complied with.
- Procedural fairness would entail, inter alia, the employer giving the employee an opportunity to be heard and to defend himself against the allegations. The fact that a disciplinary hearing was held, however, appears to comply with such procedural fairness (subject to A having been granted an opportunity to defend himself).

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- (a) Susan who is an accountant works for two companies as an auditor. On Fridays she works at Special Products and on Mondays she works at Fresh Produce. However, Susan makes her own decisions regarding working hours. Susan is a member of an independent pension fund, but makes use of a motor vehicle provided by Special Products for tax benefits. Susan has her own office at the back of Fresh Produce. Special Products has provided a computer for Susan, but she usually uses her own computer

Discuss whether Susan is an employee or an independent contractor

(5)

Susan is an independent contractor.

- Susan determines her own working hours and works less than 40 hours a week.
- Although Special Products has provided her with a computer, Susan makes use of her own computer and not the companies.
- She also works for more than one company at a time and does not render her services to

- (b) "Operational requirements" means requirements based on the economic, technological, structural or similar needs of the employer (section 213 of the Labour Relations Act, 1995). What are "similar needs"?

(3)

only one employer.

Similar needs would justify retrenchment in cases where:

- The employee's actions or presence have a negative effect on the business
- The employees conduct has led to a breakdown of the trust relationship.
- The enterprises business requirements are such that changes must be made to the

- (c) Under which circumstances will the Labour Court not order a "re-instatement or re-employment", as remedies for unfair dismissal?

(4)

employee's terms and conditions.

- When the employee does not wish to be reinstated.
- The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.
- It is not reasonably practicable for the employer to reinstate the employee
- The dismissal is unfair only because the employer did not follow fair procedure.

(d) **Discuss the difference between a "preventative suspension" and a "punitive suspension".** (4)

- **Precautionary suspension**
 - Could be implemented to allow an employer to investigate alleged misconduct of employee
 - With pay – unless otherwise negotiated
 - Employee should not be suspended unless:
 - Prima facie reason to believe employee committed serious misconduct
 - Is some objectively justifiable reason for excluding employee from workplace
- **Punitive Suspension:**
 - Fair suspension without pay
 - In terms to correct the behavior of employee

(a) **The application of the doctrine of 'vicarious liability'.** (4)

- Where appropriate
- Vicarious liability is a doctrine according to which an employer is liable for the unlawful or delictual acts of an employee performed during the course of business.
- The operation of this doctrine is regulated by the common law and not by employment legislation.
- The doctrine of vicarious liability is based on the principle that the employer has to compensate those who suffer injury as a result of the wrongful conduct of an employee.
- Vicarious liability protects third parties. It does not mean that the employer will not have recourse against the employee. Depending on the circumstances, the employer can discipline the employee for misconduct and even claim repayment in this regard.
- In order for the employer to be held liable for the employee's wrongful conduct, the following three requirements must be met:
 - There must be a contract of employment
 - The employee must have acted in the course and scope of employment, and
 - The employee must have committed a delict (a delict is a negligent or intentional unlawful action or omission by an employee causing a third party to suffer damages or personal injury).
- The most problematic requirement is normally to determine whether the employee acted in the course and scope of employment. Each case must be judged on its own merits.

(a) The validity and permissibility of a 'restraint of trade' agreement signed by an employee (5)

(b) The purpose and implications of a 'restraint of trade' agreement the employee signs with the employer. (4)

- Restraint of trade is usually included in the employment contract to protect the interests of the employer, for instance, against unfair competition from employees during and after their employment has ended.
- The purpose of a restraint-of-trade agreement is to protect the employer's trade secrets, goodwill and business connections. It prevents the employee from competing with his/her employer within a defined area for a prescribed period.
- In determining whether a restraint of trade is enforceable, a court will balance the public interest (which requires parties to comply with contractual obligations even if these are unreasonable or unfair) versus the right of all persons to be permitted as far as possible to engage in commerce or the professions of their own choice.
- In *Magna Alloys & Research SA (Pty) Ltd v Ellis*, the court had to balance the competing interests of the employer and employee.
- It held that a restraint of trade agreement is valid and enforceable unless it is contrary to public policy, which it will be if it is unreasonable.
- Reasonableness will be determined with reference to the interests of both the employer and the employee, public policy and surrounding circumstances.
- For example, an employer who unlawfully terminates a contract of employment containing a restraint of trade clause should not be allowed to benefit from that restraint

(a) **Joy is a cashier at CC Bakeries She was accused by her manager, Ally, of stealing the company's money. Joy pleaded innocent to Ally's accusations and even asked Ally to let her undertake a lie-detector test to prove her innocence, but Ally refused. Ally continued to call Joy a thief in front of other cashiers Joy was disturbed by Ally's persistent allegations and decided to resign**

Joy tells you that she has been dismissed from her employment. Do you think Joy has been dismissed? Substantiate your answer. (5)

- Where an employee resigns because the employer made continued employment intolerable for the employee, it will constitute a constructive dismissal. Although the employee (and not the employer) terminates the contract of employment, it was not done voluntarily.
- The employer's conduct made it impossible for the employee to continue working for the employer.

In *Copeland and New Dawn Prophecy Business Solutions (Pty) Ltd*, the court held that the following three elements must be present to succeed with a claim for constructive dismissal:

- The employee must show that he/she has resigned,
- The employee must show that the reason for the resignation was that continued employment became intolerable, and
- The employee must show that it was the employer's conduct that created the intolerable circumstances.

Joy will thus have to convince the court that Ally's accusations and persistently calling Joy a thief in front of other cashiers made Joy's working conditions intolerable and she resigned as a result thereof. If the court is satisfied of the above, Joy can succeed in a claim for constructive dismissal

(b) **Assume that another cashier, Maggie, saw Joy stealing money from the till. Maggie reported it to Ally. Ally wants to dismiss Joy for misconduct and comes to you for advice. Advise Ally about the requirements she must meet in order for Joy's dismissal based on misconduct to be procedurally fair.**

(7)

- Procedural fairness is as important as substantive fairness for a dismissal based on misconduct (as, in fact, all other dismissals).
- The requirements for a procedurally fair dismissal based on misconduct must be followed to ensure that the process complies with the provisions of the Labour Relations Act in this regard.
- The main principle is that the employer must give the employee an opportunity to be heard and to defend himself/herself against the allegations. If the working environment is less formal and this happens in a more informal manner, it will also constitute a fair process.
- Some of the procedural steps Ally would be required to take in order to ensure a procedurally fair dismissal are as follows:
 - Conduct an investigation to determine whether there are grounds for dismissal. - Notifying the employee of the allegations (in a form and language that the employee can reasonably understand).
 - Giving the employee reasonable time to prepare. - Allowing the employee to state a case in response to the allegations.
 - Allowing the employee the assistance of a union representative or co-employee. - The employer, after enquiry, is to communicate the decision taken, and furnish the employee with written notification of the decision as well as the reasons for the decision.
 - If the employee is dismissed, the employer is to remind such employee of any rights to refer the matter to a bargaining council or the CCMA.
- If Ally complies with the aforementioned procedural requirements and finds that Joy is, in fact, guilty of misconduct, the dismissal would be fair.

ZZ Projects has been paying its employees an amount of R300 per month for the last three years as transport allowance, but has not increased the amount during this period. Trade union ABC threatens to declare a dispute because the amount has not been increased. Will this be a dispute of right or a dispute of interest? Briefly discuss.

- Having proper investigations and a disciplinary hearing are of paramount importance in complying with procedural fairness prior to proceeding with dismissal for misconduct.
- A dispute regarding an unfair labour practise must amount to a dispute of right. These entail disputes about existing rights.
- In contrast "dispute of interest" concern the creation of new rights. The latter must be resolved by way of industrial action and not by court.
- An employee may be unhappy about something in the workplace but not sufficiently so to resign.
- For example, if an employee is not promoted, or an employer discontinues a cell phone allowance.
- Even though termination of the contract of employment is not yet on the table, section 186 of the LRA may provide protection for employees based on unfair practises committed by employers.

(b) **Discuss the right of an employer to discipline employees for misconduct committed after hours and off the premises of the employer** (5)

- An employer cannot dictate an employee's conduct outside working hours, as employees' personal lives do not fall within the ambit of the working relationship.
- However, the distinction between an employee's private life and working life cannot always be separated, as the employer could have an interest when the employee's behavior affects the employee's ability to do his/her work, the good name and reputation of the employer or its business dealings with others, or interpersonal relations in the workplace.
- In such cases, the employer may be entitled to take appropriate action against the employee.
- Should the employer wish to discipline the employee for conduct outside working hours, the employer bears the onus of proving that it has a sufficient and legitimate interest in the employee's conduct which justifies action being taken.
- Therefore, it is important for the employer to show that despite the conduct not being directly related to the employee's employment, it does impact on the employment relationship in one way or another.
- If there is a sufficiently close link between the misconduct of the employee and the employment relationship, the employer can discipline the employee for such misconduct after hours and/or off the employer's premises, provided that the link exists in the particular circumstances.
- This was the case in *National Union of Mineworkers & others v East Rand Gold & Uranium Co Ltd* where an employee who attacked his supervisor on the bus to work was fairly dismissed.
- All prescribed procedures for misconduct will have to be followed and the Employee must be granted an opportunity to defend himself/herself and provide his/her own version of events so as to enable a decision to be made upon consideration of all facts.
- Disciplining an employee for misconduct committed outside the work place can result in a warning, suspension and even dismissal, depending on the seriousness of the employee's misconduct.

(a) **The University of Gauteng's entrance is secured by a safety boom which is manually operated by a security guard. One day while Mr Driver is exiting the campus, the security guard drops the boom on the windscreen of Mr Driver's car. It appears that the security guard was busy sending an sms to his girlfriend while operating the boom and consequently lowered the boom on top of Mr Driver's car. Mr Driver sustains serious nose injuries and would like to take action against the University of Gauteng, since the security guard was in its employment at the time of the accident. Discuss whether he will succeed with his claim** (5)

- The doctrine of vicarious liability is based on the principle that the employer has to compensate those who suffer injury as a result of the wrongful conduct of an employee. Vicarious liability protects third parties.
- In order for the employer to be held liable for the employee's wrongful conduct, the following three requirements must be met:
 - There must be a contract of employment,
 - The employee must have acted in the course and scope of employment, and
 - The employee must have committed a delict (i.e. a negligent or intentional unlawful action or omission by an employee causing a third party to suffer damages or personal injury).
- The guard's wrongful conduct took place during the course and scope of employment and his negligence in failing to pay attention caused Mr. Driver serious nose injuries. The University of Gauteng can, in fact, be held vicariously liable for the costs of the injuries sustained by Mr. Driver and any damages sustained by his car as well.
- The University of Gauteng does, however, still have the right to later recover the costs from the guard and discipline the guard accordingly.

(a) Which factors must be considered when determining whether dismissal is an appropriate sanction in cases of misconduct? (5)

Dismissal based on misconduct - employee is at fault, by breaking a workplace rule. In terms of the Code: Dismissal, all employers should adopt disciplinary rules to ensure that employees know the required standards of conduct.

This must be communicated to them in manner that they understand. These may vary depending on the size and the nature of the workplace. The employer's rules must create certainty and constitute in the application of discipline

Some rules are known, duty to act in good faith, that they apply implicitly and need not be included in the contract of employment. Even though misconduct is a recognised reason for dismissal, it still needs to be substantively fair.

The Code: Dismissal sets the following requirements for substantive fairness:

- Did the employee contravene a rule or standard regulating conduct in, or of relevance to the workplace
- If so, was the rule valid and reasonable? this is normally determined with reference to the need of the workplace and business
- Was the employee aware of the rule, or could he reasonably be expected to have been aware of it. An employee can only be punished if he knew that the conduct was unacceptable and that a transgression of this rule could lead to dismissal
- Was the rule consistently applied by the employer - employer cannot enforce a rule which had previously been ignored. Historical inconsistency, because present conduct is inconsistent with past conduct. If a rule is to be enforced in future, the employer must inform employees beforehand. If, at a given time, an employer's treatment of several employees guilty of the same offence is inconsistent, that would be " contemporaneous inconsistency"

Is dismissal an appropriate action for contraventions of the rule? Dismissal should be seen as a matter of last resort. Not appropriate for first offence, unless serious misconduct, renders relationship intolerable. Dismissal will depend on circumstances: length of service, previous disciplinary records, personal circumstances, nature of the job, circumstances of the infringement itself unacceptable and that a transgression of this rule could lead to dismissal

(ii) The difference between being absent without leave (absconding) and desertion. (5)

AWOL	DESERTION
<ul style="list-style-type: none"> • If employee does not want to terminate employment contract, but stays away from work without leave. • Warrant dismissal if period of absence is unreasonably long • If employee returns after few days with letter to show he/she had reason for absence 	<ul style="list-style-type: none"> • If employee, without resigning, stays away from work with intention of terminating contract of employment • employer must terminate contract of employment by holding disciplinary hearing in absence of employee • Even if employee returns after dismissal, the employer must give him/her an opportunity to be heard

JJ Trackers has branches in the nine provinces of South Africa. Ben has worked as a sales person at the company's Mpumalanga branch for more than ten years. Ben is an active member of Amandla Trade Union, and this has frequently caused tension between Ben and his manager, Mr Brown. Mr Brown wants Ben to relocate to Cape Town where he will occupy the same position as sales person. Ben informs Mr Brown that he will not be able to move to Cape Town due to serious family problems, but Mr Brown insists that Ben should be transferred to Cape Town. Ben refuses and Mr Brown threatens him with a disciplinary hearing. Ben decides to resign.

Ben approaches you for advice. Advise Ben on the following:

- (i) Whether he was dismissed or not. (1)
(ii) If Ben was dismissed, what type/s of dismissal would it be? Substantiate your answer. (4)

- Where an employee resigns because the employer made continued employment intolerable for the employee, it will constitute a constructive dismissal. Although the employee (and not the employer) terminates the contract of employment, it was not done voluntarily.
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