The Response of Labour Law to COVID-19 Related Dismissal in South Africa

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Abstract

The outbreak of the COVID-19 pandemic in 2020 imposed sudden and severe hardship on several businesses. It not only resulted in fatalities, but it also caused significant numbers of job losses. As a result of the COVID-19 outbreak employees in the workplace had to adapt to the new normal and certain constitutional rights were limited. Many employees were retrenched, and as a result, these COVID-19 retrenchments were not procedurally or substantively fair. The post COVID-19 period has highlighted that much work needs to be done to reform our existing labour laws. During pandemics, current labour regulations do not help. As a result, the question arises as to how far the Labour Relations Act 66 of 1995 protects employees in the workplace in times of public health emergencies. This article will look at how labour laws responded to COVID-19 retrenchments. It will also go over the forms of dismissal and important judicial decisions handed down during the COVID-19 period that support the idea that retrenchments made during the COVID-19 period were unfair. Thus, the authors will examine how to maintain the promotion of justice in the workplace and provide a discussion of law reform ideas that can be used to address the employment law-related flaws of the COVID-19 period will be presented in order to avoid the same challenges during pandemic periods that the country may face in future.

Keywords*: COVID-19 retrenchments, labour laws, development of new labour laws, Labour Relations Act 66 of 1995.*

JEL Classification*:* K31, K32

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1. Introduction

Retrenchment is said to be a form of dismissal due to no fault of the employee but rather it is a process whereby the employer reviews its business needs to increase profits or limit losses which leads to a decision to reduce its employees. It is therefore regarded as a procedure that is both substantively and procedurally fair for as long as it meets the requirements as set out on what retrenchment entails in terms of the Labour Relations Act[3]. Section 189 of the Labour Relations Act[4] provides instances in which retrenchment can be done. It provides that retrenchment can be done based on operational requirements. The Labour Relations Act[5] permits employers to dismiss employees for operational requirements. What this article will focus on is whether the dismissals done during the COVID-19 period based on operational requirements were both substantively and procedurally fair[6].

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[3] Act 66 of 1995.

[4] Act 66 of 1995.

[5] Act 66 of 1995.

[6] See more in Jance, Kristinka & Mirjam Reci, 'Restrictions on Human Rights During the COVID-19 Pandemic in the Western Balkans', *Juridical Tribune – Review of Comparative and International Law* 14, no. 3 (October 2024): 465-480; Kecső, Gábor, Boldizsár Szentgáli-Tóth and Bettina Bor, „Emergency Regulations Entailing a Special Case of Norm Collision Revisiting the Constitutional Review of Special Legal Order in the Wake of the COVID-19 Pandemic", *Juridical Tribune - Review of Comparative and International Law* 14, no. 1 (March 2024): 5-26.

According to section 23(1) of the Constitution[7] of the Republic of South Africa, everyone has a right to fair labour practices.[8] This therefore is an indication that anything that has to do with the employer and employees must be both procedurally and substantively fair. What then is a dismissal and when is it regarded to be both substantively and procedurally fair are key questions for this paper in determining whether the dismissals that were done as a result of COVID-19 retrenchments were procedurally and substantively fair.

2. Dismissal in terms of the Labour Relations Act, 1995

Parties wishing to give and receive labour-related service generally enter into an employment contract. Such a contract is an agreement in which the employee agrees to place his or her services at the employer's disposal for a set period in exchange for remuneration.[9] The Constitution recognises the importance of employment as the right to practise one's trade, profession and occupation, which is intrinsically linked to the right to work – the right to earn a livelihood.[10] The right to work has a close nexus with other constitutionally protected human rights, particularly the right to human dignity[11]. In *Affordable Medicines Trust and Others v Minister of Health and Others*,[12] Ngcobo J. expressed this connection as follows: [w]hat is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence.'

During the employment contract, the employer has the authority to define the employee's duties and control how the employee performs them.[13] Whereas the common law and statutory provisions obligate an employer to provide a safe work environment and uphold fair labour practices.[14] The latter objective is achieved by protecting employees against unfair labour practices and unfair dismissal based on misconduct, incapacity and the operational requirements of employers in respect to COVID-19 matters.[15] There are no provisions in South Africa's legal system that protect an employee from being dismissed, but employees who are unfairly dismissed are protected.[16]

Therefore, employment is not guaranteed and can be terminated. The termination of employment between an employer and an employee can occur *inter alia* through dismissal, the expiration of a contract, or notice from the employer to the employee.[17] It is important to reiterate that the purpose of this article is to discuss the dismissal regime in South Africa in terms of the Labour Relations Act, 1995 (LRA) with particular regard to the period of the COVID-19 pandemic.[18] It essentially seeks to determine the different forms of dismissals applicable to employees who refuse to vaccinate against COVID-19.

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[7] The Constitution of the Republic of South Africa,1996.

[8] Section 23 of the Republic of South Africa, 1996.

[9] John Grogan, *Workplace Law* 13th ed (2020), Juta & Co, South Africa, p. 25.

[10] S 22 of the Constitution.

[11] See some recent developments in Cristina Elena Popa Tache, *Le dynamisme du droit international public contemporain et la transdisciplinarité,* Préface de Florent Pasquier, Ed. L`Harmattan Paris, la collection « Le droit aujourd'hui », 2023, pp. 83-144.

[12] 2005 (6) BCLR 529 (CC) paras 58–59; 62–63.

[13] Grogan, *op. cit. Workplace Law* 13th ed (2020) 25.

[14] S 23(1) of the Constitution.

[15] The concept of dismissal is regulated in ch VIII of the LRA. See s 185–188 of the LRA.

[16] Grogan, *op. cit. Workplace Law* 13th ed (2020) 247

[17] Ibid, p. 247.

[18] Act 66 of 1995.

3. Forms of dismissals in terms of the Labour Relations Act of 1995

Employees have a duty to perform in an employment relationship. Likewise, the LRA recognises that an employer has the right and a duty to maintain discipline in the workplace.[19] The purpose of 'discipline' in the employment context is to ensure that employees contribute effectively and efficiently to the employer's goals in ensuring that production and the provision of services are not impeded.

The authority to maintain discipline in the workplace has been expressed by the courts. In *Atlantis Diesel Engines v. Roux NO*,[20] the court held that disciplinary authority ultimately resides in the person who manages, or body that manages, the enterprise. This was further illustrated in *Dyasi v. Onderstepoort Biological Products*,[21] in which the court found that the authority to institute disciplinary action was vested in the board of directors of the respondent company and not in the minister under whose portfolio the company fell. It is important to mention that an employer's disciplinary authority is not limited to employees' conduct in the workplace and during working hours.[22] In instances where an employee commits misconduct outside the workplace, even in the employee's private time, and that conduct adversely impacts the employment relationship, the employer may take the employee to task.

The point of departure regarding the dismissal of an employee who refuses to vaccinate against COVID-19 is to determine whether a dismissal occurred. This entails asking, first, whether the complainant was an 'employee' as defined in terms of the LRA, considering that only employees can be dismissed.[23] For the sake of this article, the person who refuses to vaccinate against COVID-19 is taken as an employee in terms of the LRA. Therefore, the test for determining whether a person is an employee is not discussed.[24] The next important question that needs answering is what constitutes a dismissal.

Generally, a dismissal occurs when the contract is terminated at the instance of the employer by some act which denotes that the employer has brought the contract to an end.[25] Section 186 of the LRA provides what constitutes a dismissal. It is not intended to discuss all forms of dismissal, it will be limited to the relevant provisions for this article in terms of the LRA being termination with or without notice,[26] non-renewal of fixed-term contracts,[27] selective non-re-employment,[28] constructive dismissal,[29] and automatically unfair dismissals.[30] The next subsections discuss these various forms of dismissals.

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[19] Grogan, *op. cit. Workplace Law* 13th ed (2020) 114.
[20] (1988) 9 ILJ 45 ©.
[21] (2011) 32 ILJ 1085 (LC).
[22] The primary consideration is the impact on the employment relationship and whether the employee's conduct outside of the workplace has resulted in the breakdown of the trust relationship between the parties see *Hoechst (Pty) Ltd v CWIU* (1993) 1 ILJ 1449 (LAC).
[23] While only employees can be dismissed in the sense contemplated by s 186 (1)(a), the courts have extended the scope of the statutory definition of 'employee' wider than parties to contracts of employment *stricto sensu*. The termination of the services of a woman who hired her services to the 'employer' through the medium of a close corporation or company was held to constitute a dismissal as was the termination of the services of the employee of a labour broker who was retained in the employer's service after the termination of her contract with the broker, even though this was conditional on the employee forming her own 'sole employment agency' The deletion of the phrase 'contract of' before 'employment' in s 186 (1)(a), (e) and (f) provides statutory endorsement for this approach, see *Niewoudt v All-Pak* (2009) 30 ILJ 2451 (LC) and *Trio Glass t/a The Glass Group v. Molapo NO* (2013) 34 ILJ 2662 (LC), where the employer tried to rely on an alleged agreement that the contract would simply lapse if 'things didn't work out'.
[24] Tamara Cohen, Meryl du Plessis, Shane Godfrey, Rochelle Le Roux, Sufinnah Singlee, *Labour Law in South Africa: Context and Principles* (2020), Oxford University Press Southern Africa, p. 69–92.
[25] A dismissal is easy to recognise with the exception of 'constructive' dismissals.
[26] S 186 (1)(a) of the LRA.
[27] S 186 (1)(b) of the LRA.
[28] S 186 (1)(d) of the LRA.
[29] S 186 (1)(e) of the LRA.
[30] S 187 of the LRA.

3.1. Termination with or without notice

Section 186 (1)(a) of the LRA provides for the termination of employment with or without notice. It is said to mean that the existence of a valid contract of employment is no longer a requirement for a dismissal of this type.[31] The only requirements now are that an employment relationship must have existed, and that the relationship was terminated at the instance of the employer.[32] An employer may terminate employment within the meaning contemplated in section 186 (1)(a) formally – by giving written notice – or in any manner which signifies an intention on its part not to continue the contract.[33] Unless the relationship is terminated immediately; dismissal occurs only at the end of the notice period.[34] The decision to give notice does not constitute a dismissal and is not subject to challenge until the dismissal has been effected.[35]

The withdrawal of an offer of employment will also not constitute a dismissal if the appointment is conditional on the employee first fulfilling some requirement, such as producing a COVID-19 vaccination certificate of qualifications.[36] This is relevant as employers are making it a prerequisite in the form of a suspensive condition, whereby the contract of employment comes into effect when the condition is satisfied.[37] In other instances, an employer places a resolutive condition whereby the contract of employment becomes effective but terminates automatically if the condition is not met. If the condition is not satisfied, the employee cannot claim to have been dismissed if the employer withdraws the offer or cancels the contract.

It is accepted that employment ends as a result of the resignation on notice when the employee's notice expires.[38] Since his resignation is generally regarded as a unilateral act, the employee will not be regarded as having been dismissed even if the employee subsequently changes his or her mind and tries to withdraw the resignation.[39] However, the Labour Appeal Court in *CEPPWAWU v. Glass & Aluminium 2000*,[40] has accepted that, in some limited cases, an employer's refusal to accept an employee's request to stay on after resigning may constitute a dismissal. The court was satisfied that the employee had not properly considered the matter, and that the employer's refusal to accept his requests to withdraw a resignation tendered in the heat of the moment constituted a dismissal.[41]

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[31] Tamara Cohen, Meryl du Plessis, Shane Godfrey, Rochelle Le Roux, Sufinnah Singlee, *op. cit.*, (2020), p. 87. Prior to this, in *Discovery Health Ltd. v. CCMA & Others* [2008] 7 BLLR 633 (LC) and *Kylie v. CCMA & Others* [2010] 7 BLLR 705 (LAC), the courts were prepared to look beyond the requirement of a valid contract of employment in establishing whether an employee had been 'dismissed' within the meaning and ambit of the legislation and were accordingly deserving of protection. Finding that the 'contract of employment is not the sole ticket for admission into the golden circle reserved for "employees"' (at para 51), the court in Discovery concluded that the substance of the employment relationship as opposed to the legal form it takes is determinative of the rights and remedies that ensue.

[32] See *Wyeth SA v. Manqele* (2005) 26 ILJ 749 (LAC) and *Mills and Drake International* SA (Pty) Ltd. (2004) 25 ILJ 1519 (CCMA).

[33] See, for example, *Trio Glass t/a The Glass Group v. Molapo NO* (2013) 34 ILJ 2662 (LC), where the employer tried to rely on an alleged agreement that the contract would simply lapse if 'things didn't work out'.

[34] *Delfos Meat & Chicken v. CCMA* (2003) 24 ILJ 2298 (LC). This means that the termination of the contract by the employer before the notice period constitutes a dismissal: the decision to the contrary in *Uthingo Management v. Shear NO* (2009) 30 ILJ 2152 (LC) is debatable.

[35] *Moropane v. Gilbeys Distillers & Vintners* (1998) 19 ILJ 635 (LC). The onus is on the employer to prove that the employee demonstrated a clear and unequivocal intention to terminate the employment relationship forever, see *21st Century Life v. Nombewu* (2019) 40 ILJ 1493 (LAC) and *Ouwerhoud v. Hout Bay Fishing Industries* (2004) 25 ILJ 731 (LC).

[36] *Langa v. SALGBC (Mpumalanga)* (2013) 34 ILJ 2248 (LC).

[37] *Nogcantsi v. Mnquma Local Municipality (PA07/15)* [2016] ZALAC 54 provides an example of the legal effect of such a condition. After being interviewed for an advertised post with the Mnquma Municipality, Mr Nogcantsi accepted a written offer of a post. The offer was subject to a 'vetting and screening process' and stipulated that the contract would automatically terminate if the outcome was negative. After the contract was concluded, the municipality learned that Nogcantsi had left his previous employer in suspicious circumstances. His contract was terminated. The LAC held that Nogcantsi had not been dismissed. The negative vetting result had not been triggered by the municipality and it had not directed its action to bring about a dismissal. A resolutive condition had been triggered.

[38] If the employee is subjected to disciplinary action in that period, it is unnecessary to impose a sanction of dismissal after the notice period expires see *Solidarity obo Bakkes and Nampak Divfood* (2014) 35 ILJ 2952 (BCA).

[39] *Rustenburg Town Council v. Minister of Labour* 1942 TPD 221; *Maada v. MEC of the Northern Province for Finance & Expenditure* (2003) 24 ILJ 937 (LAC); *De Villiers v. Premier, Eastern Cape Provincial Government* (2012) 33 ILJ 382 (LC); *Samuels and B & G Displays* (2005) 26 ILJ 1145 (BCA).

[40] (2002) 23 ILJ 695 (LAC).

[41] Refer to *Toyota SA Motors v. CCMA* (2016) 37 ILJ 313 (CC). In the minority judgment the Court could not see why an employer who refuses to accept an employee's resignation should be allowed to rely on it later as a defence to an unfair dismissal claim. The

When an employee abandons their work, it may be unclear who was responsible for terminating the contract. In some cases, it has been accepted that an absconded employee is not dismissed.[42] However, the correct position in law is that, when an employee deserts, it is the employer who brings the contract to an end by accepting the employee's repudiation.[43] The courts accept that if the employee has formed a fixed intention not to resume employment before the employer accepts the repudiation, it is the employee, not the employer, who has terminated the contract.[44]

3.2. Non-renewal of fixed-term contracts

Regarding section 186 (1)(b) of the LRA this form of dismissal applies when the employer declines to renew a fixed-term contract on its termination, or renews it on different terms, or when the employee reasonably expected to be permanently employed after the contract expired.[45] The onus of proving a reasonable expectation rests on the employee: the employee must prove that he or she actually or 'subjectively' expected the contract to be renewed.[46] Only then does the question of whether the expectation was reasonable to arise. Once a subjective expectation is proved, the employee must prove the existence of facts which, in the ordinary course, would lead a reasonable person to anticipate renewal. Circumstances that might find a reasonable expectation of renewal will clearly differ from case to case but, apart from a prior promise, most commonly take the form of a past practice – for example, where the employer has habitually renewed the contract,[47] or where the employee had been acting in a post for which he had been encouraged to apply.[48]

Where the employer has repeatedly renewed a fixed-term contract, the weight to be attached to the practice increases in proportion to the number of successive contracts the parties have concluded, especially where the employer is unable to provide a compelling reason for not renewing the contract.[49] Including a clause that the contract will be subject to renegotiation with a view to a renewal during the month before its expiry date does not in itself create a reasonable expectation of renewal.[50] Further, a fixed-term contract that has been renewed several times is not, however, in itself conclusive proof of a reasonable expectation of renewal; whether there was a reasonable expectation of renewal must be determined from the perspective of both the employer and the employee.[51] Where the employee did not disclose their non-vaccination status against COVID-19 when required in their application for renewal, it is improbable that a reasonable expectation that the employee's contract would be renewed after the employer discovers the nondisclosure even though it had been renewed many times before.[52] The conduct of the employer in dealing with the relationship, what the employer said to the employee at the time the contract was concluded or thereafter, and the motive for

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Justices held that the principle that an employee cannot withdraw a resignation once it has been communicated to management was based on old authorities which had been overtaken by the Bill of Rights. See also, *ANC v. Municipal Manager, George Local Municipality (2010) 31 ILJ 69 (SCA)*.

[42] *Maila v. Hungry Eye Restaurant* (1990) 11 ILJ 400 (IC); *Seven Abel t/a The Crest Hotel v. HRWU* (1990) 11 ILJ 504 (LAC) at 510D.

[43] *SABC v. CCMA* (2002) 23 ILJ 1549 (LAC); *SACWU v. Dyasi* [2001] 7 BLLR 731 (LAC).

[44] See *SABC v. CCMA* (2002) 23 ILJ 1549 (LAC).

[45] The extension of the definition to situations where the employee reasonably expected permanent employment is a direct legislative response to the *University of Pretoria v. CCMA* (2012) 33 ILJ 183 (LAC).

[46] *MEC for the Department of Finance, Eastern Cape v. De Milander* (2011) 32 ILJ 2521 (LC); confirmed on appeal: *De Milander v. MEC for the Department of Finance: Eastern Cape* (2013) 34 ILJ 1427 (LAC).

[47] In *Mavata and Afrox Home Health Care* (1998) 19 ILJ 931 (CCMA), the employment of nurses on a casual basis, determined by the operational needs of the employer, was held not to be inherently unfair or contra bonos mores. Such 'casual' arrangements are generally treated as non-renewable fixed-term contracts. However, where annual fixed-term contracts were renewed three times and there was no apparent need not to renew them for a fourth year, the non-renewal was held to constitute an unfair dismissal: see *King Sabata Dalindyebo Municipality v. CCMA* (2005) 26 ILJ 474 (LC). See also *SACTWU v. Cadema Industries* [2008] 8 BLLR 790 (LC) (repeated renewals over a long period of relatively short fixed-term contracts giving rise to a reasonable expectation, reinforced by the fact that the employee had been permitted to work beyond the termination date of the final contract).

[48] *Department of Agriculture, Forestry & Fisheries v. Baron* (2019) 40 ILJ 2290 (LAC). On the other hand, where the employee had unsuccessfully applied for a post, it was held that the employer retained the prerogative to appoint the most suitable candidate, even though her contract had been previously renewed several times: *Pikitup Johannesburg v. Muguto* (2019) 40 ILJ 2829 (LC).

[49] See, for example, *Makoti v. Jesuit Refugee Service SA* (2012) 33 ILJ 1706 (LC).

[50] *SA Bank of Athens v. Cellier NO* (2009) 30 ILJ 197 (LC).

[51] *Magubane and Amalgamated Beverages* (1997) 18 ILJ 1112 (CCMA).

[52] The principles that applied in *Njikelana v. Kruger NO (2019) 40 ILJ 2380 (LC)* can be applied to Covid-19 situations.

terminating the relationship,[53] have been cited as further factors to be considered when determining whether an employer implied that a fixed-term contract would be renewed.[54]

In all cases, establishing whether the non-renewal of a fixed-term contract constitutes a dismissal must begin with the contract; its provisions are important, though not a definitive indication that the parties intended the contract and relationship to terminate on the date or occurrence of the event mentioned.[55] On the other hand, the labour courts and arbitrators have become increasingly intolerant of the use of fixed-term contracts to circumvent employees' constitutional and statutory right not to be unfairly dismissed.[56] This will be particularly so in the case of employment contracts that provide for 'automatic termination', for example, the contract of employment will terminate when an employee fails to provide proof of booster shots for COVID-19 vaccination every six months.

3.3. Selective non-re-employment

Another form of statutory dismissal which confirms the existence of an extended employment relationship is that created by section 186 (1)(d) of the LRA. This provision deals with the situation in which an employer re-employs one or more of a group of employees whom it had earlier dismissed for the same or similar reason. Since such 'dismissals' are deemed to have occurred on the date, the employer made the appointments and declined to re-employ the others, an employment relationship is implicitly recognised as being in existence at that time.[57] The question in each case will be whether there was any basis for distinguishing between the employees who were re-employed and those who were not. Selective non-re-employment constitutes a dismissal only when one or more of the formerly dismissed employees have been offered re-employment, and when others have been refused re-employment.

Finally, section 186 (2)(c) of the LRA offers relief to former employees when their former employer has failed to reinstate or re-employ them 'in terms of any agreement'. This provision endorses the judgment in *NAAWU v. Borg-Warner S.A.*,[58] in which the former Appellate Division of the Supreme Court declared the employer's refusal to re-employ former employees in contravention of an agreement which had been entered into with their trade union an unfair labour practice. Rehiring agreements concluded during retrenchment exercises or those contained in retrenchment agreements now receive statutory endorsement. All the persons concerned need prove, in order to obtain relief, is the existence of an agreement and a breach thereof.

As in the case of conventional employment relationships, those extended by these provisions can be lawfully terminated only if the employer acts in accordance with the provisions of the LRA. So, employers who selectively re-employ, fail to extend or renew fixed-term contracts, or fail to re-employ in terms of rehiring agreements, may prove that they had a fair reason to do or not to do so and that they followed a fair procedure.

3.4. Constructive dismissal

A further form of statutory dismissal is constructive dismissal. Section 186 (1)(e) of the LRA provides that a constructive dismissal occurs when an employee terminates the employment with or without notice due to the employer's conduct in making continued employment intolerable for the

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[53] For example, a valid operational need: see *Dube v. University of Zululand* [2019] 3 BLLR 285 (LC).

[54] *Joseph v. University of Limpopo* (2011) 32 ILJ 2085 (LAC); *Zwane and Elegance Jerseys* (1998) 19 ILJ 969 (CCMA). The factors to be considered are more fully set out in *Pik-It-Up Johannesburg v SALGBC* (2011) 32 ILJ 2728 (LC).

[55] See *Foster v. Steward Scott Inc* (1997) 18 ILJ 367 (LAC); *Malandoh v. SABC* (1997) 18 ILJ 544 (LC); *Swissport v. Smith NO* (2003) 24 ILJ 618 (LC).

[56] *SAPO v. Mampeule* (2009) 30 ILJ 664 (LC).

[57] See Ray Mahlaka 'Corporate South Africa Rehiring Workers who Refused to Comply with Covid Vaccination Policies', *Daily Maverick* (no date) https://www.dailymaverick.co.za/article/2022-07-18-corporate-south-africa-rehiring-workers-who-refused-to-comply-with-covid-vaccination-policies/ (accessed 2024-01-10).

[58] (1994) 15 ILJ 509 (A).

employee. The onus to determine whether the dismissal was based on constructive dismissal rests upon the employee. Therefore, the first requirement of constructive dismissal is that an employment relationship must exist at the time the employee leaves the employer's service.[59] The second requirement is that the employee must have brought the relationship to an end due to the employers conduct which caused the circumstances that induced the employee to resign.[60]

In making out a case of constructive dismissal, employees who have resigned must generally show that they were subject to coercion, duress or undue influence. Mere unhappiness at work is not enough.[61] Managers, in particular, are expected to be able to put up with 'ambiguity, conflict in relationships, power struggles, office politics and the demand for performance where if not delivered any payment is made'.[62]

An unreasonable instruction by the employer to an employee will not justify resignation and a subsequent claim of constructive dismissal, particularly in instances an employee did not use the employer's grievance procedure or some other method by which he or she could have sought relief.[63] However, the lodging of an internal grievance is not required if it is clear that management is irredeemably prejudiced against the employee.[64]

If an employer does not use an available grievance procedure, the employer will be deprived of the opportunity of rectifying the situation in which the employee complains. But, more importantly, the employee may be unable to prove that the situation would have remained intolerable.[65] Where employees could reasonably have lodged a grievance regarding the cause of their unhappiness and failed to do so before resigning, they will be hard put to persuade a court or arbitrator that they had no option but to resign.[66] Where an employee filed a grievance but resigned before the grievance procedure had run its course, she was held not to have been constructively dismissed.[67] Employees who resign to escape facing disciplinary inquiries will also seldom succeed in proving that they have been constructively dismissed.[68] An employee's unsuccessful attempt to withdraw his resignation has also been ruled incompatible with a claim of constructive dismissal.[69] But this may not hold where the source of the employee's complaint was removed.

A unilateral variation of the contract by the employer will not in itself justify a claim of constructive dismissal; the variation must be such as to show an intention on the employer's part to cancel the contract,[70] if it is to warrant the conclusion that the employee could not reasonably be expected to endure the situation,[71] or be such as to go to the root of the employment relationship. If the employer's conduct renders it impossible for the employee to work, a constructive dismissal will have taken place. The Labour Court has found that an employee was constructively dismissed because

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[59] *MEC, Department of Health, Eastern Cape v. Odendaal* (2009) 30 ILJ 2093 (LC).

[60] See *Agricultural Research Council v. Ramashowana* NO (2018) 39 ILJ 2509 (LC); *Western Cape Education Department v. GPSSBC* (2013) 34 ILJ 2960 (LC); *Western Cape Education Department v. GPSSBC* (2014) 35 ILJ 3360 (LAC). *Mafomane v. Rustenburg Platinum Mines* [2003] 10 BLLR 999 (LC); *Ntsabo v. Real Security* (2003) 24 ILJ 2341 (LC); *Daymon Worldwide SA Inc v. CCMA* (2009) 30 ILJ 575 (LC); *Conti Print v. Rafee* NO (2015) 36 ILJ 2245 (LAC); *Niland v. Ntabeni* NO (2017) 38 ILJ 1686 (LC).

[61] *Jordaan v. CCMA* (2010) 31 ILJ 2331 (LAC), in which the applicant claimed that she was unhappy because she had been asked to sign a restraint of trade agreement. See also *Eastern Cape Tourism Board v. CCMA* [2010] 11 BLLR 1161 (LC) (employee unable to get on with CEOs); *Distinctive Choice 721 t/a Husan Panel Beaters v. Dispute Resolution Centre (MIBCO)* (2013) 34 ILJ 3184 (LC) (employee resigning because he was unhappy about being demoted).

[62] *Moyo and Standard Bank of SA* (2005) 26 ILJ 563 (CCMA). But see *Metropolitan Health Risk Management v. Majatladi* (2015) 36 ILJ 958 (LAC). In *Solidarity obo Van Tonder v. ARMSCOR* (2019) 40 ILJ 1539 (LAC), the court held that a 'tense and awkward' relationship between managers is not a ground for constructive dismissal.

[63] *Smith and Magnum Security* (1997) 2 LLD 50 (CCMA); *Aldendorf and Outspan International* (1997) 18 ILJ 810 (CCMA); *Olivier and Imperial Bank* (2006) 27 ILJ 1049 (CCMA).

[64] *Du Plessis/JDG Trading t/a Price and Pride* [2003] 4 BALR 413 (CCMA).

[65] See, for example, *LM Wulfsohn Motors t/a Lionel Motors v. Dispute Resolution Centre* (2008) 29 ILJ 356 (LC).

[66] See, for example, *Aldendorf and Outspan International* (1997) 18 ILJ 810 (CCMA); *Foschini Group v. CCMA* (2008) 29 ILJ 1515 (LC).

[67] *HC Heat Exchangers v. Araujo* [2020] 3 BLLR 280 (LC).

[68] See, for example, *Billion Group v. Ntshangase* (2018) 39 ILJ 2516 (LC); *Asara Wine Estate & Hotel v. Van Rooyen* (2012) 33 ILJ 363 (LC) and *Hickman v. Tsatsimpe NO* (2012) 33 ILJ 1179 (LC); *Regent Insurance Co v. CCMA* (2013) 34 ILJ 410 (LC) (in which the employee had not challenged the warning which she claimed had forced her to resign).

[69] *Value Logistics v. Basson* (2011) 32 ILJ 2552 (LC).

[70] *Ferrant v. Key Delta* (1993) 14 ILJ 464 (IC).

[71] *McMillan v. ARP & P Noordhoek Development Trust* (1991) 2 (3) SALLR 1 (IC).

the employer had denied him to use a company car to get to work when he did not have one of his own.[72] Employees resign at their peril if confronted with *bona fide* proposals to amend terms and conditions of employment as a possible means of avoiding retrenchment. Termination, for this reason, will not provide a basis for a claim of constructive dismissal.[73]

Whether the common practice of offering an employee or the choice of resigning rather than being dismissed constitutes constructive dismissal depends on the circumstances in which such an offer was made. Subjecting an employee to a procedurally unfair disciplinary hearing during which he was offered the choice of resigning was found not to constitute 'intolerable pressure' amounting to constructive dismissal.[74] Nor will an employee be able to prove constructive dismissal in the face of evidence that he resigned merely to take the employer 'to the cleaners',[75] or claimed that the employment relationship had been rendered intolerable because the employer had declined to offer him a monetary settlement and at the same time warned him that it intended pursuing criminal and civil action against him.[76] But in exceptional circumstances employees who resign rather than face disciplinary proceedings have been constructively dismissed.[77]

A constructive dismissal is not necessarily unfair; once proved, the onus shifts to the employer to prove that it did not act unfairly. The central question is whether the conduct of the employer that prompted the employee to resign was fair.[78] In other words, a constructive dismissal is not inherently unfair;[79] a court will consider the circumstances with a view to establishing whether the employer's conduct was justified.[80] If the employee is partly to blame for creating the conditions of which he or she complains, compensation may be reduced.[81]

An employee makes advancements that they were constructively dismissed if an employer requires and insists that they vaccinate against COVID-19. This requirement could in itself make continued employment intolerable resulting in the employee resigning from their employment. Conversely, even if it is acknowledged that there was a constructive dismissal an employer could, in specific instances, vindicate the fairness of such dismissal on the basis of its obligation in terms of the OHSA.

The Labour Court has also considered legal questions pertaining to the unilateral amendment of employment contracts.[82] In *Macsteel Service Centres SA (Pty) Ltd. v. National Union of Metalworkers of SA*, the Court had to consider a dispute concerning wage reductions imposed by employers due to the COVID-19 lockdown measures. The Court found that unilateral changes to terms and conditions of employment of the LRA,[83] is *per se* unlawful. Therefore, the same principle will apply in circumstances that employers cannot unilaterally change an employee's contract of employment that they must be vaccinated.

3.5. Automatically unfair dismissals

Section 187 of the LRA various reasons for dismissal that are regarded as automatically unfair. There are instances where dismissal of an employee is not justified and as a result it is said to be automatically unfair. In some cases, the dismissal of an employee is deemed to be automatically unfair since it was not justifiable.[84] There are circumstances listed in section 187 where the dismissal

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[72] In *Quince Products v. Pillay* (1998) 3 LLD 53 (LAC).
[73] *Van der Merwe and Becker* (2004) 25 ILJ 1349 (CCMA).
[74] *Braun v. August Laepple* [1996] 6 BLLR 724 (IC).
[75] *Murray v. Minister of Defence* (2006) 27 ILJ 1607.
[76] *Nokeng Tsa Taemane Local Municipality v. Louw* NO [2019] 1 BLLR 35 (LAC).
[77] See, for example, *Majatladi v. Metropolitan Health Risk Management* (2013) 34 ILJ 3282 (LC).
[78] *Jonker v. Amalgamated Beverages Industries* (1993) 14 ILJ 199 (IC) at 211.
[79] *McMillan v. ARP & P Noordhoek Development Trust* (1991) 2 (3) SALLR 1 (IC).
[80] *Jooste v. Transnet t/a SAA* (1995) 16 ILJ 629 (LAC).
[81] *SAPS v. SSSBC* (2012) 33 ILJ 453 (LC).
[82] *Macsteel Service Centres SA (Pty) Ltd. v. National Union of Metalworkers of SA* 2020 8 BLLR 772 (LC).
[83] As contemplated in ss 64(1), (4) and (5) LRA.
[84] This is determined by an enquiry to ascertain the true reason for the dismissal and whether such reason falls within one of the prohibited grounds identified in s. 187.

of an employee is automatically deemed to be unfair.[85] However, this section is confined to section 187 (1)(f) of the LRA which reads: that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

It is often the above provision that dismissed employees who have refused mandatory vaccinations against COVID-19 raise. If an employee was fired because they refused to get vaccinated for whatever reason, including religious objections or other comparable grounds, they may claim that their dismissal was automatically unfair. The employer has the duty to prove the fairness of the dismissal to demonstrate that it was not made for discriminatory reasons in accordance with section 187 (1)(f) of the Labour Relations Act.[86] Automatically unfair dismissals require the court to be satisfied that a causal link is established on a balance of probabilities between the prohibited reasons for dismissal and the circumstances of the dismissal[87].

Although the overall onus resides with the employer, the employee has an evidential burden to provide prima facie evidence of the reason for the dismissal. If such a causal link is established, there is limited justification on which the employer may rely. A possible defence for fair dismissal by an employer is that 'a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job'.[88] Reference is made to the case of *Gibson v Lothian Leisure*[89] about an employee who believed that there was imminent danger. The employee was automatically unfairly dismissed for raising concerns with regard to the workplace and the availability of personal protective equipment. It was held that the employee was automatically unfairly dismissed.

Reference is also made to the case of *Preen v. Coolink Ltd and Mullins*[90] where the employee raised his concerns pertaining to safety in the workplace to his manager who insisted that the employee must go to work during the first national lockdown period. The employee's daily routine prevented him from completing them while working from home, and he wanted to comply with the government's requirements for non-essential personnel staying at home.

4. Grounds for a fair dismissal

The LRA provides that 'a dismissal is unfair if it is not effected for a fair reason falling within one of the three categories of dismissal recognised by the [LRA], and in accordance with a fair procedure.'[91] The three reasons for dismissal are based on the employee's performance, capacity, and, finally, the operational requirements of the employer's business. These categories into which an employee may be dismissed will be discussed below in a more detailed manner with reference to case law where applicable.

Section 188 of the LRA provides that 'dismissal is fair if the employer can prove that the dismissal is related to the employee's conduct or capacity, or if it can be proven that the dismissal is based on the employer's operational requirement.' It is stated that a dismissal must be both substantively and procedurally fair to be considered fair. If the latter is not complied with, the dismissal is considered unfair.

Schedule 8 item 4 of the Code of Good Practice: Dismissal (Dismissal code) provides guidelines for determining whether a dismissal is fair. Before dismissing an employee, an employer must investigate to determine whether proper procedures were followed. According to the Code of

[85] S. 187 of the LRA.
[86] 66 of 1995.
[87] For theoretical aspects see P. Kruger, K. Moyo, P. Mudau, M. Pieterse, A Spies, *South Africa: Legal Response to Covid-19*, in Jeff King and Octávio L.M. Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19 (OUP 2021)*. doi: 10.1093/law-occ19/e6.013.6; Philippa M. Collins, „Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal", *Industrial Law Journal*, Volume 51, Issue 3, September 2022, pp. 598–625, https://doi.org/10.1093/indlaw/dwab018.
[88] S. 187 (2)(a) of the LRA.
[89] Gibson v. Lothian Leisure 4105009/2020.
[90] (WECT17050-21).
[91] S. 188 of the LRA.

Good Practice, the employer is required to notify the employee of the allegations in a form and language that the employee can reasonably understand. It is the employer's responsibility to ensure that the employee is given the opportunity to present his or her case in response to any allegations made against him or her.[92]

Employees are entitled to a fair dismissal, and as a result, if an employer dismisses an employee, the employee should be given a reason for the dismissal and informed of any other rights to refer the matter to the council, the commission, or any dispute resolution procedures established in accordance with a collective agreement.[93]

4.1. Misconduct

The first form of fair dismissal discussed in terms of the LRA is based on misconduct.[94] This form of misconduct involves an act on the part of an employee whereby the employee is at fault for contravening a rule or standard regulating conduct in, or of relevance to, the workplace.[95] The fault on the part of the employee is determined on whether the employee had the intention or acted negligently on that matter depending on the nature and circumstances involved. The employer must provide proof on a balance of probabilities when (s)he alleges that the employee has committed the act of misconduct intentionally. The test for negligence will involve the employee to proof on a balance of probabilities that a reasonable personal in the employees' position would not have taken those actions given the situation.[96] Accordingly, employers can formulate their vaccination policies in such a manner that it creates a rule or requirement for employees to take the vaccine. Nonetheless, the LRA makes it clear that the procedure for misconduct cases must be that of a disciplinary enquiry.[97]

For the dismissal based on misconduct to be fair; the reason for the dismissal must not be classifiable as automatically unfair, it must be substantively fair,[98] and the dismissal must be effected in a procedurally fair manner.[99] An employer could justify the rule mandating an employee to vaccinate against COVID-19 on the basis that vaccination is required to enable the employer to comply with its obligations to provide a safe working environment. The employee dismissing an employee for refusing to vaccinate against COVID-19 will have the onus of establishing that the disciplinary sanction of dismissal is fair. It is not possible to provide an all-inclusive list on the various forms of misconduct that can be associated with employees who refuse to vaccinate against COVID-19; however, failure to get vaccinated could be a form of insubordination. Regardless, an employee is not precluded from challenging the reasonableness of the mandatory rule to vaccinate against COVID-19, for example, on the basis that it constitutes a serious infringement of their constitutional rights to bodily integrity of other valid grounds for the employee's failure or refusal which do not justify his/her dismissal.

For example, in *Eskort Limited v. Mogotsi*,[100] the employee tested positive for COVID-19,

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[92] Sch 8 item 4 of the Code of Good Practice.

[93] Sch 8 item 4 of the Code of Good Practice.

[94] 66 of 1995.

[95] Item 7 of the Dismissal Code.

[96] The same standard is applied in forums such as the CCMA and the courts, unless, it is alleged that the employee committed a criminal offence.

[97] Par (a) of item 7 of the Dismissal Code.

[98] To justify dismissal following the factual enquiry, the employer must be able to establish that: a) the employee has breached a valid or reasonable rule of which the employee was aware or could be expected to be aware; b) the employer has consistently applied the rule or standard in the workplace; and c) dismissal is an appropriate sanction.

[99] Refer s. 188 (1) of the LRA and item 4 of the Dismissal Code. Disciplinary procedures applicable in terms of a collective agreement should prevail over the Dismissal Code. Similarly, where a contract of employment imposes disciplinary procedures, such procedures will generally prevail too, unless the procedure undermines the protections afforded by the Dismissal Code and is unfair. A failure to comply with contractually agreed procedures may be fair but may nonetheless constitute a contractual breach.

[100] 2021 42 ILJ 1201 (LC). See also Tshoose 'Dismissal Arising from Flouting COVID-19 Health and Safety Protocols: *Eskort Limited v. Stuurman Mogotsi* [2021] ZALCJHB 53' 2021 *Obiter* 702 where the author states that '[f]ollowing the Labour Court judgment in Eskort Limited, it is now clear that should an employer issue a lawful and reasonable instruction to its employees, even in the midst of a pandemic, the employee is obliged to adhere to it and could face dismissal for failure to comply'. See also the decision of the *Botha v. TVR Distribution* 2020 12 BALR 1282 (CCMA) where a similar approach was adopted.

but continued reporting for work and was caught on video footage at the workplace hugging a fellow employee that had a heart condition. The employee further flouted the measures put in place to limit the risks associated with COVID-19 such as not wearing a mask resulting in those being in contact with the said employee being sent home to self-isolate. The employer dismissed the employee on grounds of misconduct. The employee challenged their unfair dismissal in terms of the LRA at the CCMA. The employee argued that that no clear directives were issued pertaining to the COVID-19 pandemic by the employer. The CCMA reinstated the employee, finding that he should rather have received a written warning in line with the employer's disciplinary code.[101] This case was taken on a review to the Labour Court. The Labour Court held that disciplinary codes constitute guidelines and not binding contractual provisions.[102] The Court concluded that the dismissed employee put the lives of his colleagues at risk by ignoring various health and safety protocols and procedures. The employee was also a member of the company's in-house coronavirus site committee, and he should have been aware of the dangers inherent to the spreading of the disease.

4.2. Incapacity

It is said that under some conditions, the termination of employment may be acceptable due to incapacity.[103] An employee may be dismissed if they are unable to carry out the tasks assigned to them by their employer.[104] This can occur when an employee refuses to vaccinate against COVID-19 and as a result the employer is unwilling to allow the employee to continue work. As in some cases, where employees are required to interact with one another and/or where interaction with the public is necessary in order for employees to carry out their duties, the risk assessments performed by the employer may make it mandatory for employees to be vaccinated for them to render their services safely. For example, in *Theresa Mulderij v. Goldrush Group*[105] where Ms M was dismissed due to incapacity to perform her duties. Her refusal to mandatory vaccine subjected her to being dismissed on incapacity grounds. The commissioner held that the dismissal was substantively fair based on the basis that she was incapacitated based on her decision not to receive the COVID-19 vaccine.

4.3. Operational requirements

The LRA allows employers to dismiss employees based on operational requirements. The concept of operational requirements refers to economic, technological, structural, or similar needs.[106] In the case of *Freshmark (Pty) Ltd v. CCMA and Others,*[107] the employee was dismissed based on operational requirements for refusing to vaccinate against COVID-19 and it was further held that the employee was not entitled to any severance pay by the employer. From this case the interests which in most COVID-19 related matters on dismissals, the commissioners only made priority to other people's rights being those who worked with the employee and the employer without making a thorough investigation on how the interests of both the employee and the employer can be considered and protected without condoning the issue of dismissal. Another case is *HOSPERSA obo Meintjies v. Huis Ravenzicht (for the elderly)*[108] the applicant worked directly with the elderly who were over the

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[101] *Eskort Limited v. Mogotsi* par [16].
[102] *Eskort Limited v. Mogotsi* par [7.5].
[103] Grogan, *op. cit, Workplace Law* 13ed (2020) 256. Refer to *Yodaiken v. Angehrn* & Piel 1914 TPD 254; *Schlengemann v. Meyer Bridgens & Co* 1920 CPD 494 and ARMSCOR v CCMA (2016) 37 ILJ 1127 (LC).
[104] See *Samancor Tubatse Ferrochrome v. MEIBC & others* (2010) 31 ILJ 1838 (LAC) whereby the Labour Appeal Court acknowledged that incapacity may arise when an employee is unable to tender his or her services due to factors such as imprisonment and that incapacity should not be confined to incapacity arising from ill health, injury or poor work performance. This approach was confirmed on appeal to the SCA. However, on the facts in Samancor, the SCA upheld the arbitrator's decision that the dismissal was unfair in the circumstances as the employer had failed to consider alternatives short of dismissal. The employer also had not complied with the dictates of procedural fairness.
[105] *Theresa Mulderij v. Goldrush Group* (GAJB 24054-21).
[106] S. 213 of the LRA. Lorna McGregor, Kieran McEvoy, *Transitional Justice from Below*, Hart Publishing, 2008, p. 169.
[107] *Freshmark (Pty) Ltd. v. CCMA* [2003] 6 BLLR 521 (LAC).
[108] HOSPERSA obo *Meintjies v. Huis Ravenzicht* WECT 387-22.

age of 80. A few of the residents had contracted COVID-19 and died as a result. It is stated that while the vaccination at first was not required, it became so when a resident died after being exposed to two staff members who were determined to have COVID-19. The applicant was initially placed on suspension, but after objecting to the vaccination for religious reasons, the employee was then dismissed.

5. Test for fair dismissals

As mentioned earlier, there are two requirements for a fair dismissal, being procedural and substantive fairness. Procedural fairness refers to a process that allows both the employer and the employee to present their perspectives on a work-related issue before a neutral chairperson who will decide whether disciplinary action is justified.[109] *Botha v. TVR Distribution*,[110] is an example of a COVID-19 related case where the dismissal of an employee was substantively fair but procedural unfair. Botha was a sales executive who was dismissed for gross insubordination and insolence after refusing to attend work during the COVID-19 lockdown. The commissioner found that the dismissal was substantively fair but procedurally unfair. It is stated that Botha was informed during the level 5 lockdown that the company had applied for a certificate from the Companies and Intellectual Property Commission to allow it to operate as an essential service during the lockdown and that he was required to work and present himself at the office. Mr Botha refused and made a list of reasons why he could not come to work, including that he had not been provided with personal protective equipment, that he hadn't been given a permit, and that the level 5 lockdown regulations did not allow him to work and that he would not break the law.

The commissioner determined that the company had taken necessary safety precautions, had the necessary personal protective equipment, and that the Companies and Intellectual Property Commission certificate was adequate to allow Botha to travel. This case demonstrated that the employee had no intention of attending work. Botha failed to obey a lawful and reasonable instruction and was thus insolent and insubordinate in doing so, according to the commissioner, and his dismissal was thus substantively fair. Furthermore, the commissioner claimed that the presiding chairperson and Botha had previous 'run-ins.' As a result, prior to the hearing, the presiding officer may have formed a negative opinion of Botha. Also, Botha was not given the opportunity to provide mitigating factors for his actions. As a result, the dismissal was deemed procedurally unfair. Botha's employer was ordered to pay him one month's salary as compensation.

Another case where the dismissal of an employee was found to be unfair is the case of *October v. Teleperformance S.A. (Pty) Ltd*.[111] October who was a call centre agent was dismissed for 4 days unauthorised absence during the month of May 2020. October claimed that when the COVID-19 pandemic became more severe, and after raising concerns with his employer, Teleperformance S.A., about non-compliance with health and safety protocols, which caused him to fear for his own personal health and safety, his supervisor gave him permission to stay at home until he felt it was safe to return to work. However, the employer raised a defence in response to the allegations, claiming that it had complied with all lockdown directives issued by the government and that October was the only agent who had refused to report for duty and had a rather poor attendance record.

At arbitration, the commissioner noted that a regulation issued by the Minister of Employment and Labour in April 2020 provided, among other things, that employees could refuse to tender their services if they reasonably believed that doing so would expose them to COVID-19 and that such employees could not be fired, disciplined, or harassed for doing so. The dismissal of October was directly related to his supervisor's concern about workplace health and safety. October was informed that he could stay at home and not render services if he desired, and that the no work, no pay policy would apply. It is stipulated that, in the circumstances, the employer's reliance on sick leave and disciplinary policies was misplaced, as the applicable government regulation should have been

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[109] Grogan, *op. cit. Workplace Law 13th ed* (2020) 137.
[110] *Botha v. TVR Distribution* (2020) 12 BALR 1282 (CCMA).
[111] *October v. Teleperformance SA* (Pty) Ltd [2021] 4 BALR 426 (CCMA).

followed. The Commissioner determined that October's dismissal violated the regulation, rendering October's dismissal unfair, and thus ordered the employer to compensate October with four months' salary.

Dale Dreyden v. Duncan Korabie Attorneys[112] is another case in which an employer fired an employee in a manner that was substantively fair but in which the employer did not follow the correct procedures, leading the court to rule that the dismissal was procedurally unfair. In terms of procedural fairness, the fact that it is difficult or impossible for the employer to hold a pre-dismissal enquiry does not relieve the employer of the obligation to provide the employee with a fair opportunity to present his or her case and to make representations and be heard.[113] This is necessary, even if it occurs after the dismissal, in which case the hearing must be fair and not simply amount to an 'ex post facto rationalisation of the earlier decision'.[114]

Regarding substantive unfair dismissal, this refers to the termination of employment without justification or valid reason. It is provided that the concept of 'substantive' refers to the merits of the reason for dismissal.

Therefore, it is crucial for an employer to provide sufficient proof why an employee should be dismissed. For example, in *NUMSA obo Manyike v. Wenzane Consulting & Construction*,[115] the court found that the employee's termination was substantively unfair. The rigger employee was dismissed for talking on his phone to the employer's security while his face mask was below his chin. In a default arbitration session when the employer failed to appear, the employee insisted that he had done so because the person he was speaking to would not have been able to hear him. He also argued that his dismissal was substantively unfair. The commissioner acknowledged that it might have been unsafe behaviour to not use a mask at all times during the COVID-19 pandemic. The commissioner discovered that there was uncertainty about the requirement to wear masks at work and that additional education was required in this area. Therefore, given the circumstances of this case, a sanction other than termination, such as a period of unpaid leave, would have been more appropriate. Based on this decision one can argue that there is a penalty for any conduct that is done by an employee in the workplace and the penalty depends on the seriousness of the conduct made by the employee.

In *DETAWU obo Jacobs v. Quality Express*[116], the employee was fired for reporting for duty knowing he was a COVID-19 risk, failing to remain in isolation, and failing to notify the employer's management team that he had tested for COVID-19 and was awaiting results. After considering the gravity of the pandemic, the commissioner determined that the employee could not claim ignorance of the rules. Because the employee purposefully jeopardised the safety of his co-workers, the commissioner determined that the employee's offence was serious and had harmed the trust relationship. As a result, the employee's dismissal was deemed fair.

6. Conclusions

It is the duty of the employer before exercising his or her rights in respect to the dismissal of an employee to establish whether there are any reasonable grounds for a fair dismissal. Unfair dismissal refers to a right given to employees who believe that fair procedure was not followed when they were dismissed or if the employee is of the belief that the employer dismissed him or her based on unreasonable grounds.[117] Unfair dismissal law is a statutory protection to employees' rights from being infringed by those who are in a superior bargaining position.[118] Therefore, the law of unfair

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[112] *Dale Dreyden v. Duncan Korabie Attorneys* [2022] WECT13114-21. See also, *Food and Allied Workers Union v. South African Breweries (Pty) Ltd.* 2020 41 ILJ 2652 (LC) where the Labour Court ruled that that the LRA does not prescribe the form in which consultation in terms of section 189A must take place and that video-conferencing was an acceptable method of consultation under the present circumstances.
[113] Sch 8 item 4 of the Code of Good Practice.
[114] Sch 8 item 4 of the Code of Good Practice.
[115] *NUMSA obo Manyike v. Wenzane Consulting & Construction* [2021] 5 BALR 479 (MEIBC).
[116] *DEJTAWU obo Jacobs v. Quality Express* [2021] 5 BALR 453 (NBCRFLI).
[117] John Mcmullen, „Unfair Dismissal”, *Industrial Law Journal*, Volume 13, Issue 1, 1984, p. 57–60, https://doi.org/10.1093/ilj/13.1.57
[118] Philippa Collins, „The Inadequate Protection of Human Rights in Unfair Dismissal Law”, *Industrial Law Journal*, Volume 47, Issue 4, December 2018, pp. 504–530, https://doi.org/10.1093/indlaw/dwx026.

dismissal provides employees with an avenue to refer a matter to the CCMA where they can challenge the grounds of their dismissal. The Dismissal code sets out broad guidelines on dismissal for misconduct, incapacity and poor work performance.[119] The Dismissal code is relevant as the courts and arbitrators are required to have regard to it when determining the fairness of a dismissal for misconduct, incapacity or poor work performance. This article answered the questions whether employees can be dismissed for refusing to vaccinate against COVID-19 and how the labour laws responded to COVID-19 dismissals with reference to decided case law. The proper procedure must be followed, and it must be substantively fair for it to amount to a fair dismissal. To determine whether a fair dismissal has occurred can only be done on a case-by-case basis. There is therefore a need for labour laws in terms of the Labour Relations Act to be updated and provide protection to both the employer and employees during pandemic periods. These laws will be made to be in accordance with the values of the Constitution.[120] The current labour laws were made to correct the laws of the apartheid regime and as such they do not entirely provide protection during pandemic periods which can result in a huge change for both the employer and employees in the workplace[121]. This paper suggests therefore a need for a clause in the Labour Relations Act which will provide guidelines and protection in respect of pandemic periods on what must be done by both the employer and employees in the workplace.

Bibliography

I. Books and articles

1. Cohen, Tamara, Meryl du Plessis, Shane Godfrey & Rochelle Le Roux, Sufinnah Singlee, *Labour Law in South Africa: Context and Principles* (2020), Oxford University Press Southern Africa, p. 69–92.
2. Collins, Philippa M., „Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal", *Industrial Law Journal*, Volume 51, Issue 3, September 2022, pp. 598–625, https://doi.org/10.1093/indlaw/dwab018.
3. Collins, Philippa, „The Inadequate Protection of Human Rights in Unfair Dismissal Law", *Industrial Law Journal*, Volume 47, Issue 4, December 2018, pp. 504–530, https://doi.org/10.1093/indlaw/dwx026.
4. Grogan, John, *Workplace Law* 13th ed. (2020), Juta & Co, South Africa.
5. Jance, Kristinka & Mirjam Reci, 'Restrictions on Human Rights During the COVID-19 Pandemic in the Western Balkans', *Juridical Tribune – Review of Comparative and International Law* 14, no. 3 (October 2024): 465-480.
6. Kecső, Gábor, Boldizsár Szentgáli-Tóth and Bettina Bor, „Emergency Regulations Entailing a Special Case of Norm Collision Revisiting the Constitutional Review of Special Legal Order in the Wake of the COVID-19 Pandemic", *Juridical Tribune - Review of Comparative and International Law* 14, no. 1 (March 2024): 5-26.
7. Kruger, P., K. Moyo, P. Mudau, M. Pieterse & A. Spies, *South Africa: Legal Response to Covid-19*, in Jeff King and Octávio L.M. Ferraz et al. (eds.), *The Oxford Compendium of National Legal Responses to Covid-19 (OUP 2021)*. doi: 10.1093/law-occ19/e6.013.6.
8. Mahlaka, Ray, 'Corporate South Africa Rehiring Workers who Refused to Comply with Covid Vaccination Policies', *Daily Maverick* (no date) https://www.dailymaverick.co.za/article/2022-07-18-corporate-south-africa-rehiring-workers-who-refu sed-to-comply-with-covid-vaccination-policies/ (accessed 2024-01-10).
9. McGregor, Lorna & Kieran McEvoy, *Transitional Justice from Below*, Hart Publishing, 2008.
10. Mcmullen, John, „Unfair Dismissal", *Industrial Law Journal*, Volume 13, Issue 1, 1984, p. 57–60, https://doi.org/10.1093/ ilj/13.1.57
11. Popa Tache, Cristina Elena, *Le dynamisme du droit international public contemporain et la transdisciplinarité,* Préface de Florent Pasquier, Ed. L`Harmattan Paris, la collection « Le droit aujourd'hui », 2023, pp. 83-144.
12. Staunton, Ciara, Carmen Swanepoel & Melodie Labuschaigne, „Between a rock and a hard place: COVID-19 and South Africa's response", *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, lsaa052, https://doi.org/ 10.1093/jlb/lsaa052.

[119] S. 188 (2) reads as: '[a]ny person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in accordance with a fair procedure must take into account any relevant *code of good practice* issued in terms of *this Act*. The code of good practice being is found in Schedule 8 of the LRA titled: the Code of Good Practice: Dismissal.

[120] The Constitution of the Republic of South Africa, 1996.

[121] Ciara Staunton, Carmen Swanepoel, Melodie Labuschaigne, „Between a rock and a hard place: COVID-19 and South Africa's response", *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, lsaa052, https://doi.org/10.1093/jlb/lsaa052.

II. Case law

1. *Atlantis Diesel Engines v. Roux* NO (1988) 9 ILJ 45 ©.
2. *Delfos Meat & Chicken v. CCMA* (2003) 24 ILJ 2298 (LC).
3. *Dyasi v. Onderstepoort Biological Products* (2011) 32 ILJ 1085 (LC).
4. *Wyeth SA v. Manqele* (2005) 26 ILJ 749 (LAC).
5. *Moropane v. Gilbeys Distillers & Vintners* (1998) 19 ILJ 635 (LC).
6. *21st Century Life v. Nombewu* (2019) 40 ILJ 1493 (LAC).
7. *Ouwerhoud v. Hout Bay Fishing Industries* (2004) 25 ILJ 731 (LC).
8. *Langa v. SALGBC (Mpumalanga)* (2013) 34 ILJ 2248 (LC).
9. *Nogcantsi v. Mnquma Local Municipality* (PA07/15) [2016] ZALAC 54.
10. *SABC v. CCMA* (2002) 23 ILJ 1549 (LAC); *SACWU v Dyasi* [2001] 7 BLLR 731 (LAC).
11. *Sabata Dalindyebo Municipality v. CCMA* (2005) 26 ILJ 474 (LC).
12. *SACTWU v. Cadema Industries* [2008] 8 BLLR 790 (LC).
13. *Department of Agriculture, Forestry & Fisheries v. Baron* (2019) 40 ILJ 2290 (LAC).
14. *Pikitup Johannesburg v. Muguto* (2019) 40 ILJ 2829 (LC).
15. *Makoti v. Jesuit Refugee Service SA* (2012) 33 ILJ 1706 (LC).
16. *SA Bank of Athens v. Cellier* NO (2009) 30 ILJ 197 (LC).
17. *Magubane and Amalgamated Beverages* (1997) 18 ILJ 1112 (CCMA).
18. *Njikelana v. Kruger* NO (2019) 40 ILJ 2380 (LC).
19. *Dube v. University of Zululand* [2019] 3 BLLR 285 (LC).
20. *Joseph v. University of Limpopo* (2011) 32 ILJ 2085 (LAC)
21. *Foster v. Steward Scott Inc* (1997) 18 ILJ 367 (LAC).
22. *Malandoh v. SABC* (1997) 18 ILJ 544 (LC).

III. Legislation

1. The Labour Relations Act 66 of 1995.
2. The Constitution of the Republic of South Africa,1996.