MAY AN EMPLOYER DISMISS AN EMPLOYEE IF THE DISCIPLINARY CHAIR IMPOSED A LESSER SANCTION? *SOUTH AFRICAN REVENUE SERVICE V COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION* 2017 38 ILJ 97 (CC) *

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1 Introduction

> "It can never be over-emphasised that being called a kaffir is the worst insult that can ever be visited upon an African person in South Africa, particularly by a white person."[1]

The use of the word "kaffir" by Kruger, a white employee of the South African Revenue Service ("SARS"), referring to his black superior was the reason for a dispute, which was eventually heard by the Constitutional Court ("CC") in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* ("*Kruger*").[2] The chairperson of the disciplinary hearing imposed a sanction of ten days suspension without pay, a final written warning and counselling. The SARS Commissioner then unilaterally changed the sanction without giving the employee an opportunity to be heard and dismissed the employee. The Commission for Conciliation Mediation and Arbitration ("CCMA"), the Labour Court ("LC") as well as the Labour Appeal Court ("LAC") held that the employer's action was invalid because in terms of its disciplinary code it had no right to substitute the sanction. The CC, in contrast to the decisions of the lower courts, agreed with SARS and held that Kruger should be dismissed.

In this article, I discuss the dilemma that employers such as SARS face when the chairperson of a disciplinary hearing imposes a lesser sanction for serious misconduct, but the employer is of the view that given the gravity of the offence, the employee should be dismissed. This creates a dilemma for the employer if the disciplinary code forms part of the employees' employment contracts, especially if a collective agreement embodies the code.

If the decision of the chairperson is regarded as a mere recommendation to management, the employer could substitute the sanction, but if it is clear that

* I would like to thank two anonymous reviewers for their helpful comments

1 *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 38 ILJ 97 (CC) para 53 See also P de Vos "'On 'kaffirs', 'queers', 'moffies' and other 'hurtful terms'" (26-02-2008) *Constitutionally Speaking* <http://constitutionallyspeaking co za/on-kaffirs-queers-moffies-and-other-hurtful-terms> (accessed 28-10-2018) cited with approval

2 2017 1 SA 549 (CC)

management is required to implement the decision, questions of invalidity, unlawfulness and unfairness of the employer's substitution of the original sanction may arise. The CC did not deal with these issues raised by the lower courts, since at the stage of the appeal to the highest court, SARS only attacked the appropriateness of the remedy of reinstatement and no longer persisted with the view that they had the right to substitute the sanction.[3]

In an attempt to answer the above questions, in part 2 below I shall discuss the facts and the judgments of the three courts, that is, the LC ("*Kruger LC*"),[4] the LAC ("*Kruger LAC*")[5] and the CC ("*Kruger CC*").[6] Thereafter, a discussion of the relationship between invalidity, unlawfulness and unfairness, especially as analysed by the CC in *Steenkamp v Edcon Limited* ("*Steenkamp*"),[7] is contained in part 3. In part 4, I discuss the importance of disciplinary codes and collective agreements in terms of the Labour Relations Act 66 of 1995 ("LRA") and the negative effect that disregarding these instruments will have. Part 5 deals with the different options available to employers in the case of an unsatisfactory sanction by a disciplinary chairperson, followed by a conclusion and recommendation in part 6.

The discussion in part 5 corresponds to a certain extent to a case discussion of *E v Ikwezi Municipality*[8] by this author[9]. In this case the employer-municipality thought that it was bound by the inappropriate decision of the chair of the disciplinary hearing. That case note argues that the employer was not bound by the decision of the disciplinary chair and points out that the employer had the option of *inter alia* referring the decision of the chairperson to the LC for review in terms of section 158(1)(h) of the LRA.

2 The facts of *Kruger* and the judgments in the different courts

Kruger, an employee of SARS, on two occasions referred to his black superior as a "kaffir" and used words to the effect that black people were inferior and incompetent.[10] A plea bargain was struck with the chairperson at the disciplinary hearing after which Kruger pleaded guilty. The chairperson of the disciplinary hearing imposed a sanction of 10 days suspension without pay, a final written warning and counselling. Dissatisfied with the sanction, the SARS Commissioner unilaterally dismissed Kruger without giving him

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3 *South African Revenue Services v Commission for Conciliation, Mediation and Arbitration* 2010 31 ILJ 1238 (LC) SARS abandoned this argument after the judgment in *SARS v CCMA* 2014 35 ILJ 656 (LAC) in which the court held that the unilateral substitution of the sanction was invalid

4 *South African Revenue Services v Commission for Conciliation, Mediation and Arbitration* 2010 31 ILJ 1238 (LC) The name of the employee will be used to distinguish this case from other cases in which SARS and the CCMA were parties

5 *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2016 37 ILJ 655 (LAC)

6 *South African Revenue Services v Commission for Conciliation, Mediation and Arbitration* 2017 1 SA 549 (CC)

7 2016 37 ILJ 564 (CC)

8 2016 5 SA 114 (ECG)

9 K Calitz Sexual Harassment: "Why do Victims so often Resign? *E v Ikwezi Municipality* 2016 37 ILJ 1799 (ECG)" (2019) 22 *PER/ PELJ* 2-23

10 *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 1 SA 549 (CC) para 15

an opportunity to be heard, which contravened the disciplinary code.[11] The relevant part of the disciplinary code, which is embodied in a collective agreement to which SARS and two trade unions were parties, reads as follows:

> "10.3.3 Before deciding on a sanction, the chair must give the employer and employee parties an opportunity to present relevant circumstances in aggravation and mitigation.
> 10.4 Sanctions …
> 10.4.2 The chairperson with due consideration to the Code of Good Practice in the Labour Relations Act, the nature of the case, the seriousness of the misconduct, the employee's previous record, any relevant mitigating or aggravating circumstances and sanctions imposed in similar or comparable cases in the past *may impose any of the following sanctions*:
> 10.4.2.1 counselling;
> 10.4.2.2 a written warning;
> 10.4.2.3 a final written warning;
> 10.4.2.4 suspension without pay, for no longer than 15 working days;
> 10.4.2.5 demotion of one grade;
> 10.4.2.6 a combination of the above; or
> 10.4.2.7 dismissal.
> 10.4.3 With the agreement of the employee, the chairperson may only impose the sanction of suspension without pay or demotion as an alternative to dismissal.
> …
> 10.4.6 Employee relations will be responsible for implementing the hearing outcome, and informing the employee.
> 10.4.7 The employee has the right to appeal the outcome of the disciplinary proceedings using the proceedings outlined in section 11 below.
> 10.4.8 The employer shall not implement the sanction during an appeal by the employee."[12]

After an unsuccessful appeal against the sanction, Kruger referred a dispute regarding an unfair dismissal to the CCMA. He argued that the unilateral substitution of the sanction imposed by the disciplinary chairperson contravened the disciplinary code and that it was therefore invalid and unfair. Kruger rightly argued that it was clear from the code that the sanction of the chairperson of a disciplinary hearing was final and had to be implemented by SARS.[13] The CCMA agreed that Kruger was unfairly dismissed, because the employer did not have the power to substitute the sanction of the disciplinary chair. The arbitrator ordered Kruger's reinstatement, subject to the same sanction imposed by the disciplinary chairperson.[14] SARS then referred the award for review to the LC in terms of section 145 of the LRA. Although SARS acknowledged that the collective agreement left no room for the employer to substitute the sanction imposed by the disciplinary chair, they argued that the collective agreement was subject to the implied term of trust and confidence in the employment contract that Kruger breached when he uttered the racist remarks. SARS argued that in the light of this breach, the arbitrator should have ruled that SARS could dismiss the employee despite the binding nature of the collective agreement.[15]

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11 *South African Revenue Service v CCMA* 2016 37 ILJ 655 (LAC) paras 8-9
12 Para 27 [own emphasis]
13 Para 28
14 Para 13
15 *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2010 31 ILJ 1238 (LC) para 7

The LC did not agree with SARS and held that the dismissal was unfair. The court relied on *County Fair Foods (Pty) Ltd v Commissioner for Conciliation Mediation and Arbitration* ("*County Fair Foods*")[16] in which the LAC held that an employer may not substitute the sanction of the chairperson of the disciplinary hearing if the disciplinary code does not make provision for such a change. However, the court in *Kruger LC* agreed that employers should not be "saddled with an egregious decision"[17] forcing them to keep employing someone who is guilty of serious misconduct. Pillay J pointed out that state organs may in such circumstances apply for a review in terms of section 158(1)(h) of the LRA. A discussion of the availability of this procedure will take place in part 4.

The LC further held that the dismissal of Kruger was "substantively unfair because the decision to dismiss was not one that SARS could validly make; the collective agreement barred it from substituting the decision of the disciplinary chairperson".[18] Pillay J found that the dismissal was also procedurally unfair "because the process of dismissing the employee was not available to SARS".[19] SARS appealed to the LAC, which formulated the issue as going

> "to the heart of a fair system of employee discipline in our Labour Law jurisprudence: may an employer unilaterally substitute a decision of a chair of a disciplinary enquiry, to whom the final decision making authority had been assigned, and impose a different, harsher sanction?"[20]

Similar to their argument in the LC, SARS raised the issue of the implied relationship of trust in the employment contract, which had allegedly been breached by the racist remarks, justifying the employer to substitute the sanction of the disciplinary chair with the sanction of dismissal. However, the court in *Kruger LAC* agreed with the LC that the substitution of the decision of the chairperson was a decision that SARS could not make. The court therefore found that the decision was invalid and therefore unfair.[21] To support its finding, the LAC quoted the following *dictum* from another LAC case in which SARS also disregarded the disciplinary code, namely *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* ("*Chatraghoon*")[22] in which an employee accessed personnel files of other SARS employees while not authorised to do so:

> "Therefore, for SARS to have substituted its own sanction it acted ultra vires the disciplinary code and the collective agreement which had statutory authority in terms of the LRA. Indeed, it was up to SARS at the time of conclusion of the collective agreement to have negotiated a clause that would

16 2003 24 ILJ 355 (LAC)
17 *South African Revenue Services v Commission for Conciliation, Mediation and Arbitration* 2010 31 ILJ 1238 (LC) para 29
18 Para 52
19 Para 52
20 *South African Revenue Service v CCMA* 2016 37 ILJ 655 (LAC) para 2
21 Para 28
22 2014 35 ILJ 656 (LAC)

include its right to substitute the disciplinary sanction in certain circumstances. This, unfortunately, SARS did not do."[23]

The LAC in *Kruger* held that the LC in the same case was correct in not dealing with the arbitrator's finding of the fairness of the dismissal since once the dismissal was found to be invalid, it was unfair and there was no need to further enquire into the facts.[24]

SARS argued that the substitution of the sanction was only procedurally unfair and for that reason the arbitrator could still have addressed the substantive fairness of the dismissal. SARS found support in the view held by the LC in yet another judgment in which SARS and the CCMA were involved (again as a result of SARS's disregard of the same disciplinary code), namely *South African Revenue Service v Commission for Conciliation, Mediation And Arbitration* ("*Botha*")*.*[25] In this case, Botha downloaded pornographic material from the internet while at work. The chairperson of the disciplinary hearing imposed a final written warning, but the employer unilaterally dismissed Botha. On review, the LC found that the decision of the arbitrator that the dismissal was substantively unfair was unreasonable, since the trust relationship had been impaired. The court held that the dismissal was only procedurally unfair *inter alia* because SARS acted in breach of the collective agreement that embodied the disciplinary code.[26] In this case, in contrast to *Chatraghoon* and *Kruger LAC*, the substitution of the sanction was not seen as per se substantively unfair. Sutherland JA in *Kruger LAC* was of the view that Le Grange J in *Botha* based his judgment on an incorrect interpretation of the judgment in *Chatraghoon by* which the LC was bound.[27] The LAC in *Kruger* explained that the substitution of a sanction is invalid as it "vitiates the act completely". Invalidity is more than procedural unfairness, it denotes an unlawful act; that is, one that the law will not acknowledge.[28] The substitution of the sanction did thus not only constitute procedural unfairness (as held in *Botha*).[29]

Sutherland JA in *Kruger LAC* conceded that racist abuse constitutes extremely serious misconduct, for which dismissal would be appropriate and that having to keep such a racist in employment "sticks one in the craw".[30] According to the court, however, this did not empower SARS to substitute the sanction imposed by the disciplinary chair:

"What seems to me to be of paramount importance is to recognize that racists have done quite enough damage to our country and we should guard against a hard case tempting us to distort established legal principle to ensure that they do not get away with insulting us. If we fell victim to that temptation, it would mean a subtle and exquisite victory for the racists. What the arbitrator did and what Pillay J did,

[23] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2014 35 ILJ 656 (LAC) para 30 It needs to be noted that it is possible that SARS did endeavour to include such a clause but could perhaps not reach agreement with the trade union on this aspect of the disciplinary code

[24] *South African Revenue Service v CCMA* 2016 37 ILJ 655 (LAC) para 28

[25] 2015 5 BLLR 531 (LC)

[26] Para 25

[27] *South African Revenue Service v CCMA* 2016 37 ILJ 655 (LAC) para 39

[28] Para 42

[29] Para 42

[30] Para 47

was not to allow their indignation to undermine their fidelity to law. People who are like Mr Kruger without honour, are beneficiaries of that system of law no less than the rest of us, an outcome which is to our credit, not theirs."[31]

The LAC reasoned that the rationale for employers not being allowed to interfere with the decision of a disciplinary chairperson "has as its aim, the protection of workers from arbitrary interference with discipline in a fair system of labour relations. This principle is worthy of protection".[32]

SARS appealed to the CC but, because of the judgment handed down in *Chatraghoon,*[33] abandoned its argument that it could substitute the decision of the chairperson of the disciplinary hearing because of a breach in the trust relationship. Its only argument before the CC was now that the arbitrator's decision to reinstate Kruger was (considering the gravity of the offence) a decision that a reasonable arbitrator could not have reached.[34] The CC was thus only required to consider the narrow issue of the appropriateness of reinstatement. Those who eagerly awaited the decision of the highest court to clarify whether the substitution of a sanction of the disciplinary chair by the employer was invalid and thus substantively unfair, were disappointed. The CC did not once refer to the question of invalidity that received extensive attention in *Botha* in the LC as well as in *County Fair Foods*, *Chatragoon* and *Kruger* in the LAC.

Mogoeng CJ extensively discussed the derogatory nature of the term "kaffir"[35] and how Kruger's utterances infringed the dignity of and vilified all black colleagues at SARS. The Chief Justice continued by saying that measures taken against people using the word are often not strict enough:

"Another factor that could undermine the possibility to address racism squarely would be a tendency to shift attention from racism to technicalities even where unmitigated racism is unavoidably central to the dispute or engagement. The tendency is, according to my experience, to begin by unreservedly acknowledging the gravity and repugnance of racism which is immediately followed by a de-emphasis and over technicalisation of its effect in the particular setting. At times a firm response attracts a patronizing caution against being emotional and an authoritative appeal for rationality or thoughtfulness that is made out to be sorely missing".[36]

It appears as if the Chief Justice could be referring to the words of Sutherland JA in the LAC quoted above.[37] The word "technicalisation" probably referred to the finding that the employer's substitution of the sanction was invalid in terms of the disciplinary code, even though the misconduct was of an extremely serious nature.

Mogoeng CJ pointed out that the arbitrator was bound to follow the LAC judgments in *County Fair Foods* and *Chatragoon* which held that employers

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31 Para 49
32 Para 48
33 2014 35 ILJ 656 (LAC)
34 *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 1 SA 549 (CC) para 30
35 See *Rustenburg Platinum Mine v SAEWA obo Meyer Bester* CCT 127/2017 in which the CC found that even the words "*swart man*" at the workplace was not racially innocuous, but warranted dismissal in the light of South Africa's history of race discrimination and also because the employee showed no remorse
36 *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 1 SA 549 (CC) para 10
37 *South African Revenue Service v CCMA* 2016 37 ILJ 655 (LAC) para 49

exercised power that was no longer theirs to exercise. The CC continued by criticising the arbitrator in that "on this basis and this basis alone, not on the basis of the merits or demerits of the case, the arbitrator concluded that the substituted sanction of dismissal was unfair".[38] The CC remarked further that the arbitrator did not specify whether her finding "that Mr Kruger's dismissal was unfair was based on the absence of a fair reason to dismiss (substantive unfairness) or the failure of SARS to follow a fair procedure before the dismissal". The court continued: "It can be accepted that the Arbitrator implicitly found that the dismissal was substantively unfair".[39] This last statement could be seen as an unjustified conclusion regarding the reasons for the arbitrator's decision. The arbitrator was bound to follow the LAC decisions (in *County Fair Foods* and *Chatraghoon*) and the LAC in these cases held that because of the invalidity of the substitution, the dismissal was unfair. In the light of these judgments there was strictly speaking no need for the arbitrator to spell out the substantive or procedural fairness of the decision, although she did comment on it.[40]

Formulating the question merely as whether the reinstatement was the appropriate remedy for such grave misconduct, disregards the debate about the invalidity of the substitution of the sanction. By focusing on the arbitrator's "implied" finding of substantive unfairness, the CC narrowed the issue down and provided the basis for an uncontroversial judgment that crude racism should lead to dismissal and that reinstatement is not appropriate. One cannot but agree, yet the burning question of possible invalidity of the unilateral action of the employer remains.

It is not clear whether Mogoeng CJ regarded the breach of the disciplinary code as procedural unfairness. However, before ordering compensation to be paid for procedural unfairness, the court did remark that there was a "marked deviation from procedure by the SARS Commissioner when he dismissed Mr Kruger".[41] Mogoeng CJ further commented that "a breach of the regulatory framework ought generally to be viewed in a serious light".[42] The court then referred to the fact that SARS reneged on the deal struck in the plea bargain by unilaterally substituting the sanction and further that SARS at one stage informed Kruger that SARS would not lodge an appeal against the judgment in the LAC and three days afterwards reversed its decision. For these reasons, the dismissal was found to be procedurally unfair. Nowhere did the court explicitly comment on the effect of disregarding the disciplinary code.

The judgment leaves one with several questions. Did the court's ruling imply that an act of unilaterally substituting a sanction in the case of grave misconduct is valid? Is it justifiable for employers to act unlawfully (for example, by disregarding the disciplinary code which is binding and part

[38] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 1 SA 549 (CC) para 21
[39] Para 22
[40] *South African Revenue Service v CCMA* 2016 37 ILJ 655 (LAC) para 28
[41] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 1 SA 549 (CC) para 52
[42] Para 57

of the employment contract) to attain a fair result? Does the only value for employees of a negotiated disciplinary code – encompassed in a collective agreement – lie in the fact that the court may order compensation for procedural unfairness? Could a fair result be attained without acting unlawfully? In the next section, these questions will be discussed by *inter alia* analysing the CC's judgment in *Steenkamp v Edcon Ltd* ("*Steenkamp*")[43] which also dealt with the possible invalidity of dismissals, albeit in a different context.

3 Invalidity, unlawfulness, and unfairness

Questions regarding unlawfulness, invalidity, and unfairness not only came to the fore in judgments dealing with employers disregarding disciplinary codes, but also in the context of inadequate notices for dismissals based on operational requirements.[44]

The so-called "De Beers principle" was established in *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd* ("*De Beers 2006*")[45] in which the employer did not heed the number of days that (in terms of the LRA) had to elapse before giving notice of dismissal. Freund AJ held that notices given in contravention of section 189A(8) of the LRA are invalid since

> "section 189A(2) provides explicitly and in imperative language that the employer 'must' give notice of termination in accordance with the provisions of section 189A. It would, in my view, flout the intention of the language and the policy underlying section 189A to recognise the validity of notices given in contravention of section 189A(8)."[46]

This argument was endorsed in two judgments of the LAC, namely in another case in which De Beers was involved, *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* ("*De Beers Group Services*")[47] as well as in *Revan Civil Engineering Contractors v National Union of Mineworkers* ("*Revan*").[48] The LAC in *De Beers Group Services* (relying on the above *dictum* of Freund AJ in *De Beers 2006*) held that the effect of prematurely issuing notices of termination was that the dismissal was invalid and of no force and effect.[49] The court thus ruled that the employees remained in their positions since the *status quo* had been retained.

In *Steenkamp* a number of Edcon's employees were retrenched and received notices of dismissal. Since it was a large-scale dismissal by a big employer and no facilitator was appointed, section 189A(8) of the LRA applied. However, Edcon issued the notices before the dispute was referred for conciliation as prescribed by this section.

The employees in *Steenkamp* challenged their dismissals, but did not allege any substantive or procedural unfairness. They relied on the "De Beers principle" in terms of which invalid dismissals had no force and effect and

43 2016 37 ILJ 564 (CC)
44 Section 189 of the LRA
45 LC 26-05-2006 case no JS242/06
46 Para 40
47 2011 32 ILJ 1293 (LAC)
48 2012 33 ILJ 1846 (LAC)
49 2011 32 ILJ 1293 (LAC) para 36

argued that they should be reinstated in their positions. Edcon challenged the correctness of the judgments in *De Beers Group Services* and *Revan* and argued that the dismissals in the current case were not invalid. The LAC in *Steenkamp* agreed with Edcon, holding that the judgments in these two cases were "obviously wrong".[50] The court noted that the definition of dismissal in section 186(1) of the LRA includes termination of employment by the employer with or without notice, in other words also an unlawful dismissal. Thus, even though in the context of section 189A, the notice of dismissal was inadequate, it was nevertheless a dismissal (and not an invalid action).[51]

The employees appealed, and the CC eventually decided the matter. Cameron J for the minority disagreed with the judgment in the LAC and held that the legislature in section 189A had created a "dismissal free zone"[52] for a certain period during which an inadequate notice of the employer that employment would terminate had no force and effect. Employees can thus, according to Cameron J, challenge the lawfulness of the action by means of review proceedings or obtain an order of invalidity and reinstatement, although it does not mean that the employees will be automatically entitled to full retrospective reinstatement.[53] Relying on *Fedlife Assurance Ltd v Wolfaardt* ("*Fedlife*"),[54] Cameron J pointed out that the LRA did not extinguish common-law remedies and further there is no rule of law that a party's wrongful cancellation of a contract of personal services puts an end to the contract.[55]

In contrast to the minority judgment, Zondo J for the majority in the CC held that short notice was merely procedurally unfair, that the employees were in fact dismissed and since the dismissal was not invalid, the employees consequently did not remain in their positions. The court pointed out that the employees should not seek a remedy for an unfair dismissal in terms of the LRA when they rely on grounds outside the LRA. They cannot allege that the dismissal is invalid (a common-law ground) and then claim an LRA remedy for unfair dismissal.[56] Zondo J persuasively argued that the LRA does not typify unfair actions by employers as invalid, since the legislator established a framework balancing the interests of employers and employees by considering all the circumstances.[57] An LRA remedy should therefore be sought for a LRA breach[58] as was also decided in the CC's judgment in *Chirwa v Transnet Limited* ("*Chirwa*").[59]

Zondo J further remarked on the invalidity of dismissals as follows:

> "The LRA does not contemplate orders of invalidity in respect of dismissals. This is because through orders of reinstatement that operate with retrospective effect to the date of dismissal, the same result

[50] *Edcon v Steenkamp* 2015 36 ILJ 1469 (LAC) para 57
[51] Para 41
[52] *Edcon v Steenkamp* 2016 37 ILJ 564 (CC) para 45
[53] Para 83
[54] 2002 2 All SA 295 (A)
[55] *Edcon v Steenkamp* 2016 37 ILJ 564 (CC) para 76
[56] Para 112
[57] Para 99
[58] Para 140
[59] 2008 29 ILJ 73 (CC)

may be achieved as is achieved through an order declaring a dismissal invalid. Furthermore, this is achieved while retaining the flexibility that comes with fairness and equity which are the foundation of the LRA dispensation and without the rigidity of the common law on which the invalidity of the dismissals is based. Therefore, under the LRA the need for invalid dismissals does not arise".[60]

In the case of section 189A, there was no reason to hold that the employer's short notice was invalid, since the employees had sufficient remedies. Zondo J discussed the decision of the Appellate Division (as it then was) in *Pottie v Kotze*[61] in which the court had to decide whether a transaction involving the sale of a second-hand car, which did not comply with legislation, was invalid. The court in that case held that there were sufficient remedies available to the person who would suffer a loss if the act of the other party was not regarded as invalid[62] and concluded that "serious inequities" could be caused if the contract was to be regarded as invalid.[63]

When one applies these principles to the facts in *Kruger LAC* it is immediately clear that there is a difference between the cases because *Kruger LAC* does not deal with the contravention of legislation. However, the collective agreement that had been disregarded by the employer could be seen as akin to subordinate legislation since the LRA provides that contracts of employment may not disregard or waive collective agreements.[64] The terms of a collective agreement will thus become part of employees' employment contracts. Considering whether there were adequate remedies available to Kruger, it is clear that he had ample remedies in terms of both the LRA and the common law. Breach of the terms of the contract would have entitled Kruger to claim specific performance in that SARS could be ordered to continue employing him[65] or he could claim damages based on breach of contract.[66] However, had Kruger based his claim on the common law, SARS could have argued that he had breached a material term of the contract and that it thus had the right to cancel the contract.[67] SARS indeed relied on a material breach of the implied term of trust and confidence in the employment contract in the LAC. In spite of that, the court held that reading such an implied term into the contract would go against the express provisions of the collective agreement that confers the final decision-making power on the disciplinary chair.[68]

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60 *Edcon v Steenkamp* 2016 37 ILJ 564 (CC) paras 180, 183

61 1954 3 SA 719 (A)

62 *Edcon v Steenkamp* 2016 37 ILJ 564 (CC) para 179

63 *Pottie v Kotze* 1954 3 SA 719 (A) 727 A-B as referred to in *Steenkamp* para 179

64 Section 199 of the LRA

65 Specific performance had been ordered *inter alia* in *National Union of Textile workers v Stag Packings (Pty) Ltd* 1982 3 ILJ 285 (T) and *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 23 ILJ 2001 (C)

66 A claim for damages by an employee on an indefinite contract would be limited to the amount that the employee would be entitled to had the employer given the notice period required by the common law for terminating an employment contract In *Jafta v Ezemvelo KZN Wildlife* 2009 30 ILJ 131 (LC) para 125 the court held that this position was changed by the LRA, (although the employee's claim was based on common-law damages) and awarded more than the amount of notice pay in terms of the common law However, in *SA Maritime Authority v McKenzie* 2010 3 SA 601 (SCA) the court held that the common-law contract of employment had not been developed to include the requirements of fairness as an implied term The current position thus seems to be that the amount of damages for breach of an indefinite contract would be equivalent to the required common-law notice period

67 J Grogan *Employment Rights* 2 ed (2014) 80

68 *South African Revenue Service v CCMA* 2016 37 ILJ 655 (LAC) para 28

Regarding lawfulness and fairness, it is trite that a lawful act is not necessarily fair. Labour law, which is based on fairness, was developed to complement the common law that regards employers and employees as parties on an equal footing and which merely requires lawful conduct.[69]

But could an act which is unlawful possibly be fair? In *W L Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*,[70] Froneman J held that unlawfulness (in this case the unilateral variation of the terms of the employment contract) would not always be unfair and was fair in the particular case, since the employer had good reasons to vary the terms of the original contract. The court held that the employment contract couldn't be static and there may be circumstances in which the employer would have a commercial rationale to make changes after proper consultation.[71]

Kruger provides a good example of an unlawful act by the employer (breach of contract), which it sought to justify as fair because of the gravity of the offence. As explained above, the CC did not rule that Kruger's dismissal was unlawful; it was merely regarded as procedurally unfair. This is in contrast to the LC and LAC that ruled that the dismissal was invalid (unlawful) and therefore substantively as well as procedurally unfair. As emphasised by Zondo J in *Steenkamp*, an unlawful dismissal is still a dismissal in terms of the LRA. An employee can however not rely on unlawfulness to claim remedies for unfairness,[72] but could seek common-law remedies by relying on unlawful conduct by the employer.

In the following part, part 4, the importance of disciplinary codes and collective agreements in terms of the LRA will be discussed. An understanding of the objects and function of these instruments is fundamental to the question of whether the disregard of these instruments by an employer should be condoned.

4 The importance of disciplinary codes and collective agreements

In this part I argue that in light of the importance of collective agreements and negotiated disciplinary codes and considering the negative effects of disregarding these, employers should avoid disregarding them at all costs.

The purpose of the LRA as contained in the LRA's section 1 is the advancement of economic development, social justice, labour peace, and the democratisation of the workplace by fulfilling the primary objects of the Act. One of the primary objects of the LRA is to provide a framework within which employees and employers can collectively bargain to determine wages,

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69 Grogan *Employment Rights* 2

70 1997 18 ILJ 361 (LAC)

71 Para 366; This was also the court's view in *A Mauchle* (Pty) Ltd *t/a Precision Tools v NUMSA* 1995 16 ILJ 349 (LAC) para 9

72 This view is also in accordance with the judgment in *South African Maritime Safety Authority v McKenzie* 2010 3 SA 601 (SCA) in which the employee argued that an implied term of fair dealing has after the advent of the Constitution been incorporated in the contract of employment (paras 55-57) The court held that the contract of employment had not been developed to encompass such a duty Employees should rely on the LRA if they want to claim LRA remedies

terms and conditions of employment and other matters of mutual interest. Another primary object is to promote orderly collective bargaining.

The LAC in *Kem-Lin Fashions CC v Brunton* ("*Kem-Lin*")[73] interpreted section 1 of the LRA as follows:

> "The Act seeks to promote the principle of self-regulation on the part of employers and employees and their respective organisations. This is based on the notion that, whether it is in a workplace or in a sector, employers and their organisations, on the one hand, and, employees and their trade unions, on the other, know what is best for them, and, if they agree on certain matters, their agreement should, as far as possible, prevail."[74]

Collective agreements are binding on the parties – and can be extended in terms of sections 23 and 32 of the LRA (in the case of bargaining councils) to non-parties – and could thus be seen as akin to subordinate legislation. Collective agreements will further replace terms and conditions in individual contracts where applicable.[75] Section 199(1)(b) of the LRA provides that a contract of employment "may not permit any employee to be treated in a manner, or to be granted any benefit, that is less favourable than that prescribed by that collective agreement".

Regarding disciplinary codes, the Code of Good Practice: Dismissal[76] provides that "all employers should adopt disciplinary rules that establish the standard of conduct required of their employees" and "[a]n employer's rules must create certainty and consistency in the application of discipline".[77]

Although codes of good practice are not directly enforceable, section 188(2) of the LRA requires adjudicators and arbitrators to take relevant codes of good practice in terms of the LRA into consideration in establishing whether a dismissal is substantively and procedurally fair.

It is clear from the Code of Good Practice: Dismissal that preference is given to disciplinary codes contained in collective agreements. The Code provides that it "is not intended as a substitute for disciplinary codes and procedures where these are the subject of collective agreements"[78] and further that employees should be protected from arbitrary action.[79]

Disciplinary codes embodied in collective agreements are conducive to balancing the power between employers and employees, self-regulation and democratisation of the workplace as well as consistency and certainty. Employers who unilaterally substitute the sanction of a disciplinary chair should not compromise these ideals.

Judgments on employers disregarding disciplinary codes have not been consistent. In some cases, the court allowed a deviation as long as the process was nevertheless fair and in others the employer was required to strictly adhere to the disciplinary code. The LAC in *Leonard Dingler (Pty) Ltd v*

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73 LAC case no DA1015/99 of 16-11-2000
74 Para 18
75 Section 23(2)(3) of the LRA
76 Schedule 8
77 Item 3(1) of the Code of Good Practice: Dismissal
78 Item 1(2)
79 Item 1(3)

Ngwenya ("*Dingler*"),[80] dealing with a minor deviation from the code, held that regarding disciplinary codes

> "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 in *Dingler* was followed in *Highveld District Council v Commission for Conciliation Mediation and Arbitration*.[81] In this case the LAC held that a deviation from the disciplinary code (even if embodied in a collective agreement) is not necessarily unfair and that the court must analyse the process followed to establish if the procedure followed by the employer was actually fair.[82] The court remarked that the conduct of the employer could still give rise to contractual remedies,[83] but in this case it only had to deal with a statutory right to a fair dismissal.

In contrast to the above cases, the employee in *Denel (Pty) Ltd v Vorster* ("*Denel*")[84] relied on contractual remedies. The employer unilaterally disregarded the disciplinary code so that the decision to dismiss the employee was not taken by officials in positions prescribed in the disciplinary code. The court remarked that

> "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".[85]

The court in *Denel* further held that if "there was breach of contract, it is not sufficient for the employer to argue that the alternative procedure was 'just as good'".[86] The court did not deal with unfairness, since the employee relied on common-law remedies.

In an application for an interdict restraining an employer from acting in contravention of the code, the LC held that the employer could not unilaterally disregard the collective agreement embodying the disciplinary code. In *SAMWU obo Abrahams v City of Cape Town* ("*Abrahams*")[87] the employer planned to use an abridged procedure for the disciplinary hearings of a large number of traffic officers. The court interdicted and restrained the employer from continuing with the disciplinary hearings.[88] The importance of a disciplinary code embodied in a collective agreement was also acknowledged in *SAMWU obo Jacobs v City of Cape Town* ("*Jacobs*").[89] The LC held that where the employer acted outside the prescribed period of three months allowed for instituting a disciplinary hearing, the City had breached the

[80] 1999 20 ILJ 1171 (LAC) para 44
[81] 2003 24 ILJ 517 (LAC)
[82] Para 15
[83] Para 16
[84] SCA case no 13/2003 of 05-03-2004
[85] Para 15
[86] Para 16
[87] 2008 29 ILJ 1978 (LC)
[88] Para 26
[89] 2015 36 ILJ 484 (LC)

collective agreement, which had the effect of nullifying the disciplinary hearing.[90]

The LC directed a stern warning to employers who bypass their own disciplinary codes in *Solidarity obo SW Parkinson v Damelin (Pty) Ltd*.[91] In this case, the employee did not receive a final written warning as required by the disciplinary code before he was dismissed. The LC's view was that if the employer deviates from the code it must have "compelling and good reasons" to do so and further

> "you cannot simply bypass a Disciplinary Code and Procedure that you yourself have drafted when it suits you. This makes nonsense of a Disciplinary Code and Procedure which employees are required to follow and gives *carte blanche* to the employer to act at its will."[92]

Regarding more severe sanctions being imposed by the chairperson of an internal appeal hearing, the LC in *Rennies Distribution Services v Bierman NO* ("*Rennies*")[93] held that a chairperson of an internal appeal procedure may not increase the sanction imposed by the disciplinary chairperson if the disciplinary code does not make provision for a more severe sanction on appeal. The decision in *Rennies* was followed in *Lisanyane v Wessels NO*[94] and in *Opperman v CCMA*.[95]

In summary, in the case of an employer deviating from its disciplinary code, where the employee claims breach of contract, the court will require strict adherence to the code. Courts will also generally require strict adherence where the disciplinary code is embodied in a collective agreement. Even if there is no collective agreement, our courts will not accept a deviation from the code, unless there are compelling reasons for doing so. However, smaller digressions will be allowed if the process is nevertheless fair.

5 Alternatives to a unilateral substitution of a sanction by the employer

The decision of the CC in *Kruger* could encourage employers (who are willing to pay compensation for procedural unfairness) to disregard their disciplinary codes in order to rid themselves of employees who are guilty of gross misconduct. Considering the value that the legislator and our courts place on collective agreements and disciplinary codes, this result should be avoided.

In this part, I discuss alternatives to a unilateral variation of a sanction of a disciplinary chair by the employer. Pillay J in *Kruger LC* pointed out that SARS could have referred the unsatisfactory (in its view) decision for review in terms of section 158(1)(h) of the LRA. This subsection provides that the

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90 Para 21
91 LCJHB case no JR2792/12 of 04-12-2004
92 Para 21; On appeal the LAC found in *Damelin (Pty) Ltd v Solidarity obo Parkinson* 2017 38 ILJ 872 (LAC) that the employer did not prove that the dismissal was substantively and procedurally fair and did not further remark on the issue of the disregarding of the disciplinary code
93 2008 29 ILJ 3021 (LC)
94 LCJHB case no JR 202/10 of 11-10-2012
95 2017 38 ILJ 242 (LC)

LC may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.

It is incomprehensible why SARS did not refer the decision of the disciplinary chair in *Kruger* to the LC for review in terms of this section. In at least two other cases, namely *Botha* and *Chatraghoon*, SARS disregarded the same collective agreement concluded with two trade unions. SARS unilaterally substituted the sanction of the disciplinary chair and dismissed the employees.

The reason for not using the review procedure in terms of section 158(1)(h) could be that in *Sidumo v Rustenburg Platinum Mines Ltd*[96] the CC held that where the employer is the State, the decision of the chair of a disciplinary hearing constitutes administrative action. The implication is that such a decision must be lawful, reasonable and administratively fair.[97] Read with the CC judgment in *Chirwa* in terms of which public employees may not rely on administrative grounds in seeking a remedy for unfair dismissal, some have argued that employers should likewise not rely on unreasonableness (an administrative-law ground) when a decision of a chairperson of a disciplinary hearing is referred for review.[98] However, the court in *Ntshangase v MEC for Finance, Kwa-Zulu Natal* ("*Ntshangase*")[99] pointed out that the court in *Chirwa* only dealt with the remedies for employees against alleged unfair actions of their employers and not with remedies that employers may have against inappropriate sanctions of a disciplinary chair. The argument that the decision in *Gcaba v Minister of Safety and Security* ("*Gcaba*")[100] overruled *Ntshangase* was laid to rest by the LAC judgment in *Hendricks v Overstrand Municipality* ("*Hendricks*").[101] This court explained why *Chirwa* and *Gcaba* should not be interpreted to deny state employers recourse to the LC in terms of section 158(1)(h) as follows:

> "The underlying guiding rationale of the *ratio decidendi* in *Gcaba* and *Chirwa* is that once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. In other words, and in practical terms, remedies for unfair dismissal and unfair labour practices contained in the LRA should be used by aggrieved employees rather than seeking review under PAJA. The *ratio* cannot justifiably be extended to deny an employer a remedy against an unreasonable, irrational or procedurally unfair determination by a presiding officer exercising delegated authority over discipline. The remedies available to an aggrieved employee under the unfair dismissal and labour practice jurisdiction of the LRA are not available to employers. … The only remedy available to the employer aggrieved by the disciplinary sanction imposed by an independent presiding officer is the right to seek administrative law review; and s 158(1)*(h)* of the LRA empowers the Labour Court to hear and determine the review. To hold otherwise is to deny the employer any remedy at all against an abuse of authority by the presiding officer. …"[102]

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96 2008 2 SA 24 (CC)
97 Para 13
98 J Grogan *Dismissal* (2010) 263
99 2010 3 SA 201 (SCA)
100 2010 1 SA 238 (CC)
101 2015 36 ILJ 163 (LAC)
102 Para 27

In which circumstances would an employer have a basis for review on grounds "permissible in law" in terms of section 158(1)(h)?[103] In *National Commissioner of Police Service v Bobie NO* ("*Bobie*")[104] the court emphasised that an employer may not refer a decision for review merely because he or she is unhappy with the result of the disciplinary hearing. It is not sufficient for the employer to allege that the decision of a disciplinary chair is "irrational" or "unreasonable". The grounds in law on which the employer relies for the referral must be identified.[105]

In *Ntshangase* the employee was found to have mismanaged the state's finances. The court held that an employer was entitled to take a decision of a disciplinary chair on review in terms of section 158(1)(h) if the chair did not take all relevant facts into account and the decision is "manifestly unfair" to the employer. In this case the employer had a duty in terms of sections 195 and 197 of the Constitution of the Republic of South Africa, 1996 ("Constitution") to ensure accountable public administration, which the disciplinary chair did not take into account.[106]

Likewise, the employer in *Moses Kotane Local Municipality v Mokonyama NO* ("*Kotane*")[107] succeeded with a review application in terms of section 158(1)(h). The LC held that in light of the gravity of the misconduct (tampering with tender documents), evidence on the breakdown of the trust relationship and a lack of remorse on the employee's side, dismissal was the only appropriate sanction.[108]

Apart from the gravity of the misconduct, the breakdown of the trust relationship that would render a continued relationship intolerable, the lack of remorse[109] and the constitutional duties of the employer,[110] the employer's operational requirements could also weigh heavily in favour of regarding a sanction less than dismissal as unreasonable. In *Kruger* the CC pointed out that racist remarks have in the past led to labour unrest at workplaces.[111]

There can thus be no doubt that SARS in *Kruger* had sufficient reasons to refer the decision of the chairperson of the disciplinary hearing for review on the ground that the decision was unreasonable. Had the employer taken this route, none of the protracted litigation would have followed.

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[103] In *Mohlomi v Ventersdorp/Tlokwe Municipality* 2018 39 ILJ 1096 (LC) para 67, the employer unilaterally terminated the employment of the employee who did not have the necessary qualifications and argued that this was a lawful termination The employee referred the dispute in terms of s 158(1)(h) The employer brought a counter application arguing that the original appointment was invalid The court held that the employee should have pursued a remedy for unfair dismissal in terms of the LRA and the employer should have dismissed the employee in line with the fairness requirements of the LRA None of the parties had any ground to refer the dispute to the LC in terms of s 158(1)(h) The court held that the employee could have made use of ordinary processes, and since other remedies were available and there were no exceptional circumstances, review in terms of s 158(1)(h) was not appropriate

[104] 2018 39 ILJ 1140 (LC)

[105] Para 14

[106] *Ntshangase v MEC for Finance, Kwa-Zulu Natal* 2009 30 ILJ 2653 (SCA) para 18

[107] 2018 39 ILJ 1130 (LC)

[108] Para 37

[109] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 1 SA 549 (CC) para 45

[110] Para 39

[111] Para 47

Section 158(1)(h) is however only available to employers that are organs of state. What can state employers therefore do if section 158(1)(h) is for some reason not appropriate and what can employers in the private sector do if the sanction imposed by a disciplinary chair is not satisfactory?

Employers can be proactive and endeavour to phrase their disciplinary codes in such a way that the decision of the chairperson of the disciplinary hearing only constitutes a recommendation. If the disciplinary code is the subject of a collective agreement, it is unlikely that trade unions will agree. Trade unions also have no incentive to agree to a second hearing because this could be regarded as an instance of double jeopardy.[112] However, in the seminal case on second hearings, namely *BMW (South Africa) (Pty) Ltd v L van der Walt* ("*BMW*")[113] the LAC held that the principles of double jeopardy are not applicable to disciplinary hearings. The yardstick in such cases is according to the court whether it is fair to have such a hearing. The court added that it would probably be a stumbling block if the second hearing was *ultra vires* the disciplinary code and further that it may not be regarded as fair if no exceptional circumstances exist.[114] A second hearing, in the light of *BMW*, would probably not be an option in *Kruger,* since the substitution of the sanction was *ultra vires* the disciplinary code. There were furthermore no exceptional circumstances like in *BMW* where new evidence became available after the first hearing.

If a second hearing is not an option, an employer can also endeavour to reserve for itself the right in the disciplinary code to appeal against the decision of a disciplinary chairperson. An appeal procedure is not mentioned in the Code of Good Practice, but bigger undertakings where there are different levels of management often make provision for an internal appeal. A right to an internal appeal in terms of the disciplinary code is usually only available to employees, probably because it is a strange notion that employers can lodge an appeal against their own decisions. However, it could appear equally contradictory that a state employer can refer its own (delegated) decision for review in terms of section 158(1)(h). Negotiations with a trade union on the right to hold a second hearing or to regard the decision of the chair as a mere recommendation, will seldom be successful. The reason is that the balancing of power between employer and employee (attained by a negotiated disciplinary code to ensure a limitation of the managerial prerogative of the employer), will again be disturbed. By allowing an appeal for both employer and employee in the disciplinary code, the managerial prerogative of the employer will still be limited if the chairperson of the appeal hearing is an objective person from an outside organisation. The disciplinary code will have to make provision for a

[112] See Grogan *Dismissal* 251

[113] 2000 21 ILJ 113 (LAC)

[114] Para 12 The test in *BMW* has been followed in *Branford v Metrorail Services* LAC case no DA19/2002 of 13-11-2003); *YF and Multichoice Management Services (Pty) Ltd t/a MWeb v Van Staden* 2008 29 ILJ 2850 and *Theewaterskloof Municipality and Independent Municipal & Allied Trade Union on behalf of Visagie* 2012 33 ILJ 1031 (BCA)

more severe sanction on appeal; if not, a more severe sanction will in terms of jurisprudence be regarded as unfair.[115]

6 Recommendations and conclusion

In this article, I endeavoured to find answers to questions left open by the CC in *Kruger CC*.[116] The first question was whether employees seeking a remedy for unfair dismissal may rely on the invalidity of the substitution of a sanction of the disciplinary chair where the disciplinary code does not make provision for such a substitution. *Steenkamp* provided clarity in this regard. The CC in that case held that employees seeking a remedy for unfair dismissal in terms of the LRA cannot rely on the invalidity of the dismissal, but should instead rely on the fairness dispensation of the LRA. Such employees are however, (according to the court in *Steenkamp*) not barred from pursuing remedies based on the common law. Employees can thus apply for an interdict barring the employer from proceeding with an unlawful disciplinary hearing. The employee may also claim damages based on breach of contract where the disciplinary code forms part of the employee's contract, or the employee may claim specific performance. The continued availability of common-law remedies despite the possibility of claiming remedies in terms of the LRA, was confirmed in *Fedlife*. Regarding an employee relying on the invalidity of a dismissal to retain his or her position, the CC in *Steenkamp*[117] held that courts will not lightly accept that an act was invalid if there are other remedies available to the aggrieved party. Thus, employees whose sanctions were substituted in contravention of the relevant disciplinary code will be unsuccessful if they rely on invalidity, since there are remedies available in terms of the LRA as well as the common law. The CC in *Steenkamp* in effect overruled the decisions of the LAC in *Chatraghoon, County Fair Foods* and *Kruger*, which held that the dismissal of these employees contrary to the disciplinary code was invalid.

A further question is whether, after the judgment in *Kruger CC*, the only consequence for employers unilaterally substituting a sanction imposed by a disciplinary chair (for gross misconduct) is that they have to pay compensation for procedural unfairness? If the answer is yes, it would mean that the end justifies the means in that an unlawful dismissal by an employer will be seen as substantively fair. The *Kruger* judgment appears to be endorsing this view.

Although unlawful conduct will not always be unfair, the importance attached by the LRA to democratisation of the workplace, collective bargaining and the preference for a disciplinary code embodied in a collective agreement will be negated by such unilateral action by an employer. This

[115] In *Rennies Distribution Services v Bierman NO* 2008 29 ILJ 3021 the LC held that a chairperson of an internal appeal procedure may not increase the sanction imposed by the disciplinary chairperson if the disciplinary code does not make provision for a more severe sanction on appeal Even then the employee should be heard at the appeal hearing The decision in *Rennies* that a sanction may not be increased on appeal by the employee was followed in *Lisanyane v Wessels NO* LCJHB case no JR 202/10 of 11-10-2012 and in *Opperman v CCMA* 2017 38 ILJ 242 (LC)

[116] 2017 1 SA 549 (CC)

[117] 2016 37 ILJ 564 (CC)

conduct could destroy the bargaining relationship between trade unions and employers, precisely because the limitation that a negotiated disciplinary code places on the managerial prerogative of the employer is negated by a unilateral substitution of the sanction. Even if the disciplinary code had not been negotiated, the unilateral action of the employer would still compromise consistency and certainty. The LC has rightly held that smaller digressions from the disciplinary code should not be rigorously enforced, as long as the procedure that was actually followed was fair.[118] The unilateral substitution of a sanction is however no small matter and could hardly be regarded as mere procedural unfairness. As Sutherland JA in *Kruger LAC* remarked, this issue goes to the heart of a fair system of industrial relations.

However, one cannot but agree that employers should not be burdened with an egregious decision forcing them to continue employing an employee who is guilty of grave misconduct. The employment relationship may have become intolerable, employers in the public sector may not be able to fulfil their public duties in terms of the Constitution and continued employment of the culprit may cause unrest at the workplace. One could therefore argue that lawfulness (adhering to the disciplinary code as part of the employment contract) could lead to unfairness towards the employer. Keep in mind that in *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town*[119] the CC held that the LRA protects both employers and employees against unfairness.

There are however alternatives to acting unilaterally which will avoid the negative consequences of unlawful action. If the employer is a state organ, it could apply for a review in terms of section 158(1)(h) of the LRA. This would be preferable to a unilateral decision where the employer exercises unfettered power over employees, often disregarding the rules of natural justice as was the case in *Kruger CC*. Moreover, the integrity of collective agreements will be preserved. The court and not the employer will establish whether the decision of the disciplinary chair was reasonable. Subsequent to the decisions in *Ntshangase* and *Hendricks* there could no longer be any doubt that the judgments in *Chirwa* and *Gcaba* do not prohibit an application by the employer for review of the decision of the chairperson of a disciplinary hearing in terms of section 158(1)(h). Against this background, it is incomprehensible that SARS persisted in unilaterally substituting sanctions of disciplinary hearings, disregarding the same negotiated disciplinary code in *Chatraghoon, Botha* and *Kruger*.

Non-state employers may not make use of section 158(1)(h) but may exercise the option of a second hearing if it is fair to do so, which could be the case if there are exceptional circumstances. Employers could also endeavour to negotiate a disciplinary code in terms of which the outcome of a disciplinary hearing would be regarded as a mere recommendation to the employer. It is doubtful whether trade unions will agree to this as the managerial power of

[118] *Highveld District Council v Commission for Conciliation Mediation and Arbitration* 2003 24 ILJ 517 (LAC)
[119] 2003 3 SA 1 (CC) para 40

the employer, which is limited by the negotiated disciplinary code, will in effect be handed back to the employer. In *Chatragoon* the LAC suggested that employers who did not negotiate a disciplinary code that could be deviated from in certain circumstances, must bear the consequences, namely that a unilateral substitution of the sanction will be invalid. This proposed "solution" to the dilemma of employers burdened with an inappropriate sanction is unhelpful because it is almost unthinkable that trade unions would agree that the employer could disregard the disciplinary code in certain circumstances. Which circumstances would this be? Would it be when there is a breach in the trust relationship? If so, would the trade union be consulted as to whether it agrees that there is a breach in the trust relationship?

Employers could possibly be more successful in negotiating for themselves a right to an internal appeal, which is usually only available to employees in bigger undertakings. To ensure that a more severe sanction can be imposed, the code should make provision for this; if not, the substitution of the sanction will be regarded as unfair. Trade unions will probably see this as fair if the chairperson of the appeal hearing is an independent person from outside the workplace.

A right to internal appeal in the disciplinary code would solve the problem of inappropriate sanctions for non-state employers and also for state organs who for some reason cannot make use of section 158(1)(h) of the LRA. Employers will avoid having to pay compensation for a procedurally unfair dismissal (if the employee claims in terms of the LRA) or to be burdened by an order for specific performance or the payment of damages if the employee claims in terms of the common law.

SUMMARY

In *South African Revenue Services v Commission for Conciliation, Mediation & Arbitration, Kruger*, the employee, called his superior a "kaffir" on more than one occasion. The employer unilaterally dismissed the employee after the chairperson of the disciplinary hearing had imposed a lesser sanction. In doing so, the employer disregarded the collective agreement which did not make provision for the sanction of the disciplinary chair to be substituted. The employee claimed that his dismissal was invalid and therefore unfair. The Commission for Conciliation Mediation and Arbitration ("CCMA"), Labour Court and Labour Appeal Court ("LAC") agreed. However, in the Constitutional Court ("CC") the employer no longer argued that it was entitled to substitute the sanction in the light of the breach in the trust relationship, but only alleged that reinstatement was a remedy that no reasonable decision-maker would order. The CC agreed and held that the dismissal was substantively fair but procedurally unfair. The CC did not answer questions of lawfulness, fairness and invalidity, but in *Steenkamp v Edcon* the CC held that employees claiming remedies for unfair dismissal in terms of the Labour Relations Act 66 of 1995 ("LRA") should not rely on invalidity. However, employees still have the right to common-law remedies based on their employment contract.

Considering the importance of collective agreements, negotiated disciplinary codes, certainty and consistency, and to avoid employers exercising unfettered power over employees, state organs should apply for a review of an unsatisfactory sanction by the disciplinary chairperson in terms of section 158(1)(h) of the LRA. Private employers could negotiate a disciplinary code which allows both the employer and employee to appeal against the decision of the disciplinary chair which should make provision that a more severe sanction can be imposed on appeal.