

OIL ON TROUBLED WATERS?★ THE SLIPPERY
INTERFACE BETWEEN THE CONTRACT
OF EMPLOYMENT AND STATUTORY
LABOUR LAW

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INTRODUCTION

Historically, the contract of employment has served, and continues to serve, as the main ‘port of entry’ to what is today termed the individual employment relationship.¹ In general, its terms (express or implied) will govern that relationship, except to the extent that they are unlawful or have been superseded by statute² or collective agreement.³ This is the essence of what used to be known as the law of master and servant.

This article revisits these basic propositions. It sets out to examine the underlying relationship between the contract of employment and statutory labour law which, together, form the heart of individual labour law (or, as it

★ The title may call to mind what has in Britain been termed the ‘oil and water’ approach to the relationship between common law and statute; that is, ‘the view dominant since the time of Coke and Blackstone that common law and statutes flow next to but separately from each other in their separate streams’: Jack Beatson ‘The role of statute in the development of common law doctrine’ (2001) 117 *LQR* 247 at 251, cited in Bob Hepple ‘The common law and statutory rights’ in *Rights at Work: Global, European and British perspectives* (2005) at 3; available at http://ucl.ac.uk/laws/hamlyn/hamlyn04_3.pdf (last accessed on 6 February 2008). In fact, the article explores an alternative view that was first put forward by the author in a paper with the same title delivered at the 19th Annual Labour Law Conference, Johannesburg, 5–7 July 2006.

† (Available at <http://www.irnetwork.co.za/nxt/gateway.dll?f=template&fn=default.htm&vid=irnetwork:10.1048/enu>).

¹ Alan Rycroft & Barney Jordaan *A Guide to South African Labour Law* 2 ed (1991) para 1.1.7.1.

² To alter the common law, a statute ‘must either expressly say that it is the intention of the legislature to alter the common law, or the inference . . . must be such that we can come to no other conclusion’: *Casserly v Stubbs* 1916 TPD 310 at 312, cited in *S v Makhatini* 1995 (2) BCLR 226 (D) at 230.

³ Or, since 1994, the Constitution. For a more detailed discussion of the sources of individual employment law, see S R van Jaarsveld & B P S van Eck *Principles of Labour Law* 2 ed (2002) paras 87–91; John Grogan *Workplace Law* 9 ed (2007) chap 1.

is more commonly known internationally, ‘employment law’). In general, the enactment of labour legislation in South Africa (as in other countries) signified that government was attempting to pour oil on the troubled waters of the common-law relationship.⁴ The outcome, it is argued, has been one in which contract and statute — quite unlike oil and water — have become inextricably intermingled. The process, however, has not been systematic. Judgments dealing with the relationship between common law and statute have frequently shown a rather ad hoc approach. The result has been a growing number of ambiguities and, in general, a confusing overlay between statutory and contractual rights and remedies.

In a recent judgment, the Supreme Court of Appeal had an opportunity to clarify the position.⁵ Unfortunately, it cannot be said that this was done. At issue was the right to procedural fairness prior to dismissal, a doctrine of recent statutory origin without any antecedents in the contract of employment. With surprisingly little deliberation the court found that such a right is ‘now protected by the common law: to the extent necessary, as developed under the constitutional imperative (s 39(2)) to harmonize the common law into the Bill of Rights (which itself includes the right to fair labour practices (s 23(1))’.⁶ No less surprisingly, in defining the content of the right, the court based itself not on the jurisprudence developed in terms of the current Labour Relations Act⁷ but on the courts’ interpretation of fairness in terms of the previous LRA⁸ and international law. This may be linked to the court’s conclusion that the right to procedural fairness can have different sources: either ‘the common law or a statute . . . applies to the employment relationship between the parties [or] the parties may opt for certainty and

⁴ That is, not only by regulating the contractual relationship to prevent abuse but also by promoting collective bargaining as a means of addressing the inherent inequality between employer and employee: see generally Paul Davies & Mark Freedland *Kahn-Freund’s Labour and the Law* 3 ed (1983). Thus the Industrial Conciliation Act 11 of 1924, which laid the foundations for centralized collective bargaining in South Africa, was a direct response to the revolt of white mineworkers against their employers’ common-law power to hire (cheaper black employees) and fire (unionized white employees); in similar vein, its radical revision fifty-five years later (discussed below) was prompted by the revolt of black workers against the conditions imposed on them in terms of a largely unreconstructed common-law regime, aggravated by apartheid legislation. See also the comments by Froneman J in *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* [1997] 2 BLLR 124 (LAC) at 128–9.

⁵ *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 28 ILJ 1499 (SCA), in effect overruling the approach of the High Court in *Harper v Morgan Guarantee Trust Co of New York, Johannesburg* 2004 (3) SA 253 (W); (2004) 25 ILJ 1024 (W) para 15–16.

⁶ *Old Mutual Life Assurance Co SA Ltd v Gumbi* supra note 5 para 5. It is, however, respectfully submitted that the ‘constitutional imperative’ applies only ‘to the extent that legislation does not give effect to [a provision of the Bill of Rights]’: s 8(3) of the Constitution.

⁷ Act 66 of 1995 (‘the LRA’).

⁸ That is, Act 28 of 1956, with specific reference to *Slagmont (Pty) Ltd v Building, Construction and Allied Workers’ Union* 1995 (1) SA 742 (A) and *National Union of Metalworkers of SA v Vetsak Co-operative Ltd* 1996 (4) SA 577 (A).

incorporate the right in the employment agreement'.⁹ In the case at hand, it appears that such a right had not been incorporated into the contract of employment; rather, the court inferred its existence from the development which the common law is assumed to have undergone in order to give effect to the constitutional right to fair labour practices.¹⁰

This judgment is the latest in a series (discussed below) in which the courts have upheld common-law rights in the face of overlapping or competing statutory rights. In the employment context, it will be argued, this is problematic. To infer the existence of a common-law right duplicating a statutory right is to call into question the purpose of enacting that statutory right. Likewise, the reason for creating statutory rules where common-law rules already exist becomes unclear, since the promulgation of the former seemingly does not necessarily, as might have been thought, signify any intention of the legislature to replace the latter. Indeed, even the fact that the enactment of a statutory right (for example, an employer's right to dismiss an employee for a fair reason based on its operational requirements)¹¹ is at odds with a common-law right (such as an employee's right to remain in employment until the expiry of a fixed-term contract) is not considered enough to overrule the latter right 'by necessary implication' in circumstances where the employer's operational requirements justify dismissal.¹² This comes close to asserting the supremacy of common law over statute.

Against this background, the trend towards the establishment of two parallel regimes of employment law — one based on statute and one on common law — has been given added momentum by the judgment in the *Gumbi* case. This cannot be conducive to legal certainty. It remains to be seen how the issue will be resolved if and when the Supreme Court of Appeal or the Constitutional Court considers it explicitly and in all its ramifications.

This article explores the possibility of a more consistent articulation between the two principal regulators of the employment relationship, based on the underlying constitutional rights.

HAS THE WHEEL TURNED FULL CIRCLE?

It is helpful to begin by viewing the issue in its historical setting. Up to the 1970s the law of master and servant held sway in the context of the individual

⁹ *Old Mutual Life Assurance Co SA Ltd v Gumbi* supra note 5 para 4 with reference to *Lamprecht v McNeillie* 1994 (3) SA 665 (A) at 668.

¹⁰ Even if this is so, it is not obvious why reliance should be placed on pre-constitutional jurisprudence in interpreting the right to procedural fairness implied by the Constitution, given the existence of a massive body of case law on this very issue developed in terms of the LRA — a statute expressly giving effect to s 23 of the Constitution.

¹¹ Section 188(1)(a)(ii) LRA.

¹² See *Buthlezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC), discussed below.

employment relationship¹³ This era ended in 1979 with far-reaching amendments to the Industrial Conciliation Act,¹⁴ following the report of the Wiehahn Commission of Inquiry into Labour Legislation, and the establishment of an Industrial Court with the power to ‘determine’ ‘unfair labour practices’ — a notion defined so loosely as to be capable of including the exercise of contractual rights. A classic example was the power of the court to decide on the ‘fairness’ of *lawful* termination of a contract of employment by an employer and, if deeming it *unfair*, to strike it down.¹⁵ Potentially, the Industrial Court had the same power to overrule any other contractual right in the name of ‘fairness’, thus placing the status of the employment contract as a definitive source of rights and duties in limbo.

This remarkable development is explained by the equally remarkable nature of the period in which it took place. Employment law deals, at the best of times, with ‘a relation between a bearer of power and one who is not a bearer of power’.¹⁶ The 1980s in South Africa, when the Industrial Court went about its work, was not the best of times. It was a deeply troubled decade which saw the critical stages of the struggle against apartheid, nowhere more so than in the labour arena. Historically, the power of white employers over black workers had been exercised in an untrammelled and often tyrannical manner, backed by a violently oppressive state and a racially exclusive political system. Every aspect of this system was called into question by the upheavals from the mid-1970s onwards. The legal subjugation of black workers provoked growing resistance from an emergent trade union movement (as well as criticism and calls for change from a new generation of lawyers).¹⁷ By the end of the 1970s, as the Wiehahn Commission understood, the situation was threatening to become untenable.¹⁸ To stem the tide it was necessary to remove the main causes of conflict. Industrial stability could not be achieved without bringing

¹³ See, in general, C Norman-Scoble *Law of Master and Servant in South Africa* (1956). For a comprehensive analysis of the employment relationship in South Africa, see Martin Brassey *Employment and Labour Law* vol 1 (looseleaf), especially ss B and C. See also Rycroft & Jordaan op cit note 1 chap 1; Francois du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) chap 29; Grogan op cit note 3 chaps 2–7.

¹⁴ Act 28 of 1956, renamed the Labour Relations Act by Act 57 of 1981.

¹⁵ *Marievale Consolidated Mines Ltd v National Union of Mineworkers* (1986) 7 ILJ 108 (W); *Marievale Consolidated Mines Ltd v The President of the Industrial Court* (1986) 7 ILJ 152 (T).

¹⁶ Davies & Freedland op cit note 4 at 18.

¹⁷ Cf Nicholas Haysom & Clive Thompson ‘Labouring under the law: South Africa’s farmworkers’ (1986) 7 ILJ 218; Susan Flint ‘The protection of domestic workers in South Africa: A comparative study’ Part 1 (1988) 9 ILJ 1; Part 2 (1988) 9 ILJ 187; Paul Benjamin ‘An accident of history: Who is (and who should be) an employee under South African labour law?’ (2004) 25 ILJ 787.

¹⁸ For a brief but vivid overview of the manner in which the Wiehahn Commission responded to ‘the internal and external forces ranged against the status quo of the seventies’, see Clive Thompson ‘Twenty-five years after Wiehahn — A story of the unexpected and the not quite intended’ (2004) 25 ILJ iii.

organized black labour into the collective bargaining system; conflict in the workplace could not be contained without placing limits on ‘the unbridled common law power of the employer’.¹⁹ From a legal perspective the latter proposition was especially challenging. On the one hand, change in the workplace regime was urgently needed; on the other hand, as an institution deeply embedded in the common law, the contract of employment was resistant to rapid change.²⁰ Under such circumstances legislation is normally the instrument of reform but, given the nature of government at the time, an employment statute curbing employers’ powers and entrenching workers’ fundamental rights would have been too much to expect.

In the event, the Industrial Court became the agent of change with the notion of ‘fairness’, rather than ‘lawfulness’, as the touchstone of its jurisprudence. This, in turn, made it necessary to move beyond the contractual paradigm in order to explain the new relationship between employer and worker. Internationally, similar questions had been raised by legal scholars: in particular, the notion of ‘contract’ as conceptual framework for the relationship between employers and employees in the modern industrial economy had come under the spotlight.²¹ Although in South Africa the debate did not stand out amidst the burning issues of the time, it was perhaps inevitable that the notion of ‘employment relationship’, as opposed to ‘contractual relationship’, would become accepted as the theoretical basis for the jurisprudence of the Industrial Court. It happened by degrees. In *Steel, Engineering & Allied Workers Union of SA v Trident Steel (Pty) Ltd*²² Landman AM first distinguished between ‘the narrow contractual relationship between the respondent and its employees [and] the wider employment relationship which existed between them’. Following several contrary decisions by the Industrial Court, the Appellate Division eventually upheld the notion of an ‘employment relationship’ capable of existing outside the bounds of contract, governed by equity and terminating only ‘when both parties so agree, or when equity permits’.²³ Van den Heever JA (guided, ironically, by common-law principles)²⁴ concluded that ‘[t]he unmistakable intent of labour legislation generally, is to intrude, or permit

¹⁹ Edwin Cameron, Halton Cheadle & Clive Thompson *The New Labour Relations Act: The Law after the 1988 Amendments* (1989) 6.

²⁰ Cf the observations by Marais J in *Martin v Murray* (1995) 16 ILJ 589 (C) at 600, cited by Malcolm Wallis ‘The LRA and common law’ (2005) 9 *Law, Democracy & Development* 181 at 185fn18.

²¹ See Rycroft & Jordaan op cit note 1 chap 1.

²² (1986) 7 ILJ 86 (IC) at 91.

²³ *National Automobile & Allied Workers Union v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A) at 518. Barney Jordaan adds: ‘It is . . . normally assumed that . . . [the employment] relationship merely exists between the employee and the employer. In reality, however, that relationship would seem to exist between the employee and the undertaking itself’: ‘Transfer, closure and insolvency of undertakings’ (1991) 12 ILJ 935 at 953, with reference to *Building Construction & Allied Workers Union v Masterbilt CC* (1987) 8 ILJ 670 (IC).

²⁴ Wallis op cit note 20 at 183.

the intrusion of third parties, on . . . [the contractual] relationship in innumerable ways'.²⁵ In fact, throughout the 1980s and early 1990s the Industrial Court, armed with its unfair-labour-practice jurisdiction, kept up such 'intrusion', persistently mitigating the common-law powers of employers in the quest for industrial peace and the promotion of collective bargaining. The body of case law that emerged brought South African labour law broadly in line with international standards, albeit not always consistently, and with little help from the common law.²⁶

At the dawn of the new South Africa, then, the contract of employment might well have seemed little more than a historical relic — except in the minds of a few die-hard lawyers of the old school. At the very least there was a (perceived) chasm between the common law and the prevailing statutory regime.²⁷ The question in practice was not so much whether an employer's or employee's conduct was lawful but whether it was 'fair'. Identifying the criteria of 'fairness' was the main task of labour lawyers.

This era, in turn, ended with the promulgation of the Labour Relations Act of 1995 which, in a dramatic break with the previous decade and a half, abandoned the broad definition of 'unfair labour practice'. Two main factors accounted for this change. First, the Act codified most of the jurisprudence of the Industrial Court determining what was 'fair' and 'unfair' in the employment relationship. Secondly, in contrast to its predecessor, the new Act was driven by a voluntaristic vision of collective bargaining, making it necessary to abolish the power of compelling collective bargaining by order of court. This, in turn, meant narrowing down the definition of 'unfair labour practice' to specific forms of individual conduct in order to avoid the possibility of judicial 'intrusion' into the collective bargaining arena. The implications of this change, while much debated in relation to collective bargaining, were not immediately realized in the context of individual labour law.²⁸ The Explanatory Memorandum which accompanied the Draft Labour

²⁵ *NAAWU v Borg-Warners* supra note 23 at 515.

²⁶ In *Die Raad van Mynvakbonde v Die Kamer van Mynwese van Suid-Afrika* (1984) 5 ILJ 344 (IC) the Industrial Court held that its unfair-labour-practice jurisdiction did not allow it to *amend* the common law, even though it could *overrule* it (at 362H). In this sense, though in practice the employment relationship was radically transformed, in theory the contract of employment survived the 1980s unscathed; at most, rules laid down by the Industrial Court might have been regarded as implied terms of specific employment contracts: cf *Key Delta v Marriner* [1998] 6 BLLR 647 (E) (discussed below).

²⁷ As Froneman DJP put it: 'Prior to the . . . enactment of the Constitution, our law maintained a rigid distinction between a common law contract of employment, which was said to have nothing to do with fairness, and a statutory labour dispensation, which had much to do with fairness': *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) para 3.

²⁸ See, e.g. Barney Jordaan 'Collective bargaining under the new Labour Relations Act: The resurrection of freedom of contract' (1997) 1 *Law, Democracy & Development* 1.

Relations Bill²⁹ commented only that the ‘residual unfair labour practice definition [was] confined to individual unfair labour practices’ other than dismissal disputes. Nothing was said about individual disputes falling outside that definition. Likewise, neither the CCMA nor the Labour Court was given jurisdiction to adjudicate contractual disputes;³⁰ such jurisdiction (concurrent with that of the ‘civil courts’) would only be conferred on the Labour Court by the Basic Conditions of Employment Act³¹ some two years later.³²

In fact, the revival of freedom of contract at the collective level meant its reassertion at the individual level too. As in pre-Industrial-Court times, the absence of an open-ended jurisdiction in respect of unfair labour practices left the courts no room to interfere with a contract of employment except to strike down unlawfulness. But here the resemblance with the earlier period ended. The enactment of a Constitution containing a justiciable Bill of Rights in 1993 marked a sea-change that would leave no area of law, including employment law, unaffected. Not only did it require the enactment of new labour legislation, but it also necessitated a reassessment of the common law. In the first place, it meant that contractual terms were invalid not only if they were unlawful but also to the extent that they were unconstitutional. It also meant that, in certain circumstances, common-law rules (like legislation) had to be interpreted to give effect to constitutional rights and values as well as international law.

To lawyers schooled in Roman-Dutch law, the idea of the unlawfulness of contractual obligations presented no difficulty. Far more challenging was the task of interpreting labour rights (statutory and contractual) within the matrix of the Constitution and international law — a task which, to this day, continues to present the South African labour courts with considerable difficulties. For this reason it is proposed briefly to consider what the constitutional framework involves before proceeding to the question that

²⁹ GGa16259 of 10 February 1995 at 154.

³⁰ *Ackron v Northern Province Development Corporation* [1998] 9 BLLR 916 (LC) para 29; *Gaylard v Telkom South Africa Ltd* (1998) 19 ILJ 1624 (LC) para 18. As was observed in *Maseko v Entitlement Experts* [1997] 3 BLLR 317 (CCMA) at 320: ‘The Act is severely defective in various respects insofar as the individual employer or employee is concerned.’

³¹ Section 77(3) the Basic Conditions of Employment Act 75 of 1997 (‘BCEA’). For cases in which this jurisdiction was first exercised, see *Penta Publication (Pty) Ltd v Schoombie* (2000) 21 ILJ 1833 (LC); *Brickman v Community Growth Asset Management* (2000) 21 ILJ 2403 (LC).

³² It would take another four years before the Labour Court received the power of ‘making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation’: s 77A(e), introduced by Act 11 of 2002. This formulation leaves open the question on which specific grounds the Labour Court may strike down contractual terms and conditions which it considers ‘unreasonable’.

forms the focus of the article: the relationship between common law and statute in the employment context.³³

THE CONSTITUTIONAL FRAMEWORK

The starting point for present purposes is s 23 of the Constitution (the 'labour clause') and, in particular, the right to 'fair labour practices' which it entrenches.³⁴ The exact content of this open-ended term, so reminiscent of that defining the jurisdiction of the Industrial Court, was left for the legislature and the courts to delineate.³⁵ The Constitutional Court has approached the question thus:

'Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.

The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1). In giving content to this concept the Courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance.' (Footnotes omitted.)³⁶

³³ On the interpretation of labour law to 'give effect to' and 'in compliance with' the Constitution and international law, see Darcy Du Toit et al *Labour Relations Law: A Comprehensive Guide* 5 ed (2006) chap 2. For more detailed discussion, see Dennis Davis, Halton Cheadle & Nicholas Haysom (eds) *Fundamental Rights in the Constitution* (1997) 3ff; M H Cheadle, D M Davis & N R L Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2005) (looseleaf) chap 3.

³⁴ Section 23 of the final Constitution superseded the equivalent s 27 of the interim Constitution of 1993, in terms of which the LRA was enacted. Section 157(2) of the LRA adds that '[t]he Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of *any fundamental right* entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from [*inter alia*] employment and from labour relations'. (Emphasis added.)

³⁵ Given that fairness at the collective level is comprehensively codified by the LRA and entrenched by the remainder of s 23, it has been argued, the right to 'fair labour practices' in s 23(1) should be understood as applying at the individual level only: Brassey op cit note 13 at C3:6 with reference to Cheadle in Davis, Cheadle & Haysom op cit note 33 at 213.

³⁶ *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC) paras 33–4.

Given this generalization, how far does the right extend? Does it give the Labour Court, and possibly even the CCMA, a power similar to that of the Industrial Court to strike down labour practices, including contractual rights and obligations that are found to be ‘unfair’?

Arbitrators and judges have from the start set their face against such an interpretation. The CCMA has interpreted its jurisdiction as being limited to those types of disputes which the Act expressly allows it to entertain — thus excluding, for example, complaints by employers against employees³⁷ and contractual disputes.³⁸ The Labour Court, similarly, was reluctant to assume a power of enforcing ‘fair labour practices’ over and above those expressly codified in the Act.³⁹ Thus, in *Denel Informatics Staff Association v Denel Informatics (Pty) Ltd*⁴⁰ Basson J held that the LRA ‘creates legal procedures by way of which employees and employers can enforce and give effect to their fundamental rights which are entrenched in the labour relations clause (section 23) of the Constitution’. This, indeed, follows from s 1(a) of the LRA, stating that it is a ‘primary object’ of the Act ‘to give effect to and regulate the fundamental rights conferred by [s 23] of the Constitution’. It is well established that, where a fundamental right is regulated by means of legislation, then such legislation — and not the underlying constitutional right — becomes the primary means for giving effect to the latter.⁴¹ The effect was explained as follows by Conradie J in *NAPTOSA v Minister of Education, Western Cape*:⁴²

‘If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek a remedy

³⁷ *NEWU v CCMA* (2007) 28 ILJ 1223 (LAC); *Maseko v Entitlement Experts* supra note 30. The CCMA is, however, not precluded from interpreting and applying constitutional rights in matters that come before it: *Department of Justice v CCMA* (2004) 25 ILJ 248 (LAC); and see ss 8(1) and 39(2) of the Constitution.

³⁸ Cf *Langeveldt v Vryburg Transitional Local Council* (2001) 22 ILJ 1116 (LAC) para 54; *Protekon (Pty) Ltd v CCMA* (2005) 26 ILJ 1105 (LC) paras 33–8.

³⁹ See *3M SA (Pty) Ltd v SACCAWU* (2001) 22 ILJ 1092 (LAC) para 17, where Zondo JP held that ‘[t]he only fairness that [the labour courts] apply in dealing with matters which come before them is such fairness as they are specifically required to apply in specific sections of the Act in respect of specific types of disputes as well as such fairness as every Court of law is required to observe in terms of the rules of natural justice’. This was, however, with reference to the categorization of the Labour Court and Labour Appeal Court as courts of ‘equity’ rather than to s 23(1) of the Constitution.

⁴⁰ (1999) 20 ILJ 137 (LC) paras 18–19; confirmed in *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC). See also *Bensingh v Minister of Education and Culture: Province of the Kwazulu-Natal* (2003) 24 ILJ 1098 (D).

⁴¹ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 437; *Institute for Democracy in SA v African National Congress* 2005 (5) SA 39 (C) para 17. See also Davis, Cheadle & Haysom op cit note 33 at 215–17.

⁴² 2001 (2) SA 112 (C) at 122; referred to approvingly by Ngcobo J in *Minister of Health v New Clicks South Africa (Pty) Ltd* supra note 41 and endorsed by the unanimous Constitutional Court in *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 51.

under the LRA. If he or she finds no remedy under that Act, the LRA might come under constitutional scrutiny for not giving adequate protection to a constitutional right. If a labour practice permitted by the LRA is not fair, a Court might be persuaded to strike down the impugned provision. But it would, I think, need a good deal of persuasion.⁴³

However, it has also been held that the LRA does not regulate the concept of 'fair labour practices' exhaustively and that the omission of protection against a particular form of unfairness need not render it unconstitutional.⁴⁴ It is submitted that this is correct. Where the LRA (or any other statute) fails to provide a means of enforcing a constitutional right, the common law should be applied or developed to do so;⁴⁴ and, if this cannot be done, the constitutional right may be relied upon directly.⁴⁵ 'Constitutional scrutiny' therefore does not necessarily mean that a provision of the LRA which fails to give effect to the right to fair labour practices in all its aspects in any given context is per se invalid. Rather, it may reveal a hiatus which can be remedied by developing the common law or relying on the constitutional right itself.

A similar approach, it will be argued, should be followed when seeking to interpret a contract of employment in accordance with the Constitution.⁴⁶ If a common-law principle exists that is capable of being 'developed' to give effect to the right to fair labour practices in such a situation, it should be construed accordingly. But, if no such principle exists, direct reliance on s 23(1) of the Constitution should be possible.

What happens if a contractual term is prima facie in conflict with a basic right? The enquiry in such an event is similar but not identical⁴⁷ to that used in testing the constitutionality of a statutory or common-law rule. In principle, such a term ought to be invalid. However, a distinction must be drawn between rights that are so fundamental that they cannot under any

⁴³ *NEWU v CCMA* [2004] 2 BLLR 165 (LC) at 168.

⁴⁴ Section 8(3) of the Constitution; and see the minority judgment of Froneman AJA in *Fedlife Assurance Ltd v Wolfaardt* supra note 27 para 4.

⁴⁵ *Simela v MEC for Education, Province of the Eastern Cape* [2001] 9 BLLR 1085 (LC) para 56. Contra, see the view of Conradie J in *NAPTOSA v Minister of Education, Western Cape* supra note 42 at 123 that, '[t]aking into account the right to fair labour practices and the duties imposed thereby on employers and employees alike, it is not a right which can, without an intervening regulatory framework, be applied directly in the workplace. The social and policy issues are too complex for that'.

⁴⁶ Parties to an employment relationship are bound by the horizontal application of the Bill of Rights: see Darcy Du Toit 'Labour and the Bill of Rights' in *Bill of Rights Compendium* (1996) (looseleaf, issue 13) para 4B23 citing Erika De Wet 'A German perspective on the constitutional enforceability of children's and labour rights in the interim bill of rights with special reference to *Drittwirkung*' (1996) 59 *THRHR* 577 at 589; Barney Jordaan 'The new Constitution and labour law' (1996) 6(1) *Labour Law News and Court Reports* 1 at 2; Martin Brassey & Carole Cooper 'Labour relations' in Chaskalson et al (eds) *Constitutional Law of South Africa* vol 1 (1996) at 30–3.

⁴⁷ That is, because the 'limitation clause' (s 36 of the Constitution) permits the limitation of basic rights only by law of general application; there is no provision for limitation by private persons.

circumstances be excluded by agreement⁴⁸ and those of which the purported exclusion is open to interpretation. For example, a restraint of trade clause is not automatically invalid even though it limits the fundamental right 'to choose [a] trade, occupation or profession freely'.⁴⁹ In terms of the common law, generally speaking, a restraint clause is valid provided that enforcement thereof will not be contrary to public policy.⁵⁰ In such a case, where a limitation of a basic right is permitted by a common-law rule, the inquiry shifts to the validity of the latter rule in terms of s 36(1) of the Constitution. If the rule does not pass the test, the contractual term must likewise be invalid.⁵¹

CONTRACTUAL REMEDIES AND STATUTORY REMEDIES

What, then, is the position when a term (express or implied) of a contract of employment, and the attendant contractual remedy, coincide with a statutory right or remedy enacted by the legislature in accordance with the right to fair labour practices? In many cases, of course, the statute itself will specify the scope (if any) for varying its requirements by agreement.⁵² But if nothing is said, does the statutory remedy supersede the contractual remedy?

As is well known, this question was answered in the negative by the Supreme Court of Appeal in *Fedlife Assurance Ltd v Wolfaardt*.⁵³ At issue in this matter was the right of an employee whose fixed-term contract of

⁴⁸ For example, protection against unfair discrimination: *Parry v Astral Operations Ltd* (2005) 26 ILJ 1479 (LC) para 58. Hepple describes such rights as 'inderogable': see Bob Hepple *Rights at Work: Global, European and British perspectives* (2005) 20 (under the heading 'The common law and statutory rights'), with reference to Lord Wedderburn 'Inderogability, collective agreements, and community law' (1992) 21 ILJ (UK) 245.

⁴⁹ Section 22 of the Constitution.

⁵⁰ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). In general, see J T R Gibson *South African Mercantile & Company Law* 7 ed (1997) at 78–81. The Bill of Rights has been described as 'an exceptionally reliable statement of seriously considered public opinion', although 'it would be a mistake to treat its provisions as the last word on public policy' – the latter is a broader concept in that additional principles, such as freedom of contract, may also be part thereof: R H Christie 'The law of contract and the Bill of Rights' in *Bill of Rights Compendium* (1996) (looseleaf) at 3H10–3H11.

⁵¹ In the case of restraint of trade agreements, it has been held that the common-law rule is consistent with the Constitution. The question of onus, however, is unsettled: cf *Kotze en Genis (Edms) Bpk v Potgieter* 1995 (3) SA 783 (C); *Knox D'Arcy Limited v Shaw* 1996 (2) SA 651 (W); *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2005 (3) SA 205 (N).

⁵² For example, s 49(3) of the BCEA and s 197(2) of the LRA.

⁵³ *Supra* note 27. See also *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* *supra* note 4, where the previous Labour Appeal Court reached a similar conclusion, and *Jacot-Guillarmod v Provincial Government, Gauteng* 1999 (3) SA 594 (T) where the High Court treated a dispute similar to that in *Fedlife* as one concerning the enforcement of an employment contract. For a critical analysis of the *Fedlife* judgment, see John Grogan 'Which court when – and why? – Jurisdiction over employment disputes' *Employment Law Journal* December 2001.

employment had been terminated prematurely to claim damages for breach of contract rather than seeking a remedy for unfair dismissal in terms of the LRA.⁵⁴ The practical importance of the question was (and is) that statutory compensation for unfair dismissal must be ‘just and equitable in all the circumstances’ but may not exceed the equivalent of twelve months’ remuneration (or, in the case of automatically unfair dismissal, twenty-four months’ remuneration)⁵⁵ whereas common-law damages have no a priori limits. The majority of the court found that the LRA did not ‘expressly abrogate an employee’s common-law entitlement to enforce contractual rights’, nor did it do so by necessary implication.⁵⁶ This means that employees, certainly in disputes arising from the termination of employment, may choose whether to base their action on their contractual rights or on the LRA.⁵⁷ This ruling has not gone without criticism, which will be considered below.⁵⁸ It is, however, the law.⁵⁹

The effect, on the face of it, is to create a dualistic model of dispute resolution, consisting of statutory remedies mirrored by their common-law counterparts and, hence, two parallel streams of jurisprudence. It is, of course, not all-pervasive. Common-law rules, as was confirmed in *Fedlife*, fall away to the extent that they are expressly overruled or in direct conflict with legislation. The Constitution, and legislation giving effect to the Constitution, should therefore be the starting point in identifying employment rights and duties. The common law is no more than ‘residuary’, ‘subordinate’ to legislation, operative only ‘when no statute or [collective]

⁵⁴ See s 193 LRA. In practice, the question is only likely to arise in respect of fixed-term contracts, in that contractual damages for unlawful termination of an indefinite contract will generally be limited to ‘notice pay’ — i.e., well below the statutory maximum — while in the case of fixed-term contracts with an extensive period left to run it may be considerably higher.

⁵⁵ See s 194 LRA. ‘Automatically unfair dismissal’, generally, refers to dismissal for reasons so offensive to public policy as to be unjustifiable under any circumstances: see s 187 LRA.

⁵⁶ Paragraph 17.

⁵⁷ This may be contrasted with the distinction drawn in the UK between ‘unfair dismissal’ in terms of the Employment Rights Act 1996 and ‘wrongful dismissal’ based on breach of contract, i.e. dismissal without due notice. As discussed below, the House of Lords has excluded what may be termed the substantive fairness of dismissal from the purview of the common law.

⁵⁸ The opposing view being that, where the facts of an applicant’s case bring it within the ambit of a statutory remedy, the common-law remedy should be excluded: see the minority judgment of Froneman AJA in the same matter, discussed below.

⁵⁹ While the judgment does not deal with other categories of dispute, it has been suggested that a similar approach should be followed in all cases where a statutory right overlaps with a contractual right — that is, it should be assessed whether the statute expressly or by implication abolishes the contractual remedy: see Christoph Garbers ‘The battle of the courts: Forum shopping in the aftermath of *Wolfaardt* and *Fredericks*’ (2002) 6 *Law, Democracy & Development* 97 at 106.

agreement prevails'.⁶⁰ Even so, Brassey has suggested, it remains important in two respects:

- it provides concurrent causes of action in the ordinary courts; and
- it is 'the embodiment of equity'.⁶¹

The first proposition is illustrated by the *Fedlife* judgment (above). The second would seem to need some qualification. It is undeniable that the common law is a source of equitable principles. To see it as the 'embodiment' thereof, however, does not sit easily with the existence of a Bill of Rights which, arguably, is the ultimate source of equity in our law.⁶² It is true that the Bill of Rights mandates recourse to, and development of, the common law as one means of realizing its objectives where legislation is silent.⁶³ This shows that the interaction between common law, the Constitution and statute is not a one-way process. The very need for the enactment of a series of statutes to give effect to constitutional provisions such as the labour clause, however, reminds us that the common law, in itself, cannot underpin an equitable regime consistent with the right to fair labour practices. To achieve that requires a combination of statutory rules and contractual principles, the former devised and the latter (to the extent that hiati remain) interpreted in accordance with the Bill of Rights. To this extent, the common law can no longer be regarded as an autonomous source of law separate from the Constitution.⁶⁴

The picture that emerges is thoroughly dialectical. Labour statutes are superimposed on common law while, at the same time, common-law principles are interwoven with statutory rules, giving them content or helping to define their scope. Both, however, are informed and limited by the Constitution. Viewed thus, employment law presents not so much a dichotomy between statute and common law but, rather, a continuum ranging from statutory rights at one end to contractual rights at the other,

⁶⁰ Martin Brassey 'Common law: Opportunities and obstacles' Unpublished paper delivered at the 6th Annual Conference of the South African Society for Labour Law 2003.

⁶¹ *Ibid.*

⁶² The Bill of Rights "enshrines the rights of all people in our country" [s 7(1) of the Constitution] and affirms the foundational values of human dignity, equality and freedom. Courts must give expression to these foundational values when construing any legislation': *Daniels v Campbell NO 2004 (5) SA 331 (CC)* para 45. The term 'equity', though undefined in our law, literally denotes fair and impartial treatment. As such it is integral to the 'foundational values' of the Constitution and must inform the interpretation of all laws in accordance with the Constitution.

⁶³ Section 8(3), read with s 39(2).

⁶⁴ Thus, Kentridge AJ warns that 'constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law': *S v Zuma 1995 (2) SA 642 (CC)* para 15; and see J R de Ville *Constitutional and Statutory Interpretation* (2000) at 172, who argues that 'extreme caution is called for in interpreting the Constitution insofar as reliance is placed on the common law'. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)* paras 22 and 25.

with a considerable interface in between where it is difficult or impossible to separate one from the other. It is in this intermediate zone that the ambiguities alluded to in the Introduction to this article are located; and, from what has been said, it follows that these can only be resolved in the light of the constitutional principles that underpin both common law and statute.

To illustrate the point, two examples will be considered: (a) the definition of ‘dismissal’ in s 186 of the LRA; and (b) the relationship between the concept of ‘unfair dismissal’ and that of unlawful termination of the employment contract.⁶⁵

(a) *The definition of ‘dismissal’*

As early as 1995, P A K le Roux noted that, on the face of it, the LRA’s definition of ‘dismissal’ is essentially limited to employees employed in terms of a contract of employment.⁶⁶ The statutory definition of ‘employee’, on the other hand, includes persons who ‘in any manner [assist] in the carrying on or conducting the business of an employer’ [s 213]. This formulation is broad enough to include persons working for an employer without a valid contract of employment.⁶⁷ In s 186(1) of the LRA, however, ‘dismissal’ is equated with termination (or non-renewal) of a ‘contract of employment’; and, to gain access to the CCMA, a dismissed employee must prove ‘dismissal’ in this sense.⁶⁸ On a strict reading of the Act, therefore, workers without a valid contract of employment cannot be ‘dismissed’ and thus do not qualify for protection in terms of the LRA.⁶⁹ It is submitted that this cannot have been the intention.⁷⁰ The only way of avoiding it is to interpret

⁶⁵ Other examples of potential overlap include the circumstances under which the Labour Court may award sentimental damages as part of compensation (*Minister of Justice v Bosch NO* (2006) 27 ILJ 166 (LC)) and the power assumed by the High Court to review disciplinary proceedings by private employers (*Feinberg v African Bank Ltd* (2004) 25 ILJ 217 (T)). Further instances are mentioned elsewhere in the article.

⁶⁶ With the exception, that is, of the atypical forms of dismissal described in s 186(1)(c) (not allowing an employee to resume work after taking maternity leave) and (d) (selective non-re-employment). See P A K le Roux ‘Developments in individual labour law’ in Halton Cheadle et al *Current Labour Law* (1995) 3–4.

⁶⁷ For example, a foreigner without a valid work permit, or an unassisted minor whose guardian repudiates the contract. In *White v Pan Palladium SA (Pty) Ltd* (2006) 27 ILJ 2721 (LC) at 2727J–2728A Oosthuizen AJ accepted that the existence of an employment relationship is ‘not dependent solely upon the conclusion of a contract recognized at common law as valid and enforceable’. See also *Rumbles v Kwa Bat Marketing (Pty) Ltd* (2003) 24 ILJ 1587 (LC) para 17; *Church of the Province of Southern Africa (Diocese of Cape Town) v CCMA* (2001) 22 ILJ 2274 (LC) para 29.

⁶⁸ Section 192(1) LRA.

⁶⁹ See, for example, ‘*Kylie*’ and *Van Zyl t/a Brigittes* (2007) 28 ILJ 470 (CCMA). The same applies to the BCEA and the Employment Equity Act 55 of 1998 (‘the EEA’). For criticism, see Craig Bosch ‘Can unauthorized workers be regarded as employees for the purposes of the Labour Relations Act?’ (2006) 27 ILJ 1342; Craig Bosch & Sarah Christie ‘Are sex workers “employees”?’ (2007) 28 ILJ 804.

⁷⁰ ‘[T]he Bill of Rights, with certain express exceptions, applies to all persons within the Republic, including [for example] illegal foreigners’: *Lawyers for Human*

‘contract of employment’ in s 186 in a purposive sense as meaning ‘the employment relationship’. In general, departure from the plain wording of a statute is justified in circumstances where a literal reading would lead to ‘a result contrary to the legislative intent’.⁷¹ The plain wording of s 186 would imply unequal treatment of two categories of employees, as well as discrimination between them, in almost certain conflict with subsecs 9(1) and (2) of the Constitution.⁷² This cannot have been intended by the legislature, nor is it consistent with the purposes of the Act. It is therefore submitted that a broader reading of ‘contract of employment’, as suggested above, is both justified and necessary.

The equation of ‘dismissal’ with termination of the contract of employment is awkward in other ways too. Repudiation is one of the ways in which termination of a contract of employment can be triggered. Repudiation happens where one party, expressly or by conduct, signifies an intention not to be bound by the contract. This gives the innocent party a choice whether to reject the repudiation and hold the other party to the contract, or to accept the repudiation and terminate the contract (usually accompanied by a claim for damages).⁷³ It is, in other words, the innocent party that terminates the contract. The result is that, where an employer repudiates a contract of employment (for example, by unlawfully purporting to terminate it without notice) and the employee tacitly accepts it (typically, by acquiescing, in the belief that the contract has in fact been ended) it is the employee and not the employer who terminates the contract.⁷⁴ This means, on a strict reading of s 186(1), that no ‘dismissal’ has taken place, thus precluding the employee from seeking relief in terms of the LRA. Bosch⁷⁵ argues convincingly that, under such circumstances, the act of repudiation by the employer rather than its acceptance should be regarded as constituting ‘dismissal’ for purposes of the Act; and, once again, there seems to be no other way of avoiding an outcome that is manifestly at odds with the underlying purpose of the Act.

Rights v Minister of Home Affairs 2003 (8) BCLR 891 (T) at 897; and see *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 41”, where the Constitutional Court, while substituting the order made by the High Court, endorsed the above principle. No category of persons is excluded from the protection of s 23(1) of the Bill of Rights.

⁷¹ *Adampol (Pty) Ltd vs Administrator, Transvaal* 1989 (3) SA 800 (A) at 804.

⁷² Section 9(2) prohibits the state from discriminating unfairly against anyone on any ground, which has been held to include lack of South African citizenship: *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC).

⁷³ In general, see François du Bois (ed) *Wille’s Principles of South African Law* (2007) 866–70.

⁷⁴ See, for example, *Coetzee v Pitani (Pty) Ltd t/a Pitani Electrification Projects* (2000) 21 ILJ 1324 (LC).

⁷⁵ Craig Bosch ‘What’s in the word? Giving definition to “dismissal”’ Paper presented to the 18th Annual Labour Law Conference, Johannesburg 2005, available at www.imetwork.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=imetwork:10.1048/enu (last accessed on 16 February 2008).

Difficulties may also arise where an employee repudiates a contract,⁷⁶ the employer accepts the repudiation, and the employee claims unfair dismissal. If the employee's conduct is construed as termination of the contract without due notice, and the employer acquiesces, it would mean that the contract was ended by mutual agreement and, therefore, no dismissal took place.⁷⁷ If the employee's conduct is construed as repudiation and the employer's conduct as acceptance thereof, on the other hand, the employer would have terminated the contract,⁷⁸ the LRA would apply and the employer would be exposed, at very least, to the cost and tribulations of arbitration and possible legal proceedings. While under such circumstances the employer would almost certainly be able to show a fair reason for 'dismissal', it is inherently unlikely that any 'fair procedure' will have been followed. Even if no compensation is ordered on this count, it seems incongruous that an employer that has acted entirely reasonably in the circumstances should be found to have acted unfairly.⁷⁹ Once again, such an outcome can only be avoided by giving the term 'dismissal' a meaning other than that stated in the Act.⁸⁰ To all intents and purposes, termination in the circumstances outlined above is at the instance of the employee, not the employer. Given the object of protecting employees from the unfair exercise of employers' power, it is suggested that cases of termination where the employer played no active role fall beyond the scope of Chapter VIII of the LRA.⁸¹

(b) *Unfair dismissal v unlawful termination of the employment contract*

A major area of uncertainty, as already noted, is the coexistence of contractual and statutory regimes based on the same employment relationship and, consequently, a potential overlap between contractual and statutory causes of action based on the same facts. One result, highlighted by the *Fedlife* decision, is that different remedies may be available where causes of action overlap, thus potentially frustrating any attempt by the legislature at

⁷⁶ For example, by announcing a desire to cease working for the employer and lack of confidence in it: cf *Council for Scientific & Industrial Research v Fijen* 1996 (2) SA 1 (A), discussed below.

⁷⁷ If the employee acted 'in the heat of the moment' and subsequently repented, the employer might be able to prove misconduct but not to claim repudiation: see *CEPPWAWU v Glass & Aluminium 2000 CC* (2002) 23 ILJ 695 (LAC); *Nashwa v Unisel Gold Mine* [1995] 9 BLLR 132 (IC); and see also the voluminous body of case law and literature dealing with constructive dismissal.

⁷⁸ *Council for Scientific & Industrial Research v Fijen* supra note 76.

⁷⁹ Unless, that is, it is found on the facts that the employee had waived the right to a fair procedure.

⁸⁰ See, for example, *Thubane v Hendlers Industrial Carriers* [1997] 2 BLLR 131 (IC) where it was found that an employee who had repudiated his contract of employment was not 'dismissed'.

⁸¹ Also relevant is the statutory object of promoting 'the effective resolution of labour disputes' (s 1(d)(iv) LRA), which would not be served by opening an already overburdened CCMA to disputes about the 'fairness' of an employer accepting repudiation by an employee.

designing an appropriate remedy. Conversely, a cause of action may exist in terms of the one system but not the other. This is not problematic in cases where a statutory cause of action is created where the common law had offered none; this is, after all, this is one of the purposes of legislation. It does, however, become problematic if conduct provided for by statute is held to be actionable in terms of common law. This is clearly in conflict with the fundamental hierarchy of sources of law, in which legislation occupies a higher tier.⁸² As will be seen, the risk of inadvertently reversing the roles is inherent in the unsystematic enforcement of common-law rights and remedies alongside their statutory counterparts.

Further uncertainty arises in respect of the extent of the overlap between the two regimes. For example, does (fundamental) breach of contract by an employee ipso facto amount to a fair reason for dismissal based on conduct in terms of s 188 of the LRA? The answer is not self-evident. In most cases breach of contract by an employee serious enough to warrant summary termination will also amount to a fair reason for dismissal. However, two different rules of law are involved: the question whether termination was 'lawful' is distinct from an inquiry whether it was 'fair' in terms of the Act.⁸³

These various problems have been illustrated by a growing number of decisions. For example, in *Denel (Pty) Ltd v Vorster*⁸⁴ a dismissed employee claimed contractual damages from his former employer based on the latter's failure to adhere to its disciplinary procedure. In terms of the LRA it is accepted that a disciplinary procedure, even when laid down in a collective agreement,⁸⁵ should be treated as a guideline rather than an inflexible code and that deviations therefrom are not necessarily unfair.⁸⁶ The employer in this matter argued that the procedure it had followed was fair in terms of the constitutional right to fair labour practices. However, the procedural rules were also incorporated into the employee's contract of employment; and this, in the view of Nugent JA, made all the difference:

⁸² Compare Du Bois cit note 73 at 36.

⁸³ Similarly, breach of contract by an employer (relating, for example, to discipline short of dismissal) does not necessarily amount to an unfair labour practice: see *Jonker v Okhahlamba Municipality* (2005) 26 ILJ 782 (LC); *Mankahla v University of Transkei* [2004] 11 BALR 1340 (P).

⁸⁴ 2004 (4) SA 481 (SCA).

⁸⁵ Which, in general, trumps the individual contract: see ss 23(3) and 199 of the LRA.

⁸⁶ As was explained in *NEHAWU v Director-General of Agriculture* (1993) 14 ILJ 1488 (IC) at 1500: 'the purpose of the Labour Relations Act of 1956 was the promotion of good labour relations by way of striking down and remedying unfair labour practices. To that end a strictly legalistic approach should yield to an equitable, fair and reasonable exercise of rights; and insistence on uncompromising compliance with a code, to substantial fairness, reasonableness and equity.' This approach has been maintained in terms of the current Act: see *Malelane Toyota v CCMA* [1999] 6 BLLR 555 (LC); *Highveld District Council v CCMA* (2003) 24 ILJ 517 (LAC); *Khula Enterprise Finance Ltd v Madinane* (2004) 25 ILJ 535 (LC); Du Toit et al op cit note 33 at 396ff.

'If the new constitutional dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly, it does not follow that it deprives contractual terms of their effect. Such implied duties would operate to ameliorate the effect of unfair terms in the contract, or even to supplement the contractual terms where necessary, but not to deprive a fair contract of its legal effect.'⁸⁷

Had the disciplinary procedure *not* been incorporated in the employee's contract of employment, in other words, it might well have been open to the employer to follow an alternative procedure provided it was fair. Merely because it was so incorporated, however, the disciplinary procedure was treated as strictly enforceable regardless of the fairness of the procedure actually followed.⁸⁸ In the absence of any material reason for insisting on literal performance dictated by the facts of a particular case, it may well be asked if such differentiation does not amount to elevating form above substance.

A more nuanced view was taken in the subsequent matter of *Riekert v CCMA*⁸⁹ where the Labour Court, on review, overturned the finding of the CCMA that an employer had been justified in disregarding key aspects of a strict disciplinary code incorporated into an employee's contract of employment. Nel AJ held as follows:

'I am in agreement with the proposition that disciplinary codes are guidelines and that an employer will not necessarily be regarded as having acted procedurally unfairly if it did not comply with certain specific parts of its code. [But] I do not believe that the fact . . . that disciplinary codes are guidelines can under any circumstance be understood by employers as meaning that they may chop and change the disciplinary procedures they have themselves set as and when they wish to. Employees (and employers) are entitled to expect that their employers (and employees) will comply with the prescribed rules of the game as far as disciplinary enquiries go. . . . When an employer does not comply with aspects of its own disciplinary procedures, there must be good reason shown for its failure to comply with its own set of rules.'⁹⁰

On this approach it would seem that a procedural rule embodied in a contract of employment could be departed from if there is 'good reason' for

⁸⁷ Paragraph 16.

⁸⁸ As Nugent JA put it: 'It might be that the construction advanced by the appellant would create a disciplinary regime that was equally acceptable (whether that is so is by no means certain) but that is not the test: through its disciplinary code, as incorporated in the conditions of employment, the appellant undertook to its employees that it would follow a specific route before it terminated their employment and it was not open to the appellant unilaterally to substitute something else' (para 15). In contrast, see *Jonker v Okhahlamba Municipality* supra note 83 where time limits for disciplinary action contained in a contract of employment were treated as 'a guide' and not 'written in stone' (para 20).

⁸⁹ (2005) 14 LC 7.1.5.

⁹⁰ Paragraph 22. In in this instance the employer's departure from the agreed procedure was found to have resulted in serious unfairness and, as a result, the dismissal was procedurally and substantively unfair.

doing so, the procedure actually followed by the employer is fair, and the employee suffers no prejudice as a result.

The picture is even less clear-cut when it comes to terms that were not agreed by the parties but are alleged to be tacit. A case in point is *Key Delta v Marriner*⁹¹ in which a dismissed employee based a claim for contractual damages on the procedure followed by the employer in terminating his employment as well as the alleged absence of a fair reason for dismissal. In fact, the employee's letter of appointment was silent on both matters. While accepting that there is 'no presumption in a contract of employment that the employer requires a valid reason for dismissing its employee, nor that the audi alteram partem rule has to be observed',⁹² Erasmus J went on to reason as follows:

[G]enerally employers and employees [at the time of the dismissal] were conscious of the fact that under the Labour Relations Act arbitrary dismissal amounted to an unfair labour practice. This translates into a more ready inference that the parties tacitly incorporated such principles of fairness into their agreement. It is of course not in itself decisive. The Court must establish and give effect to the intention of the parties, as reflected in their agreement seen in the light of the relevant surrounding circumstances.'

From the nature of the employee's work, and the fact that the employer's defence was essentially to deny the unfairness alleged by the employee, the court concluded that the parties had indeed intended to incorporate requirements of substantive and procedural fairness into their agreement, which duty the employer had breached.

Leaving aside the merits of the outcome, it is submitted that the method followed by the court in reaching it is problematic. In general, a court 'does not readily import a tacit term' into a contract.⁹³ In the case of a written contract, the parole evidence rule places formidable barriers in the way of inferring terms other than those which the parties reduced to writing. In *casu* the court based its finding primarily on the parties' supposed understanding, not at the time of concluding the contract, but at the time of the dismissal (more than a year later) and on their subsequent conduct.⁹⁴ One is left with a

⁹¹ [1998] 6 BLLR 647 (E). The case, on appeal from the Magistrate's Court, was heard before two judges.

⁹² At 651.

⁹³ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532H–533A, cited in *Denel v Vorster* supra note 84 para 15. The judgment continues: '[The court] cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.'

⁹⁴ In other cases where the labour courts were prepared to relax the parole evidence rule, the evidence considered admissible related to events leading up to or contemporaneous with the conclusion of the written agreement: *SASBO v First National Bank*

sense that the manner in which the employer conducted its defence,⁹⁵ rather than the strength of the applicant's case, was the deciding factor. This rather technical victory establishes little by way of precedent but does raise questions about the lengths to which a court may go in inferring the existence of tacit contractual terms.⁹⁶

Even more perplexing is the judgment in *Buthlezi v Municipal Demarcation Board*⁹⁷ where an employee's fixed-term contract had been terminated prematurely on the grounds of the employer's operational requirements. Remarkably, the Labour Appeal Court concluded that the dismissal had been without a fair reason because, at common law, an employer may not terminate a fixed-term contract in the absence of agreement to that effect or material breach by the employee.⁹⁸ The LRA, it was held, had not amended that principle.⁹⁹ This raises at least two questions. First, it is difficult to understand how the *unlawfulness* of the termination of a contract in terms of common law can be equated with *lack of a fair reason* for dismissal in terms of the LRA. The fact that termination (and hence 'dismissal') was premature says nothing about its reason or the fairness thereof. Secondly, the finding that the LRA did not amend the common law relating to the termination of fixed-term contracts of employment is puzzling. In fact, the LRA amended the common law profoundly by abolishing the employer's right to terminate an employment contract unless a 'fair reason' exists. In doing so, no distinction was drawn between fixed-term and indefinite contracts.¹⁰⁰ The court in *Buthlezi* accepted that an employee's conduct may provide a fair reason to terminate a fixed-term contract — and there is nothing in the Act to indicate that an employer's operational requirements should be treated

of Southern Africa Ltd (1996) 17 ILJ 135 (IC); *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC).

⁹⁵ That is, by denying unfairness rather than excepting to the claim as not disclosing a cause of action.

⁹⁶ As Bosch comments: '[I]mporting or constructing terms in particular cases involves a more active interference by the courts in parties' autonomy to contract as opposed to simply accepting that at the outset there is a duty of good faith implied into every contract of employment which may then be excluded or varied if the parties apply their minds to it': Craig Bosch 'The implied term of trust and confidence in South African labour law' (2006) 27 ILJ 28 at 50.

⁹⁷ *Supra* note 12.

⁹⁸ Under the heading 'substantive unfairness', the court expressed itself thus: 'I conclude that the respondent had no right in law to terminate the contract of employment between itself and the appellant. Accordingly, the termination of such contract before the end of its term was unfair and constituted an unfair dismissal.' (Para 16).

⁹⁹ Paragraph 12.

¹⁰⁰ Section 185 and 188 LRA. The Act did not, in other words, preserve the employer's common-law right to terminate a fixed-term contract without a reason as an 'alternative' to the statutory dispensation, which would clearly have made nonsense of s 188.

any differently as a potential ground for dismissal.¹⁰¹ In my view, the right to dismiss employees when operational requirements justify it (subject to ss 189 and 189A of the LRA) is part of the employer's right to fair labour practices and (in the language of *Fedlife v Wölfardt*) does not seem to be excluded, either expressly or by necessary implication, in respect of employees on fixed-term contract.

A CASE STUDY: THE COMMON-LAW DUTY OF 'TRUST AND CONFIDENCE'

A common difficulty runs through the judgments discussed above. The problem is not that employees' claims were upheld in most cases; if anything, given that employee protection is a central purpose of labour law, that should reinforce their authority. The problem is how it was done. The grounds on which the cases were decided were for the most part technical rather than substantive. If anything, this suggests an absence of legal principle clearly entitling employees to the protection which the court saw fit to provide.

Given the traditional function of statute in supplementing the deficiencies of common law, this reversal of roles raises questions as to the adequacy of the relevant provisions of the LRA. If the rights and remedies recognized by the courts are implicit in the constitutional right to fair labour practices, was the legislature not remiss in omitting them from the Act — or, if it did intend employees to enjoy these protections, should the Act not have said so? If it is left to the courts to construe such protections on a case-by-case basis, will we not end up — as in the days of the Industrial Court — with 'a confused "patchwork" jurisprudence'?'¹⁰²

Even if we embrace common law as a source of equitable principles (as we must), does it follow that all those principles are consistent with the complex of rights and duties created by the LRA and BCEA — which, after all, were designed to give carefully balanced effect to basic constitutional rights? In principle this may well be possible; indeed, the Constitution mandates the courts to develop the common law to the extent that legislation does not give effect to a constitutional right.¹⁰³ Even then, the scope and content of

¹⁰¹ The court's reasoning was that a fixed-term contract cannot be terminated for operational reasons because 'the employer is free not to enter into a fixed-term contract but to conclude a contract for an indefinite period if he thinks that there is a risk that he might have to dispense with the employee's services before the expiry of the term' (para 11). This assumes that the possibility of operational requirements justifying dismissal should be foreseeable at the time of entering into the contract. In my view, this hardly follows. Moreover, it is accepted that poor management on the part of an employer, resulting in an operational need to dismiss, does not in itself exclude substantive fairness: see *Benjamin v Plessey Tellumat SA Ltd* (1998) 5 ILJ 595 (LC). Failure to anticipate a foreseeable risk of having to terminate a contract prematurely, it would seem, is a good example of this.

¹⁰² The expression is borrowed from Bosch op cit note 96.

¹⁰³ Section 8(3)(a) of the Constitution.

each ‘developed’ common-law rule in relation to its constitutional (and general statutory) environment would need to be assessed in each instance.

A case in point is the implied contractual duty of trust and confidence existing between employer and employee.¹⁰⁴ Its utility within a constitutional matrix is clear. ‘[D]irect reliance on the [constitutional] right to fair labour practices’, Bosch points out, ‘can be avoided by fleshing out the existing common law implied term of trust and confidence.’¹⁰⁵ Given its constitutional resonance, it is suggested, the duty should be seen as ‘an *essentialium*, and not a mere *naturalium* of the employment contract’.¹⁰⁶ Moreover, there is no reason to fear the application of a general term requiring employers ‘to act in a certain manner’:

‘It is important to set standards of behaviour so that the parties to the contract know at the outset what kind of conduct is expected of them. This seems a better approach than finding tacit terms to the effect that certain employer conduct is unacceptable. Adopting that approach we are likely to develop a confused ‘patchwork jurisprudence’ and the implied term of trust and confidence only becomes relevant at the stage where the employee seeks a remedy.’¹⁰⁷

Thus, in *Fijen* breach of this duty by an employee was held to constitute repudiation, entitling the employer to dismiss the employee. It is, however, important to note that this matter was decided on a purely contractual basis, before the enactment of the Constitution and the current LRA. It is less clear what would have happened if the court had been charged with interpreting the duty of trust and confidence in light of the constitutional right to fair labour practices and the employee’s statutory protection against unfair dismissal. For example, how would the employer’s duty of trust and confidence towards an employee relate to the latter’s statutory protection

¹⁰⁴ See *Council for Scientific & Industrial Research v Fijen* supra note 77 where it was held that ‘the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the “innocent” party to cancel the agreement’ (at 9H). On the origin of the term, see Hepple op cit note 48 at 18–20.

¹⁰⁵ Bosch op cit note 96 at 31. He continues: ‘In addition, the right to fair labour practices is not the only constitutional right protected by the implied term of trust and confidence. It might also be used to ensure proper respect for an employee’s rights to dignity and possibly freedom and security of the person, particularly the right to bodily and psychological integrity’ (footnotes omitted).

¹⁰⁶ Ibid at 51, with reference to Hepple op cit note 48. The argument is that ‘dignity, respect and equality are fundamental rights . . . [which] should not be capable of being excluded by agreement; they are “inderogable” in the employment context. To the extent that the implied term of trust and confidence gives effect to fundamental rights perhaps it should be seen as “uneradable” from the contract of employment’: Hepple op cit note 48 at 31–2; and see *Parry v Astral Operations Ltd* supra note 49.

¹⁰⁷ Ibid at 50.

against ‘constructive dismissal’?¹⁰⁸ Would breach of that duty by an employer amount to making continued employment ‘intolerable’ for the employee? Or, following *Fedlife v Wolfaardt*, should the two sets of rights be treated as ‘oil and water’, each to be interpreted in its own terms without reference to the other? If so, is it possible that an employer might breach the common-law duty (thus entitling the employee to terminate the contract and claim damages, possibly in excess of the statutory limit) without necessarily rendering continued employment ‘intolerable’? In this event, would the statutory protection not become redundant? Put differently, how would one construe the purpose of s 186(1)(e) in light of the injunction to interpret the LRA to ‘give effect to its primary objects’,¹⁰⁹ including that of regulating the right to fair labour practices?

Nor is it clear how far the duty of ‘trust and confidence’ extends.¹¹⁰ Does it prohibit an employer from terminating a contract of employment for (otherwise lawful) reasons inconsistent with that duty, thus entitling an employee to damages if he or she is dismissed in this way? Some support for such an approach can be found in related areas of law — for example, an employer’s general duty of good faith in the context of a pension scheme.¹¹¹ It may also be argued that such an extension of the duty is implicit in the basic right to equal treatment — in other words, that the right to enforce common-law remedies in addition to statutory remedies cannot (without some constitutionally valid reason)¹¹² be limited to employees on fixed-term contract (as in *Fedlife* and *Buthlezzi*) but should be available to all employees. And if one common-law duty of an employer remains enforceable — that is, the duty not to terminate a fixed-term contract prematurely — why not the duty of trust and confidence in general?

It will not be attempted to answer these questions definitively; rather, an alternative basis for approaching them will be suggested. Suffice it to note that in *Harper v Morgan Guarantee Trust Co of New York, Johannesburg*¹¹³ the

¹⁰⁸ Defined as termination of the employment contract by an employee ‘because the employer made continued employment intolerable’: s 186(1)(e) LRA.

¹⁰⁹ Section 3(a) read with s 1.

¹¹⁰ The duty of trust and confidence, Bosch suggests, overlaps with and may be synonymous with the duty of good faith, although the latter may be more extensive: Bosch op cit note 96 at 52.

¹¹¹ *Tek Corporation Provident Fund v Lorentz* 1999 (4) SA 884 (SCA); see Graham Damant and Tashia Jithoo ‘The pension promise: Regulating employer conduct’ (2003) 24 *ILJ* 712 at 716–17.

¹¹² Given that the right to equal treatment is premised on substantive rather than formal equality, it implies ‘treating like alike’ while differentiating between unlike cases. For an illuminating application of the principle, see *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC). On this basis it is arguable that the special position of fixed-term employees, bound up with the insecure nature of their employment, justifies the special protection extended to them in *Fedlife v Wolfaardt* supra note 27.

¹¹³ 2004 (3) SA 253 (W).

High Court rejected the notion of an implied term of good faith¹¹⁴ overriding the right of the employer to terminate the contract on due notice. Also in English law, the court noted, such a duty extends only to conduct during the course of a contract of employment — that is, to the manner in which the parties perform their duties — but not to the manner of its termination, which is governed by statute.¹¹⁵

THE IMPORTANCE OF LEGISLATIVE POLICY

The last-mentioned judgment refocuses attention on a theme running through all the cases discussed so far: rather than being merely about forum-shopping, they are really about the relationship between the common law and legislation. Legislation, as every lawyer knows, may amend the common law or leave it unamended. To leave it at that, however, is to misunderstand the role of legislation in a constitutional dispensation. Legislation is the product of deliberate policy, informed by constitutional imperatives and values, setting out to mould, supplement or replace common-law rules in the light of those values as well as governmental duties and socio-economic objectives derived from the Constitution. The LRA, in particular, was drafted with careful reference to the requirements of the Constitution and international law, following intensive negotiation between government, business and labour.¹¹⁶ The protection of employees against unfair termination of employment, balanced by the employer's right to terminate fairly, is a particularly sensitive aspect of the right to fair labour practices. In the result 'unfair dismissal', to all intents and purposes, has been placed on a par with fundamental breach of contract, accompanied by specific, and no less carefully crafted, remedies.¹¹⁷ With regard to compensation for unfair dismissal the Explanatory Memorandum to the Draft Labour Relations Bill of 1995 identified the problem implicit in a common-law approach, which the Act set out to rectify, as follows:

'In the absence of statutory guidelines or caps on compensation, which are the norm in other countries, the courts have used tests applied in personal injury claims to assess losses. Awards have become open-ended and, in the case of the

¹¹⁴ Bosch suggests that the duty of good faith and the duty of trust and confidence 'are synonymous, or that the duty of good faith encapsulates and extends what is contained in the implied term': Bosch op cit note 96 at 52.

¹¹⁵ *Harper v Morgan Guarantee Trust Co of New York, Johannesburg* supra note 5 paras 10–11 with reference to *Johnson v Unisys* (discussed in the text to note 120 below).

¹¹⁶ All proposed labour legislation must be considered by the National Economic, Development and Labour Council (NEDLAC), a multipartite council with the primary object of '[promoting] the goals of economic growth, participation in economic decisionmaking and social equity': s 5(1) National Economic, Development and Labour Council Act 35 of 1994.

¹¹⁷ See ss 193 and 194 LRA (as amended in 2002). For discussion, see Graham Giles & Darcy du Toit 'Compensation for unfair dismissal: How will the new section 194 work?' (2002) 6 *Law Democracy & Development* 124.

dismissal of executives, sometimes amount to hundreds of thousands of rands.¹¹⁸

It then put forward the proposed solution:

‘Without reinstatement, compensation must be open-ended and calculated on a delictual damages basis. Because the draft Bill offers reinstatement as a primary remedy, it caps compensation awards’.¹¹⁹

The thinking behind this approach was revealed more fully in the judgment of the House of Lords in *Johnson v Unisys Ltd.*¹²⁰ Observing that ‘this statutory system for dealing with unfair dismissals was set up by Parliament to deal with the recognized deficiencies of the [common] law’ when it came to damages in dismissal disputes, Lord Hoffmann on behalf of the majority interpreted the rationale of statutory compensation as follows:

‘The remedy adopted by Parliament was not to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith, leaving the courts to give a remedy on general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering statutory remedies. Many of the new rules, such as the exclusion of certain classes of employees and the limit on the amount of the compensatory award, were not based upon any principle which it would have been open to the courts to apply. They were based upon policy and represented an attempt to balance fairness to employees against the general economic interests of the community.’¹²¹

Next, Lord Hoffmann turned to the question ‘whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit’, and dealt with it as follows:

‘I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell,¹²² to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said: “there is not one hint in the authorities that the . . . tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way?. . . it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear.”

I can see no answer to these questions. For the judiciary to construct a general

¹¹⁸ GG of 10 February 1995 at 140. Translated into today’s terms, ‘hundreds of thousands’ would read ‘millions’. In itself, of course, this argument is inconclusive: the question is not the size of an award but whether it is justified. The arguments for capping compensation to anything less than contractual damages therefore deserve careful scrutiny.

¹¹⁹ Ibid at 143.

¹²⁰ [2001] UKHL 13, available at <http://www.bailii.org/uk/cases/UKHL/2001/13.html> (last accessed 16 January 2008).

¹²¹ Paragraph 54.

¹²² Before whom, in the County Court, the matter was originally heard.

common-law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.¹²³

This approach was again endorsed by the House of Lords in the subsequent matter of *Eastwood v Magnox Electric Plc; McCabe v Cornwall County Council*¹²⁴ where the rationale behind it was explained as follows:

‘In fixing these limits on the amount of compensatory awards Parliament has expressed its view on how the interests of employers and employees, and the social and economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for the courts to extend further a common law implied term when this would depart significantly from the balance set by the legislature. To treat the statutory code as prescribing a floor and not a ceiling would do just that. A common-law action for breach of an implied term not to be dismissed unfairly would be inconsistent with the purpose Parliament sought to achieve by imposing limits on the amount of compensatory awards payable in respect of unfair dismissal.’¹²⁵

It is not difficult to apply the above reasoning in the South African context, but, confronted with the same issue in *Fedlife v Wolfaardt*, the majority of the Supreme Court of Appeal preferred a different approach. Although the court noted the ‘broad scheme’ of the LRA and acknowledged the argument that ‘the material inroads made by the legislature upon the right of employers to terminate contracts of employment in accordance with their terms must necessarily have been intended to be balanced by the abrogation of employees’ rights to enforce such contracts at common law’, it nevertheless arrived at the following conclusion:

‘The clear purpose of the legislature when it introduced a remedy against unfair dismissal in 1979 was to supplement the common-law rights of an employee whose employment might be lawfully terminated at the will of the employer (whether upon notice or summarily for breach). It was to provide an additional right to an employee whose employment might be terminated lawfully but in circumstances that were nevertheless unfair.’¹²⁶

What, then, of the prevailing ‘broad scheme’ of the LRA, designed sixteen years after the original prefiguration of a statutory remedy against unfair dismissal in 1979 (alluded to above), informed by the Constitution and international law? The court made no further reference to it, nor to the solution it proposed (in the shape of s 194) to the problems linked to the discretionary power of the Industrial Court to order compensation.¹²⁷ Noting the question ‘whether [the 1995 Act] . . . deprived employees of their pre-existing common-law right to enforce [fixed-term] contracts,

¹²³ Paragraph 57–8.

¹²⁴ [2004] UKHL 35, available at <http://www.bailii.org/uk/cases/UKHL/2004/35.html> (last accessed on 16 January 2008)

¹²⁵ Paragraph 13.

¹²⁶ *Fedlife Assurance Ltd v Wolfaardt* supra note 27 para 13.

¹²⁷ See also the text to note 55 above.

thereby confining them to the remedies for “unlawful dismissal” as provided for in the 1995 Act’, the court answered it tersely:

‘In considering whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the legislature did not intend to interfere with existing law and *a fortiori*, not to deprive parties of existing remedies for wrongs done to them. A statute will be construed as doing so only if that appears expressly or by necessary implication’.¹²⁸

This reasoning, it is respectfully submitted, fails to engage with the purposes underlying the relevant provisions of the LRA; and it remains confined to the formal principles of common law, taking little account of the constitutional context in which the common law must be interpreted. It therefore does little to clarify what the appropriate balance should be between ‘the interests of employers and employees and the social and economic interests of the country as a whole’¹²⁹ that are bound up in the legal regulation of the remedy for dismissal. Grogan suggests that even in terms of the formal statutory framework the judgment is questionable. Given the *concurrent* jurisdiction conferred on the Labour Court to deal with contractual disputes, and the *exclusive* jurisdiction conferred on it ‘in respect of all matters in terms of [the BCEA]’, he points out that

‘[o]ne of the “matters” dealt with in the BCEA is the termination of employment (Chapter 5). Section 37(6) provides that “nothing in this section affects the right . . . of a dismissed employee to dispute the lawfulness or fairness of the dismissal in terms of Chapter VIII of the Labour Relations Act”. . . . A clearer indication that the legislature intended section 191 [providing for the referral of unfair dismissal disputes in terms of the LRA] to cater for all dismissals, irrespective of whether the complaint relates to alleged breach of contract or unfairness, can hardly have been offered.’¹³⁰

One is thus left with the question whether in *Fedlife* (as in *Buthelezi and Denel*) the common-law cart was not being put before the (vibrant) horse of statute. Is judge-made law taking precedence over legislative policy? Might the Supreme Court of Appeal, or the Constitutional Court,¹³¹ decide the issue differently in future if the purpose of the LRA in capping compensation for unfair dismissal is considered fully? To ask the question is not to anticipate any particular answer. The final part of this article suggests a basis on which the relief granted in *Fedlife v Wolfaardt* might conceivably be endorsed, albeit a different one from that relied on by the court.

¹²⁸ *Fedlife Assurance Ltd v Wolfaardt* supra note 27 para 15–16.

¹²⁹ *Eastwood v Magnox*; *McCabe v Cornwall County Council* supra note 124 para 13.

¹³⁰ Grogan op cit note 53.

¹³¹ Arguably, an employer’s right to fair labour practices may be infringed if contractual damages can be claimed for unlawful termination of employment in circumstances where Parliament, in giving effect to s 23(1), set out to limit the employer’s liability in terms of s 194 of the LRA.

SOME ANALOGIES

It is instructive to consider how the relationship between statutory and common law rights has been interpreted in other areas of employment-related law. Of particular interest is *Jooste v Score Supermarket Trading (Pty) Ltd*,¹³² where the constitutionality of a statutory remedy expressly excluding a common-law remedy was directly challenged. At issue was s 35(1) of the Compensation for Occupational Injuries and Diseases Act,¹³³ which limited the plaintiff to claiming statutory compensation for an injury suffered at work and barred her from suing her employer for general delictual damages. The Constitutional Court dismissed the challenge for the following reasons:

‘Whether an employee ought to have retained the common-law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the legislature and not a court must make. The contention represents an invitation to this Court to make a policy choice under the guise of rationality review; an invitation which is firmly declined. The legislature clearly considered that it was appropriate to grant to employees certain benefits not available at common law. The scheme is financed through contributions from employers. No doubt for these reasons the employee’s common-law right against an employer is excluded. Section 35(1) of the Compensation Act is therefore logically and rationally connected to the legitimate purpose of the Compensation Act, namely, a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.’¹³⁴

The similarity between this approach and that of the House of Lords in *Unisys* is evident. The *Jooste* case is, of course, distinguishable from *Fedlife v Wolfaardt* in that COIDA expressly excludes any common-law remedy whereas the LRA is silent on the question. The issue, thus, is whether Chapter VIII of the LRA (in providing statutory remedies for unfair dismissal) by implication excludes contractual remedies. The judgment in *Jooste* assists in answering this question by emphasizing the importance of legislative purpose, a factor which the court in *Fedlife* considered only in passing.

Also of importance is the scope of a statutory remedy. Even where it does set out to replace a common-law remedy, a statutory remedy may fail to do so. In such an event the common-law remedy will survive to the extent of any hiatus in the statute. This was demonstrated (again in the context of COIDA) in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*¹³⁵ where the employee of a labour broker, after being injured whilst working for the latter’s client, sought to hold the client vicariously liable for wrongful

¹³² 1999 (2) SA 1 (CC).

¹³³ Act 130 of 1993 (‘COIDA’).

¹³⁴ Paragraph 17.

¹³⁵ 2007 (2) SA 118 (SCA).

conduct of its employees. The Supreme Court of Appeal held that, since the labour broker (and not the client) was the claimant's employer,¹³⁶ s 35(1) of COIDA did not immunize the client against common-law claims. Thus, even though the labour broker may well have been liable in terms of COIDA (in that the employee's injury arose 'out of and in the course of' her employment with the labour broker), and therefore no common-law claim could lie against the labour broker, nothing prevented the employee from seeking delictual damages from the client for which she was actually working. This gap is particularly significant. There can be no doubt that COIDA set out to create a comprehensive statutory scheme to regulate compensation for occupational injuries and diseases. The *Rieck* case is a reminder that COIDA, like other employment statutes, remains premised on the 'typical' (full-time, indefinite) employment relationship. In this respect, as in others, the law has yet to take full cognizance of the proliferation of 'atypical' employment relationships that often fall beyond the ambit of traditional definitions.

The most important analogy, however, is to be found in the sphere of administrative law. It goes without saying (to lay a contentious issue immediately to rest) that administrative law applies to the exercise of public power and finds no application in the individual employment relationship. However, the relationship between statutory and common-law remedies has been analysed with particular clarity in the administrative sphere and the principles thus developed are equally illuminating in the context of employment. In *Pharmaceutical Manufacturers Association of SA; In Re: Ex Parte Application of President of the RSA*¹³⁷ the Constitutional Court, in dealing with the validity of the exercise of executive power, explained the relationship between the Constitution and the common law as follows:

'There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'

Four years later, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,¹³⁸ O'Regan J applied this analysis in a context where a statute had been enacted to regulate the constitutional right in question:

'There are not two systems of law regulating administrative action — the common law and the Constitution — but only one system of law grounded in

¹³⁶ In terms of s 198(2) of the LRA.

¹³⁷ 2000 (2) BCLR 674 (CC) para 44ff. It should be noted that this matter arose before the enactment of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

¹³⁸ 2004 (4) SA 490 (CC) para 22, with reference to *Pharmaceutical Manufacturers Association of SA; In re Ex parte President of the Republic of South Africa* supra note 138. See also *Minister of Health NO v New Clicks South Africa (Pty) Ltd* supra note 41 paras 434–7.

the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution.' (footnotes omitted.)

Much the same can be said of employment law. There are not two systems of law regulating the employment relationship but 'only one system of law grounded in the Constitution'. Its grundnorm is no longer to be found in the contract of employment (as modified by statute); it is to be found 'in the principles of our Constitution' – especially s 23, but not only there. In regulating employment relations, too, '[t]he extent to which the common law remains relevant . . . will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of . . . [the LRA, the BCEA] and the Constitution.'¹³⁹

This line of reasoning suggests an alternative to the ad hoc development of common-law remedies alongside, and possibly at the expense of, statutory remedies. In the next section it will be considered to what extent the basis for such an approach can be found within labour jurisprudence itself.

RECONCILING COMMON LAW, STATUTE AND THE CONSTITUTION

Fedlife v Wolfaardt is where the concurrence of statutory and common-law remedies was first asserted; an obvious starting point in considering an alternative approach, therefore, is the dissenting judgment of Froneman AJA (as he then was) in that matter. The essential steps in his reasoning may be summarized as follows:¹⁴⁰

- The facts of the matter 'clearly bring the respondent within the definition of "employee" in s 213 of the Act, and the termination of his employment within the definition of "dismissal" in s 186.'
- 'Dismissal upon an unlawful breach of contract by an employer is an unfair dismissal. And the Act deals fully with the consequences of an unfair dismissal.'
- Section 195 of the LRA¹⁴¹ ensures that the Act does not '[deprive] employees, on dismissal, of the right to enforce bargained terms in their

¹³⁹ See also *Transnet Ltd v Chirwa* 2007 (2) SA 198 (SCA) paras 11–12.

¹⁴⁰ See paras 8ff of the judgment.

¹⁴¹ Section 195 states that '[a]n order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.' Froneman DJP, in other words, suggests that the statutory remedies may be

contracts of employment that would put them in a better financial position than that which the statute itself provides for’.

- ‘Once it is accepted that this particular dispute is one about the fairness of a dismissal it follows that it must be dealt with in accordance with the procedure set out in s 191 of the Act.’

Reference is also made to the trenchant critique by Zondo JP, in *Langeveldt v Vryburg Transitional Local Council*,¹⁴² of the overlap in jurisdiction and causes of action between the Labour Court, the High Court and other tribunals. Although the Supreme Court of Appeal had not yet handed down its judgment in *Fedlife v Wolfaardt* at that point, Zondo JP assumed that a claim of unlawful dismissal could go either to the High Court or Labour Court to be decided in terms of common law whereas, if the same dismissal is claimed to be ‘unfair’, it had to be dealt with in terms of the LRA. This state of affairs, the learned Judge-President found, created uncertainty in that the various courts ‘have different jurisdictions and powers in relation to virtually the same dispute’.¹⁴³ For Zondo JP the solution lay in the creation of ‘a single hierarchy of courts [with] jurisdiction in respect of all employment and labour matters’; and, to this end, he urged that ‘all such jurisdiction as the High Courts may presently have in employment and labour disputes be transferred to the Labour Court and all such jurisdiction as the Supreme Court of Appeal may have in employment and labour disputes be transferred to the Labour Appeal Court’.¹⁴⁴

Ironically, it may be noted, the Superior Courts Bill of 2003¹⁴⁵ subsequently did propose a ‘single hierarchy of courts’ (albeit in response to another problem) but with a difference: it envisaged the merger of the Labour Court with the High Court and of the Labour Appeal Court with the Supreme Court of Appeal. This process, and the impact it may have on the relationship between contractual and statutory rights in the future, must be left to another discussion.

The issue, thus, presented itself in the labour courts primarily as a practical problem of legal incoherence and conflicting jurisdictions in dealing with labour disputes. The overarching authority of the Constitution was never denied and has been invoked on numerous occasions, but seldom in seeking a solution to the problem of competing sources of law. The judgment of the Constitutional Court in *Bato Star* certainly had no immediate impact. Although it was referred to in some cases, this was primarily in the context of seeking solutions to other, more specific questions — in particular, whether

supplemented by individually bargained contractual provisions rather than a general right to claim contractual damages in addition to statutory compensation.

¹⁴² (2001) 22 *ILJ* 1116 (LAC) paras 23ff.

¹⁴³ Paragraph 64.

¹⁴⁴ Paragraph 67.

¹⁴⁵ After much debate, the Bill at the time of writing still appeared to be with the Portfolio Committee on Justice and Constitutional Development of the National Assembly: see National Council of Provinces Order Paper No 19 of 7 June 2007.

awards of the CCMA should be regarded as ‘administrative action’ subject to review in terms of PAJA,¹⁴⁶ and whether actions by the state in its capacity as employer qualify as ‘administrative action’ subject to PAJA.¹⁴⁷

In *Jonker v Okhahlamba Municipality*,¹⁴⁸ although no reference was made to *Bato Star*, a significant step was taken towards fashioning a solution similar to that developed by the Constitutional Court in the administrative sphere. In this rather complex matter, involving an urgent application to prevent a disciplinary hearing, the applicant alleged an unfair labour practice on the part of his employer as well as material breach of his contract of employment. Although the application was disposed of on the basis that the court lacked jurisdiction it, Pillay J went on in an obiter dictum to express a view on the proper way to deal with cases where different causes of action are intertwined. It is worth quoting the salient comments at some length:

‘The interface between the Constitution, labour legislation and the common law depends on the right claimed and how it is pleaded. If a claim is pleaded as a breach of contract, the courts are duty-bound to decide it on that basis subject to these caveats: Firstly, the courts have a duty to develop the common law to promote the spirit, purport and objects of the Bill of Rights . . .

Secondly, a common-law breach of contract could also be a statutory violation. A court will need to enquire whether the statute supplants the common law. If it does, the statutory procedures and remedies must apply. . . .

Thirdly, a common-law breach of the contract of employment remains an employment dispute. As such, sight should not be lost of the primary object[s] of the LRA. . . .

Lastly, irrespective of whether a right is claimed under the common law or legislation it must be consistent with the overarching authority of the Constitution.’

Having warned against ‘the potential development of two parallel streams of labour law, one under the common law and the other under labour legislation, one through the general civil courts and the other through the specialist labour courts’, Pillay J elaborated as follows:

‘Litigants will frame their cases opportunistically by weighing and contrasting the risks and costs against the benefits of High Court and Labour Court litigation. The courts are straightjacketed into responding to disputes on the basis of how they are pleaded and presented. Practitioners should plead and present cases in ways that enable the courts to develop labour law as one system of law under the Constitution. Labour and employment law under the Constitution compels a mind shift from a linear common law approach to a polycentric socio-economic approach. After all, labour rights fall under the broad family of socio-economic rights. Not to treat them as such would defeat the aims of the Constitution.’¹⁴⁹

¹⁴⁶ *PSA obo Haschke v MEC for Agriculture* (2004) 25 ILJ 1750 (LC)

¹⁴⁷ *SAPU v National Commissioner of the South African Police Service* (2005) 26 ILJ 2403 (LC).

¹⁴⁸ *Supra* note 83.

¹⁴⁹ Paragraphs 23–7.

This line of reasoning has yet to be developed further in the jurisprudence of the labour courts.¹⁵⁰ It does, however, provide a clear basis from which to address the continued relevance of common-law remedies, in the paraphrased words of O'Regan J (above), 'on a case-by-case basis as the courts interpret and apply the provisions of [the LRA, the BCEA] and the Constitution.'

Finally, reference has been made to the principle that, where necessary, the common law must be 'developed' to give effect to the Constitution (in the present context, particularly the right to fair labour practices) where legislation (and established common law rules) fail to do so.¹⁵¹ This issue was touched on in *Protekon (Pty) Ltd v CCMA*¹⁵² where an arbitrator's award in respect of an unfair labour practice concerning the provision of benefits was on review. 'Benefits', Todd AJ concluded, fall into two categories: those that are due in terms of contract and those that are at the discretion of the employer. In the first case, he held, there is an overlap between the jurisdiction of the CCMA to arbitrate disputes of this nature and that of the courts to adjudicate contractual disputes, whereas, in the second, the CCMA will have exclusive jurisdiction (unless the contract itself requires the employer to act fairly). Todd AJ then made the following observation:

'It is possible that a contractual term to this effect (imposing a duty on the employer to act fairly) will readily be implied in the context of employment benefits. The courts have, on a number of occasions, found an implied duty of good faith. . . . It seems to me that the requirement of fairness derived from the right to fair labour practices may well be found to coincide substantially if not completely with the duty of good faith referred to in these decisions.'¹⁵³

The last sentence evidently refers to the constitutional right to fair labour practices rather than the specific requirements of fairness defined by s 186(2) of the LRA. If so, it reinforces the approach outlined above by providing a concrete instance of interpreting a contract of employment in accordance with s 23(1) of the Constitution.

It remains, in the light of what has been said, to revisit the third element of the equation: statutory rights that give effect to constitutional rights, and their relationship to the corresponding common-law rights.

¹⁵⁰ The only reference thus far made to it in reported judgments was by the High Court in *Olivier v MTN Management Services* (2006) 27 ILJ 547 (W) where Claasen J dismissed an application for a similar interdict brought in terms of s 23(1) of the Constitution on the ground that it was 'undesirable that an unfair labour practice should be the subject of litigation in this court prior to any decision in that regard in the Labour Court' (at 554D).

¹⁵¹ See the discussion above.

¹⁵² *Supra* note 38 paras 36–8.

¹⁵³ Paragraph 38, with reference to *Tek Corporation Provident Fund v Lorentz* *supra* note 111 at 894B–E; *IBM Pensioners Action Group v IBM SA (Pty) Ltd* (2000) 21 ILJ 1467 (PFA) paras 27–38.

STATUTORY VIS--VIS CONTRACTUAL RIGHTS: A BALANCE SHEET

It is possible to identify at least five ways in which statutory regulation of the employment relationship may impact on common-law rights and obligations:

- There may be no impact at all, namely where a statutory provision fills a contractual void or adds a new right without changing any pre-existing contractual obligation. An example of this is the right of employees to be transferred to the 'new employer' when a business is transferred as a 'going concern' in terms of s 197 of the LRA. This gives employees a right they did not have before but, in itself, places no new obligation on their existing employer.
- Statutory provisions may expressly or implicitly override contractual rights and obligations. One example, discussed above, is s 35(1) of COIDA, which expressly removes an employee's common-law right to claim damages from an employer for an accident suffered at work. Another is s 186(1)(b) of the LRA,¹⁵⁴ which overrides the common-law rule that a fixed-term contract expires automatically and without termination by either party. Indeed, s 186(1)(b) may apply 'even though the written contract of employment expressly stipulates that the employee fully understands that he has no expectation of the contract being renewed'.¹⁵⁵ Similarly, ss 200A of the LRA and 83A of the BCEA create a presumption that, in given circumstances, a person working for another is an 'employee' for statutory purposes 'regardless of the form of the contract' between them.
- Statutory provisions may be contingent on the existence of a contract of employment or the exercise of a contractual right. For example, in terms of s 197 of the LRA the rights vested in employees (as mentioned above) are premised on the existence of contracts of employment between the old employer and affected employees 'immediately before the date of the transfer'. Another example, (also discussed in some detail above) is the LRA's reliance on 'termination' of a contract of employment by an employer to trigger the statutory rules applicable to 'dismissal'.¹⁵⁶
- Statutory provisions giving effect to the basic right to fair labour practices may coexist with equitable common-law doctrines, such as the mutual duties of good faith, trust and confidence, without any competition between them and, hence, no implication of abolishing those doc-

¹⁵⁴ Providing that 'dismissal' includes an employer's failure to renew an employee's fixed-term contract in a situation where the employee 'reasonably expected' this to happen.

¹⁵⁵ *SA Rugby (Pty) Ltd v CCMA* (2006) 27 ILJ 1041 (LC) para 13; *Mediterranean Woollen Mills Pty Ltd v SA Clothing & Textile Workers Union* (1998) 19 ILJ 731 (SCA) at 733-4.

¹⁵⁶ See s 186 and the discussion above.

- trines.¹⁵⁷ If anything, it is submitted, the contrary is to be inferred, since those doctrines are the very foundations on which the development of common law beyond the limits of the statutory provisions may depend.
- Finally, statutory provisions may create new rights and obligations which do compete with existing contractual or common-law rights (that is, arise under the same circumstances as) but do not expressly repeal them – a grey area which has been the primary focus of this article. Among the examples discussed above is s 186(1)(e) of the LRA,¹⁵⁸ which practically codifies the common-law rule relating to repudiation of a contract of employment by an employer¹⁵⁹ but is silent as to its impact on that rule. More generally, the law of unfair dismissal at various points covers the same ground as the common law governing the termination of employment, raising numerous uncertainties which ultimately come down to a single question: is the purpose of the statutory regime merely to supplement the common-law regime, or to supersede the latter in accordance with broader constitutional objectives?

In approaching these questions the courts have tended to proceed cautiously, laying down few principles capable of general application and showing little inclination to extend those principles beyond the circumstances in which they were formulated. Thus, while breach of contract is now recognized as a cause of action in the alternative to a statutory claim of unfair dismissal in the case of fixed-term employees, there has been no comparable affirmation of claims for breach of contract as an alternative to unfair labour practice claims where conduct amounting to breach of contract is alleged.¹⁶⁰ There are, however, indications that such claims would be

¹⁵⁷ Similarly, at a procedural level, the status quo remedy created by s 64(4) of LRA enables an employee or trade union temporarily to restrain an employer from unilaterally varying terms and conditions of employment. This cannot be understood as implying that such unilateral variation is permissible subject to s 64(4); rather, the purpose is to create an additional mechanism designed to avert the costlier remedies of breach of contract claims or industrial action, but not excluding these. See *SAPU v National Commissioner of the South African Police Service* (2006) 26 ILJ 2403 (LC) paras 79 and 81.

¹⁵⁸ See note 108 above and discussion in the text thereto.

¹⁵⁹ Thus, '[u]nilateral demotion is a form of repudiation of the contract of employment, amounting to a constructive dismissal': *Mhlambi v CCMA* (2006) 27 ILJ 814 (LC) para 15. See also *Jooste v Transnet Ltd* (1995) 16 ILJ 629 (LAC) at 639; *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* supra note 4 at 128; *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC); *Victoria Hospital Ltd v CCMA* [2001] 10 BLLR 1185 (LC) para 14; *Van Wyk v Albany Bakeries Ltd* [2003] 12 BLLR 1274 (LC) para 26.

¹⁶⁰ In *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* supra note 4, decided in terms of the 1956 LRA, the previous LAC held that an unfair labour practice claim (in casu based on dismissal) precluded a breach of contract claim. But cf *Unilong Freight Distributors (Pty) Ltd v Muller* (1998) 19 ILJ 229 (SCA) at 239C (also decided under the 1956 Act) where Vivier JA distinguished between remedies for breach of contract and those for the 'the broader concept of an unfair labour practice'.

entertained.¹⁶¹ It is pertinent to note that compensation is capped only in respect of dismissal and unfair labour practice claims, thus removing any financial incentive for claimants to pursue common-law remedies in respect of other disputes.¹⁶² But is the quantum of compensation, as opposed to the existence of a remedy, a good enough reason to justify the development of legal doctrine?

It is submitted that a broader view is needed. Hepple, dealing with the same issues in the context of UK law, spoke of ‘the “great structural problem”¹⁶³ of the unsatisfactory relationship between common law and statutory rights’.¹⁶⁴ ‘The common law of employment and statutory rights’ he argued, ‘are imbricated, like overhanging roof-tiles, and keep each other in place. Their separation in *Johnson v Unisys*¹⁶⁵ and other cases means there is a leaky roof.’¹⁶⁶ In South Africa the approach in *Johnson [v Unisys]* has been rejected. If any principle can be read into the decisions discussed above, it is the importance attached by the courts to upholding or developing common-law rights in the interests of employee protection. To that extent, the roof will not leak. But, as we have also seen, the ‘imbrication’ of statute and common law is not always neat, and various parts of the law have taken on a ‘patchwork’ appearance as a result of questionable legislative drafting and/or ad hoc jurisprudence. To that extent, some employees seeking shelter in the house of legal protection (Ms Morgan) may still be exposed to the elements but others (Mr Wolfaardt) not. This is likely to remain the case for as long as the relationship between statute and the common law of employment is not addressed systematically.

But there is yet another difference. The existence of a Bill of Rights in South Africa introduces, as it were, a blueprint for the way in which the common law of employment and statutory rights should supplement one another. Both must be interpreted in such a way as to give comprehensive

¹⁶¹ See *United National Public Servants Association of SA v Digomo NO* (2005) 26 ILJ 1957 (SCA) where it is observed that ‘[t]he remedies that the Labour Relations Act provides against conduct that constitutes an “unfair labour practice” are not exhaustive of the remedies that might be available to employees in the course of the employment relationship’ and that ‘[p]articulate conduct by an employer might constitute both an “unfair labour practice” (against which the Act provides a specific remedy) and it also might give rise to other rights of action’ (para 4). Cf the similar observation by Landman J in *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) para 20, and see *Jonker v Okhahlamba Municipality* supra note 83 para 21ff.

¹⁶² Section 194 LRA.

¹⁶³ Per Lord Steyn in *Eastwood v Magnox Electric plc* supra note 124 para 51.

¹⁶⁴ Hepple op cit note 48 at 2.

¹⁶⁵ *Johnson v Unisys* supra note 120.

¹⁶⁶ Hepple op cit note 48 at 20. An important ‘leak’, in the case of the UK, is the fact that the rule in *Johnson v Unisys* precludes a common-law right of action only where a statutory remedy exists (e.g., in the event of dismissal) but leaves it intact where no such right of action exists (e.g., in the event of suspension). As a result, employers must dismiss rather than suspend employees to avoid the risk of claims for uncapped damages.

effect, between them, to the right to ‘fair labour practices’ as promised by s 23(1) of the Constitution and international law. The fact that contractual rights may need to be ‘developed’¹⁶⁷ to fulfil this purpose underscores the inherently dynamic nature of labour law and the interaction between common law and statute. Contractual rights operate alongside statutory rights as instruments for achieving the objects of the LRA. The principles outlined in *Jonker v Okhahlamba Municipality*¹⁶⁸ provide a jurisprudential basis for such an approach.

How should the matter be taken forward? Hepple, writing from a British perspective, proposes that individual employment rights should be codified within a comprehensive legislative framework ‘which promotes collective bargaining and is freed from the contract of service’.¹⁶⁹ Such a framework ‘would leave a role for contract law only to improve on the minimum standards prescribed by the code or by collective bargaining’.¹⁷⁰ At the same time the author acknowledges that such a code would face deep-rooted opposition and is unlikely to see the light of day in the foreseeable future.

South Africa’s Bill of Rights already provides a legally binding framework for the elaboration of employment rights.¹⁷¹ The problem is that the framework is very general, setting parameters rather than defining rights, and flexible enough to accommodate (or at least not prevent) the inconsistencies which have been noted. To that extent the challenge existing in the UK faces South African labour law as well. Inconsistencies will be eliminated to the extent that the right to fair labour practices at the individual level is codified and scope for contractual variation is confined to areas and issues where the legislature considers it appropriate.

The BCEA already does this in respect of terms and conditions of employment relating to working time, leave and certain other matters. Its modus operandi is instructive. First, it lays down ‘basic’ or minimum conditions in these areas which may be ‘revised upward’ in the manner suggested by Hepple. Second, it permits ‘revision downward’ of basic conditions in respect of defined issues by bargaining council agreement,¹⁷² collective agreement outside a bargaining council,¹⁷³ or by written agreement¹⁷⁴ or verbal agreement¹⁷⁵ between employer and employee. In

¹⁶⁷ Section 8(3) of the Constitution.

¹⁶⁸ *Supra* note 83.

¹⁶⁹ Hepple *op cit* note 48 at 24.

¹⁷⁰ *Ibid* at 25.

¹⁷¹ European law, and its Directives applicable to employment, fulfill this role in the UK only to a limited extent.

¹⁷² See s 49(1) BCEA.

¹⁷³ For example, to ‘average’ hours of work for periods up to four months: see s 12 read with s 49(2) BCEA.

¹⁷⁴ For example, to ‘compress’ working hours for periods of up to one week: see s 11 BCEA.

¹⁷⁵ For example, to reduce the prescribed lunch break of one hour to not less than 30 minutes: see s 14(5) BCEA.

general, the more fundamental a provision is to an employee's dignity and quality of life, the more strictly it is guarded and the narrower the possibilities of varying it downward. The power imbalance between employer and employee is central to this calculation. Thus, variations that may impact on employees' quality of life to a significant extent are possible only by collective agreement; the assumption is clearly that trade unions have the power to resist employer pressure and will protect their members' interests. Conversely, relatively minor variations are permitted by individual agreement. Bargaining councils, as statutory bodies bound to give effect to the purposes of legislation, are given the most extensive powers of all — in effect to design minimum regulatory conditions for their sectors as an alternative to the scheme of the BCEA. But even bargaining councils are expressly prohibited from reducing certain fundamental conditions¹⁷⁶ and are bound to observe constitutional rights and values not expressly regulated by the Act.

What are the prospects of systematically extending a framework of this nature to include all individual employment rights, including those regulated by the LRA and, in particular, the rules governing unfair dismissal and unfair labour practices? In fact, following the promulgation of the interim Constitution, it had been envisaged that a statute comprehensively regulating individual employment relations would be enacted and, with this in mind, the 'mixed bag of unfair labour practices gleaned from the jurisprudence [of the Industrial Court]' was included in the LRA 'only as a holding operation'.¹⁷⁷ Yet this plan has remained shelved for a decade.¹⁷⁸ The preoccupation of business, labour and government with the alleged over-regulation of the labour market, the perceived burdens imposed on small employers and, in particular, the much-contested extension of bargaining council agreements to non-party employers, may partly explain the lack of focus on the regulation of the individual employment relationship. This, however, should not be the end of the matter. The original challenge remains: either to enact a comprehensive employment code in the form of a consolidated statute or to amend the relevant provisions, wherever they are located, in such a way as to establish a floor of statutory rights with contractual variation possible only where expressly permitted and to the specified extent.

The obstacles to such an exercise may be political rather than legal. Either option would require a generally acceptable design for harmonizing the rights and duties currently regulated by the BCEA, the LRA and the EEA as well as common law. Given the requirements of the National Economic

¹⁷⁶ For example, the prohibition of working time in excess of 45 ordinary hours or the reduction of annual leave to less than two weeks per year: see s 49(1).

¹⁷⁷ Halton Cheadle 'Regulated flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663 para 26–7.

¹⁷⁸ Indeed, the Labour Relations Amendment Act of 2002 moved the 'mixed bag of unfair labour practices' from the schedule where they had been placed, adding them to the body of the Act.

Development and Labour Council Act,¹⁷⁹ it would involve negotiation between government, business and labour about the substance of rights which are currently left to the discretion of the courts. Such a process, judging by past experience, is likely to be complicated. The drafting of the LRA and BCEA, as well as the substantive amendments of both statutes in 2002, were highly contentious; and enough unfinished business remains between capital and labour to suggest that a fundamental re-examination of the employment relationship would be no less contentious. One reason for postponing it might well be to avoid opening cans of worms on which the lids have thus far been kept. Or is it perhaps now the time, fourteen years into democracy, to lift them?

The advantage of codification over case law is akin to the advantage of foresight over astonishment: in general, it allows for greater adherence to policy and greater predictability. If employment law were to be codified, the contract of employment would continue to play its part in giving effect to constitutional values within a more clearly circumscribed domain. The great difference would be that contractual terms could deviate from statutory rights only where this was expressly permitted. Never again would a court have to rule on policy issues as it was called on to do in *Fedlife v Wolfaardt*.

¹⁷⁹ 35 of 1994.