

INSUBORDINATION IN THE WORKPLACE

THESIS

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by

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ABSTRACT

This thesis traces the development of insubordination in the employment relationship. The essence of the relationship is that the employee, by contracting out his or her productive capacity, occupies a subordinate position. The primary aim is to locate and define the nature of subordination and to investigate how the breach of this position would justify dismissal as interpreted and applied by the courts. This is achieved by investigating dismissal for insubordination under the common law contract of employment, the unfair labour practice jurisdiction and the 1995 Labour Relations Act. Initially the obligation of the employee to be subordinate, an essential term of the contract of employment, is located and defined by using the tests of Control, Organisation and Dominant Impression, which theoretically indicate the true nature of insubordination. Insubordination under the common law is equated with disobedience to the lawful and reasonable instructions of the employer which were given in good faith and fell squarely within the contractual relationship. Insubordination under the unfair labour practice jurisdiction was equated with a challenge to the authority of the employer of which disobedience was a manifestation of such intention. Instructions given by the employer under the unfair labour practice jurisdiction had to be lawful, reasonable and fair. What was fair depended on the surrounding circumstances of the dismissal and a wilful and unreasonable refusal of the employee to obey the valid instructions of the employer justified dismissal. Under the 1995 Labour Relations Act it is submitted that insubordination will be dealt with in essentially the same manner as under the previous jurisdiction, subject to the Act's objectives and purposes. The disobedience of the employee is to be tolerated if that employee is attempting to achieve the Act's objectives, and any dismissal as a result of the disobedience could be unfair, because the employer's conduct frustrates the purpose of the Act. Therefore, the contractual right of the employer to expect subordination from the employee may have been whittled away to such an extent over time that it seems superficial to regard subordination as an essential term of the contract of employment.

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LIST OF ABBREVIATIONS

A	Decision of the Appellate Division of the Supreme Court.
AD	Appellate Division.
BLLR	Butterworths Labour Law Reports.
CCMA	Commission for Conciliation Mediation and Arbitration.
C	Cape Provincial Division.
CC	Constitutional Court.
D & CLD	Decision of the Durban and Coastal Local Division of the Supreme Court.
EDC	Eastern Districts Court Reports.
IC	Industrial Court.
ILJ	Industrial Law Journal.
LC	Labour Court.
LAC	Labour Appeal Court.
MLR	Modern Law Review.
NPD	Natal Provincial Division of the Supreme Court.
SALJ	South African Law Journal.
T	Transvaal Local Division of the Supreme Court.
TPD	Transvaal Division of the Supreme Court.
TS	Transvaal Supreme Court.
WLD	Witwatersrand Local Division.

GENERAL INTRODUCTION.

“If your employer was to ask you to do a task, would you obey?” The majority of employees would respond that they would obey. The majority of employees would see themselves as owing their employer an obligation to obey their instructions. The employer is usually the one who gives instructions and sets out what the employee is to do during working hours. For performing the instructions the employee is remunerated.

The thesis contends that the essence or nature of the employment relationship, which indicates the unique role of each party in the contract of employment, is that the employee, by contracting away his or her productive capacity, assumes a subordinate role in the relationship. It is this position of “subordination”, or more specifically its breach, insubordination, that is the topic of investigation.

The aim of the study is to locate and define the nature of “subordination” in the employment relationship, and then to investigate how the breaching of this “position” would justify dismissal, as interpreted and applied by the courts. This is to indicate indirectly the restrictions placed on the “legal right” of the employer to ensure that the employee does not breach the “position” of subordination. What has been deemed a fair reason to dismiss for insubordination is set out and this in turn will clarify both the employer and employee’s duties toward each other.

Because the thesis deals with the way in which insubordination has been understood and developed by the courts, the main sources are case law and the thesis has been set out according to three periods in the history of labour law. These periods are basically; insubordination under the common law contract of employment, insubordination under the unfair labour practice jurisdiction and, finally, insubordination under the Labour Relations Act 66 of 1995.

The reader is firstly introduced to “contract” and to the contract of employment. It is then highlighted that contract is the source of the employment relationship. The contract of service is set out historically to introduce the reader to the nature of the relationship. Definitions of the employment relationship are then offered and it is through this that the reader is introduced to the employee’s obligation to be subordinate.

It is from this foundation that the thesis turns to the location of the nature or essence of the employment relationship - which it will be shown is "subordination". This will primarily be achieved by an analysis of the three common law tests - Control, Organisation and the Dominant Impression - which have been used in both locating and distinguishing the contract of employment from other relationships. In discussing the common law tests it will be shown that the tests are merely tests which tend to focus on indicators that represent the essence or nature of the relationship. The nature or essence of the employment relationship will be argued to be "subordination", the breach of which would be insubordination. This will include, though not exclusively, disobedience and disrespect directed towards the employer. Any conduct that breaches the employer's right to demand that the employee act according to the position of subordination is insubordination.

Chapter 3 discusses how insubordination was understood and applied under the common law contract of employment. Essentially this will focus on the requirements that justify dismissal for disrespect or disobedience. It will be shown that disobedience only amounted to a material breach of the contract of employment justifying dismissal where the order was given in good faith, fell within the parameters of the contract between the parties and was lawful and reasonable - reasonable was narrowly construed and was not of such a wide application as under the unfair labour practice. Further, the refusal must be wilful - that is deliberate in a legal sense.

Chapter 4 discusses insubordination under the unfair labour practice jurisdiction. Once the nature of insubordination has been identified the requirements for the offence will be discussed. Essentially the common law understanding of dismissal is extended to fall within the requirements of fairness, which demand that the order should be reasonable - that is fair- and the refusal, though wilful, must be unreasonable. The misconduct will be discussed in relation to the requirements of lawfulness, fairness and reasonableness.

Chapter 5 sets out insubordination as a dismissible offence under the Labour Relations Act 66 of 1995, wherein the statutory requirements for a fair reason to dismiss will be set out.

The Conclusion, Chapter 6, summarises and presents the nature and manner in which each period treated dismissal for insubordination. This is to indicate the resultant limitations placed on the

employer's contractual right to demand that the employee occupies a subordinate position in the employment relationship.

Chapter 1

BASIC CONCEPTS

1.1. Introduction.

The aim of this chapter is to introduce the reader to the contract of employment. To achieve this, the chapter will look firstly at what contract is, and then highlight the relationship between contract and employment.

Various “terms” will then be discussed in order to introduce and define terminology that is used throughout this thesis. Following the discussion of terms, the characteristics of the contract of employment are discussed from an historical perspective, from Roman through Roman Dutch to the current South Africa law. Thereafter, a list of definitions of the contract of employment as offered by respective authors is supplied. Throughout the section the employee’s duty of the subordination, characteristic of the employment relationship, is highlighted as this element of subordination is the primary object of investigation.

1.2. The contract of employment.

1.2.1 Contract.

Contract “belongs to the species of legal facts known as juristic acts.... A juristic act is the lawful act of a legal subject which has at least some of the consequences which its author intended to bring about.”¹ Therefore contracts belong to the category of legally relevant agreements, which are agreements entered into to achieve intended consequences.² In short, a contract is an agreement that is intended by the parties to have legal consequences.

Contract is the means for structuring private transactions essential for the distribution of commodities and services.³ Most contracts are reciprocal.⁴ Reciprocal contracts are known as mutual or synallagmatic contracts, and examples of these are: contracts of sale, exchange, letting and hiring of things (*locatio conductio rerum*) or of service (*locatio conductio operarum*), and

¹Van der Merwe *et al Contract: General Principles* 1993 page 5.

²*Ibid.*

³Van der Merwe *et al Contract: General Principles* 1993 page 6, citing Harker *Acta Juridica* 1980 page 61 at page 62.

⁴reciprocal- ie, performance is owed in exchange for performance from the other party, therefore a party sued for performance may refuse to perform unless the plaintiff has performed properly or tenders proper performance when suing. See Van der Merwe *et al Contract: General Principles* 1993 page 9.

giving out of work (*locatio conductio operis*).⁵ Their common characteristic is that one party is bound to perform in exchange for the performance of the other party. Performance in terms of the one obligation is a prerequisite for the enforceability of the right to demand performance of the other obligation.⁶

1.2.2 Terms

A contract, giving rise to obligations, is expressed in terms. Terms are used to describe all obligations, both essential and non-essential, which the parties assume. Terms may be express, or implied or tacit, or any combination thereof.

Express terms are obligations actually stated in the contract, either written or verbal, which convey an intention. Tacit terms and implied terms are more difficult to locate in the relationship.

Tacit terms are derived from the common intention of the parties, as inferred by the court from the express terms of the contract in conjunction with the surrounding circumstances, including the conduct of the parties. These tacit terms are attributed to the common intention of the parties based on the facts of the case,⁷ while implied terms are implied by law.⁸

An implied term is “...an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties.”⁹ Implied terms are usually associated with “named”, nominate, contracts. That is, contracts with a particular content which occur frequently in market transactions that have become known by reference to their specific nature.¹⁰ Examples are the contracts of sale, lease and employment.

The implied term is a rule of law,¹¹ but the intention of the parties is not totally ignored:

“Indeed, terms are often implied by law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract.”¹²

⁵Ibid.

⁶See in this regard *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1)SA 391 (A) at 415-417, *Nesci v Meyer* 1982 (3) SA 498 (A).

⁷*Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) at 197.

⁸This terminology is also used by Christie *The Law of Contract* 1991, and is approved by the Appellate Division, *Alfred McAlpine and Son (Pty)Ltd Transvaal Provincial Administrator* 1974 (3) SA 506 (A), see also, *Delfs v Kuehne and Nagel (Pty) Ltd* 1990 (1) SA 822 (A) 827.

⁹*Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administrator* 1974 (3) SA 506 (A) at 531 D-531 E.

¹⁰Van der Merwe *et al Contract: General Principles* 1993 page 196.

¹¹*Alfred McAlpine and Son (Pty)Ltd Transvaal Provincial Administrator* 1974 (3) SA 506 (A) at 532 G.

¹²At 531 F.

However, such a term is not implied if it is in conflict with the express provisions of the contract.¹³

Implied terms may be derived from the common law, trade usage or custom, or from statute. Where mercantile agreements are subject to the usages or customs of a particular trade or profession, in that they are implied, the usage must be:

- (a) notorious;
- (b) certain, ie of general application within the trade or profession;
- (c) reasonable;
- (d) not contrary to the positive law.

If these four requirements are met, then the term will be implied to form part of the contract, unless the agreement expressly excludes the term. This would occur even though the party being sought to be bound had no knowledge of the trade usage.¹⁴ Once a term is implied, that term is held to be inherent to the nature of that specific type of contract, and the law will imply it in every case, provided the parties have not expressly excluded its operation.¹⁵

Smith comments that the courts are achieving what they consider “industrial justice” by the use of implied terms.¹⁶ There is a need for implied terms in many contracts of service, if only to fill in the gaps revealed in areas of contract law. Although the result may be far removed from any real subjective intention.¹⁷ These terms are used by the courts as a means of regulating the employment relationship and imposing conditions which the court considers desirable, in line with the demands of *boni mores* and public policy.

“In a sense ‘implied term’ is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts. It is the *naturalium* of the

¹³At 531 E.

¹⁴See *Coutts v Jacobs* 1927 EDL 120 and *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 (2)SA 642(C). No distinction is drawn between a trade usage and a trade custom, see *Tropic Plastic Packaging Industry v Standard Bank Ltd of South Africa* 1969 (4)SA 108 (D) at 119 and *Catering Equipment Centre v Friesland Hotel* 1967 (4)SA 336 (O) at 338-339.

¹⁵“The parties may exclude the operation of implied terms by express agreement to that effect, subject to two provisos: exclusion is not permitted where it would be *contra bonos mores* ... while exclusion of a term which is essential to the existence of a contract of employment will change the nature of the contract.” Thompson and Benjamin *South African Labour Law* (vol 1), amended service 36 of 1997, page E1-10, per B Jordaan.

¹⁶Smith *Is Employment Properly Analysed in Terms of Contract* 1975 page 354.

¹⁷*Ibid* page 355-356.

contract in question.”¹⁸

Christie¹⁹ comments that Pothier classifies the terms of a contract into *essentialia*, *naturalia* and *accidentalialia*.²⁰ Pothier describes *essentialia* as:

“Things which are of the essence of a contract are those without which such contract cannot subsist, and for want of which there is either no contract, or a contract of a different kind.”²¹

Essentialia serve to identify a contract as belonging to a particular class or category of contract. Such identification is essential because the class of contract determines the *naturalia* of a particular contract.²² Thus, if the *essentialia* of a particular contract are present certain consequences follow, these being the *naturalia*.

“Things which are only of the nature of the contract are those which, without being the essence, form part of it, though not expressly mentioned; it being of the nature of the contract that they shall be included and understood...they differ from those which are of the essence of the contract, inasmuch as the contract may subsist without them, and they may be excluded by the express agreement of the parties.”²³

Naturalia are terms implied by law. These terms aid to determine the rights and duties of the contracting parties and the effects and consequences of their contract.²⁴ *Naturalia*, are based largely on notions which originated in Roman Law but they are not fixed. Recognised *naturalia* may be extended or curtailed and new *naturalia* may develop through adaptation by the courts in response to changed circumstances, legislation, custom or trade usage.²⁵

Pothier’s third class, the *accidentalialia*, are included in the contract expressly. For instance, the allowance of a certain time for paying a sum of money due; or the liberty of paying it by instalments, etc.²⁶

¹⁸*Alfred McAlpine and Son (Pty)Ltd Transvaal Provincial Administrator* 1974 (3) SA 506 (A) at 531 G-531 H.

¹⁹Christie *The Law of Contract* 1991 page 183 to 184.

²⁰*Incidentalialia and Accidentalialia* refer to the same class of terms.

²¹Christie *The Law of Contract* 1991 page 183 citing Pothier ss 6-8.

²²Van der Merwe *et al Contract: General Principles* 1993 page 200.

²³Christie *The Law of Contract* 1991 page 183-184.

²⁴Van der Merwe *et al Contract: General Principles* 1993 page 200.

²⁵*Ibid* page 201.

²⁶Christie *The Law of Contract* 1991 page 184.

In summary, *essentialia* form the bones of the special contract. When further detail is needed, due to the type of contract, *naturalia* are added. After that, if more flesh is needed, the parties incorporate the *accidentalia*.

“The most convenient method of ascertaining the full terms of a contract is therefore first to identify the express terms and, in the light of those express terms, to consider whether any additional terms are to be implied either by law or from trade usage or from the express terms and the surrounding circumstances.”²⁷

It is not doubted that while the sources of the contract of employment are rich and varied, the contract itself remains the foundation of the employment relationship.

“It not only acts as a conduit for rights and duties derived from other sources, eg statute and collective bargaining, but it is also itself an important source of rights and duties. Apart from the terms expressly or tacitly agreed to by the parties, a number of terms dealing with their basic rights and duties are also implied into the contract as a matter of law. In addition, judge-made law and the provisions of legislation and collective agreements combine with the express, tacit and implied terms of the contract to mould the relationship between employer and employee.”²⁸

1.2.3 Contract in relation to the employment relationship.

In the common law, the contract of employment is an agreement between the parties that their relationship will be bound and restricted by certain mutually agreed rights and duties, provided the parties intended to be legally bound and these rights and duties are physically possible and legal. In other words, both parties bargain at arms length and are deemed to be the best judge of their own interests.²⁹ But the inequality of the positions of the parties to the employment contract has a tendency to go unnoticed or tends to be sacrificed to the contractual ideal of voluntarism.³⁰ What is more, voluntarism tends to place the content of the relationship “outside the domain of public policy and beyond the reach of the courts”.³¹ In other words, sanctity of contract is the court’s binding ethic. Didcott J, quoted Jessel MR in *Printing and Numerical Registering Co v*

²⁷Ibid.

²⁸Thompson and Benjamin *South African Labour Law* (vol 1), amended service 36 of 1997, page E1-9, per B Jordaan.

²⁹The law will not interfere to protect him or her from the consequences of a bad bargain. See Jordaan *The Law of Contract and the Individual Employment Relationship* 1990 page 77.

³⁰“The view that a contract is constituted by agreement, signifies the recognition of individual autonomy as a philosophical premise.” Van der Merwe et al *Contract: General Principles* 1993 page 10.

³¹Haysom and Thompson *Labouring under the law* page 222 quoted in Jordaan *The Law of Contract and the Individual Employment Relationship* 1990 page 77.

*Sampson*³² to this effect:

“If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.”³³

The above is supported by *Paiges v Van Ryn Gold Mine Estates*³⁴ wherein it was argued that a provision in an employment contract should not be enforced because it bore oppressively on the employee. The court rejected the argument and restricted itself to the interpretation of the contract as it stood.³⁵

In reality, the majority of employees have little control over the substance of the relationship with their employers. The common law of contract, in short, offers little protection against arbitrariness;³⁶ it allows the party with the greater bargaining power to extract any bargain he or she wants, however oppressive, perverse or absurd it may be, provided that it is not illegal or immoral.³⁷ It is in reaction to this inequality that the South African Parliament, by statutory intervention, has favoured two methods in an attempt at levelling the playing fields. The first is to impose minimum conditions of employment on employers and employees; the second is to promote collective bargaining.³⁸

In line with this, Grogan³⁹ lists the following deficiencies at the common law level of employment to which the legislature has already given its attention, namely:

1. That the common law contract is, by its nature, individualistic, which, as a result, does not give regard to the collective relationship;
2. Inherent inequality in the bargaining power between employer and employee;⁴⁰
3. There being no regard for the enduring nature of the employment relationship;
4. That freedom of contract encourages the exploitation of labour;

³²(1875) LR 19 Eq 462 at 465.

³³See *Brassey et al The New Labour Law* 1987 page 2.

³⁴1920 AD 600.

³⁵*Brassey et al The New Labour Law* 1987 page 3.

³⁶Consequences of the right to be arbitrary: “...the average employee has little bargaining power, for the simple reason that he needs his wages more than the employer needs his services. He is the victim of the power to be arbitrary, and the employer is the beneficiary.” *Brassey et al The New Labour Law* 1987 page 6.

³⁷*Ibid* page 5.

³⁸*Grogan Riekert's Basic Employment Law* 1993 page 4.

³⁹*Grogan Workplace Law* 1996 page 4.

⁴⁰*Martin v Murray* (1995) 16 ILJ 589 (IC) at 601 C-F.

5. The contract does not promote participatory management.

Though the voluntary contract defines the employment relationship, it is, however, in no way the exclusive memorial of the content and duration of the relationship. Statute has to a large extent regulated the employment relationship, and as a result the employment relationship is usually distinct from and wider than the contractual relationship.⁴¹ It has been argued that the employment relationship, consequently, exists beyond the borders of the contract of employment.⁴²

Furthermore, due to the above shortcomings - that the parties in a contract of employment are not on an equal footing to each other in their respective bargaining positions, that the parties may enter into oppressive contracts through contractual voluntarism, and the view of labour as a commercial transaction - some persons have called for the contract model to be abandoned altogether.⁴³

Jordaan states that:

“Dogmatic assumptions about voluntarism and freedom of contract in the employment context are unwarranted, particularly today when so much of the context of that relationship is governed by statute”.⁴⁴

Others have opted for a reformist approach, and tend to regard the law of contract as “a necessary element in labour law”.⁴⁵

It must be remembered that the rules of the law of contract “reflect the attempts in the legal system to achieve a balance between relevant principles and policies so as to satisfy prevailing perceptions of justice and fairness. For this reason, the law of contract has a dynamic and changing nature.”⁴⁶ It seems that this dynamic and changing nature of the law of contract is overlooked. Surely the law of contract has sufficient means available for balancing the principles of policy with the laws of contract.

⁴¹Grogan *Workplace Law* 1996 page 33.

⁴²Grogan *Workplace Law* 1996 page 33, see also, Grogan *A Secret Weapon Defined* 1994 15 ILJ 720.

⁴³Jordaan *The Law of Contract and the Individual Employment Relationship* 1990 page 73.

⁴⁴*Ibid* page 78.

⁴⁵Freedland *The Contract of Employment* 1976 page 3.

⁴⁶Van der Merwe *et al Contract: General Principles* 1993 page 10.

1.2.4 Conclusion

It is submitted that the correct view would be to see the contract as the source of the employment relationship, and that the relationship between the parties is created thereby.⁴⁷ In other words, without a contract between the parties there would be no employment relationship.⁴⁸

If the relationship of employment is created by contract it is the contract that is the sole guide as to the true intentions of the parties. It is the role of the implied term and legislation, as in all other contracts of a commercial nature, to define the ambit of the relationship in accordance with public policy and *boni mores*. Then the nature of the relationship is to be determined by analysing the terms of the contract.⁴⁹ Therefore the legal relationship between the parties must be gathered from a true construction of the contract that exists.⁵⁰ If the agreement rests on a verbal agreement then the court will rely on the surrounding circumstances to locate the true intention of the parties.⁵¹ In short, the nature of the employment relationship is a conclusion of law dependent on the rights conferred and the duties imposed by the contract⁵² - which is the source of the relationship.

1.3. The Contract of Service.

1.3.1 Roman Law

Jordaan argues that in Roman law there was no systematic development of a distinct contract of employment, because slave labour satisfied the market demands and the letting of services for a wage was treated with disdain in Roman custom.⁵³ The rendering of services for remuneration

⁴⁷Grogan *Workplace Law* 1996 page 3 and 33, see also, Grogan *A Secret Weapon Defined* (1994) 15 ILJ 720. *Borg Warner SA (Pty) Ltd v National Automobile and Allied workers Union* (1991) 12 ILJ 549 (LAC) at 557 G-I; the Appellate decision, of the same case, reported (1994) 15 ILJ 509, does not change the above statement but adds that the employment relationship could endure beyond its lawful termination.

⁴⁸The most acceptable view seems to be that the relationship of employment is basically of a contractual nature, see LAWSA volume 13 (1995) at page 37-38, who in turn relies on Brassey *South African Journal of Human Rights* 1993, and Olivier *Tydskrif vir die Suid-Afrikaanse Reg* 1993.

⁴⁹Those facts which do not go to prove the existence of the contract are irrelevant in determining the nature of the relationship. *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) at 455 A-C.

⁵⁰*Smit v Workmen's Compensation Commissioner* 1979 (1)SA 51 (A) at 64 A - B, see also *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) at 457 B.

⁵¹In the words of Rabie JA (with whom Rumpff CJ, Wessels JA, Corbett JA and Miller AJA concurred): "Dit spreek vanself dat die kontrak nie net in skrif hoef te wees nie, en dat ook na 'feite', of 'omliggende feite', soos die kommissaris dit stel, gekyk kan word, maar die bedoeling moet steeds wees om vas te stel wat die kontrak tussen die partye is." *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) at 455 A.

⁵²*Ready Mixed Concrete v Minister of Pensions* 1968 1 All ER 433 at 439 per MacKenna J. Thus it is irrelevant that the parties had declared the relationship to be something else.

⁵³Jordaan *The Law of Contract and the Individual Employment Relationship* 1990 page 74.

was dealt with as two species of lease or hire under the consensual contract of *locatio conductio*;⁵⁴ viz *locatio conductio operarum* and *locatio conductio operis*.

Locatio conductio operarum, being the letting and hiring of personal services, was a consensual contract where the worker, as employee, undertook to place his or her personal services, for a certain time, at the disposal of an employer. The employer in return undertook to pay him or her the amount agreed upon in consideration of his or her services.⁵⁵ Usually the subject matter of the contract consisted of unskilled services which could be valued in money.⁵⁶ The intellectual services of certain classes of professional men⁵⁷ were not considered estimable in terms of money and could not be the subject matter of the contract.⁵⁸

Locatio conductio operis is defined as the letting and hiring of a particular work to be done, as a whole, in consideration of a fixed money payment. What was contemplated was not the supply of services or a certain amount of labour but the execution or performance of a specified work as a whole. The subject matter of the contract was not the supply of services or labour as such but the product or result of labour.⁵⁹

1.3.2 Roman Dutch Law

Under Roman Dutch law, the rendering of personal services was an instance of *locatio conductio*. The above general principles underlying *locatio conductio operis* were adopted and further developed in Roman Dutch law.⁶⁰ *Locatio conductio operarum* was known as “*diens contract*” or “*huur en verhuur van diensten*”, and covered all contracts of letting and hiring of personal services in respect of domestic servants, workmen, labourers, apprentices, sailors and other types of employees.⁶¹ In general “the employment relationship received scant attention from institutional writers, probably because its content was to a large extent determined by local placats and

⁵⁴*Smit v Workmen Compensation Commissioner* 1979 (1)SA 51 (A) at 56 D to 57 C.

⁵⁵At 56 E to F.

⁵⁶At 56 H.

⁵⁷Such as land surveyors, doctors, advocates, these being listed in *Smit v Workmen Compensation Commissioner* 1979 (1)SA 51 (A) at 56 H.

⁵⁸At 56 H.

⁵⁹At 57 E.

⁶⁰At 58 G to H.

⁶¹At 58 H to 59 A.

ordinances.”⁶² “In short the position at common law was that the employee as lessor leased his services to his employer who was regarded as the lessee of such services, and the compensation of the employer was regarded as rent.”⁶³

In Europe, during the latter half of the eighteenth century, a distinct contractual model for the employment relationship started developing. According to Jordaan, the new development was aimed at giving effect to the differences in the underlying economic relations serviced by agreement for the lease of things (*locatio conductio rei*), personal services (*locatio conductio operarum*), and the services of independent contractors (*locatio conductio operis*).⁶⁴

1.3.3 South Africa

South African courts have consistently classified the employment relationship as a species of *locatio conductio*.⁶⁵ The employment relationship is *locatio conductio operarum*, the leasing of personal services, while the contract between a principal and a contractor is *locatio conductio operis*, the letting and hiring of some definite piece of work.⁶⁶ The difference between these two, expressed in the judgment of De Villiers CJ,⁶⁷ is to ascertain whether the worker renders the service in the course of an independent occupation representing the will of his or her employer only as to the result of the work, and not as to the means by which it is accomplished. In the relationship of independent contractor the principal can control the end product, in other words what he or she wants, but not how the task is to be achieved.

In the employment relationship the employer may demand both the end result and the means to be used to achieve that result. At this stage it is necessary to state that the employer’s “control” in the employment relationship is not decisive, but merely important in the classification of the contract of employment. The courts have tended to opt for a classification of the contract based on a dominant impression of the circumstances, in other words, an impression of which form of

⁶²At 58 H see also *Spencer v Gostelow* 1920 AD 617 at 628 to 629, 638 and B Jordaan *The Law of Contract and the Individual Employment Relationship* 1990 page 75.

⁶³LAWSA volume 13 (1995) page 8.

⁶⁴Jordaan *The Law of Contract and the Individual Employment Relationship* 1990 page 75.

⁶⁵Jordaan, *ibid*, relies on:

- *Spencer v Gostelow* 1920 AD 617

- *Smit v Workmen Compensation Commissioner* 1979 (1) SA 51 (A)

- *Potchestroom Municipality v Bouwer NO* 1958 (4) SA at 382 (T).

⁶⁶*Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 at 433.

⁶⁷At 432-3.

contract is dominant in the circumstances, or more probable.⁶⁸

1.4. Definitions of the contract of employment.

Authors have offered the following definitions of the contract of employment:

Coetzee,⁶⁹

“...a contract of employment is a mutual agreement in terms of which one person (the employee) for remuneration, makes his personal services available to another person (employer), in such a manner that the former occupies a subordinate position towards the latter”.

Du Plessis *et al*,⁷⁰

“A contract of employment may be defined as an agreement in terms of which one party (the employee) agrees to make his personal services available to the other party (the employer) under the latter’s supervision and authority in return for remuneration.”

Fourie,⁷¹

“The service contract is an agreement in which one party (the employee) undertakes to provide services to the other party (the employer) for remuneration in such a manner that the employer exercises authority and supervision over the employee.”

Grogan,⁷²

“A contract of employment is an agreement between two legal personae (parties) in terms of which one of the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return for a fixed or ascertainable wage, and which entitles the employer to define the employee’s duties and (usually) to control the manner in which the employee discharges them.”

Mureinik,⁷³

“A service contract is simply ... an agreement in which one party (the servant) agrees to

⁶⁸See in this regard chapter 2 where the three tests, traditionally used in locating and distinguishing the employment contract from other contracts, namely control, organisation and dominant impression are discussed and analysed.

⁶⁹Coetzee *Die Toepassingsterrein van Ongevallewetgewing in die Suid-Afrikaanse Reg* cited in LAWSA (volume 13) 1995 page 38.

⁷⁰Du Plessis *et al A Practical Guide to Labour Law* page 8, cited in LAWSA (volume 13) 1995 page 39.

⁷¹Fourie *Law of Master and Servant in South Africa* page 2, cited in LAWSA (volume 13) 1995 page 39.

⁷²Grogan *Workplace Law* 1996 page 20. Grogan offers the definition “if only for the purposes of identifying its essentials.”

⁷³Mureinik *The contract of service- an easy test for hard cases* 1980 page 263.

work for another (the master) in which the servant occupies a subservient position.”

Editors W A Joubert and T J Scott,⁷⁴

“A contract of employment is a mutual agreement in terms of which an employee makes available his services for a determined period and remuneration under authority of the employer.”

All the above definitions seem to highlight the following as playing a role in the nature of the employment relationship:

1. An agreement.
2. Between two persons.
3. For a period of time.
4. The offering of personal services.
5. For remuneration.
6. Some sort of subordinate status of the employee. A subservient position (Mureinik), a subordinate position (Coetzee), where the employer has supervision and authority (Du Plessis and Fourie), authority (Joubert and Scott), and to define the employee’s duties and usually to control the manner in which the employee discharges them (Grogan).

This is not to say that these above elements are the “essentials” of the contract of employment, but rather they highlight those elements which are important, from the perspective of the writers listed. Remembering that a court will determine the nature of the relationship on an impression of the circumstances of the case, it follows that the above elements may only be strong indicators for the impression that the contract is one of employment. The existence of some kind of authority by an employer over the employee is an important indication of a contract of employment.⁷⁵ Joubert JA comments that it is clear that “one of the important legal characteristics of *locatio conductio operarum*...in Roman-Dutch law is the duty of the employee ... irrespective of whether he happens to be a domestic servant or any other type of employee, to obey the lawful commands, orders or instructions of his employer... in regard to the performance of his services”.⁷⁶ For “the

⁷⁴Editors W A Joubert and T J Scott, LAWSA (volume 13) 1995 page 39.

⁷⁵LAWSA (volume 13) 1995 page 43, see also Kerr *The Law of Agency* 1991 page 38.

⁷⁶*Smit v Workmen Compensation Commissioner* 1979 (1) SA 51 (A) at 60 G-H.

relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination ...”.⁷⁷

1.5. Conclusion.

Contract is the source of the relationship between an employee and employer. *Essentialia* form the bones of the special contract. Due to the type of special contract, *naturalia* occur. If more flesh is needed then terms incidental to the nature of the contract will be expressed, these being the *accidentalialia*. The contract of employment is the source of the parties’ rights and duties,⁷⁸ which include the employer’s power of supervision and control,⁷⁹ and remedies.⁸⁰ Finally, the contract of employment operates as a conceptual framework for statutory regulation of the employment relationship.⁸¹

The legal relationship between the parties is to be gathered from a true construction of the contract that existed between the parties.⁸² This conclusion, of the nature of the relationship, is a conclusion of law dependent on the rights conferred and the duties imposed by the contract.⁸³

In employment some sort of subordinate position or status is held by the employee in the relationship. The employer has the “traditional right” to control the means to achieve the end result for which the employee has been employed. It is this authority over the employee or subordinate status of the employee, or the exercising of control by the employer, and the breach of this position by the employee that is the focus of this thesis. The role of “subordination” in the employment relationship is the topic of discussion in the following chapter.

⁷⁷Being the words of Sir Otto Kahn-Freund: P Davies and M Friedland Kahn-Freund’s *Labour and the Law* 1983 page 18, cited in Grogan *Workplace Law* 1996 page 31 footnote 35.

⁷⁸For example, employee’s duty of good faith and, for the employer, the duty of safe working conditions. B Jordaan *The Law of Contract and the Individual Employment Relationship* 1990 page 80.

⁷⁹By virtue of the employee’s implied duty of obedience. See Jordaan *The Law of Contract and the Individual Employment Relationship* 1990 page 80.

⁸⁰*Ibid.*

⁸¹*Ibid.*

⁸²*Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A) at 64 A to B, see also *Ongevallekommissaris v Onderlinge Verzekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) at 457 B.

⁸³*Ready Mixed Concrete v Minister of Pensions* 1968 1 All ER 433 at 439 per Mackenna J.

Chapter 2

SUBORDINATION IN THE EMPLOYMENT RELATIONSHIP

2.1 Introduction.

This Chapter will discuss the three common law tests of Control, Organisation and Dominant impression which are, or have been, used in locating and distinguishing the contract of employment from other contractual relationships. Each test will be discussed and problems associated therewith will be presented. The underlying theme is to highlight the importance of the employer's control over the employee within the employment relationship, as well as discussing the place and extent of "control" in that relationship. The nature of the relationship of employment will then be discussed in order to isolate the employee's duty to be subordinate.

2.2 The Common Law Tests for locating the Contract of Employment:

"Control", "Organisation", and "Dominant Impression".

2.2.1 The Control Test.

It is clear that "one of the important legal characteristics of *locatio conductio operarum* ...in Roman-Dutch law is the duty of the employee ... irrespective of whether he happens to be a domestic servant or any other type of employee, to obey the lawful commands, orders or instructions of his employer ... in regard to the performance of his services."¹ The employer thus, under *locatio conductio operarum*, has a concomitant right to supervise and control the manner in which the employee is to perform his/her services.²

Decisions as early as 1894³ have stressed the right of the employer to control⁴ both the result and the means of the employee's work⁵ as an essential fact which establishes the relationship between

¹*Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) per Joubert JA at 60 G-H.

²*Ibid* 60 H.

³*East London Municipality v Murray* 1894 (9) EDC 55.

⁴In *Townsend v Hankey Municipality* 1920 EDL 226 at 228 the element of control was the proper criterion by which to determine whether the relation of master and servant exists, and is found in the right of the master to control and order the other (the employee) in the performance of the work.

⁵*East London Municipality v Murray* 1894 (9) EDC 55 at 61, see also: *Eyssen v Calder and Co* 1903 (20) SC 435.

the employer and employee.⁶ Therefore where there is no right of control there is no employment relationship.

In *Colonial Mutual Life Assurance Society Ltd v MacDonald*⁷ the Appellate Division adopted the English⁸ test of supervision and control⁹ for distinguishing the relationship of employment from other relationships. De Villiers CJ agreed with the statement of McCardie J in *Performing Right Society, Ltd v Mitchell and Booker (Palais de Danse) Ltd*¹⁰ where McCardie J observed that it was notoriously difficult to place one's hand upon any one test which is conclusive in distinguishing the employment relationship from other relationships.¹¹ Nevertheless, De Villiers CJ observed that while it may be a delicate matter to decide whether the control reserved to the employer under the contract was of such a nature as to constitute the employer the master of the workman, it was beyond dispute that the relation of employer and employee could not exist where there was a total absence of the right of supervising and controlling.¹²

Therefore, in line with the thinking found in *Colonial Mutual Life Assurance Society Ltd v MacDonald*, the crucial difference in the relationship of employment and that of the independent contractor is that in the former the employer engages an employee to work and is entitled, under the contract, to supervise and control the work of the employee¹³ - both as to the end result to be achieved and the means to be used. On the other hand, the independent contractor is bound to contract and the principal may only control the end to be achieved and not the means - unless this is expressly contracted for. The essential difference then lies in controlling the "means". The test for the existence of the employment relationship is therefore dependent on the existence of a right

⁶*East London Municipality v Murray* 1894 (9) EDC 55 at 62. In *Union Government (Minister of Agriculture) v Lombard* 1926 CPD 150 at 154, Cardiner J refers to the degree of control to conclude if the relationship is one of master and servant or of an independent contractor.

⁷1931 AD 412. Which was relied on in *R v Caplin* 1931 OPD 172 at 173.

⁸Joubert, JA in *Smit v Workmen's Compensation Commissioner* 1979 (1)SA 51 (A) at 62 C.

⁹*Smit v Workmen's Compensation Commissioner* 1979 (1)SA 51 (A) at 61H.

¹⁰1924 1 K.B at 766.

¹¹*Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 at 434.

¹²"One thing appears to me beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervision and controlling the workman under the contract; in other words unless the master not only has the right to prescribe to the workman what work has to be done, but also the manner in which that work has to be done." *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 at 435.

¹³Per De Villiers CJ in *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 at 433.

of control held by the employer over the employee, to control both the end to be achieved and the means used¹⁴ in achieving that end.

The test has been stated as follows:

“A servant is an agent who works under the supervision and the direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer’s orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it - he is bound by his contract, but not by the employer’s orders.”¹⁵

The basis of the test is “control”,¹⁶ control as a “legal right” allows the employer to command what work is to be done and the manner in which that work has to be done.¹⁷ Specifically the right of control includes the right of the employer to decide *what* work is to be done by the employee and the *manner* in which it is to be performed, the *means* used in doing it, the time *when* and the place *where* the work is to be done.¹⁸ As such this right of control, “makes possible the deployment of the productive capacity for which the employer contracts, and so is the essence of what has come to be termed ‘managerial prerogative’”.¹⁹

Though control is the test for the existence of the relationship of employment, it does not follow that the independent contractor may not be subject to the employer’s control. The right to supervise may be reserved as one of the terms of the contract. For the independent contractor, the source of the relationship is contract and the contract will expressly state the end result which should be achieved. The independence of the contractor is at the heart of this relationship - independence being the lack of control the other party may claim over the manner in which the contract should be achieved. Control as to means is not inferred from the circumstances of the

¹⁴See *Townsend v Hankey Municipality* 1920 EDL 226 at 228.

¹⁵Salmond *Law of Torts* 6th edition page 96 cited by De Villiers CJ in *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 at 435.

¹⁶The hallmark of the employment relationship. Grogan *Workplace Law* 1996 page 13.

¹⁷*Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 at 436, see also *R v AMCA Services Ltd and another* 1959 (4)SA 209 (A) at 212.

¹⁸*Smit v Workmen’s Compensation Commissioner* 1979 (1)SA 51(A) at 60H (the italics is mine). “Supervision implies the right of the employer to inspect and direct the work being done by the employee.” at 60H.

“ ‘Control’ and ‘supervision’ are related. ... When reference is made to an employer’s right to prescribe ‘the manner in which the work has been done’, what is meant can also be conveyed by saying that the employer has the right not only to say *what* has to be done, *when* it has to be done, and *where* it has to be done, but also *how* it is to be done.” (Italics being mine) Kerr *The Law of Agency* 1991 page 39.

¹⁹Brassey *The Nature of Employment* 1990 page 908.

individual relationship and if control is exercised in the way the work is to be done then it is to be stated so expressly. The contract of the independent contractor is the source of the conclusion that the other party lacks control over the means to achieve the contracted for result.²⁰ In the independent contractor's contract control as to means is absent because independence is secured.

On the other hand, the converse would occur in a relationship that was dominated by control, such as in the employment relationship. Here *any* limitation of the employer's control over the employee must be expressly mentioned in the contract.

In both relationships, the employment relationship and the relationship of the independent contractor, the element of control gives each their specific identity. Their nature is dependent on the presence or lack of "control" as to the means of achieving the contracted for result. If this essence of the relationship is to be restricted or limited it must be done consciously and expressly. Thus there would be no relationship of employment where the employer lacks, as to means and ends, control over the employee. The presence of control is essential,²¹ but does control have to be absolute?

In the decision of *Colonial Mutual Life Assurance Society* the court highlighted that "the relation of master and servant cannot exist where there is a total absence of the right of supervision and controlling the workman".²² If there was a *total absence* of the right to control then there would be no relationship of employer and employee. If there was *complete control* in detailed supervision and control then there would be a relationship of employer and employee. In later decisions it was held that *Colonial Mutual Life Assurance Society* was authority for the right to control, as to both the means and end, being vital for the existence of the relationship of employment.²³ But whether a relationship of employer and employee existed depended mainly,

²⁰Note here the circularity of the control test, which will be discussed more fully hereunder in dealing with the "difficulties with the control test".

²¹*Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 at 435 per De Villiers CJ.

²²*Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 at 435.

²³*R v Feun* 1954 (1)SA 58 (TPD) 58 at 60 D -F per Roper J.

if not entirely, upon the *degree*²⁴ of control exercised by the employer over the manner in which the work was performed.²⁵ In the words of Roper J, as he then was:

“Complete control in every respect is in my view not essential to the master and servant relationship, and some degree of freedom from control is not incompatible with the relationship”.²⁶

Whether the control exercised is enough to lead to the conclusion that the engaged person is a servant is therefore a question of *degree*.²⁷

“It seems, however, reasonably clear that the final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant.”²⁸

The control the employer can exercise must be detailed, but it need not be total.²⁹ How detailed should this control be?

“Proponents of the test do not say how detailed the control must be. If they did, they would probably have to say, it is control sufficient to make the worker an employee - there seems no other way of putting it. Circular reasoning of this sort may not be foreign to the law, but the control test certainly seems to encourage it”.³⁰

2.2.1.1 Difficulties with the Control Test

It must, at the beginning of this section, be noted that the majority of the cases that use the control test involve the attachment of liability to the employer for the delicts of his or her employees. The result is that these decisions may be unsatisfactory guides in determining the nature of employment, in reality they turn more on the power of control than the fact of employment.³¹

Kahn-Freund³² focusses on the social origins of the control test, and in comparing these origins to the differing social realities in a post-industrial world and assuming that control must be

²⁴See *Union Government (Minister of Agriculture) v Lombard* 1926 CPD 150 at 154, where Gardiner J relies on *Performing Right Society, Ltd v Mitchell and Booker (Palais De Danse) Ltd* 1924 1 KB 762 and *Addis v Schiller Lighting and Plumbing Co* 1906 TH 218 to make the comment that the test of whether one was a servant or independent contractor depended on the degree of control exercised by him.

²⁵See *Union Government (Minister of Agriculture) v Lombard* 1926 CPD 150 *Lombard* at 154.

²⁶*R v Feun* 1954 (1)SA 58 (TPD) at 60 H - 61 A.

²⁷Roper J relying on and quoting Curlewis J from *De Beer v Thompson* 1918 TPD 70 at 76.

²⁸*Performing Right Society Ltd v Mitchell and Booker (Palais De Danse) Ltd* 1924 1 KB 762 at 767.

²⁹*Brasscy The Nature of Employment* 1990 page 911.

³⁰*Ibid* at page 911.

³¹*Ibid* at page 936.

³²Kahn-Freund *Servants and Independent Contractors* 1951 (14) Modern Law Review 504, referred to and relied upon in *Brasscy The Nature of Employment* 1990 page 908.

complete, he forms his criticism of the control test. Because some employees in the post-industrial era work at a distance from their employers and possess skills and knowledge that their employers lack it is obvious that these employees need more freedom to perform their employment duties. Therefore these “post-industrial employees” could not be subject to detailed supervision and thus could not be under the employer’s control in relation to the manner in which they performed their work. Strictly speaking these servants could not be said to be under the employer’s power of control. Brassey states that whether the control test was so bound up with the conditions of the age is debatable, but what is more debatable is the construction that Kahn-Freund places on the control test.³³

Brassey argues that Kahn-Freund regards the control test as being concerned with whether the employer practically controls or can practically control the employee, when in reality the control test is concerned with whether the employer has the contractual right to do so.

“The fact that control cannot *de facto* be exercised may justify the inference that it was not *de iure* contracted for, but the opposite conclusion is not impossible, and it would be one to which the courts would be driven if the contract contained express terms to that effect.”³⁴

If control cannot practically be exercised then this may justify the conclusion that it was not contracted for, but if the control is not exercised then the conclusion that it was contracted for is not impossible. Furthermore, it may be argued that employees work at a distance or without supervision only with the leave of the employer - this being a waiver or self-restriction of the contractual right of control being made in the best interests of the employer. The employer, however, still retains the contractual right to transfer the employees back to head office and the like.³⁵

In assessing the completeness of control which Freund-Kahn assumes, Brassey comments that proponents of the control test “see the test as operating only in a residual area, the area remaining after allowance has been made for the duties imposed by statute and other imperative rules.”³⁶ Thus the test is seen as operating in that part of the relationship the parties can regulate for

³³Brassey *The Nature of Employment* 1990 page 909.

³⁴Ibid at page 909-10.

³⁵Ibid at page 910.

³⁶Ibid.

themselves.³⁷ In the words of Roper J: "Complete control in every respect is ... not essential to the master and servant relationship, and some degree of freedom from control is not incompatible with the relationship".³⁸

With such difficulties in the application of the control test in mind, courts shifted from requiring *de facto* control to requiring merely a right of control.³⁹ Grogan argues that the court is speaking of a right to control *in principle*.⁴⁰ The fact that the employer does not choose to exercise the right of control will not render the contract something other than one of employment,⁴¹ provided the employer has the ability to exercise the right of control. Mureinik points out that what this contention overlooks is that the content of the right of control is the right of detailed supervision, that is, detailed supervision as to the manner in which the work is done.⁴² He argues that this is the problem, because the employer cannot supervise all work in detail.⁴³ He continues by asking the apt question: "Is it not artificial to distil from a right which is not only never exercised, but which is inherently incapable of exercise, the acid test for the existence of an employment contract?"⁴⁴ In the words of Schreiner JA, "the presence of a right of control, as opposed to the actual practice of control, will often prove so difficult of verification as to make it most unsuitable as a test for the purposes of such regulations as these".⁴⁵ To do so places a premium, Mureinik continues, on the existence of a right so theoretical as to be almost fictitious, with the result that it divorces the legal criterion from social reality.⁴⁶

Mureinik then asks another important question: "[I]s it necessarily true that the right exists even in theory?"⁴⁷ He argues as follows: The application of the control test for the existence of a service contract implies that control is one of the *essentialia* of the contract.⁴⁸ As an *essentialia* the right of control is to be stated expressly. But usually this right of control is not stated expressly,

³⁷Ibid.

³⁸*R v Feun* 1954 (1)SA 58 (TPD) at 60H - 61A.

³⁹*Rodrigues v Alves* 1978 (4)SA 834 (A) at 842 A.

⁴⁰Grogan *Workplace Law* 1996 page 13.

⁴¹Grogan *Riekert's Basic Employment Law* 1993 page 10.

⁴²Murcinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 249.

⁴³Ibid.

⁴⁴Ibid.

⁴⁵*R v AMCA Sevices Ltd and Another* 1959 (4) SA 207 (A) at 213 D.

⁴⁶Murcinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 249.

⁴⁷Ibid.

⁴⁸Murcinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 249.

especially when the employee is more skilled than the employer. If this is so, then from what may this right of control be inferred? Mureinik continues that in these cases the right of control could not be said to exist in theory unless it is implied *ex lege*, that is, it is one of the *naturalia* of the contract.

“This it could not be if it was the test for the existence of the contract. It would be circular to infer the contract from the right of control and the right of control from the contract. And even if it were assumed that the test is not control, where the employee contracts to work remote from supervision or where he possesses more skill than his employer... the right of control must surely be taken to have been excluded by necessary implication.”⁴⁹

Brassey attacks the control test for its impracticality.⁵⁰ Taken literally, it identifies people as employees who are not, for example National Service men who peel potatoes in the mess.⁵¹ And what of “the problem created by the independent contractor who, willing to trust the good sense of the employer, agrees to work in accordance with instructions”?⁵² Furthermore, Brassey sees the test failing because it insists that the employer should be the repository of the right of control.⁵³ This, according to Brassey, has nothing to do with the fact that control in a large undertaking is normally exercised by supervisory staff and not by the employer personally.⁵⁴ Rather, it deals with the case where the employer expressly agrees not to interfere in the way the job is done, and someone else - an employee or independent third party - is appointed to supervise the worker. Proponents of the control test would have to say that there is no employment relationship between this worker and the employer, but this conclusion seems unrealistic.⁵⁵

⁴⁹Mureinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 250.

⁵⁰Brassey *The Nature of Employment* 1990 page 912.

⁵¹*Ibid.*

⁵²*Ibid.* Brassey suggests that a solution perhaps is found in *Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance* 1968 2 QB 497 where MacKenna J recognised that “the right of control can never be a sufficient condition for the existence of an employment relationship (at 516G-517A). At best it is a necessary one.” (Brassey *The Nature of Employment* 1990 page 912) Brassey continues highlighting that even in this role it fails, this is so because the test “prefers form above substance, looking at the source of the control rather than its nature. By postulating that the employer must have a residual right, however attenuated, to give the worker instructions, it excludes from employment those cases in which the way the job must be done is exhaustively prescribed by the contract.” (Brassey *The Nature of Employment* 1990 page 913).

⁵³*Ibid* page 913.

⁵⁴ “[T]he supervisory staff obviously exercise the right of control as the employer’s agents, [in the loose sense, see footnote 144 page 913 of Brassey *The Nature of Employment* 1990] and the employer invariably retains the ultimate right of control over each employee in the firm.” (Brassey *The Nature of Employment* 1990 page 913.

⁵⁵*Ibid* page 913-4.

“Accepting that a third party can have exclusive right of control over employees would probably destroy the control test; for, once this proposition is conceded, it becomes impossible to see why the employee should not, as it were, be that third party; why, in other words, it is incompatible with employment that the worker should have the discretion to decide how the job is to be done. If, for example, a person hired to manage a hotel under the supervision of the owner is an employee, one cannot understand why he should cease to be so when the owner decides to retire and puts his accountant, or the manager himself, in ultimate control of the business.”⁵⁶

From the above difficulties it comes as no surprise that the control test did not survive. It was only the endorsement by the Appellate Division in *Colonial Mutual Life Assurance Society Ltd v MacDonald* kept it alive for so long. Before *Colonial Mutual Life Assurance Society Ltd v MacDonald*, courts started describing the right of control not as decisive but merely as important.⁵⁷ The result was that the control test became no absolute test at all, but no one really said as much until *Smit v Workmen’s Compensation Commissioner*.⁵⁸

2.2.2 The Organisation Test.

Dissatisfaction with the control test led to the organisation test being adopted by the Appellate Division in *R v AMCA Services (Pty) Ltd*⁵⁹ which will be discussed here under.

The organisation test was first concisely articulated by Kahn-Freund who argued that the key question was whether the alleged employee formed part of the employer’s organisation.⁶⁰ An employee was one who agreed to work for another and who found himself or herself in a subordinate position to the employer through having submitted contractually to the employer’s power of organisation.⁶¹ In other words, the test depends on whether the person is “part and

⁵⁶Ibid page 914.

⁵⁷Brassey relies on the following authorities: *De Beer v Thomson and Son* 1918 TPD 70 at 76, *Dennis Edwards and Co v Lloyd* 1919 TPD 291 at 295, *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4)SA 446 A at 456H, *Lichaba v Shield Versekeringsmaatskappy* 1977 (4)SA 623(O) at 635F-H, *Sasverhijl Beleggings en Verdiskonterings Maatskappy v Van Rhynsdorp Town Council* 1979 (2) SA 771 (W).

⁵⁸1979 (1) SA 51 (A). See Brassey *The Nature of Employment* 1990 page 915. It should be noted that in the law of Delict, the control test in the determination of a master and servant relationship is still being applied for the purposes of fixing the master with liability for the servant’s Aquilian wrongs. Mureinik *The Contract of service-An easy test for hard cases* 1980 page 248, see also *Rodrigues v Alves* 1978 (4) SA 834 (A).

⁵⁹*R v AMCA Services Ltd and another* 1959 (4) SA 207 (A).

⁶⁰Kahn-Freund *Servants and Independent Contractors* 1951 14 Modern Law Review 504 at 507 cited in Mureinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 251.

⁶¹Mureinik *The Contract of service-An Easy Test for Hard Cases* 1980 page 251.

parcel of the organization.”⁶²

The essence of this test, “which would seem to have been prompted mainly by considerations of social and economic policies, turns on the integration of the employee into the employer’s business.”⁶³ Or, in the words of Lord Denning:

“under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract of services, his work, although done for the business is not integrated into it but is only accessory to it.”⁶⁴

In *R v AMCA Services Ltd and another*,⁶⁵ Schreiner JA,⁶⁶ who delivered the judgement, saw the question to be decided as whether premium collectors were “employed or working for any other person” within the definition in the cost of living regulations contained in War Measure 43 of 1942, as amended. Schreiner JA commented that though each statutory definition of employee stands primarily by itself,⁶⁷ he noticed that the statutory language attempted to make the cost of living allowances net wide, and was so wide that it obviously had to be cut down to exclude certain cases.⁶⁸ As a result, he continued, one seeks a test to judge whether a person who in the widest sense works for another falls within the scope of the Regulations.

The first test that was considered by the court was whether the employer had the right to control, not only the end to be achieved by the other’s labour and the general lines to be followed, but the detailed manner in which the work was to be performed.⁶⁹ Seeing that the right of detailed control

⁶²Denning LJ in *Bank voor Handel en Sheepvaart NV v Slatford and Another* 1952 2 All ER 956 (CA). at 295 cited in Murcinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 252.

⁶³*Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A) at 63 E, per Joubert AJ.

⁶⁴*Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* (1925) 1 TLR 101 at 111. Cited in *South African Labour Law* Thompson and Benjamin, part E by B Jordaan page 5.

⁶⁵1959 (4)SA 207 (A).

⁶⁶Malan JA, and A B Beyers JA, concurred.

⁶⁷*R v AMCA Services* 1959 (4) SA 207 (A) at 211 H.

⁶⁸At 212 E.

⁶⁹“[T]he principal reason for distinguishing between the servant and the independent agent is to fix the employer’s liability for the other’s delicts. To explain the reasons for the master’s special liability for the delicts of his servant when he has not authorised them, and even when he has expressly prohibited them, has proved no easy task. The main reason may be historical, that, as Holmes put it in *The Common Law*, service is ‘the decaying remnant of an obsolete institution’, slavery. But at any rate if the employer can control, or at least has the right to control, the detailed manner of the other’s work, it is not obviously unreasonable to hold the employer liable. But if the right of detailed control is crucial in deciding whether a person is a common law servant for the purposes of the law of delict, there seems to be no reason, in common sense, why it should be crucial in deciding whether a person is or is not an employee as defined in the present regulations.”Schreiner

was crucial in resting liability on the employer for the employee's delict it did not follow that the right of control was instructive in deciding if the person was or was not an employee. Rather, for Schreiner JA, the true test was one that incorporated the aim of the Regulations at requiring the payment of a cost of living allowance for the lower paid members of an organisation but not for payment to persons outside of the organisation.

"Inside the organization you may have persons whose work is subject to close control, or to slight control or to no control at all, as may seem most convenient. Some of the workers in the organisation may be paid by time and may be required to work during fixed hours at specified places. Others may be paid by results and may not be restricted in regard to hours of work or where it is to be done. Some may have transport or other equipment provided, others may have to provide their own. Some may have no latitude to work for other concerns, competing or non-competing, others may have some such latitude. Some may work under the supervision or subject to inspection, others not. Some may be subject to regular leave agreements, others not. Though none of these considerations will by itself be decisive they will all to a greater or lesser extent throw light on the problem whether the persons in question are inside or outside the business organisation or not."⁷⁰

It was, however, held that the work done by the collectors was work done inside the company's organisation. The collectors were performing the company's work and not their own, they were members of its organisation and were therefore employees within the scope of the "definition".⁷¹

"It seems to me that the general picture of the work done by the collectors is that of work done inside the company's organisation. In the nature of things a fair amount of latitude was left to them, but they had their rounds to do and what they were doing was primarily the company's work not merely their own. They were members of its organization and therefore employees within the definition."⁷²

In the above decision it would seem that control or the lack thereof would merely function as an indicator as to whether or not a person forms part of an organisation - or is integrated into the organization. This still, however, begs the question of what forms the criteria of being part of or being integrated into an organization.

In the later judgement of *S v AMCA Services (Pty) Ltd*⁷³ the only question to be decided was whether the "collectors" were employees within the scope of the definition in the Regulations.

JA dismissing the control test at 212 H to 213 B.

⁷⁰At 214 - 214 C.

⁷¹At 214 G-H.

⁷²At 214 G-H.

⁷³1962 (4)SA 537 (A).

Before 1957, in the decision of *R v AMCA Ltd and another* the collectors were held to be employees but since then the terms had been altered; it was contended that the alterations no longer made the collectors employees.⁷⁴

Botha JA⁷⁵ held it was clear that the organisation test was not used by Schreiner JA for the purpose of deciding whether a person is employed by or works for another, rather the organisation test was utilised for the purpose of excluding from the wide scope of the regulations persons who, though they may in a sense be said to be working for another, were not “employed by or working for” such other person within the meaning of the regulations. It followed, therefore, that the organisation test could not be used to bring within the Regulations persons who did not work for another.⁷⁶

Therefore, the need to apply the organisation test may arise if the response to the following questions are in the affirmative: can the collectors be said to be employed by or working for the company in the ordinary broad sense, and can they be entitled to be paid in respect of such employment or work?⁷⁷ In short, it is important, firstly, to decide if the collectors are employees by using the “traditional test”. If held to be employees and they fall outside the company’s organisation then those employees may be excluded from the operation of the regulations. The result was that the organisation test as a test for distinguishing the contract of employment from other relationships was rejected in *S v AMCA Services (Pty) Ltd*.⁷⁸

In *Smit v Workmen’s Compensation Commissioner*,⁷⁹ Joubert JA held:

“The essence of this test, (the organisation test) which would seem to have been prompted mainly by considerations of social and economic policies, turns on the integration of the employee into the employer’s business. But it fails to shed any light on the legal nature of integration... In my view the organization test is juristically speaking of such a vague and nebulous nature that more often than not no useful assistance can be derived from it in distinguishing between an employee (*locator operarum*) and an independent contractor (*conductor operis*) in our common law.”⁸⁰

⁷⁴*S v AMCA Services (Pty) Ltd* 1962 (4)SA 537 (A) at 540 F.

⁷⁵With whom Steyn CJ, Beyers JA, Rumpff JA, Williams JA concurred.

⁷⁶At 541 E-F.

⁷⁷At 541 G.

⁷⁸1962 (4)SA 537 (A).

⁷⁹1979 (1) SA 51 (A).

⁸⁰At 63 D-F.

Furthermore, in *Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance*, MacKenna J commented that the organisation test:

“raises more questions than I know how to answer. What is meant by being ‘part and parcel of an organization’? Are all persons who answer this description servants? If only some are servants, what distinguishes them from the others if it is not their submission to orders?”⁸¹

Riekert states the reason for the organisation test’s failure is that it begs two questions: “how much organization must there be before one is integrated in it; and what degree of integration is necessary?”⁸² What actually is meant by the use of the phrase “in the organisation” is no doubt the test’s greatest downfall.⁸³

Due to the test’s vague and nebulous nature as well as its ability to raise more questions than it settles, the organisation test has been rejected and has not been relied upon since *R v AMCA Services Ltd and another*.

2.2.3 The Dominant Impression Test

The main feature of this test is that the court, in deciding if an employment relationship exists, will view the relationship as a whole and from this formulate its decision.⁸⁴ Where a relationship has the elements of both an employment relationship and another the court will sort from the facts what the “dominant impression” of the contract is.⁸⁵ In line with this, it is easier to locate what the contract of employment is not, rather than what it is.⁸⁶

In *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB*⁸⁷ the court did not spell out exactly what may be included in the “general picture”, but some guidance is to be found from the English case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*⁸⁸ in which MacKenna J sets out three possible components:

⁸¹*Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance* 1968 2 QB 497 at 524 B-C.

⁸²Riekert *Basic Employment Law* 1987 page 9.

⁸³Brassey *The Nature of Employment* 1990 page 917.

⁸⁴See *Medical Association of SA and others v Minister of Health and another* [1997] 5 BLLR 562 (LC) where the court used this test in finding a relationship of employment.

⁸⁵*Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4)SA 446 (A) at 457 A.

⁸⁶At 458 A to C.

⁸⁷1976 (4)SA 446 (A).

⁸⁸1968 2 QB 497.

“(1) The servant agrees that in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make the other master. (3) The other provisions of the contract are consistent with it being a contract of service.”⁸⁹

Under the third heading, which is intentionally wide, the court will be free to approach any indication that the contract is or is not representative of the nature of an employment relationship. It must be noted that the parties’ own description of their relationship is never conclusive, particularly if the court finds that the facts support a conflicting conclusion.⁹⁰

What must a court obtain the dominant impression of to classify the contract as one of employment? Mureinik states the court should glean an impression of a contract of master and servant.⁹¹ The judge’s task is to classify the contract. He or she may, in performing this task, take into account other matters besides control.⁹² The presence of the right of control over the servant, under this test, is, however, one of the most important *indicia* that a contract of employment in all probability was entered into.⁹³ That is, the more control exercised by the employer, the more probable it will be that a contract of employment exists. The existence of such a right is, however, not the sole criterion for the existence of the relationship of employment but rather an important *indicia*. What other *indicia* are to be considered will depend on the provisions of the contract in question.⁹⁴

Mureinik comments that it “seems plain that while the notion of employment may have sufficient content to enable an employee to be identified in simple (non-penumbral) cases, the ‘dominant impression’ test offers no guidance in answering the (legal) question whether the facts are of such a nature that the *propositus* may be held to be a servant within the meaning of the common law in difficult (penumbral) cases. Indeed, it is no test at all.”⁹⁵ He continues by pointing out that to

⁸⁹Cited in Grogan *Workplace Law* 1996 page 14.

⁹⁰*Ready Mixed Concrete v Minister of Pensions* 1968 1 All ER 433 Q.B at 439 H to 440A, Grogan *Riekert’s Basic Employment Law* 1993 page 12, see also *Imperial Cold Storage v Yeo* 1927 CPD 432, *S v Lyons Brooke Bond Tea (Pvt) Ltd* 1981 (4) SA 445 ZAD.

⁹¹Mureinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 258.

⁹²*Ready Mixed Concrete v Minister of Pensions* 1968 1 All ER 433 Q.B at 441 A.

⁹³*Smit v Workmen’s Compensation Commissioner* 1979 (1)SA 51 (A) at 62 D to E.

⁹⁴*Smit v Workmen’s Compensation Commissioner* 1979 (1)SA 51 (A) at 62 F.

⁹⁵Mureinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 258.

say an employment contract is one which looks like one, sheds no light whatsoever on the “legal nature” of the relationship between an employer and employee.⁹⁶ Brassey agrees, and continues that the test “...is unhelpful, indeed it is no test at all, but merely a shorthand way of saying that the decision must not be taken without considering all the relevant factors.”⁹⁷ But the test has value “for its rejection of the notion that any one factor can be decisive in determining the nature of the relationship.”⁹⁸

Therefore it can be appreciated why Brassey would comment that,

“(t)he truth is that no test exists for determining who is an employee, if by that is meant some touchstone by which the relationship can quickly and certainly be identified. It would be surprising if there were. Employment is a complex and multifaceted social relationship; its forms are protean, and its existence must be divided by a process whose application goes unremarked in most other branches of the law, the process of assessing all the relevant facts.”⁹⁹

2.3 The nature of employment.

As has been highlighted, in discussing the three common law tests, defining the nature of the employment relationship is no easy matter.

“All past attempts to compose a concise definition of the terms servant or agent have failed so lamentably as to curb even the most impetuous. At the most it seems possible in fairly general terms to enumerate the more usual incidents and salient characteristics which by their presence or absence in any given instance may serve as an element tending to determine the relations of the parties.”¹⁰⁰

In Drake’s opinion the employment relationship is indefinable.¹⁰¹ Atiyah agrees, and comments that it is impossible to define the contract of service, especially in stating a number of conditions which are both necessary to, and sufficient for, the existence of such a contract.¹⁰² Brassey argues that contributing to the problem for lawyers in finding the right answer is their failure to pose the

⁹⁶Ibid.

⁹⁷Brassey *The Nature of Employment* 1990 page 920.

⁹⁸Ibid.

⁹⁹Ibid.

¹⁰⁰De Beer J, in *Cloete and Cloete v R* 1945 OPD 204 at 205, see also *Lichaba v Shield Insurance* 1977 (4)SA 623 (O) at 635, and M Brassey *The Nature of Employment* 1990 page 893.

¹⁰¹Drake *Wage Slave or Entrepreneur?* 1968 Modern Law Review 408 at page 418, cited in Brassey *The Nature of Employment* 1990 page 894.

¹⁰²Atiyah *Vicarious Liability in the Law of Torts* 1967 at page 38 (art 849), cited in Brassey *The Nature of Employment* 1990 page 894.

right question.¹⁰³ For Brassey, lawyers have mostly been asking what the employment relationship looks like, in other words, they have been looking for the feature or features which make the relationship distinct,¹⁰⁴ not the essence of the relationship - what employment “is”. Brassey continues that there might conceivably be such a touchstone, but its existence seemed unlikely, especially in light of the various forms the relationship might take. He points out that the quest has been futile, and even harmful, having a stultifying effect on the law; so that where there might have been a coherence of principle there is only confusion.¹⁰⁵ But is there then an essence?

Notwithstanding the above, if two parties entered into a contractual relationship, then that relationship is to be determined and defined within the contract.¹⁰⁶ The search for the true relationship is the search for the true intention of the contracting parties.¹⁰⁷ It is in locating the true intention of the parties that the various tests, as examined above, have been utilised.

In *Colonial Mutual Life Assurance Society Ltd v MacDonald* control exercised over the employee was utilised to distinguish the employment relationship from others. Given the ensuing difficulties associated with the control test, courts shifted emphasis and started relying on a dominant impression made by the unique factual indicators of each case. Therefore, when considering the true intention of the parties in a particular contract regard must be had to the wording of the contract’s own provisions as a whole.¹⁰⁸ However, one should guard against elevating the provisions of a considered contract in a decided case as a yardstick for the conclusion of a similarly worded contract. Each case is to be decided on its own unique facts in determining its nature or essence. With that said, however, “decided cases are helpful in telling us what factors are relevant and why.”¹⁰⁹ Although no one factor is decisive, and there seems to be no exhaustive list of relevant factors, control is seen as particularly important.¹¹⁰

“No longer was the right of control seen as determinative: now it became simply one of

¹⁰³M Brassey *The Nature of Employment* 1990 page 895.

¹⁰⁴Such as control, the right of control, the right of control over residual matters, integration into the organisation, subordination.

¹⁰⁵M Brassey *The Nature of Employment* at page 895.

¹⁰⁶See Brassey at page 920.

¹⁰⁷The intention of the parties is conclusive. See *Briggs v CMS Support Services (Pty) Ltd* [1997] 1 BLLR 62 (IC) at 70 D-I. And *Opperman v Research Surveys (Pty) Ltd* [1997] 6 BLLR 807 (CCMA) at 810 A.

¹⁰⁸*Smit v Workmen's Compensation Commissioner* 1979 (1)SA 51 (A) at 68 E-F.

¹⁰⁹Brassey *The Nature of Employment* 1990 page 923 relying on *Smit v Workmen's Compensation Commissioner* 1979 (1)SA 51 (A) at 68 E-F.

¹¹⁰*Ibid*.

a number of factors to be considered in deciding on the nature of the relationship - the most important one, perhaps, but not the only one. The proper approach, the courts started saying, was to decide the issue on an assessment of all the relevant factors.”¹¹¹

The above reservations notwithstanding, control is an important indication of the employment relationship. As an indicator, control consists of the contractual right the employer holds to order *what* work is to be done, and *when*, *where* and *how* the work is to be done. The control, however, does not require the employer to have the personal ability to enable himself or herself to show the other party *how* the work is to be done; it is enough if he or she has the right to exercise control over the manner in which the work is to be done. For example, if a manager of a business has no knowledge of how to program a computer, he or she, nevertheless, has control over the accountant to lay down that a computer shall be used for keeping the firm’s accounts.¹¹²

The tests of control, organisation, and dominant impression are used to locate and distinguish the employment relationship from others. The test is not the relationship, but as tests they endeavour to identify the employment relationship and distinguish it from others. As a result these “indicators” used in the dominant impression are “characteristics” of the relationship of employment and serve to reveal the object of the contract.¹¹³ The indicators are not the object of the contract of employment rather they are expressions of it in practice.¹¹⁴ The question then to be asked is; what does “control” or the other indicators tell us about the essence or nature of the employment relationship?

According to Brassey, the object of the employment relationship would be conclusive of its nature.¹¹⁵ This, Brassey argues, must be so, for the object of the contract determines the parties’ rights and obligations, and they in turn determine the characteristics of the relationship.¹¹⁶

“[T]he object of the contract of service is the rendering of personal services by the employee ... to the employer... . The services or the labour as such is the object of the contract. The object of the contract of work is the performance of a certain specified work or the production of a certain specified result. It is the product or the result of the

¹¹¹Ibid at page 897.

¹¹²Kerr *The Law of Agency* 1991 page 40.

¹¹³See in general Brassey *The Nature of Employment* 1990 page 900-1.

¹¹⁴Ibid.

¹¹⁵Brassey *The Nature of Employment* 1990 page 900.

¹¹⁶Brassey *The Nature of Employment* 1990 page 900 footnote 63.

labour which is the object of the contract.”¹¹⁷

The above, according to Brassey, is where Joubert JA isolated the traditional nature of the relationship, one that remains unchanged by time, but which the Judge nevertheless failed to apply consistently; instead he chose to regard the contract’s object as just one of several important characteristics of the contract.¹¹⁸ The above isolated object of the employment contract suggests to Brassey that an employee is a person who makes over his or her capacity to produce to another; while an independent contractor is a person who commits to the production of a given result by his or her labour.¹¹⁹ “In the one case what is transacted is the capacity to work, in the other it is the product of it.”¹²⁰ Clearly Brassey prefers the surrender of the *capacity to work* as the heart of the relationship,¹²¹ and it is this surrender, of the capacity to work, which pervades the obligations the parties owe each other.

“It explains ... why the mere tender to work is enough to entitle the employee to the payment of his wage; implicit in the tender is the requisite surrender of productive capacity, and it is this that is the consideration for the wage. It also explains why ... the employee has a duty in law to obey the employer’s reasonable instructions whereas the independent contract does not; the instructions determine the work the employee must do, whereas the contractor’s job is fixed by contract.”¹²²

The result of surrendering one’s capacity to work is that the employee must be at the “beck and call” of the employer in order to render his or her personal services at the behest of the latter.¹²³ It is these instructions of the employer that determine the work the employee must do, whereas the contractor’s job is fixed by contract.¹²⁴

¹¹⁷*Smit v Workmen’s Compensation Commissioner* 1979 (1)SA 51 (A) at 61A-B.

¹¹⁸Brassey *The Nature of Employment* 1990 page 900.

¹¹⁹Brassey *The Nature of Employment* 1990 page 899.

¹²⁰*Ibid.*

¹²¹Brassey *The Nature of Employment* 1990 page 902 quotes R Hyman *Industrial Relations: A Marxist Introduction* (1975) page 24 to the following effect when Hyman describes the employment relationship: “no employer can exactly predict his workload or the labour available at any given point in time. He thus requires to be able to make flexible use of his labour force; and the contract of employment permits him to impose just such an open-ended commitment on his employees. Rather than agreeing to expend a given amount of effort, the employee surrenders his capacity to work; and it is the function of management, through its hierarchy of control, to transform this capacity into actual productive activity”.

¹²²*Ibid.*

¹²³*Smit v Workmen’s Compensation* 1979 (1)SA 51 (A) at 61 B-C, see also: *S v AMCA Services (Pty) Ltd* 1962 (4) SA 537 (A) at 542 H. *Ongevallekommissaris v Onderlinge Verzekeringsgenootskap Al’BOB* 1976 (4)SA 446 (A) at 461H-462D, *Dennis Edwards and Co v Lloyd* 1919 TPD 291 at 296, *Goldberg v Durban City Council* 1970 (3)SA 325(N) at 330 E- 331 A.

¹²⁴Brassey *The Nature of Employment* 1990 page 902.

It is submitted, that by stressing that the employee contracts away his or her capacity to produce indicates that the employee submits himself or herself to the authority of the employer, the employer thus “controls” the employee.

To borrow the words of Kahn-Freund:

“... [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indisputable figment of the legal mind known as the ‘contract of employment’.”¹²⁵

A position of subordination is taken up by the employee when he or she contracts away his or her capacity to produce in favour of the employer.

As was indicated above for Mureinik the *essentialia* of the contract of master and servant is control and the rendering of labour,¹²⁶ which is also the object of the contract.¹²⁷ With this in mind, the test,¹²⁸ strictly speaking, is not that of control alone.

“The test is whether there has been agreement that the alleged servant should work for the alleged master and that he should submit to the alleged master’s right of detailed supervision of the manner in which the work is done. Agreement that the alleged employee should work for the alleged employer, however, is implied in agreement on the employer’s right of control of the manner in which the work should be done: one cannot submit to supervision of one’s labour without also agreeing to work.”¹²⁹

Mureinik begins his analysis and search by asking if any guidance can be salvaged from *Smit v Workmen’s Compensation Commissioner* and *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB*. These judgements point to a variety of factors that contra-

¹²⁵Cited in Mureinik *Contract of Service: an Easy Test for Hard Cases* 1980 page 257.

¹²⁶Mureinik dismisses the paying of wages or a salary as an essential element of the contract. “Some other form of remuneration (such as the payment of commission) is not necessarily incompatible with the existence of a master-servant relationship (*Imperial Cold Storage v Yeo* 1927 Cpd 432 at 435; *R v Freun* 1954 (1)SA 58 T at 62), although it is one of the *indicia* that the contract is not one of employment (*AVBOB(supra)* at 461,463; *Smit(supra)* at 68). Nor is remuneration itself an *essentialia* of the contract (*Rodrigues v Alves(supra)* at 841). ...the duration of the contract is also not an essential element, and, if left open by the parties, is governed by the *naturalia* (*Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325, 326).” Mureinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 249, footnote 16, to page 250.

¹²⁷Mureinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 249, footnote 16.

¹²⁸*Ibid.*

¹²⁹*Ibid.*

indicate the existence of the employment relationship. The contra-indications are that:¹³⁰

- 1) "The alleged master has no right to supervise in detail the manner in which the work is done".¹³¹
- 2) "The alleged servant is in a position of independence in the performance of his duties."¹³²
- 3) "The alleged servant is not precluded by the contract from working for another."¹³³
- 4) "The alleged servant is not required to devote a specific amount of time to the service of his alleged master."¹³⁴
- 5) "The alleged servant may take a vacation without the consent of the alleged master."¹³⁵
- 6) "The alleged servant is not obliged to perform his duties personally."¹³⁶
- 7) "The alleged servant is remunerated by commission."¹³⁷
- 8) "The alleged master and the alleged servant jointly supply the facilities to enable the latter to work for the former."¹³⁸
- 9) "The object of the contract is the result of the alleged servant's activities and not the rendering of personal services by him."¹³⁹
- 10) "The alleged servant is liable to the alleged master for the loss of the latter's property from the former's possession even if the loss is not attributable to the alleged servant's default."¹⁴⁰
- 11) "The alleged servant guarantees as co-principal debtor the credit granted by him on behalf of the alleged master."¹⁴¹

¹³⁰Murcinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 260.

¹³¹Murcinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 261, *Smit v Workmen's Compensation* 1979 (1)SA 51 (A) at 68, *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4)SA 446 (A) at 456.

¹³²Murcinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 261, *Smit v Workmen's Compensation* 1979 (1)SA 51 (A) loc cit.

¹³³Murcinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 261, *Smit v Workmen's Compensation* 1979 (1)SA 51 (A) at 67, *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4)SA 446 (A) at 461-2.

¹³⁴Murcinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 261, *Ogevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* loc cit.

¹³⁵Murcinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 261.

¹³⁶*Smit v Workmen's Compensation* 1979 (1)SA 51 (A) at 67- 68, *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4)SA 446 (A) at 460, 462.

¹³⁷*Smit v Workmen's Compensation* 1979 (1)SA 51 (A) at 68, *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4)SA 446 (A) at 461, 463.

¹³⁸*Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4)SA 446 (A) at 459.

¹³⁹*Smit v Workmen's Compensation* 1979 (1)SA 51 (A) at 67-8.

¹⁴⁰*Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4)SA 446 (A) at 460-1.

¹⁴¹*Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4)SA 446 (A) at 463.

Mureinik believes that the above factors are linked by some “unifying theme”, and that this is the “same perception which underlies both the control test and the organisation test: that the contract of employment represents a relationship in which the employer occupies a dominant position.”¹⁴² Thus *indicia* 1, 2, 3 point toward a relationship in which the supplier of services enjoys a degree of independence. And *indicia* 4, 5, 6 “tend to show that the alleged servant has retained his independence by declining to submit to the alleged master’s power of organisation in the workplace.”¹⁴³ Item 7 indicates economic independence.

In light of the above, Mureinik argues that the principle defect from which the *Smit-AYBOB* approach suffers “is that it promotes the factors tending to establish the employee’s subservience - and which are thus only evidence of the true criterion - into the test itself. The same flaw, in an aggravated form, mars the control test: it elevates the right of supervision, which is also only evidence of the employer’s domination - and evidence of one sort only - into the determinate of the contract. A similar weakness may account for the failure of the organisation test to have gained more than marginal support: it emphasizes a single aspect of subservience only - subordination to the employer’s power of organisation.”¹⁴⁴

For Mureinik, a service contract is an agreement in which one party (the employee) agrees to work for another (the employer) in which the employee occupies a subordinate position.¹⁴⁵ Thus there are two *essentialia* of the employment relationship, firstly, the giving over of one’s personal services, and secondly, being in a subordinate position to the employer. The subordinate position of the employee is the distinguishing feature of the employment relationship. As one of the *essentialia* of the contract, the employee owes a duty to be subordinate to the employer and the employer has the correlative right to demand subordination.¹⁴⁶ In the words of Brassey, a position of subordination is taken up by the employee when he or she contracts away his or her capacity to produce in favour of the employer. Essentially the distinguishing feature - perhaps essence would be a better word - of the employment relationship is “subordination”.

¹⁴²Mureinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 261.

¹⁴³*Ibid* page 262.

¹⁴⁴*Ibid* page 263.

¹⁴⁵*Ibid*.

¹⁴⁶*Ibid* page 265.

Is the subordinate position of the employee an essential term from which the contract of employment may be inferred?

Firstly, Mureinik concedes that subordination is ordinarily thought of as a descriptive quality of the contract which is inferred from the terms agreed upon and not as a term itself. But, he continues, if it is felt desirable that the quality of subordination be transmuted into a term of the contract then authority is not wanting. In *Jamieson v Elsworth*,¹⁴⁷ where insolence was held by Innes CJ to be a breach of the contract of service, it was held that the servant's duty to be courteous to the employer was inferred from the fact that he occupies a subordinate position.¹⁴⁸

“Stated in this form the decision is a *non sequitur*: that the relationship is one of subordination affords no ground for entrenching the imbalance by imposing a duty on the servant to respect this circumstance. It is a philosophical commonplace that an ‘ought’ cannot be derived from an ‘is’; the *status quo* cannot, without more, give rise to an obligation to maintain itself.”¹⁴⁹

Mureinik appears to be contending that one may not argue that because there is this fact of subordination in the relationship of employment that the employee then ought to owe the employer the duty of subordination. He is to owe the duty. If there is this state of subordination, because the servant is in a subordinate position, then there is a duty to be subordinate. Mureinik then concludes that the learned Judge's reasoning only makes sense if the fact of “subordination is accompanied by - and buttressed by - an obligation to be subordinate.”¹⁵⁰ Thus the servant's duty to be civil, should be inferred not from the fact of subordination but from the duty of subordination. “The fact of subordination ... is *ex hypothesi* always present in a contract of master and servant; an obligation that invariably accompanies it must therefore be an essential term of the agreement.”¹⁵¹ In short, the contract contains the obligation to be subordinate. The fact of subordination is always present, but it is only the legal right and duty that make subordination factually present. The factual situation flows from the right to demand subordination and the duty to be subordinate.

It is from the essential terms of the contract that the other indicators flow, they are evidence of

¹⁴⁷1915 AD 115.

¹⁴⁸At 118.

¹⁴⁹Mureinik *The Contract of Service-An Easy Test for Hard Cases* 1980 page 264.

¹⁵⁰*Ibid.*

¹⁵¹*Ibid* page 264 to 265.

the “unifying theme”. Therefore the “indicators” are expressions of the unifying theme, and, furthermore, are not an exhaustive list of all the possible manifestations of the “unifying theme”. The control and organisation tests each focussed on a specific characteristic of the employment relationship, namely detailed supervision and power of organisation. All the tests’ failed because they focussed on a specific part of the true test, that is subordination and work done within the organisation. If this is so, then the essential ingredient that makes the employer and employee relationship different from other contracts is this subordination. This is the conclusion to which the dominant impression test points.

The above mentioned tests all highlight certain unique characteristics or indicators of the contract of employment which are physical manifestations of the object, nature or the essence thereof. Therefore all the tests, when studied together, should reveal a “unifying theme” - the essence of the relationship. In agreement with Mureinik, the unifying theme is that the employee occupies a *de facto* subordinate position in relation to the employer and it is the *de jure* duty of the employee to occupy this position. The employer has the corresponding legal contractual right to oblige the employee to assume the duty to occupy the subordinate position, which makes subordination of the employee *de facto* present.

As a result the employee owes the employer a duty or obligation to be subordinate with the employer having a concomitant legal contractual right to demand obedience to this duty. This term of subordination forms an essential term of the contract of employment.¹⁵² Therefore insubordination, strictly speaking, is any conduct that breaches this term. Seeing that the “indicators” as discussed under the Dominant Impression test are characteristics - or manifestations - of this unifying theme then it stands to reason that any breach of these “indicators”

¹⁵²Thus when a person who is an employee claims to be a partner, when he or she is not then his or her dismissal is justified. This is so because in making such a claim the employee is refusing to perform any of the duties of an employee, the employee is breaching the basis of the employment relationship, being his or her subordinate standing and subjection to the control of the employer.

“Now if the plaintiff claimed to be a partner when he was not, I think his dismissal was justified. The only direct authority on this point is the case to which Mr Ward called my attention, *Amor v Fearon* (48 Rev. Rep. 584 see also *Ridgway v Hungerford Market Co* 42 Rev. Rep 352), which, so far as I am aware, has never been doubted. This argument in this case that the plaintiff’s action was *bona fide* in making the claim to be a partner was raised in that and dismissed- in my opinion, rightly. By claiming to be a partner the plaintiff was refusing to perform his duties any longer as a servant, and the defendant was thereupon justified in dismissing him. In my opinion, therefore, the claim for damages for wrongful dismissal fails.” *Hart v Pickles* 1909 TS-TH 244 per Smith J at 252.

is, surely, insubordination. Clearly then, if the employee acts contrary to the employer's right of control and supervision¹⁵³ - an "indicator" of subordination - he or she is breaching the essential term and is insubordinate - he or she commits the misconduct insubordination. The same would occur when the employee refuses to submit to the employer's power of organisation.¹⁵⁴ Similarly, when the employee is disrespectful towards the employer he or she commits the misconduct of insubordination, because his or her duty to assume a subordinate position in the employment relationship would oblige the employee to be civil towards the employer.

2.4 Conclusion.

In every employment relationship there must be a certain amount of control, exercised by the employer, over the means of producing the desired result. It is this control that gives the employment relationship its distinctive nature. The employment relationship is a relationship where the employer has control over the employee. This factual position of subordination is typical of the relationship. It is this factual subordinate position which is the *source* for the employer's contractual right to control what, when, where and how an employee's labour is to be used. This includes the employee's duty to respect the employer.

It is this subordinate position that is the essential term of the contract of employment, because it gives the relationship its distinctive nature. Any frustration of the above rights of the employer by the employee would be a fundamental breach of the contract, because it strikes at the root of the relationship.

Insubordination, therefore, is when the employee acts contrary to his or her obligation to be subordinate. Insubordination, therefore, can be any misconduct which is directed towards the employer's rights which flow from the essential "unifying theme" of subordination. Thus, if the employee does not obey an instruction from the employer on what, when, where and how to perform an instructed task then he or she is breaching the employer's right of control which in turn is a breach of the employer's right to demand that the employee be subordinate. Furthermore,

¹⁵³Any conduct which frustrates the employer's right in deciding how the employee's productive capacity is to be used, and when, where and what is to be achieved therewith will be insubordination.

¹⁵⁴Related to this is that the employee is not permitted to act independently of the employer nor work for another, and should perform his or her services personally.

the employee by acting in a subordinate position must show the employer a certain amount of respect, which if not done, in light of the above, amounts as well to the misconduct insubordination. In line with the above thinking, insubordination is the material breach of the obligations that flow from the employees essential obligation to remain in a subordinate position. The disobedience or disrespect of the employer would constitute such a misconduct, but the above mentioned may not necessarily be the only forms of misconduct which constitute insubordination, a breach of the employer's contractual right.

Chapter 3

INSUBORDINATION UNDER THE COMMON LAW CONTRACT OF EMPLOYMENT

3.1 Introduction.

As shown in Chapter 2 “subordination” is an essential term of the contract of employment. When the employee breaches this term by being insubordinate he or she is in law breaching the essence of the contractual relationship. The obligation to be subordinate in the employment relationship is evidenced by certain characteristics, which are manifestations of the obligation or duty. The employer’s right to control the means and ends of the employee’s work is such a “manifestation”. Notwithstanding what has been discussed in the preceding chapter the employer has the right to instruct how the personal services of the employee’s productive capacity are to be used, what is to be achieved, and when and where the employee is to work. If any of these physical manifestations of the employer’s right of control are frustrated or refused then the employee breaches the employer’s right of control and thus acts contrary to his or her duty to be subordinate, which constitutes insubordination. The same would occur when the employee was disrespectful towards the employee. If the employee occupies the position of subordination, he or she is bound to act towards and address the employer with a certain amount of respect. Therefore, when the employee is being disrespectful, he or she breaches his or her duty to be subordinate and is being insubordinate.

What this chapter will endeavour to locate and discuss is how the Court’s have in practice dealt with insubordination in the workplace. Traditionally insubordination was equated with the employee’s disobedience to a lawful instruction of the employer, but, as was highlighted in chapter two, insubordination includes disrespect.¹ Both forms of the misconduct entail the same breach of the employment contract, that being the employee’s duty, or obligation, to be subordinate.

“Subordination of the employee to the power of the employer has been said to be the hallmark of the employment relationship. That subordination is encapsulated in the employee’s implied duty to obey the employer’s lawful commands. ... The duty is generally said to involve two elements: the employee is obliged to obey the employer’s

¹“Disrespect or insubordination on the part of the servant may make the intimate relationship of master and servant untenable and justify dismissal if such disrespect is of a serious character.” *Norman-Scoble Law of Master and Servant in South Africa* 1956 page 148.

lawful commands and to behave in a respectful manner towards the employer and superiors.”²

The distinction between disrespect and disobedience was formally made only recently in *CCAWUSA v Wooltru Ltd t/a Woolworths (Randburg)*,³ in which insubordination was defined as a refusal by an employee “to obey a lawful and reasonable command or request”, which refusal was “wilful and serious (wilful disobedience),” or which “poses a deliberate (wilful) and serious challenge to the employer’s authority.”⁴ Insolence was distinguished from insubordination⁵ and equated with “disrespect” or “rudeness”. The effect of the *Wooltru* decision on the nature of insubordination will be discussed fully in the next chapter.

In line with the argument in chapter two, this chapter will set out dismissal for disrespect, briefly, and, more fully, for disobedience under the common law. The aim is to understand *both* forms of misconduct, that is disrespect and disobedience, as being part of and falling under the misconduct of challenging the employer’s authority, or breaching the employee’s duty to be subordinate, that is acting insubordinately. This is done to highlight the common laws understanding of the above mentioned forms of misconduct in the employment relationship.

3.2 Dismissal for misconduct in the contract of employment.

Under the common law, the contract of employment is treated essentially as any other contract. As such it could be cancelled in one of three ways:⁶ firstly, in terms of the contract, by giving the agreed period of notice or by expiration; secondly, by cancellation due to breach;⁷ thirdly, by mutual consent.

“Under the common law, an employee may be dismissed summarily only on the grounds of some misconduct justifying such summary dismissal; and it is only misconduct of such nature that it constitutes a breach of the contract of employment as material that it goes

²Thompson and Benjamin *South African Labour Law* (vol 1) amended service 36 of 1997 page E1-18.

³(1989) 10 ILJ 311 (IC) at 315 I.

⁴Cited in Le Roux and van Nickerk *The South African Law of Unfair Dismissal* 1994 page 139.

⁵Ibid.

⁶Coaker and Zeffert *Wille and Millin's Mercantile Law of South Africa* (18th edition) 1984 page 359.

⁷“Contracts of service do not differ essentially from contracts of any other kind. In every case where one party refuses to carry out his part of a contract the other party is justified in putting an end to it. The refusal need not be an express refusal; it may be implied from conduct. And I think that the rule, that the breach by one party of an essential term of a contract justifies the other party in putting an end to it, depends upon the consideration that the breach of an essential term is equivalent to a refusal to carry out the contract.” *Brown v Sessell* 1908 TS 1137 at 1142.

to the root of the contract which amounts to such misconduct... ”⁸

The common law test for summary termination in the contract of employment generally followed the rules of contract. The question to be determined was whether the plaintiff's failure to perform part of his or her obligations under the contract were sufficient to entitle the defendant to rescind. Although the courts have stated that “there is some difficulty in phrasing a test which can be applied in all cases in which it is necessary to determine whether a failure to perform part of a contract justifies rescission.”⁹ It may, nevertheless, be commented that cancellation would be justified if a party has breached a material term, that is a vital term - express or implied - which breaches the “root” of the contractual agreement.¹⁰ This is so because the breach indicates an unequivocal intention not to be bound to the contract.¹¹

What constitutes misconduct justifying dismissal is a matter “for the courts to decide in the circumstances of that case, the degree of misconduct justifying dismissal varying with the nature of employment. The question always is whether the servant has failed substantially in the performance of the contract...”¹² Insubordination, including disrespect, has been held to constitute a material breach of the contract of service, because the breach makes the continuation of the

⁸*Ngongoma v Minister of Education & Culture & others* (1992) 13 ILJ 329 (D) at 335 A, per Magid AJ.

⁹Goes to the root of the contract: “the phrase is not one which, without further elaboration, conveys a very clear meaning. As far as I can judge a breach going to the root of the contract is the same thing as a breach of a vital term. This view is supported by the judgement of De Villiers, JP, in *Transvaal Cold Storage Co v SA Meat Export Co* (1917 TPD 413). In discussing this test and explaining its meaning, Sir Frederick Pollock (9th ed. p. 282) says: ‘Can it be said that the promisee gets what he bargained for, with some shortcomings for which damages will compensate him, or is the point of failure so vital that his expectation is in substance defeated?’ And the author proceeds to quote the following passage from the judgement of Blackburn, J in *Bettini v Gye* (1, QBD 183): ‘We are to look to the whole contract and see whether the stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant had stipulated for; or whether it merely partially affects it and may be compensated for in damages.’ In applying that test to the case then before the Court, Blackburn, J, used the following language: ‘and if the engagement had been only for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days before the commencement of the engagement was a vital part of the agreement.’ I think the test to apply in the present case is whether the plaintiff failed to perform a vital part of his agreement. It seems to me to make no difference whether the term be express or implied.” *Strachan v Prinsloo* 1925 TPD 709 at 117.

¹⁰*Strachan v Prinsloo* 1925 TPD 709 at 717-718.

¹¹See Coaker and Zeffert *Wille and Millin's Mercantile Law of South Africa* (18th edition) 1984 page 359.

¹²Coaker and Schutz *Wille and Millin's Mercantile Law of South Africa* (17th edition) 1975 page 278; relying on *Kaplan v Penkin* 1933 CPD 223.

employment relationship impossible,¹³ and justifies cancellation.

3.3 Dismissal for Disrespect.

In the employment relationship, under the common law, the employee has contracted to be under the control of the employer. It is in this subordinate position that the common law has upheld the duty of the employee to be respectful to the employer in performing his or her duties.¹⁴

Disrespect, or insubordination, may make the employment relationship untenable and justify dismissal provided the disrespect is serious.¹⁵ However, if the disrespect occurs on one occasion it must be of an aggravated character to justify dismissal.¹⁶ What constitutes disrespect will depend on the facts of the case and the nature of the position the employee holds,¹⁷ as well as public policy¹⁸.

3.4 Dismissal for Disobedience.

Subordination is essential for the relationship of employment. The employee is under the authority of the employer, who in turn controls the employee's productive capacity for the employer's own benefit. The employer therefore has the contractual right to command what the employee is to accomplish and how, when, and where a task is to be performed. When the employee disobeys the instructions of the employer he or she challenges the employer's authority and acts in breach of his or her obligation to be subordinate. Consequently, the misconduct strikes at the root of the

¹³Ibid page 353, relying on *Jamieson v Elsworth* 1915 AD 115 and *Oaten v Bentwitch and Lichtenstein* 1903 TH 118.

¹⁴"The notions of command and subordination inherent in the employment relationship give rise to both the duty to obey and the duty to show respect. Disrespect or insubordination has to be of a serious and aggravated character to justify summary dismissal." Coaker and Zeffert *Wille and Millin's Mercantile Law of South Africa* (18th edition) 1984 page 361. See as illustrations, the judgements of: *Oaten v Bentwitch and Lichtenstein* 1903 TH 118, *Jamieson v Elsworth*, 1915 AD 115, *Miles v Jagger and Co*, 21 SC 513, *Gogi v Wilson and Collins* 1927 NLR 21, and Norman-Scoble *Law of Master and Servant in South Africa* 1956 page 148.

¹⁵Norman-Scoble *Law of Master and Servant in South Africa* 1956 page 148, see also *Leonard v Scott* 1894 11 SC 358 at 360.

¹⁶*Osche v Haumann* 1910 OFS 59 who at page 62 relies on *Callo v Brouncker* 4C and P 518, *Edwards v Levy*, 2F and F94. See also Norman-Scoble *Law of Master and Servant in South Africa* 1956 page 148 and in general Thompson and Benjamin *South African Labour Law* vol1 amended service 36 of 1997 Per B Jordaan page E1-19, as well as Coaker and Zeffert *Wille and Millin's Mercantile Law of South Africa* 18th edition 1984 page 362, who further cites *Jamieson v Elsworth* 1915 AD 115.

¹⁷See *Gogi v Wilson and Collins* 1927 NLR 21.

¹⁸Ibid.

employment contract, and because the misconduct may constitute a major breach of the contractual relationship, it may justify dismissal.¹⁹

3.4.1 A valid lawful instruction.

In the employment relationship when an lawful and reasonable instruction is given the employee is obliged to obey it or face dismissal.²⁰ The requirements for a valid lawful instruction will be discussed hereunder in three broad headings; namely: that the instruction should not contradict the “law”, that the instruction must be given in good faith, *bona fide*, as well as that the instruction should fall within the scope and parameters of the contractual relationship between the parties.

3.4.1.1 The instruction must accord with the law.

It is the contract of employment that brings about the subordinate position of the employee,²¹ and sets out, with other implied terms, the parameters of the employment relationship. It is essential that the contract of employment exists and is valid, that is, capable of being enforced.²² In short, the contract must be valid and enforceable if there is to be an employer and employee, with corresponding legal rights and duties.²³

The law demands that all agreements seriously entered into and intended to be legally binding should be enforced. Notwithstanding the above, public policy nevertheless requires that the freedom of contract should not be unfettered, therefore any agreement entered into which is aimed at harming the State or the public will not be enforced.²⁴

Contracts held to be contrary to the common law²⁵ or public policy or public morals are unlawful

¹⁹Norman-Scoble *Law of Master and Servant in South Africa* 1956 page 145, who refers to *Leask v French* 1949 (4) SA 887 (C).

²⁰See *McLean v Risch* 1914 CPD 731.

²¹*K v Koertman* 1904 18 EDC 160, though dealing with the breach of a statute it is still, nevertheless, instructive.

²²*R v Hlatiwayo* 1948 (4) SA 100 (TPD).

²³See Grogan *Workplace Law* 1996 page 31.

²⁴Coaker and Schutz *Wille and Millin's Mercantile Law of South Africa* 1975 page 29.

²⁵“In the sources we find two general ideas of the common law involving prohibitions affecting the validity of contracts, to wit good morals (*boni mores*) and public policy.” Joubert *General Principles of the Law of Contract* 1987 page 132.

and accordingly unenforceable.^{26 27}

“In general it can be stated that an apparently lawful promise if knowingly made for an illegal purpose will not be enforced, a promise illegal in itself will not be enforced, and a promise made in return for an unlawful consideration will not be enforced”.²⁸

If the contract is declared unenforceable - that is invalid - no obligation arises from the agreement and no action on the contract can be maintained.²⁹ The difference between public policy and good morals is difficult to explain.³⁰ It has been suggested, however, that the concept of “public interest” is the “test” for the invalidity of the contract.³¹ The important question then is whether the courts may determine what is, or is not, of public interest and whether public policy demands that a contract offending against the public interest be unenforceable.³² Courts have assumed that they may declare that there has been an alteration in public policy with the result that contracts that were formerly valid may be declared invalid.³³

Courts have the task of administering the law, thus “[a]ll that the courts can do is to find as a matter of fact that a particular contract does or does not offend against the public interest and that there is or is not a customary rule permitting the contract or prohibiting the contract.”³⁴ The *boni mores*, public interest and public policy are only relevant because they provide the basis upon which a decision of illegality is made in law.³⁵ This power to declare contracts contrary to public policy has to be “exercised sparingly and only in the clearest of cases, lest uncertainty as to the

²⁶All three expressions are interchangeable; Christie *The Law of Contract in South Africa* 1991 page 417, relying on *Sasfin (Pty) Ltd v Beukes* 1989 1 SA (A) 8 E-G. See also Coaker and Schutz *Wille and Millin's Mercantile Law of South Africa* 1975 page 28.

²⁷“Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised: but once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look at is the tendency of the proposed transaction, not its actually proved result.” Innes CJ in *Eastwood v Shepstone* 1902 TS 294 at 302 cited in Christie *The Law of Contract in South Africa* 1991 page 417.

²⁸*Kennedy v Steenkamp* 1936 CPD, cited in Coaker and Schutz *Wille and Millin's Mercantile Law of South Africa* 1975 page 28.

²⁹ Joubert *General Principles of the Law of Contract* 1987 page 151.

³⁰*Ibid* page 132.

³¹*Ibid* page 132-3.

³²*Ibid* page 133.

³³*Ibid* page 133, relies on *Eastwood v Shepstone* 1902 TS 294 at 302, *Hurwitz v Taylor* 1926 TPD 81, *Couzyn v Laforce* 1955 (2) SA 289 (T).

³⁴*Ibid*.

³⁵Van der Merwe *et al Contract General Principles* 1994 page 139.

validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."³⁶ Furthermore, in such an investigation it must be kept in mind:

"(a) that, while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest."³⁷

Courts should therefore only declare contracts contrary to public policy in the clearest of cases, but Courts "should not regard themselves as bound by the existing heads of public policy because human devilment and foolishness know no limits and the courts cannot set themselves limits which disable them from combatting such things."³⁸

From the above, it is clear that an unlawful element contained in a contract would cause the contract to be null and void. If the employment contract is void the employee would not be obliged to obey any instruction from the employer for the simple reason that the person is not an employee.³⁹ The next issue that needs to be dealt with concerns an illegal instruction given within a legal and binding contractual relationship.

If an unlawful instruction is given by the employer then the instruction itself will not necessarily cause the relationship as a whole to be null and void, only the instruction itself will be unlawful and unenforceable. An employee is not obliged to obey an unlawful instruction. Whether an instruction will be unlawful will depend on the circumstances of each case.⁴⁰ An instruction may be declared unlawful as to two general categories; firstly, in that the instruction offends legislation; and secondly, in that the instruction offends the common law directly or indirectly, indirectly because the instruction is unreasonable to the extent that it is unlawful. The above will be elaborated more fully hereunder.

³⁶*Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9 B, see Christie *The Law of Contract in South Africa* 1991 page 417 to 8.

³⁷Hocxter JA in *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782I-783C, cited in Christie *The Law of Contract in South Africa* 1991 page 418.

³⁸Christie *The Law of Contract in South Africa* 1991 page 418.

³⁹*R v Dube and another* 1928 OPD 181.

⁴⁰Norman-Scoble *Law of Master and Servant in South Africa* 1956 page 147.

In *Coetzee v Argus Printing and Publishing Co*⁴¹ the plaintiff entered the service of the defendant company upon the signing of a contract stipulating that the only holidays to which he would be entitled were Christmas and New Year's Day. On Union Day, which was declared a public holiday by Act 3 of 1910, the plaintiff absented himself from work although he had been expressly ordered to attend and was thereupon dismissed. The plaintiff argued that he was not guilty of unlawful conduct in absenting himself from work because the day which he failed to attend was a public holiday and that he had the right to absent himself from work on that day under the law.⁴² The court was of the opinion that unless "there is special legislation declaring that certain work cannot be legally performed on a public holiday, there is nothing illegal in requiring such work to be done. I come to the conclusion that there is no provision in our law making the defendant's action in requiring the plaintiff to do his ordinary work on Union Day unlawful."⁴³ In other words, the instruction was lawful because it was in line with the common law and relevant legislation. Clearly "legislation" and the "common law" were the only categories the court was concerned with, not equity or fairness or reasonableness in a wide sense. But, as was indicated above, an instruction may be unlawful in that it offends the common law indirectly, that is the instruction is unreasonable to the extent that it offends public policy and is deemed to be unlawful - unreasonableness narrowly construed in this case. It is submitted that the relationship between the common law and public morals is such that to demand the instruction to be reasonable is merely another way of stating that the instruction should not offend the common law, indirectly, by offending against public policy and the like. In other words, an unreasonable order which offends public policy is, in law, unlawful. Thus reasonableness, it is submitted, is merely an avenue of inferring public policy into the employment relationship, the intention being to stop "serious abuse and gross injustice".⁴⁴ This submission is further supported by the court's reluctance to interfere in commercial agreements on grounds of equity alone.⁴⁵

"[W]here does the process end? Some of the *dicta* seem to suggest that we have here the thin end of a wedge whose exact shape and full dimensions remain undefined. A few more taps, maybe, and the granite concept of sanctity of contract will be shattered."⁴⁶

⁴¹1914 CPD 749.

⁴²*Coetzee v Argus Printing and Publishing Co* 1914 CPD 749 at 750-1, per Maasdorp JP.

⁴³At 751.

⁴⁴*S v Collett* 1978 (3) SA Rhodesia AD 206 at 211 B.

⁴⁵See *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 WLD at 238 G-H. Although Colman J was concerned with the English doctrine "frustration of contracts" it is submitted that the comment on equity or "fairness" would apply in the above matter of reasonable orders.

⁴⁶*Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 WLD at 238 G-H.

The above submission is supported by the decision of *R v Qumba*⁴⁷ where the accused was convicted of contravening a Regulation.⁴⁸ The defendant was accused of unlawfully and wrongfully refusing to obey a lawful order given to him by the assistant superintendent. At the time of the instruction the accused was occupying a lean-to at the back of a store, the superintendent considered that this was not a place that should be occupied. The occupation was not lawfully authorised, and the superintendent gave the accused an order to remove himself from that lean-to and to move to another hut. The Judge assumed that the regulations were *intra vires* and that Regulation 7 gave the superintendent the right to transfer any resident in the location to some other hut or building should he at any time find it necessary. The Judge, however, also stressed that the power under that regulation had to be reasonably exercised. The superintendent would not have the authority under the regulation to do anything which was dangerous to the health of people. It was this defence that was taken up by the accused, that the other hut was not fit for human habitation.⁴⁹ The court agreed that the accommodation was not fit for human habitation.⁵⁰ As a result the order of the superintendent was an unreasonable order, and for that reason it could not be regarded as lawful.

“I do not say that it was unlawful to order this man to remove from the lean-to - that may also be unfit for human habitation - but the order we have to consider is an order not merely to leave the lean-to but also to go to another hut specified, and that order I think, whatever may be his position with regard to his removing from the lean-to, he was justified in refusing to obey.”⁵¹

The employee was permitted to disobey the order because the instruction was unlawful as to its unreasonableness - in that the instruction went against public policy. Though the instruction was in accord with the legislation it violated the common law indirectly by its unreasonableness - unreasonableness narrowly construed.

Therefore whether an instruction is unlawful will depend on the circumstances of each case,⁵² but generally an instruction may be declared unlawful as to two categories; firstly, in that the instruction offends legislation; and secondly, in that the instruction offends the common law either

⁴⁷1930 CPD 396. By Gardiner JP with whom Van Zyl J concurred.

⁴⁸Framed under Act 21 of 1923.

⁴⁹At 397.

⁵⁰At 398.

⁵¹*Ibid.*

⁵²Norman-Scoble *Law of Master and Servant in South Africa* 1956 page 147.

directly or indirectly, indirectly where the instruction is unlawful due to its unreasonableness.

When should the lawfulness of an order be challenged?

In *Schierhout v Union Government*⁵³ a civil servant refused to assume duty on transfer to another post. He took up the position that his refusal to proceed to Pietermaritzburg to take up the post of professional assistant to the Attorney-General was not due to any spirit of insubordination or contumacy to lawful authority, but to a *bona fide* belief on his part that he was not legally obliged to obey the order. He argued that there was no justification for the initiation of disciplinary proceedings against him, but rather that the question whether the order was a legal one or not should be determined by proceedings in the nature of a declaration of rights. The court, however, disagreed.

“There is no ground, however, on which this contention can be supported. To suggest that, in every case where a public servant disobeys an order of a person having authority to give the same, he is entitled to take up the attitude that the order was not a legal one, and that he was therefore under no obligation to obey it until the legality had been determined by a court of law, would be totally subversive of discipline in the public service. The disobedience of the order justifies the initiation of disciplinary proceedings, and it is in the course of these that the legality of the order should be tested.”⁵⁴

In line with the above, unlawfulness of an instruction should be challenged in disciplinary proceedings, to enable the smooth running of businesses, but if the employee is convinced as to the unlawfulness of the instruction there is nothing stopping him or her, if he or she has exhausted all internal means available, to approach the court to decide on the lawfulness of the instruction. If the employee disobeys an unlawful instruction then he or she is not in breach of his or her contractual duty to be subordinate and obey the employer.

Accordingly it is within the following categories that an instruction will be deemed lawful and which the employee should obey. The instruction should be reasonable, to the extent that it does not offend against public policy, and should be in line with legislation and the common law.

⁵³1926 AD 295.

⁵⁴At 301.

3.4.1.2. The instruction must be given in good faith to be lawful.

What is under discussion in this section is the requirement that the instructions should be given in good faith. An order given in bad faith, for example in attempting to procure an employee's resignation or to engineer the employee's disobedience, to facilitate grounds for his or her dismissal, need not be obeyed.

*Denny v South African Loan, Mortgage, and Mercantile Agency Co Ltd*⁵⁵ dealt with motive behind an order.⁵⁶ The material facts may be summarised as follows: the plaintiff had agreed before being employed by the Agency that he was to be the sole manager, and he was engaged in that position as the sole manager. In this position, the plaintiff received the power of attorney authorising him to manage all the affairs of the company at Port Elizabeth. In October, 1881, the defendants wanted all their employees to be on the same footing, being subject to three month's notice, to which they proposed that the plaintiff's contract should expire and after that date continue his service subject to three month's notice.

The plaintiff, afterwards, being dissatisfied with his position gave notice that he would leave the defendant's service. Nothing that could be objected to was done by the plaintiff. Beattie, the secretary of the company, acting on instructions given to him by the managing director and the general manager and armed with a general power of attorney - recalling and cancelling the power held by the plaintiff - arrived at Port Elizabeth and gave a letter (this letter contained the order and is set out in footnote 56) to the plaintiff, signed by the general manager. Plaintiff considered the matter and after consulting a solicitor stated that the contents of the letter, besides the inspecting of all business matters, was unjust and unreasonable and thus he declined to act on them.⁵⁷ Beattie then continued that if the plaintiff persisted in his attitude towards the company he would be under the necessity of suspending him pending further instructions. He further advised the plaintiff to

⁵⁵1883 CPD 47.

⁵⁶The letter, which contained the instruction, reads as follows:

"This will be handed to you by Mr Beattie, the Secretary of the Company, to whom you will be so good to afford every facility for an inspection of your books and business. Mr Beattie's stay in Port Elizabeth may be somewhat protracted, and during the time he is there you will submit to him all and every business offered to you, and take his direction as if given by me. He will be present at every interview with applicants, and will occupy such place in the offices as he may desire. All cheques, bills, bonds, and documents signed on behalf of the Company you will please get counter signed by Mr Beattie, from and after receipt hereof, and you will give the necessary notification to the banks, handing them a specimen of Mr Beattie's signature." *Denny v South African Loan, Mortgage, and Mercantile Agency Co Ltd* 1883 CPD 47 at 51.

⁵⁷At 51.

take until the following day to consider his position, and placed the plaintiff on his honour to do no further act on behalf of the company. The plaintiff did not change his mind. Beattie said that he would be obliged to take action and left the office and went to the banks, with whom the company had accounts, and exhibited and filed his power of attorney revoking the plaintiff's power. Further he instructed the banks not to honour any cheque unless countersigned by him. On his return the plaintiff was instructed not to issue any cheque or document on the company's behalf without Beattie's signature.⁵⁸ The plaintiff, however, did issue a cheque. The next day the company advertised that the plaintiff was no longer the manager and that Beattie had been appointed. The court was asked if the order given had been lawful.

With regard to motive Skippard J commented that if

"those orders were not entirely *bona fide*; if they were given with the object and in the expectation of goading the plaintiff into some act or expression which might be construed as proof of insubordination, and be subsequently made use of to repel just such a claim as the plaintiff has preferred in this action, then a jury would be certainly justified in finding as a fact the order to resign the whole functions of manager to the London secretary was not a just and reasonable order; and consequently, that the plaintiff's alleged disobedience was not such wilful disobedience of a lawful order as would alone justify dismissal."⁵⁹

In the same case Barry JP considered, in his judgment, the motive behind the order, and commented that:

"Without distrusting the plaintiff in reality, distrust both of plaintiff's integrity and judgment was alleged with the view of inducing plaintiff to throw up his office in disgust; or to retire from it upon terms more favourable to the defendants than those given by the contract of service. I confess that I am unable to discover in the circumstances any other motive for the letter than an attempt to procure the retirement of plaintiff by unmerited indignity. No manager with any self-respect could for a moment submit to the insult intended to be conveyed by that letter; and I think the case of *Smith v Allen* (3, F. and F., 157) is some authority for the contention that a master cannot, under the mask of what in some circumstances may not be an improper direction, give the same direction in such a manner and at such a time as to convert it into an insult instead of a lawful command."⁶⁰

Although the court commented that it was a painful duty to give a verdict on the motive of an employer in giving an instruction,⁶¹ it may nevertheless be appreciated that if an instruction is given

⁵⁸At 52.

⁵⁹At 65.

⁶⁰At 57, per Barry JP.

⁶¹At 66, per Shipard J.

in bad faith to engineer the disobedience of the employee for whatever purpose then that instruction would be unlawful as to its motive.⁶²

3.4.1.3. The instruction must fall within the ambit of the contract of employment to be lawful.

In the contract of employment the employee agrees to occupy a subordinate position. This duty is however restricted by law, public policy, and the contract itself. It has been noted that the employment contract brings into being the employment relationship, and it is the contract that identifies and defines the role of each party in that relationship vis à vis the other. It is the contract between the parties which sets out the parameters of the relationship which is to be enforced between the parties, and as such it defines the extent of the parties' duties and rights therein.

The terms of the contract may set out how the duty of the employee to be subordinate is to be fulfilled, or what specifically the employee is to achieve. Obviously, if the contract disregards the essential term or terms of the employment contract then the relationship is not that of employment. Accordingly, any instruction to be valid and to demand obedience must fall squarely within the nature of the parties' roles as set out in the contract defining the relationship.

The employee is bound to perform a lawful instruction which falls squarely within the contract of employment. Four cases which deal with dismissal for disobeying orders expressed within the contract of employment will be discussed hereunder.

Firstly, in *Rene v Alexander*⁶³ the appellant entered into the service of the respondent under a written agreement, by which he bound himself to render the services of a chef de cuisine at a hotel. He undertook to do all that was necessary and required of a person in that capacity at a first class hotel, and to perform his duties truly, diligently and skilfully, as well as to do all in his power to further the interests of the employer. Furthermore, the appellant was to be bound by the rules of the hotel. The evidence showed:

“that the appellant had been guilty of several acts of misconduct. He left the hotel one afternoon in April without preparing the dinner for that evening, and did not return until the next morning at a quarter to nine o'clock. He gave an untruthful explanation to his employer of his absence, and was cautioned that upon repetition of such conduct he would be instantly dismissed. Then on the night of the 13th May he did not return before the usual closing time, in accordance with the rules of the hotel, which he had undertaken to

⁶²At 65, per Shipard J.

⁶³1916 CPD 608.

obey, and was brought in later to the hotel in a hopeless state of intoxication. Lastly on the 22nd May he again disobeyed an order not to put meat outside in the hotel yard, and that same evening, on leaving the hotel, presumably after he had prepared and served the dinner, he was told by his employer to be back by the usual time..."⁶⁴

Which he failed to do and was dismissed. The court held that he was guilty of wilful disobedience and defiance of his master's lawful orders, and of breaching the duties in his contract of service which he had bound himself to perform.⁶⁵ He failed to abide by his contractual relationship because he failed to obey an instruction that fell within the contractual role he agreed to assume.

Secondly, in *Miles v Jagger and Co*⁶⁶ the employee used insolent and offensive language towards the manager of the respondent's forwarding department, the consequence being that the employee was given one month's notice to leave his employment. The employee was then transferred from the store to the accounting department, where he was asked to do the work of a ledger clerk, which he did. Later he refused to do this work, and was then dismissed. The court found the request made to him to do this work was not unreasonable.⁶⁷ The request, or the order, was lawful because he was asked to do the work which he was contractually bound to perform. The court came to the conclusion that the accused would have been bound to perform this work because he had previously done the work which constituted evidence showing that he considered himself to be so bound. Further the salary of the accused was the same as the ledger clerk's - the court was however quick to note that the comparing of salaries was not conclusive but, nevertheless, was an important element which needed to be taken into account.

Thirdly, in *Denny v South African Loan, Mortgage, and Mercantile Agency Co Ltd*⁶⁸ (*supra*) the order was held to be unlawful. In addition to having been given with the motive of goading the employee,⁶⁹ it was found to be unlawful because the instruction contradicted the contract that

⁶⁴At 613 to 614.

⁶⁵At 614 per Kotze J, with whom Gardiner J concurred.

⁶⁶1904 SC 513.

⁶⁷At 515 per De Villiers CJ, with whom Hopley J concurred.

⁶⁸1883 CPD 47.

⁶⁹"But, independent of the question of the motive. I think the command itself in this case was an unlawful one. The defendant on receipt of this letter was willing to allow inspection of the books, but after consulting his solicitors said that the other directions were unlawful, and to test them without causing an interruption in the business of the company drew a cheque for a trifling amount for an existing debt, which cheque he delivered to the creditor without obtaining Beattie's signature. The question we have to answer is, Was plaintiff bound to obey these directions?" *Denny v South African Loan, Mortgage, and Mercantile Agency Co Ltd* 1883 CPD 47 at 57-58, per Barry JP.

existed between the parties. The letter⁷⁰ which contained the order was intended to create Mr Beattie as coadjutor. This was held to be the only object of the letter and the defendants had no right under their contract to create a dual managership. Thus the moment a coadjutor was added the agreement between the parties was breached by the defendants,⁷¹ which caused the instruction to be unlawful.

Finally, in *Oaten v Bentwitch and Lichtenstein*⁷² wherein the plaintiff was engaged as a “practical hatter”, the plaintiff was given an instruction to teach an untrained person the duty of trimming a hat. This duty, it was held, was not considered part of his contractual duty and thus did not fall within the scope of his duties.⁷³ Thus “the plaintiff was accordingly justified, when called upon to give this instruction, in refusing to obey the order. It was not an order coming within the scope of the duties he had undertaken to perform, and on this ground the defendants were not justified in dismissing the plaintiff.”⁷⁴

When entering into a contract of employment the employee-to-be, binds himself or herself to the essential terms of that specific relationship. When the person assumes the role of employee he or she is obliged to obey any lawful instruction given by the employer. This would apply to any instruction written in the contract or given verbally, provided the instruction was lawful. Verbal instructions themselves form part of the contract of employment as they flow from the essential

⁷⁰See footnote 56.

⁷¹“I am of opinion even then that in the circumstances of the employment at Port Elizabeth, and the conduct of the business there, both before and after Beattie’s advent, the withdrawal from the plaintiff the power to sign a cheque except jointly with Beattie deprived plaintiff of his powers there as sole manager, and was intended to do so, and that, therefore, that command was an unlawful one. The case of *Eaton and others v Weston* (9, Q.B. Div., 638) justifies the finding that the whole command, and even the part which related to the drawing of a cheque, was, in the circumstances, an unreasonable, and therefore an unlawful, command. Taking the letter as a whole, or part which relates to the cheque, it carries an unlawful command.” The written orders “were calculated to subject the plaintiff to indignity, to lower him in the eyes of the mercantile community, to deprive him of every vestige of power as manager, and not merely to associate another with him as joint manager, the very arrangement he had repudiated from the first, but to place another absolutely over his head. ...I think the orders in question must be taken as a whole, and I have come to the conclusion that the order conveyed to the plaintiff by Mr. Beattie was not a just and reasonable command within the fair and reasonable scope of the plaintiff’s employment... and so was not a lawful order; and consequently that this was a wrongful dismissal, and that the plaintiff is therefore entitled the judgement of the Court.” *Denny v South African Loan, Mortgage, and Mercantile Agency Co Ltd* 1883 CPD 47 at 66.

⁷²1903 TH 118 per Solomon J.

⁷³“[T]here was no obligation on his (the plaintiff’s) part to give instructions in the making of hats, his work being to make hats and not to teach others how they should be made.” *Oaten v Bentwitch and Lichtenstein* 1903 TH 118 at 119.

⁷⁴*Oaten v Bentwitch and Lichtenstein* 1903 TH 118 at 119.

term of the contract that the employee occupies a subordinate position. In *Rene v Alexander* the employee breached his duties in the written contract which he bound himself to obey, as well as the essential term of the contract by not obeying a lawful instruction given verbally. The misconduct is the same in both cases, the disobedience of a written instruction or a verbal instruction, as both forms of misconduct entail disobeying the instructions of the employer which are evidence of a challenge directed at the employer's authority. Clearly the employee is acting contrary to his or her obligation to be subordinate in both cases.

Why instructions which fall outside the parameters of the relationship are not binding, are because the instructions themselves have no bearing on the unique relationship which exists between the parties,⁷⁵.

From the above, an instruction which contradicts the contract between the parties, or which falls outside the scope of the contractual roles each party have bound themselves to fulfil, is unlawful. Notwithstanding the above, the refusal to obey must be done in a proper and orderly manner and if a employee does not do so then he or she may be validly dismissed for being insolent.⁷⁶

3.4.1.4. Conclusion

An order may be deemed unlawful on three general grounds. Firstly, *mala fides*, for example, an insult intended to procure an employee's resignation may taint an otherwise lawful instruction with unlawfulness. Secondly, an instruction that contradicts the law, or which is in law deemed unreasonable, is unlawful. Thirdly, if the order relates to a matter that contradicts or falls outside the scope of the contract between the parties then the instruction is not a lawful instruction. Restated, an order given in good faith within the parameters of the contractual relationship, which does not contradict the law, must be obeyed by the employee and if refused may constitute a breach of the employment contract between the parties justifying dismissal.

3.4.2. The refusal to obey a valid lawful instruction (the employee's disobedience)

In common law, summary dismissal is only permitted where the disobedience to an lawful order is wilful and not inadvertent or due to neglect.⁷⁷ "It is not every act of insubordination or

⁷⁵ see *Oaten v Bentwitch and Lichtenstein* 1903 TH 118.

⁷⁶ Ibid at 120.

⁷⁷ Norman-Scoble *Law of Master and Servant in South Africa* 1956 page 145.

disobedience ... which will justify the summary dismissal of a servant. Where the ground relied upon is refusal to obey an order it must be a *serious and deliberate* refusal”⁷⁸ or, in the words of Searle J, a “deliberate and wilful disobedience of a lawful order justifies dismissal.”⁷⁹

It is submitted that “wilful” and “deliberate” essentially refer to the same state of mind, that being an intentional state of mind. Thus a mere neglect to obey an order does not constitute a wilful refusal to obey.⁸⁰

3.4.2.1. What constitutes a deliberate or wilful refusal?

Essentially the enquiry into intent would revolve around whether the accused directed his will to the attainment of a particular consequence and whether the accused was conscious that the result being achieved was achieved in a wrongful or unlawful manner.

“Intent is a legally reprehensible state of mind or mental disposition encompassing the direction of the will to the attainment of a particular consequence, and consciousness of the fact that such result is being achieved in an unlawful or wrongful manner.”⁸¹

Intent is a “manifestation of the will rather than a wish or desire.”⁸² As such the concept is entirely subjective, subjective intent “is present only if the defendant in fact intended to bring about a particular result and was ... subjectively aware of the wrongful character of his conduct.”⁸³

Intention, as far as it relates to the consequences of the conduct, takes on three forms; *dolus directus*, *dolus indirectus*, and *dolus eventualis*.

Dolus directus, is when the actor directs his or her will to attain a particular consequence. *Dolus indirectus*, occurs when the actor “acts with the object of attaining a certain object but at the same time actually foresees that another consequence must necessarily flow from the conduct”, then his

⁷⁸*Moonian v Balmoral Hotel* 1925 NPD 215 at 219 per Dove Wilson JP with whom Hathorn J concurred. (The emphasis is mine.)

⁷⁹*Coetzee v Argus Printing and Publishing Co* 1914 CPD 749 at 752.

⁸⁰*See R v Motsabe* 1939 OPD 99, per Fischer R.

“Uit die getuigenis blyk dit dat op 29 November het klaer die beskuldigde beveel om die volgende oggend die skape na Abrahamskraal oor te bring en dat hy hulle eers op die 31ste daar gebring het. Daar is nie die minste aanduiding dat die beskuldigde geweier het om die bevel te gehoorsaam nie. Daar is ook verder ‘n leemte in die voldoening aan die bewyslas wat op die Kroon berus en wat genoegsaam is om die veroordeling tot niet te maak.” at 101.

⁸¹Midgley LAWSA (vol 8) 1995 page 116.

⁸²*Ibid* page 118.

⁸³*Ibid* page 116.

state of mind in relation to the consequence is indirect intent.⁸⁴ *Dolus eventualis*, occurs “[w]here one acts with the intention of attaining a particular object and at the same time subjectively realises or appreciates that another consequence may possibly result from ones conduct and one reconciles oneself with this possibility, one’s intent in relation to the possible consequence takes the form of *dolus eventualis*.”⁸⁵ The actor must have foreseen the possibility, and if it is found that the actor should have foreseen the possibility then at best he or she is guilty of being negligent.⁸⁶

Wessels J⁸⁷ in *Meerholz v Norman*⁸⁸ referred to the concept “wilful” in the contract of employment. The facts therein were that the employee was a barman in the service of the defendant, and certain hours for his service had been specified in the contract. At the beginning of February the attendance of the plaintiff became irregular, and at each time he made an excuse that his watch was not keeping good time or that he had overslept. On 29 February the employee again arrived late, the defendant informed him that if the lateness continued he intended to dismiss him. On 5 March the plaintiff was again late and, consequently, the defendant summarily dismissed him. The question which the court was asked to decide was whether the dismissal was justified

Wessels J commented: “if a servant, engaged with definite working hours, wilfully disregards his contract in that respect and wilfully comes late on many occasions, his employer is entitled to dismiss him, even although he has forgiven him his past errors.”⁸⁹ The employee may be dismissed for the breach of the specific terms of the contract, provided his conduct was wilful. Wessels J did, however, concede that “where an employee is detained by accident, or where he is unable to come at the exact hour, by reason of illness, then the master would not be entitled to dismiss him summarily unless some great prejudice were proved.”⁹⁰ It follows that if the absence is wilful then

⁸⁴Ibid.

⁸⁵Ibid.

⁸⁶Ibid.

⁸⁷With whom Gregorowski J and Mason J concurred.

⁸⁸1916 TPD 332.

⁸⁹*Meerholz v Norman* 1916 TPD 332 at 334. Looking at the thoughts of Mason J on the same matter: “I think where a master chooses to appoint certain definite hours for work and the servant accepts that contract, the master is entitled to require those hours to be adhered to, and it does no lie on him to show to any court that those hours are necessary for the purpose of his business. Where a servant fails repeatedly to keep those hours I think the master is entitled to dismiss him.” per Mason J at 335.

⁹⁰At 334.

the employer may dismiss, but if the absence is not wilful then the employer has to show prejudice to justify dismissal.⁹¹ Much seems to turn on the meaning of “wilful”. Wessels J continued:

“It may be said that if a man’s watch is slow, or if he oversleeps himself, that is not wilfulness, but I think, in a legal sense, a man who comes late under the circumstances is wilfully late. It is not an accident. If his watch is slow it is his duty to get one which is not slow. If he cannot wake at a particular time he must get an alarm clock or have some other means of waking, but he cannot make a contract that he will appear at his work at a certain hour and then, as an excuse, set up a watch that does not go well or a heavy sleep.”⁹²

The court found intent, the refusal was wilful, that is, deliberate in a legal sense. The concept of “wilfulness” was also dealt with in *Coetzee v Argus Printing and Publishing Co.*⁹³ “In the case now before us we have a clear stipulation that the plaintiff should be liable to work on days including Union Day. The plaintiff had been specially ordered to put in an appearance on Union Day, and had refused deliberately.”⁹⁴ The result was that the disobedience was wilful.

From the above decision (*Coetzee*), and in relation to the matter under discussion, an important question arises; did the employee not think that his conduct was justified in that the order was unlawful, thus affecting his “deliberate” state of mind?

The court pointed out that there may be circumstances under which a person may be improperly absent from work without being guilty of wilful disobedience.⁹⁵ The court stated:

“We have been referred to an authority⁹⁶ from which it would appear that if a servant, being under the impression that he might not be expected to come to work, absents himself, the law will not regard that as gross misconduct. It could not be taken advantage of by the employer to dismiss the servant, but even there it must appear that there is no stipulation contrary to such usage in the contract of the servant. In the case now before us we have a clear stipulation that the plaintiff should be liable to work on days including Union Day. The plaintiff had been specially ordered to put in an appearance on Union Day, and had refused deliberately.”⁹⁷

Coetzee clearly had agreed to work⁹⁸ on that public holiday - it was mentioned in the contract - and yet refused to work on that day, even though he was warned to come. The lawfulness of the

⁹¹Prejudice will be discussed later in section 3.4.3

⁹²At 335.

⁹³1914 CPD 749 at 752.

⁹⁴*Coetzee v Argus Printing and Publishing Co* 1914 CPD 749 at 752, per Maasdorp JP.

⁹⁵*ibid*.

⁹⁶The authority is not cited.

⁹⁷At 752 per Maasdorp JP.

⁹⁸Per Scarle J in *Coetzee v Argus Printing and Publishing Co* 1914 CPD 749 at 752.

order is not doubted, but it is tempting to argue that *Coetzee v Argus Printing and Publishing Co* is authority for the view that if one seriously believed that the order was unlawful then, as an employee, one would be lacking the wilful intention to disobey a lawful order, and consequently the employee was wilfully disobeying what he or she believed to be an unlawful order. The truth is that the judgment, being short, does not deal in any sufficient degree with the factual circumstances of the case to warrant this conclusion, furthermore it must be remembered that Coetzee's defence was not that he lacked "wilful intention" but rather that the command was unlawful.

Nevertheless, it would be fair to comment that if a command was given and the employee *knew* that the command was unlawful and refused, wilfully, not to obey that command then his intention is wilful in refusing to obey the unlawful order. The next question is: what of a person who *seriously believes* that an order was unlawful and as a consequence refused to obey. Surely, then, the same applies with regard to the employee's wilfulness, as in the above illustration? If the order is proved to be lawful then that alone does not affect the employee's state of mind in refusing wilfully to obey what in his or her mind was an unlawful order. He or she is, at the time of the order, not disobeying a lawful order wilfully.

Perhaps the best way to resolve the above problem would be that if the commands are obviously illegal an employee would be justified in questioning or even refusing to execute such commands, but as long as the instructions of the employer are not obviously and decidedly in opposition to the law then they must be met with complete and unhesitating obedience.⁹⁹ Thus the court would look at the objective circumstances surrounding the instruction and decide on the "obviousness" of the unlawfulness of the instruction before attributing intentional defiance.

⁹⁹The case relied on for this position was dealing with what constitutes a lawful order to a policeman. Sutton J highlights that what is lawful for a police command is basically that the command must not contradict the law and be in line with the relationship between the parties, based on custom. Sutton then relies on Solomon JP in *Rex v Smith* 17 SC page 567 where he quotes with approval the statement contained in the Manual of military law, that if the commands are obviously illegal an inferior would be justified in questioning or even refusing to execute such commands, but as long as the orders of the superior are not obviously and decidedly in opposition of the law of the land, or the well known established customs of the army then they must meet with complete and unhesitating obedience. From *Kriel v Commissioner of Police* 1929 CPD 373 at 377 per Sutton J.

3.4.2.2 Reactions in the heat of the moment.

In *Moonian v Balmoral Hotel*,¹⁰⁰ a new manager of a hotel attempted to put the Indian staff of the Hotel on twenty four hours' notice, in place of a month's notice. The Indian staff declined the offer. On the day of the dismissal, the same proposal was put to the Indian waiters, the proposal was made to the plaintiff, who was the head waiter, and it appeared that he convened the other waiters who all refused to accept it. These men were at once given notice. Within the hour the dismissal of the plaintiff occurred.

The manager claimed he went to the plaintiff and told him to get on with the preparation of sandwiches for 100 people who were expected at a reception, which was to take place that night. The plaintiff responded: "what about overtime"; the manager replied "I don't know about that yet." In reaction the plaintiff said, "well, if there is to be no overtime there will be no sandwiches." The evidence for the plaintiff was that it had been customary in the hotel always to pay for overtime, and there seemed with the arrival of the new manager that the custom being discontinued was raised, and that the Indian employees were uneasy about it. The court highlighted that though it was wrong or impertinent for the employee to have said, "if there is no overtime there will be no sandwiches", the question was whether under the circumstances such a mere remark must be taken as a deliberate refusal to obey a lawful order.¹⁰¹

It was held that the statement was made in a moment of excitement, and that no time was allowed for any explanation, or to ascertain whether it was really meant, or what it meant. The statement addressed to the manager was, for the court, consistent with a mere intimation that if the overtime had to be done and was not paid for, then the cutting of sandwiches by the workers need not be expected in the future.¹⁰²

The court seems to be indicating that the response of the accused was not a refusal to cut sandwiches as such but merely an indication that if there was no overtime then there would not be any work after hours, which was an indication of a conditional refusal, which would mean that the sandwiches would not be cut.

The court, however, also found that the dismissal was not justified on another ground:

"But even if it be taken as a refusal to cut sandwiches that afternoon, it was a statement

¹⁰⁰*Moonian v Balmoral Hotel* 1925 NPD 215.

¹⁰¹At 219 per Dove Wilson JP.

¹⁰²*Ibid.*

made in the heat of the moment.... But the manager seized the opportunity, and without any further parley or delay at once reported to the proprietress, and forthwith dismissed the plaintiff. No time was allowed to find out whether this servant of ten year's standing seriously meant what he said, or whether what he said amounted to a refusal to cut sandwiches on that day, as to all of which it seems to me the evidence leaves reasonable room for doubt; and so long as there is room for doubt the onus on the defendant of proving justification has not been discharged."¹⁰³

The court focussed on the circumstances surrounding the alleged refusal to obey in an attempt to infer the state of the worker's mind behind the "conditional" refusal and the dismissal of the employee. The Judge found that the "heat of the moment" refusal and retaliatory dismissal was a sufficient excuse for justifying the employee's disobedience and for making the unreasonable opportunistic dismissal by the manager invalid.

Clearly the refusal of an order must be wilful and not made in the "heat of the moment". Furthermore, a dismissal should not be based on a heated exchange, particularly if both parties are not thinking clearly while labouring in the "heat of the moment".

3.4.2.3 Disobedience in order to further the employer's interests

What is the position of an employee who refuses to obey a lawful order in attempting to further the employer's interests? Though the Court in *Kaplan v Penkin*¹⁰⁴ briefly dealt with this matter, the Court was nevertheless quick to point out that a desire to forward the employer's interests does not afford a good reason for disobeying orders, or that it will always serve as a bar to summary dismissal. The Court, however, did comment that the motive of the employee, if only in the circumstances of *Kaplan v Penkin* should be taken into consideration when one has to decide whether the conduct warranted dismissal.¹⁰⁵ Though not decisive, the employee's motive, nevertheless, may be taken into consideration.

¹⁰³At 220.

¹⁰⁴*Kaplan v Penkin* 1933 CPD 223.

¹⁰⁵*Kaplan v Penkin* 1933 CPD 223 at 228 per Gardiner JP with whom Jones J concurred.

3.4.3 The role of prejudice to the employer to justify dismissal

In *Schneirer and London Ltd v Bennet*,¹⁰⁶ De Waal JP had opportunity to deal with the role of prejudice in the employment relationship before the dismissal of the employee would be valid. The first case analysed was *Brown v Sessell*.¹⁰⁷ De Waal JP found that the learned judge in that judgement did not say that prejudice to the employer was an essential element in determining whether or not the employer had the right to dismiss; but rather that prejudice was an important element to be taken into consideration.¹⁰⁸ The next case to be considered was: *Meerholz v Norman*¹⁰⁹ wherein Wessels J commented: "It appears to me that if a servant, engaged with definite working hours, wilfully disregards his contract in that respect and wilfully comes late on many occasions, his employer is entitled to dismiss him, even although he has forgiven him his past errors." De Waal JP then turned to¹¹⁰ *Coetzee v Argus Printing and Publishing Company*¹¹¹ and quoted Maasdorp JP to the following effect: "In the case before us we have a clear stipulation that the plaintiff should be liable to work on days including Union Day. The plaintiff had been specially ordered to put in an appearance on Union Day, and had refused deliberately. Under such circumstances I come to the conclusion that this was such a wilful disobedience as justified the defendants in dismissing the plaintiff." Based on the above reasoning of the various courts De Waal JP concluded:

"These authorities seem to me to show that where an employee, not a menial servant, absents himself from his master's employ on an isolated occasion, and the master suffers no prejudice thereby, the master cannot dismiss him; but that where that employee has

¹⁰⁶1927 TPD 346. The grounds on which the dismissal was justified are firstly, absence from duty in breach of instructions and, secondly, being under the influence of alcohol.

The following was common cause, on 26 October the plaintiff left the business premises of the defendant between 9 and 9:30 am to go to the commercial exchange, there he was employed on the business of his employer, where he would remain in the ordinary course of business up to about 11 or 11:30 in the morning. On that day the plaintiff admitted that he was informed at the time he left that he should not be away long, he stayed away for the rest of the day. The plaintiff phoned the office and informed the person who came to the phone that he would not be in the office and that it was doubtful whether he would be back until Thursday. The reason he gave was that a friend of his was arriving from England whom he was meeting and was to help in looking for accommodation in Johannesburg. The friend did not arrive and the plaintiff knew that he would not have arrived at the station until 4:30 in the afternoon. According to the evidence of Mr Schneirer it seemed that he had on previous occasions reprimanded the plaintiff for his continual absences from his office. Further that on the morning asked the plaintiff first how long he was going to be, and then, being told about half an hour, informed the plaintiff that he should not be away long, but should return as soon as he could. When plaintiff returned the following day he was sent for and summarily dismissed.

¹⁰⁷1908 TS 1137.

¹⁰⁸*Schneirer and London Ltd v Bennet* 1927 TPD 346 at 350.

¹⁰⁹1916 TPD 332

¹¹⁰*Schneirer and London Ltd v Bennet* 1927 TPD 346 at 351.

¹¹¹1914 CPD 749

been expressly ordered or notified by his employer not to absent himself from his duty at a specified time or on a specified occasion, and the servant wilfully disregards or disobeys his master's order, he renders himself liable to dismissal. If that be so then, on the facts in this case, I am satisfied that the appellant was justified, in the circumstances, in dismissing the respondent."¹¹²

Prejudice thus may have a bearing on the validity of the dismissal of the employee in disobeying the orders of an employer although this depends on the nature of the relationship - whether menial or otherwise - but where a direct order is given or is stipulated in the contract and the employee wilfully refuses the order then he or she may be dismissed.

3.5. Conclusion.

From the evidence in this chapter there is no doubt that the court under the common law applied and understood insubordination mainly as wilful disobedience of a lawful order.

This chapter has shown that under the common law the employer, in the employment relationship, can expect the employee to obey his or her commands; given in good faith, which fall within the confines of the contract between the parties and which do not contradict the laws of the land. What constituted instructions given by the employer were either those expressed in the contract itself or those which were uttered verbally by the employer. The refusal of such an lawful order will justify dismissal if the employee was wilfully disobedient and was not a reaction in the "heat of the moment". Such disobedience goes to the root of the employment relationship because the employee will not perform his obligation to be subordinate, which justifies dismissal.

It is clear why the disobedience of these instructions would constitute a material breach of the contract, and thus be insubordination, especially if one sees that the employer has control over the productive capacity of the employee. This control is a manifestation of the *de jure* duty the employee has to be subordinate, which is highlighted by the *de facto* position the employee occupies.

It is clear that the employer was restricted in ensuring that his or her position of authority in the employment relationship was not challenged by the employee's disobedience. The employer was only permitted to dismiss the employee if the employer's instructions were lawful and reasonable.

¹¹²*Schneirer and London Ltd v Bennet* 1927 TPD 346 at 351-2.

These instructions had to be lawful to the extent that they did not contradict legislation or the common law, given in good faith, and fell within the contractual relationship of the parties, and reasonable to the extent that the instruction was in line with common law principles and public policy. Dismissal was, however, only permitted where the insubordination was intentional and did not occur in the heat of the moment. It is important to note, notwithstanding the above, that the courts dealt with the misconduct squarely as a breach of the contractual relationship and did not interfere in the relationship, or the misconduct, on grounds of fairness or equity.

Chapter 4

INSUBORDINATION UNDER THE UNFAIR LABOUR PRACTICE JURISDICTION

4.1 Introduction.

In the previous chapter dismissal for insubordination was analysed on the basis of common law principles. The subject of discussion in this chapter is the same form of misconduct but understood under the unfair labour practice jurisdiction. To achieve the above, the chapter is divided into two main sections, the first highlights what is understood by the concept “unfair labour practice”, and the second discusses insubordination under the unfair labour practice jurisdiction. The latter topic will be discussed in relation to two related categories: the giving of a lawful and reasonable order and the serious wilful refusal of an order. The aim of these sections is to highlight, by focussing on decided cases, what would justify dismissal for the misconduct and what would not.

4.2 Unfair Labour Practice

4.2.1 Introduction

According to Bennet, the first glimmering of the principle of “unfair dismissal” in South Africa emerged in the decision of *South African Association of Municipal Employees v Minister of Labour*.¹ The court held that the question before it was not whether the employer was entitled to terminate the employee’s services under the contract but was whether, notwithstanding the employer’s legal right to do so, the employer should have done so in view of the circumstances of the case. “The court made the distinction between what was lawful and what was right or fair... The Cape Provincial Division held that the question which had to be resolved by a Conciliation Board was not whether the employer had acted within its legal rights but whether it had acted ‘inequitably or unreasonably’.”²

In 1979 the Industrial Court was given jurisdiction to determine disputes concerning “unfair labour practices” by the Industrial Conciliation Amendment Act 94 of 1979.³ The unfair labour practice was defined as “any practice which in the opinion of the industrial court constitutes an unfair

¹1948 (1) SA 528 (A).

²Bennet *A Guide to the Law of Unfair Dismissal in South Africa* 1992 page 3-4.

³Le Roux and van Nickerk *The South African Law of Unfair Dismissal* 1994 page 18.

labour practice”.⁴ This definition was replaced by section 1(c) of the Industrial Conciliation Amendment Act 95 of 1980 and was later again amended by the Labour Relations Amendment Act 51 of 1982. It was from these amendments that the definition of an unfair labour practice culminated which was in force during the period when the Industrial Court formulated the basic principles regulating unfair dismissals.⁵

The definition read as follows:

“ ‘unfair labour practice’ means-

- (a) any labour practice or any change in any labour practice, other than a strike or a lock out which has or may have the effect that-
 - (1) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardized thereby;
 - (2) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
 - (3) labour unrest is or may be created or promoted thereby;
 - (4) the relationship between employer and employee is or may be detrimentally affected thereby; or
- (b) any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (a)...”⁶

By applying the above definition the Industrial Court brought about fundamental changes in the law governing the employment relationship. The amended definition, although more restrictive than the former, was, nevertheless, still open-ended and the Industrial Court essentially had the freedom to decide what was unfair or fair.⁷ The result was that the court essentially created a new labour law “in which common law contractual principles play a lesser role and where emphasis is placed on fairness in the employment and industrial relations context.”⁸

In 1988 the Labour Relations Amendment Act 83 was brought into effect. The definition of the unfair labour practice “now spanned some three pages in the Act and for the first time attempted

⁴Ibid page 18-19.

⁵Ibid page 19.

⁶Cited in Le Roux and Van Nickerk *The South African Law of Unfair Dismissal* 1994 page 19.

⁷Bennet *A Guide to the Law of Unfair Dismissal in South Africa* 1992 page 6, Bennet also cites the following: “...it would appear that the legislature by defining the concept in such wide terms could have intended that this court should lay down guidelines as to what are to be considered unfair labour practices”. *UAMAWU and Others v Fodens* (1983) 4 ILJ 212 per Ehlers DP.

⁸Le Roux and Van Nickerk *The South African Law of Unfair Dismissal* 1994 page 19.

specifically to regulate unfair dismissal”.⁹ The definition was repealed in 1991,¹⁰ and the replacement definition was similar to the pre-1982 definition,¹¹ and read that an unfair labour practice:

“...means any act or omission, other than a strike or lockout, which has or may have the effect that-

- 1) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
- 2) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
- 3) labour unrest is or may be created or promoted thereby;
- 4) the labour relationship between employer and employee is or may be detrimentally affected thereby”.¹²

In interpreting and applying the above unfair labour practice definition the Industrial and Labour Appeal Courts developed various tests, “but the truth is that whether a dismissal is fair will depend on the specific facts of each case and, in many instances, will involve a value judgement made by the manager concerned and, if necessary, the courts, or an arbitrator.”¹³ This will be discussed more fully hereunder.

4.2.2 Substantive fairness

The Industrial Court in formulating its decision as to the presence of substantive fairness established the facts surrounding the dismissal, and upon them decided whether those facts justified the dismissal. Substantive fairness requires that the circumstances surrounding the labour practice, being the reason for dismissal, constitute both a “valid” and “fair” reason for dismissal.¹⁴ The distinction between the abovementioned may be stated as follows: “[Validity] goes to proof and to the applicability to the particular employee of the reason for the dismissal; fairness¹⁵ goes to the weight or sufficiency of the reason.”¹⁶

⁹Bennet *A Guide to the Law of Unfair Dismissal in South Africa* 1992 page 7.

¹⁰The Labour Relations Amendment Act 9 of 1991.

¹¹Le Roux and Van Nickerk *The South African Law of Unfair Dismissal* 1994 page 26.

¹²Cited in Bennet *A Guide to the Law of Unfair Dismissal in South Africa* 1992 page 7.

¹³Le Roux and Van Nickerk *The South African Law of Unfair Dismissal* 1994 page 7.

¹⁴*Amalgamated Clothing and Textile Workers Union of SA and others v JMI Jacobssohn (Pty) Ltd* (1990) 11 ILJ 107 (IC) per DA Basson, A M at 111 I - 112 A.

¹⁵Fairness, for the same authors, “means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case are considered.” Cameron *et al The New Labour Relations Act: the law after the 1988 amendments* 1989 page 111.

¹⁶*Ibid* page 111.

“[A] reason will be valid if the facts indicate the employee actually did the things he is being accused of A reason will be fair if the misconduct was sufficiently serious to warrant dismissal and the employer, having regard to the substantial merits of the case, acted fairly (Rycroft & Jordaan at 152-3). Several principles and factors are taken into account when the sufficiency of the reason for dismissal is considered, for example common-law principles like the nature of the conduct, the possible prejudice to the employer and the employee’s state of mind; the employer’s disciplinary code; the consistency of the employer’s actions; prior warnings received by the employee; and the fact that the employee knew he could be dismissed for his misconduct. The circumstances of the employer also play an important role when considering the fairness of the reason to dismiss. Certain instances of misconduct that may under normal circumstances not be regarded as sufficiently serious to justify dismissal may be rendered sufficiently serious in view of the employer’s particular circumstances.”¹⁷

A valid reason for dismissing is a justified dismissal from the perspective of the employer based upon the circumstances of the case, whereas fairness is the yardstick that is placed on the valid conduct of the employer, from the perspective of the Court. In short, “[v]alidity goes to proof, fairness to gravity.”¹⁸

The Industrial Court initially relied heavily upon the test of the “reasonable employer” for locating substantive fairness in the labour practice. The “reasonable employer” test,¹⁹ borrowed from English law, was cited in *Lefu and others v Western Areas Gold Mining Co Ltd*²⁰ wherein the English decision of *Ferodo Ltd v R Barnes* [1976] IRLR 302 was quoted, where Kilner Brown J stated at 303:

“It seems to this Tribunal, therefore, that the law is quite plain and that what the Industrial Tribunal ought to do is, not to ask itself the question which this Tribunal did - “Are we satisfied that the offence was committed?” - but to ask itself the question, “Are we satisfied that the employers had, at the time of the dismissal, reasonable grounds for believing that the offence put against the applicant was in fact committed?””²¹

Landman AM, being aware that the above dictum could not be divorced from the context of the English Trade Union and Labour Relations Act of 1974, nevertheless continued that the passage seemed to express the approach the court should follow when deciding similar issues.²² As a

¹⁷*Jefferies v President Steyn Mine* (1994) 15 ILJ 1425 (IC) at 1431 H-1432 C.

¹⁸*Cameron et al The New Labour Relations Act: the law after the 1988 amendments* 1989 page 144.

¹⁹“The proper test is apparently not the policy of the employer on disciplinary matters, but the reaction of a reasonable employer who takes into account relevant circumstances.” *National Union of Mineworkers and another v East Rand Proprietary Mines Ltd* (1987) 8 ILJ 315 (IC) at 322 D per Bulbulia, M.

²⁰(1985) 6 ILJ 307 (IC).

²¹Cited at 314 C-E.

²²At 314 E-F.

result, when deciding if an employee was guilty of committing an offence the question to be asked was whether the employer had relied on reasonable grounds in finding the accused guilty.

According to Bulbulia M “[a]n employer need not be satisfied ‘beyond reasonable doubt’ that an employee has committed an alleged offence. The test to be applied is whether the employer has reasonable grounds for believing that the employee has committed the offence.”²³ Similarly, in *National Automobile and Allied Workers Union v Pretoria Castings (Pty) Ltd*,²⁴ Fabricius AM held that “ ‘Good grounds’, ‘valid reason’ or ‘good cause’ in relation to a determination whether a summary dismissal was justified, seems to me to require an evaluation of the facts under all the circumstances and the enquiry as to whether a reasonable employer having regard thereto and to equity, would or should have acted in the particular manner.”²⁵

When the Court was faced with deciding whether an employer should have, in the circumstances of the case, summarily dismissed the employee - i.e. was the dismissal fair besides being merely valid - the proper approach to be followed was indicated in *National Union of Mineworkers and others v East Rand Gold and Uranium Co Ltd* wherein the author Anderman was quoted to the following effect:

“Industrial tribunals have been sharply reminded that in deciding this issue too they must not ask themselves what they would have done had they been management, rather they must look at what the employer has decided and ask whether the employer’s decision in the circumstances was reasonable. Moreover, they must judge the reasonableness of the employer’s decision remembering that in these cases “there is a band of reasonableness within which one employer might reasonably take one view; another quite reasonably, take a different view”; and as long as it was quite reasonable to dismiss him then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”²⁶

²³*National Union of Mineworkers and others v East Rand Gold and Uranium Co Ltd* (1986) 7 ILJ 739 (IC) at 742 I.

²⁴(1985) 6 ILJ 369 (IC).

²⁵At 375 E, Fabricius AM. relies on *MacFil v Union Government* 1924 AD 77 at 80-81.

²⁶Being a quote from Anderman *Law of Unfair Dismissal* second edition at page 149, *National Union of Mineworkers and others v East Rand Gold and Uranium Co Ltd* (1986) 7 ILJ 739 (IC) at 746 F-H. The correct test was stated thus in *National Union of Wine, Spirit and Allied Workers and others v Distillers Corporation (Pty) Ltd*: “Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed, then the dismissal was fair.” (Lord Denning in *British Leyland (UK) Ltd v Swift* [1981] *JRLR* 91 at 93.)” at 788 H-J. According to De Kock AM. “the tribunal must not ask itself what it would have done had it been management, rather it must look at what the employer has decided and ask whether the employer’s decision in the circumstances was reasonable” at 788 J.

The standard was that of the reasonable employer, with the question needing to be answered: did the employer act in an unreasonable manner in relation to the behaviour of a “reasonable employer” in the same circumstances? If the employer did deviate from the standard of the reasonable employer then his or her action was unreasonable and consequently unfair. If, however, the employer’s action matches up to the standard of the reasonable employer then his or her action is reasonable and consequently fair.

With the passage of time, Fabricius AM started expressing doubts as to whether the “reasonable employer” test was the correct test to be applied in the law of labour relations²⁷ and in *National Union of Mineworkers and others v Vaal Reefs Exploration and Mining Co Ltd*²⁸ asked whether there was any point in enquiring whether an employer had acted *reasonably* in deciding to dismiss, as opposed to *fairly* or *equitably*? He thought not.

“As far as an employer’s reason to dismiss is concerned the sole question should be whether he had good grounds for doing so. From the strict jurisprudential point of view there is of course a difference between reasonableness and fairness, although the *boni mores* and policy considerations form part of each concept. A good reason (in the employer-employee relationship) may emanate from common-law principles or from standards collectively agreed to between the parties. Ultimately, and stripped of all semantics, it is conduct, or repeated conduct, which clearly indicates that the continuance of the employer-employee relationship has been made intolerable. What such conduct or course of conduct may be will ultimately depend on the facts and it would be unwise to lay down specific considerations in this regard. ... My view is therefore that the question whether the ‘reasonable employer’ test should be applied in our law or not is misplaced, and as far as substantive fairness is concerned need in any event not be decided in the sense of its being either right or wrong. The question should in fact not be an issue at all as I have attempted to indicate. The heritage of our common law seen in the light of prevailing circumstances and social conditions, plus the good judgement of the marketplace (the *boni mores*) will provide the answer in most conceivable instances.”²⁹

There was no meaningful distinction to be made between “reasonable” and “fair” behaviour. As far as an employer’s reason to dismiss was concerned the sole question should be whether he or she had good grounds for doing so. Though there is a difference between reasonableness and fairness, ultimately it is conduct, or repeated conduct, which indicates that the continuance of the employer-employee relationship has been made intolerable. This will depend on the facts of the

²⁷In *TWALA v ABC Store* (1987) 8 ILJ 714 (IC) at 717G.

²⁸(1987) 8 ILJ 776 (IC).

²⁹*National Union of Mineworkers and others v Vaal Reefs Exploration and Mining Co Ltd* (1987) 8 ILJ 776 (IC) at 779 C-J.

case, and each case should be judged as unique, rather than using the reasonable employer test. Fabricius AM's view, in the above dictum, is that substantive fairness will be located when one had regard to the common law, in particular the heritage thereof, seen in light of the prevailing circumstances and social conditions, and the good judgement of the marketplace (the *boni mores*). As a result that which was reasonable behaviour, on par with the behaviour of the reasonable employer, may be fair behaviour but this was not always the case.³⁰ In short, unreasonableness, more often than not, would indicate unfairness³¹ but reasonableness was not the enquiry itself; rather the enquiry was into the facts of the case as evaluated against the effect those facts would have on the employment relationship. Where certain conduct, on the part of the employee, was such as to cause the employment relationship to become intolerable then the employer's action in dismissing the employee would, more often than not, be fair. Essentially, at the end of the enquiry, the court is attempting to investigate if the employee's misconduct had the effect of destroying, or of seriously damaging, the employment relationship between the parties.³² Therefore it is the effect of the misconduct on the employment relationship which is paramount in the evaluation of fairness.

"An employer's response to a breach of duty by an employee ought properly to be dictated by the extent to which the breach has impaired the employment relationship, and nothing more. The fact that an employee remains defiant is relevant only in that context. In my view the proper enquiry in each case is whether the employer can fairly be expected to continue the employment relationship. The attitude adopted by the employee is but one of the factors which is relevant to that enquiry."³³

³⁰In *Chemical Workers Industrial Union v Reckitt and Colman SA (Pty) Ltd* (1990) 11 ILJ 1319 (IC) at 1328 D-G the court indicated that there was force in the submission of the applicant's counsel "that the approach to be adopted is dictated by the opening words of the definition of 'unfair labour practice' in s1 of the Labour Relations Act, which read - 'any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee...' and that this lays down a factual, objective test which does not depend on the state of mind or knowledge of the employer. Usually what is reasonable will also be fair but that is not always the case...."

³¹Indeed a labour practice which is unreasonable "may give rise to what is regarded as oppressive conduct" (*National Union of Mineworkers and another v East Rand Proprietary Mines Ltd* (1987) 8 ILJ 315 (IC) at 321 D per Bulbulia, M) and oppressive conduct is "unjust or harsh, burdensome and wrongful, or which involves at least an element of lack of probity or fair dealing or a visible departure from the standards of fair dealing and a violation of the conditions of fair play", *National Union of Mineworkers and another v East Rand Proprietary Mines Ltd* at 321 E, citing *Aspek Pipe Co Ltd and another v Mauerberger and others* 1968 (1) SA 517 (C) at 526 and 527.

³²See: *Hoechst (Pty) Ltd v CWTU and another* (1993) 14 ILJ 1449 (LAC) at 1459 cited in *Jefferies v President Steyn Mine* (1994) 15 ILJ 1425 (IC) at 1432 D.

³³*Alondi Paper Co Ltd v Paper Printing Wood & Allied Workers Union & another* (1994) 15 ILJ 778 (LAC) at 781A-B per Nugent J.

But what is the role of the common law?

A dismissal in contravention of the provisions of a statute or of provisions made or issued in terms of the statute are void, irrespective of whether justifiable cause for the dismissal exists.³⁴ If the dismissal is void then its fairness need not be enquired into. But what would occur when the dismissal was justified by the common law or the contract? The dismissal would only be permitted once it was found to be fair, which is when all the factors relating to fairness are considered.³⁵

“[T]he court has categorically stated and applied the principle that irrespective of the lawfulness of the dismissal, i.e. where the dismissal is completely in accordance with the common-law principles, or with the provisions of a contract of service... it remains to be decided whether the dismissal can be regarded as fair in the light of all the circumstances. This flows from the fact that the court is in these circumstances entitled to adopt a broader approach than a mere common-law or legalistic approach. However, the lawfulness of a dismissal is usually taken into account as a preliminary step when the fairness of the dismissal is considered.”³⁶

As early as 1983 in *Mawu v Barlows Manufacturing Co Ltd*³⁷ the court rejected the argument that a dismissal that was lawful could not be unfair.

“To confine the unfair labour practice jurisdiction of this court in respect of dismissals to those that were wrongful only would effectively render the legislative intent behind the provisions of such a jurisdiction nugatory for the employee would then be given no further rights than those he has all along enjoyed at common law.”³⁸

The enquiry is into fairness, and lawful conduct is not necessarily conclusive of fairness.

“Unlawful actions and practices are dealt with in the ordinary courts... . A practice which is quite lawful may, however, be unfair as contemplated by the definition of ‘unfair labour practice’ in s1 of the Act. I therefore find that it is unnecessary for this court first to obtain a judicial pronouncement on the lawfulness of the clause complained of. This court can make a determination without reference to the said legal point.”³⁹

In conclusion, the position of lawfulness in relation to fairness may be summarised as follows: an unlawful act would be an unfair labour practice due to its unlawfulness. This does not mean, however, that a lawful act is a fair labour practice. It is the act which must be fair and to be fair

³⁴Brassey *et al* *The New Labour Law* 1987 page 366.

³⁵Ibid.

³⁶Ibid page 366.

³⁷(1983) 4 ILJ 283 (IC).

³⁸At 294 A.

Cited in Le Roux and Van Nickerk *The South African Law of Unfair Dismissal* 1994 page 24.

³⁹*Council of Mining Unions v Chamber of Mines of SA* (1985) 6 ILJ 293 (IC), per Hicmstra AM, at 295 B-D.

it must initially be lawful, but “although a dismissal might be lawful it can still be unfair.”⁴⁰

So, after the above, what constitutes fairness? A concise, succinct statement is that:

“Fairness ... is of a subjective nature in regard to which reason is not necessarily applicable. Fairness must take account of human fallibility and of the fact that reason is seldom the sole guide of human behaviour. A sensitive response to deeply felt needs of his work-force, even if objectively those needs are not reasonable in all respects, should be expected of any manager.”⁴¹

Though “reasonable behaviour” may not be a necessary indicator of fairness, it may, nevertheless be sufficient. What is fair will be concluded from and founded upon the surrounding circumstances of the labour practice. More accurately, the judgement of fairness essentially is a value judgement which takes all the evidence into account.⁴² In light of the above, the following are offered as sufficient indicators of fairness, or the lack thereof: lawfulness, reasonableness - which should be distinguished from the reasonable employer test - equity and especially the damaging effect of the practice on the employment relationship.

4.3 Understanding insubordination under the unfair labour practice jurisdiction.

4.3.1 Control in the employment relationship - Managerial prerogative.

One of the consequences of the employee’s obligation to be subordinate is the employer’s contractual right to control the employee’s productive capacity. This right “is at the very heart of most employment relationships. It makes possible the deployment of the productive capacity for which the employer contracts, and so is the essence of what has come to be termed ‘managerial prerogative’.”⁴³ Under the unfair labour practice jurisdiction, it was said, that the power of command, “is one of the most jealously guarded territories of managers everywhere. In its modern guise as the ‘managerial prerogative’ or management’s ‘right to manage’ it underlies many contemporary disputes between management and organised labour.”⁴⁴ The Industrial Court

⁴⁰*Evans v CIT Manufacturing (Pty) Ltd* (1992) 13 ILJ 1585 (IC) before Van Zyl M at 1590 F, who in turn relies on *Metal and Allied Workers Union and others v Barlows Manufacturing Co Ltd* (1983) 4 ILJ 283 (IC) at 293 F-G; *Koyini and others, Kolase and others v Strand Box (Pty) Ltd* (1985) 6 ILJ 453 (IC), *National Union of Mineworkers v Marievale Consolidated Mines Ltd* (1986) 7 ILJ 123 (IC).

⁴¹*SA Chemical Workers Union and others v CE Industrial (Pty) Ltd t/a Panvet* (1988) 9 ILJ 639 (IC) at 649 I-J.

⁴²*Council for Scientific and Industrial Research v Fijen* 1996 (2) SA 1 (A) at 11 B.

⁴³Brassey *et al* *The Nature of Employment* 1990 page 908.

⁴⁴Rickert *Basic Employment Law* 1987 page 62.

indicated that it had the authority and power to scrutinize the so called “managerial prerogative”.⁴⁵

As to what exactly makes up managerial prerogative, the court in *Clarke v Ninian and Lester (Pty) Ltd* was in agreement with Brassey *et al*⁴⁶ and cited the following:

“The law gives the employer the right to manage the enterprise. He can tell the employees what they must and must not do, and he can say what will happen to them if they disobey. He must, of course, keep within the contract, the collective agreement and the legal rules that govern him. He must, now, also make sure his instructions do not fall foul of the unfair labour practice jurisdiction: in other words, if what has been said above is right, that they have a proper commercial rationale to them. But, even given these constraints, he still has a wide managerial discretion. He can decide which production line the employees should work on; whether they should take their tea break at ten or ten fifteen; when they may go on leave; and countless other matters beside. He can also decide what will happen to the employees if they do not work properly, if they go to tea early and so on. In short, it is he who, within the limits referred to, lays down the norms and standards of the enterprise. This - at least as far as the law is concerned - is what ‘managerial prerogative’ entails, no more and no less.”⁴⁷

Cameron in *Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering and Allied Workers Union*⁴⁸ dealt with managerial prerogative and cited the above passage by Brassey *et al* adding that the existence of the prerogative of management had a number of implications. In the first place, management has the prerogative to manage the business.⁴⁹ Thus management has a decisive say over the conduct of the enterprise and other business related decisions.⁵⁰ The second ambit of the employer’s prerogative is to impose reasonable and fair disciplinary regulations on its employees.⁵¹ The third area where managerial prerogative may come into play in defining the lawful ambit of an employee’s responsibilities was stated as follows:

“Here management’s prerogative to act unilaterally is considerably more restricted than in the other two areas. ... When an employee is engaged or promoted or when the terms of his or her contract are otherwise settled, it is true that the parties agree not only to a specified ambit of responsibility, but also to an inevitable degree of subordination, he or she is required to submit to the employer’s instructions. These may relate to what exactly the employee is required to do or to how he or she is required to do it. But the

⁴⁵*Clarke v Ninian and Lester (Pty) Ltd* (1988) 9 ILJ 651 (IC) at 655 A.

⁴⁶*The New Labour Law*, (1987) at page 74.

⁴⁷At 655 B-E.

⁴⁸(1990) 11 ILJ 1357 Arbitration, before Cameron, Arbitrator.

⁴⁹*Checkers SA Ltd (South Hills Warehouse) and SA Commercial Catering and Allied Workers Union* (1990) 11 ILJ 1357 Arbitration at 1365 D.

⁵⁰*Ibid.*

⁵¹At 1365 D-E.

prerogative has definite limits, and these lie along the boundaries of the employee's agreed contractual duties. Managerial prerogative cannot be held to make the employee submissible to instructions of whatever kind management might chose to impose. As Brassey shows, the employer must 'keep within the contract' and observe 'the legal rules that govern' the employment relationship."⁵²

It would seem that an employer's interest in maintaining discipline in his workplace is legitimate.

"As a general principle it may be stated that the breach of rules laid down by an employer or the refusal to obey an employer's lawful and reasonable order is to be viewed in a serious light and may in given circumstances even justify summary dismissal."⁵³

"The very fabric of the employment relationship requires an employee to accept and obey the reasonable orders of his superiors and to leave the taking of managerial decisions to those other employees who have charge of them."⁵⁴ Although the person placed in authority has this right or "prerogative" there is little doubt that when it is exercised, the person in instructing his or her employees how, where, when and what to do, or not to do, should do so within the following parameters. Firstly, the employer must not give an order which falls outside the parameters of the employment relationship; namely, the contract of employment and collective agreement. Furthermore, the employer should exercise his authority by not falling foul of the unfair labour practice jurisdiction. It is within these "constraints" that the employer should exercise his or her authority, or managerial prerogative, and it is within these parameters that an instruction will be deemed lawful to demand obedience, the refusal of which would be a breach of the contractual relationship. But would that disobedience constitute insubordination?

4.3.2 Identifying the nature of insubordination under the unfair labour practice jurisdiction.

As was indicated in chapter 2, the employee occupies a *de facto* subordinate position in the employment relationship. This subordinate position is evidence of the employee's *de jure* obligation to be subordinate in the relationship. This obligation, or duty, to be subordinate is buttressed with the employer's contractual right to demand that the employee act according to his or her obligation to be subordinate. As understood in the light of the above, the breaching of this duty would be any conduct which causes the employee to act contrary to his or her contractual

⁵²At 1365 G- 1366 A.

⁵³Per M Oliver in *Brassey et al The New Labour Law* 1987 page 430.

⁵⁴Landman AM in *Steel Engineering and Allied Workers Union of SA and others v Cullinan Power Equipment*, unreported NII 11/2/1575 GF 995 cited in *Madlala v Lynne and Tedder v/a Thornville Engineering* (1990) 11 ILJ 394 (IC) at 398 I- 399 A.

obligation to be subordinate. Insubordination, under the common law, as discussed in chapter 3, was more narrowly defined and equated (primarily) with the employee's disobedience rather than any conduct contrary to the duty to be subordinate.

What will be discussed hereunder is the misconduct of insubordination as defined under the unfair labour practice. This in turn will indicate to the reader the restriction and limitation placed on the contractual right of the employer to demand the employee to act according to his or her obligation to be subordinate.

In *Commercial Catering and Allied Workers Union of SA and another v Wooltru Ltd t/a Woolworths (Randburg)*⁵⁵ the court pointed out that an employer may only dismiss an employee if he or she breaches a "fundamental", "material" or "important" term of the contract.⁵⁶ Insubordination constituted such a valid reason for dismissal,⁵⁷ provided the dismissal was substantively fair.⁵⁸ The court held that insubordination took place when:

"the employee refuses to obey a lawful and reasonable command or request and the refusal is wilful and serious (wilfully disobedient) or when the employee's conduct poses a deliberate (wilful) and serious challenge to the employer's authority."⁵⁹

Insubordination was thus equated with a wilful disobedience of a lawful instruction, akin to the common law's understanding of the same misconduct. In the decision, *Mqhayi v Van Leer SA (Pty) Ltd*,⁶⁰ the Industrial Court decided a matter where an employee left his workplace in defiance of authority.⁶¹ The Industrial Court was satisfied that "the applicant's belief that permission had been granted was unfounded and calculated to challenge [the employer's] authority."⁶² Van Schalkwyk M therein noted the following from Lord Evershed MR in *Laws v London Chronicle (Indicator Newspapers) Ltd* (1959) 2 All ER 285 at 287F and 288A respectively:

⁵⁵(1989) 10 ILJ 311 (IC) per DA Basson AM, with whom Hartdegen AM concurred.

⁵⁶At 314 B-C.

⁵⁷At 313 E- 314 A. The court relied on *Transport and General Workers Union and another v Interstate Bus Lines (Pty) Ltd* (1988) 8 ILJ 877(IC) at 880-1. Furthermore the court indicated that the above was in accordance with *Mqhayi v Van Leer SA (Pty) Ltd* (1984) 5 ILJ 179 (IC) at 182.

⁵⁸To the extent that there was both a valid and fair reason for the dismissal. *Commercial Catering and Allied Workers Union of SA and another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC) at 313E.

⁵⁹At 314 H-J.

⁶⁰(1984) 5 ILJ 179 (IC) per Van Schalkwyk M.

⁶¹*Mqhayi v Van Leer SA (Pty) Ltd* (1984) 5 ILJ 179 (IC) at 179 G.

⁶²At 183 B.

“ ‘It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.’ ‘I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that the disobedience must at least have the quality that it is “wilful”: it does (in other words) connote a deliberate flouting of the essential contractual conditions.’ ”⁶³

From the above it may be concluded that the wilful disobedience of a legitimate instruction may justify dismissal, because the refusal indicates a disregard of a fundamental condition of the employment relationship, that is, the essential requirement that the employee will obey and act according to his or her subordinate position.⁶⁴ In refusing the instruction, the employee breaches the relationship fundamentally and repudiates the contract.⁶⁵ The misconduct was labelled by the court as being insubordination and consisted of the employee challenging the employer's authority. Insubordination was therefore the wilful challenge of the employer's authority, of which disobedience was a manifestation of such a challenge. Summary dismissal, however, can only be justified if the employee committed a deliberate and serious act of disobedience.⁶⁶

In *Transport and General Workers Union and another v Interstate Bus Lines (Pty) Ltd*⁶⁷ the applicant had refused to participate in a disciplinary hearing because the chief shop steward was not present to represent him. The traffic manager, who was conducting the hearing, was not prepared to adjourn as another shop steward was present who could represent the applicant. The disciplinary hearing continued and at the end of the enquiry the traffic manager informed the

⁶³At 182 A-C.

⁶⁴This even applies for employees who have been placed in a position of authority over others, insubordination relates to the breaching of this authority as well. “A refusal to obey instructions from the person whom the employer, to the knowledge of the employee, has placed in authority over that employee amounts to misconduct. This is so whether the person in authority is a subcontractor or a normal employee of the company. Such behaviour amounts to misconduct for which the employer is entitled to discipline the employee.” *Southern Sun Hotel Corporation (Pty) Ltd and SA Commercial Catering and Allied Workers Union* (1991) 12 ILJ 1403 Arbitration, per Brand, Arbitrator, at 1413 F-H.

⁶⁵*Building Construction and Allied Workers Union and another v E Rogers and C Buchel CC and another* (1987) 8 ILJ 169 (IC) at 172 E-I.

⁶⁶*Mqhayi v Van Leer SA (Pty) Ltd* (1984) 5 ILJ 179 (IC) at 182 D cites *Moonian v Balmoral Hotel* 1925 NPD 215 at 219.

⁶⁷(1988) 8 ILJ 877 IC, per De Villiers SC, M.

applicant that he was satisfied that the evidence proved his guilt. In response to this finding, the applicant became annoyed and snatched the notes from the traffic manager's hand and thereby tore them. He then shouted at the traffic manager and rushed out of the room, with the shop steward, before the disciplinary enquiry was complete, taking the torn notes with him.⁶⁸ It was this latter behaviour of the employee that resulted in the applicant having to appear at another disciplinary enquiry, the following day, where he was to face the charge of "intolerable behaviour" and "insubordination" because he removed confidential documents from the boardroom and disregarded his disciplinary enquiry by walking out of the boardroom.⁶⁹ De Villiers M pointed out that "insubordination, calculated to challenge an employer's authority warrants instant dismissal."⁷⁰ Insubordination therefore occurred when the employee challenged the employer's authority or position of authority. In relating the facts of the case matter with the above nature of insubordination the court continued:

"If the applicant in casu was not satisfied with the disciplinary proceedings he could have mentioned it at his appeal hearing and there was therefore no reason for him to behave the way he did, which behaviour was inexcusable. The court is therefore satisfied that the applicant's behaviour at the disciplinary enquiry the previous day amounts to gross insubordination and although the court cannot find that it was calculated to challenge the respondent's authority, it nevertheless had the effect of disregarding the respondent's authority and of making a mockery of the respondent's disciplinary procedure."⁷¹

The court was satisfied that a "mere disregard" of authority had the same effect as a "challenge" of authority. Thus a "challenge" directed to or a "mere disregard" of an employer's authority was evidence of the misconduct insubordination.

In *Humphries and Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union and others* the Labour Appeal Court held that "a disregard by an employee of his employer's authority, especially in the presence of other employees, amounts to insubordination and it cannot be expected that an employer should tolerate such conduct. The relationship of trust, mutual confidence and respect which are the very essence of a master-servant relationship cannot, under

⁶⁸At 880 A-F.

⁶⁹At 880 G-H.

⁷⁰*Transport and General Workers Union and another v Interstate Bus Lines (Pty) Ltd* (1988) 8 ILJ 877 (IC) at 880 I-J. The court referred to: *Mghayi v Van Leer SA* (1984) 5 ILJ 179 (IC) and *Rostoll & 'n ander v Leeupoort Minerale Bron (Edms) (Bpk)* (1987) 8 ILJ 366 (IC).

⁷¹*Transport and General Workers Union and another v Interstate Bus Lines (Pty) Ltd* (1988) 8 ILJ 877 (IC) at 880J-881C.

these circumstances, continue. ...”⁷²

In summary, from the above, the Labour Appeal Court in *Humphries and Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union and others* held that a “disregard” of the employer’s authority was insubordination, in line with the *Interstate* decision. *Wooltru* and *Mqhayi* both prefer the “challenge of authority” as constituting the misconduct. *Wooltru*, however, continues that disobedience of a valid instruction would also be insubordination. Accordingly, *Wooltru* confirms the view that insubordination may occur in any of those two forms, a challenge of authority or disobedience - in *Wooltru*, the employer’s authority was referred to as “competence to give orders”.⁷³ It is submitted that the unifying theme in these judgements is the “challenging of the employer’s authority” as the essence of insubordination, of which disobedience is evidence of such a challenge, so too is a disregard of the employer’s instruction. So, at the heart of the enquiry is conduct, on the part of the employee, which will indicate an intention to challenge the employer’s authority. One of the ways in which this challenge may be manifested is by the employee’s wilful disobedience of a legitimate instruction, or by the employee disregarding the employer’s authority.

But on what grounds can a mere disregard of the employer’s authority amount to insubordination?⁷⁴ Disregarding an employer’s authority is the same as “pay no attention to” or “treat as of no importance”⁷⁵ which would, it is submitted, have the same effect as disobeying the employer’s instructions, in both cases the employee is acting in a manner which is contrary to his or her obligation to be subordinate to the employer’s authority.

It is submitted that it does not matter how slight the disregard or disobedience is, provided the conduct indicates a deliberate challenge to the employer’s authority. If the conduct does indicate

⁷²*Humphries and Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union and others* (1991) 12 ILJ 1032 (LAC), before Spoelstra J, sitting with Van Den Heever, Claassen, assessors, at 1037 F-I.

⁷³At 317 B.

⁷⁴See *Humphries and Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union and others* (1991) 12 ILJ 1032 (LAC) at 1037 F-I.

⁷⁵*The Concise Oxford Dictionary* 1990 page 338.

such an intention then that conduct is insubordination.⁷⁶ If the conduct is insubordination then it is a valid ground for dismissal. But whether it is a fair ground for dismissal is another matter, and it is here that the “degree” of disregard or disobedience will play a more important role - the seriousness of the breach.^{77 78}

The enquiry into the seriousness of the insubordinate act relates to the fairness of the dismissal as the appropriate sanction for the misconduct. The enquiry is whether dismissal was an appropriate sanction according to the facts of the case; that is, was the insubordination so serious as to warrant dismissal? As such it is that enquiry which usually follows a finding that the employee in fact was insubordinate, i.e. that grounds for dismissal existed.⁷⁹

What is serious will depend on the surrounding circumstances of the case, which include the personal circumstances of the parties. A good guide as to what constitutes “serious misconduct” is whether or not the misconduct entailed behaviour which undermined the relationship of trust and harmony between an employer and employee to such an extent that the continued relationship would be impossible or intolerable,⁸⁰ or which caused the relationship between the employer and employee to be destroyed or seriously damaged to such an extent that the relationship could not

⁷⁶In *Interstate* the court held that a mere disregard of the employer's authority was sufficient to constitute insubordination. While in *Wooltru* a challenge of authority was insubordination. The solution offered in *Wooltru* was that the *Interstate* decision was not wrongly decided. Rather it was “submitted that the ‘disregarding of the employer's authority’ did on the facts of that case constitute a deliberate and serious challenge to or defiance of or resistance to (all of which are stronger than a mere disregard of) the authority of the employer (especially because he was making a mockery of the employer's disciplinary procedure).” *Commercial Catering and Allied Workers Union of SA and another v Wooltru Ltd t/a Woolworths (Randburg)* at 314 J. With what has been said above, and if true, the court in *Wooltru* would not have had to find that the conduct of the employee was more severe than a mere disregard, as the disregard was insubordination and was a valid ground for dismissing. Whether it was a fair ground is another matter, and therein the seriousness of the breach would be more important.

⁷⁷*Amalgamated Clothing and Textile Workers Union of SA and others v JM Jacobsohn (Pty) Ltd* (1990) 11 ILJ 107 (IC) per DA Basson AM, at 112 E who in turn cites *Building Construction and Allied Workers Union and another v E Rogers and C Buchel CC and another* (1987) 8 ILJ 169 (IC).

⁷⁸*Amalgamated Clothing and Textile Workers Union of SA and others v JM Jacobsohn (Pty) Ltd* (1990) 11 ILJ 107 (IC) at 112 G, relying on *SEAWUSA v Trident Steel* (1986) 7 ILJ 418 (IC) and *Bissessor v Beastores (Pty) LTD t/a Game Discount World* (1986) 7 ILJ 660 (IC).

⁷⁹*HLCCAWUSA and another v Wimpy Pleasure Foods t/a Wimpy Eastgate* [1996]9 BLLR 1125 (IC) at 1133 H-J.

⁸⁰*Ibid.*

“The test to be applied in determining whether an employee has committed a misconduct of such a nature was set out in *Anglo-American Farms t/a Boschendal Restaurant v Komjwayo* 1992 3 (6) SALLR 1 (LAC) as follows: ‘Whether the accused's misconduct had the effect of rendering continuation of relationship of employer and employee untenable’... .” at 1133I to 1134 A.

be continued,⁸¹ or, “the relationship of trust and confidence between employer and employee being broken down irretrievably”.⁸² Obviously, the more serious the misconduct the higher the probability of its damaging effect on the employment relationship, and where the misconduct causes the continued employment relationship to become intolerable the misconduct is serious enough to warrant the sanction of dismissal.⁸³

It is in the assessment of the seriousness of the misconduct that the court will focus on the “implications” or “consequences” that the insubordination will have on the employment relationship.⁸⁴ For example, it has been held that dismissal was justified or appropriate where the disobedience was serious because the disobedience could have caused a disaster,⁸⁵ or because of the employee’s persisting negative and militant attitude towards management,⁸⁶ or when the employee refused an instruction and used abusive language in the presence of customers.⁸⁷ Dismissal for insubordination is justified where the refusal is aggravated or repeated,⁸⁸ the wilful repeated disobedience indicates a complete disregard of the employer’s authority and the employee’s duty to obey.⁸⁹ Before the decision to dismiss is taken, similar incidents, including

⁸¹Rossouw AM, relying on *Scaw Metals Ltd v Vermeulen* (1993) 14 ILJ 672 (LAC) in *Nyembezi v NEHAWU* [1997] 1 BLLR 94 (IC) at 103 G-I.

⁸²Rossouw, AM citing *Abrahams v Pick 'n Pay Supermarkets OFS* (1993) 14 ILJ 729 (IC) in *Nyembezi v NEHAWU* [1997] 1 BLLR 94 (IC) at 103 G-I.

⁸³In general see *Nyembezi v NEHAWU* [1997] 1 BLLR 94 (IC) at 103 -105.

⁸⁴“The degree of seriousness must be assessed in the light of all the circumstances. And much depends on the implications of the refusal.” Bennet *A Guide to the Law of Unfair Dismissal in South Africa* 1992 pages 41-43, cited in *SACCAWU and another v Shoprite-Checkers* [1995] 12 BLLR 87 (IC) at 92 J-93A.

⁸⁵*National Union of Mineworkers on behalf of Mokgotho v Greenside Colliery* (1995) 16 ILJ 387 (LAC) before Nugent J, sitting with Cassim and Euijen, assessors, who concurred.

“The transgression was a serious dereliction of duty. Underground work is inherently hazardous, and management can only fulfil its duty to reduce the risks to workers if it can be confident that instructions properly given will be carried out. As appears from the evidence, it is essential that the person in charge of an underground shift is aware at all times of the location of the workers under his control. Furthermore the task which Mokgotho was assigned to was the removal of loose lying coal which presents a fire hazard underground.” at 389 C-F. See also *National Union of Mineworkers and others v Driefontein Consolidated Ltd* (1984) 5 ILJ 101 (IC).

⁸⁶*SA Clothing & Textile Workers Union & another v Ninian & Lester (Pty) Ltd* (1995) 16 ILJ 1041 (LAC). Before Combrinck J, sitting with Nicholson and Winterton, Assessors, who concurred. The shop steward incited and encouraged fellow employees to disobey instructions, the dismissal was fair in light of the shop steward’s persisting attitude of defiance and militancy towards the employer.

⁸⁷*HLCCAWUSA and another v Wimpy Pleasure Foods t/a Wimpy Eastgate* [1996] 9 BLLR 1125 (IC) at 1129 F-G.

⁸⁸*Madlala v Wynne and Tedder t/a Thornville Engineering* (1990) 11 ILJ 394 (IC) at 395 F, per De Kock, M.

⁸⁹At 365 G.

other relevant facts, should be taken into account.⁹⁰ That the insubordination occurred in the presence of other employees, who eagerly watched on, will weigh heavily with the court.⁹¹

On the other hand, the disobedience was not serious enough to warrant dismissal when the disobedience did not cause prejudice to the employer,⁹² or when the employee's failure to carry out the instructions was only partial.⁹³ It is therefore apparent that what constitutes serious misconduct is a decision based upon all the facts of the case. Notwithstanding the above, some decisions will be discussed hereunder to highlight which "surrounding circumstances" may justify the dismissal and which would not.

In the arbitration of *ATC (Pty) Ltd and National Union of Metal Workers of SA*⁹⁴ the dismissed employees were guilty of convening a meeting in defiance of management's refusal to permit one.⁹⁵ The arbitrator indicated that the following militated against any conclusion that the penalty was appropriate.⁹⁶ The day was exceptionally unusual, there was turmoil and violence in the community, and the workers in their anxiety had appealed to the union for help. Their decision to call for a meeting was found to be understandable. It was difficult at least from the side of the workers to see why management should refuse them permission to meet. The arbitrator stated:

"The question is whether they (the grievants) were guilty of misconduct so serious as to warrant their dismissal. In making that assessment, one has to bear in mind that they acted in a moment of crisis, with little time to reflect and consider, in response to an emergency of a kind they had not experienced before. They should accordingly not be condemned merely because, with the benefit of hindsight and mature reflection, it is possible to think of better ways in which they could have achieved their legitimate ends. They should instead be judged in the moment of crisis in which they found themselves and the question should be whether, in those circumstances, they were guilty of culpable conduct so serious as to warrant their dismissal. It can in my view clearly not be said that, by calling the prohibited meeting in the circumstances they did, they were guilty of serious misconduct

⁹⁰Which was enunciated as principle in "*Noddele v Mount Nelson Hotel and another* (1984) 5 ILJ 216 (IC) and the *Rostoll ... case* at 370 E - F." *Commercial Catering and Allied Workers Union of SA and another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC) at 315 I-J.

⁹¹*Humphries and Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union and others* (1991) 12 ILJ 1032 (LAC) at 1036 F.

⁹²*SACCAWU and another v Shoprite-Checkers* [1995] 12 BLLR 87 (IC) at 95 B-D.

⁹³*CWTU and another v SA Polymer Holdings (Pty) Ltd t/a Megapak* [1996] 8 BLLR 978 (LAC) at 984A.

⁹⁴(1992) 13 ILJ 1320 (Arbitration) before Trengove, Arbitrator.

⁹⁵*ATC (Pty) Ltd and National Union of Metal Workers of SA* (1992) 13 ILJ 1320 (Arbitration) at 1325 E-G.

⁹⁶At 1325 F - 1326 F.

of that kind.”⁹⁷

Though the organising of a union meeting was in defiance of management’s instructions it was not, in the light of crisis, so gross as to justify dismissal. The employees should be judged in the context of the events that gave rise to their defiance. Similarly in *Evans v CHT Manufacturing (Pty) Ltd*⁹⁸ the applicant was dismissed for gross insubordination in that he called the general manager an “ignorant bastard”. The court found that the events which occurred in the months preceding the incident; coupled with the abuse the applicant was subjected to and his general frustration at the lack of co-operation he was receiving, justified his outburst. Thus a single outburst at the end of a strained relationship could not be regarded as serious enough to warrant dismissal.⁹⁹ In a similar vein was the dismissal of an employee who acted insubordinately on the spur of the moment in *Armitage Shanks SA (Pty) Ltd v Mnisi*.¹⁰⁰ The Labour Appeal Court observed in that case:

“(The) employee had approached his charge hand to request their supervisor to allow him to leave work early. It appeared that the charge hand did not advise the employee that the supervisor refused to grant him leave. Only when the employee was about to leave did he speak to the supervisor and discover that he could not give the requisite permission. After a half-hearted attempt to find a more senior manager to obtain permission from him, the employee left work. The employee was dismissed. The Industrial Court found his dismissal to be unfair and reinstated him retrospectively for a period of six months.”¹⁰¹

The Court held that in the circumstances, although the employee did disobey the order, he did so on the spur of the moment and without committing insubordination. It is clear from the above that the surrounding circumstances exculpated the employee’s insubordination.

In each of the above three decisions the actions of the employee were analysed in light of the general surrounding circumstances of the dismissal and each time exculpated the employee, which caused the dismissal to be unfair. But should the court take into consideration the personal circumstances of the employee?

⁹⁷At 1326 D-F.

⁹⁸(1992) 13 ILJ 1585 (IC) before Van Zyl, M.

⁹⁹*Evans v CHT Manufacturing (Pty) Ltd* (1992) 13 ILJ 1585 (IC) before Van Zyl M at 1592 G-I

¹⁰⁰(1995) 16 ILJ 61 (LAC), before Goldstein J sitting with Hutton and Motimele, Assessors, who concurred.

¹⁰¹*Armitage Shanks SA (Pty) Ltd v Mnisi*(1995) 16 ILJ 61 (LAC) at 61 C-E.

In the arbitration of *Corobrick (Pty) Ltd and National Union of Building and Allied Workers*¹⁰² it was found that there could be no doubt that the employee failed to carry out the lawful instruction to clean the driers on two occasions.¹⁰³ The arbitrator found that there were factors which persuaded him that immediate dismissal was not the correct penalty, in these circumstances, for the failure to carry out the lawful instruction.¹⁰⁴ The company should have taken into account the age of the dismissed employee, and should have considered the employee's perception that he was unwell, especially because this may have rendered him psychologically incapable of carrying out the tasks asked of him.¹⁰⁵ The job category may have been above the capability of the employee.¹⁰⁶ Clearly the arbitrator was of the view that when deciding whether the dismissal was an appropriate sanction for insubordination the employer should take into account the personal circumstances of the worker involved.¹⁰⁷ *Jefferies v President Steyn Mine*¹⁰⁸ also illustrates this point. Here the applicant was a 44 year-old hostel manager at the mine and had for some time, with the approval of the respondent, also conducted a transportation business of deceased miners. This involved the transportation of the bodies of deceased miners to their place of burial, at the request of the family or other hostel managers. When the new personnel manager became aware of this he gave the applicant a written instruction to discontinue the body transportation business. The applicant ignored this instruction because he believed that it was a private business conducted after hours and off the premises of the mine. The applicant was dismissed.¹⁰⁹

The instruction was found to be reasonable and lawful,¹¹⁰ and the refusal was found to be unreasonable.¹¹¹ The court, nevertheless, held that although the applicant's misconduct

¹⁰²(1992) 13 ILJ 1616 (Arbitration) Before Pitman.

¹⁰³*Corobrick (Pty) Ltd and National Union of Building and Allied Workers* (1992) 13 ILJ 1616 (Arbitration) at 1621 C.

¹⁰⁴At 1621 D.

¹⁰⁵At 1621 G-H.

¹⁰⁶At 1621 I.

¹⁰⁷At 1616 H.

¹⁰⁸(1994) 15 ILJ 1425 (IC) per Verwey, AM.

¹⁰⁹*Jefferies v President Steyn Mine* (1994) 15 ILJ 1425 (IC) at 1426 A.

¹¹⁰At 1437 F-G.

¹¹¹“The instruction came from the personnel manager, it was on this senior management level that clarification should have been obtained immediately. Applicant had a duty to ascertain the reasonable and lawful meaning, applicability and extent of the instruction given to him, if he was uncertain about it, as he clearly was, before unilaterally deciding not to adhere thereto. I accordingly conclude that applicant, an employee in a managerial position, acted unreasonably in refusing to consider the instruction applicable to himself and accordingly refusing to obey it.” At 1438 D-F.

constituted a valid reason for dismissal it was, nevertheless, due to the personal circumstance of the employee not a fair reason.¹¹² The following personal facts weighed heavily with the court: that the applicant was 44 years of age, that he had 15 years of unblemished service, and that there was no evidence that he had abused his position to further his own business.¹¹³

Clearly the court tended to place emphasis on both the surrounding circumstances of the dismissal, as well as the personal circumstances of the employee, in searching for any sign of “reasonableness” in the disobedience which would either justify the insubordinate conduct or the dismissal. The circumstances that surround the labour practice and those of the parties either mitigate or aggravate the employee’s wilful state of mind, and in turn highlight the “seriousness” of the misconduct.

According to the common law the refusal should be wilful, that is intentional or deliberate, to justify dismissal. Thus a mere disinclination to perform the instruction,¹¹⁴ or performance under a general sense of protest,¹¹⁵ is not insubordination because the employee is performing what he or she has been instructed to perform. Conduct which appears to constitute insubordination may not necessarily be so. The arbitration of *Tubecon (Pty) Ltd and National Union of Metalworkers of SA*,¹¹⁶ was concerned with a refusal by some employees to leave a disciplinary hearing on the grounds that they had not received a fair hearing. The misconduct had occurred in the course of a disciplinary hearing.

“The line between effective and assertive defence in a disciplinary enquiry and insubordination is a very blurred one. If a worker oversteps the mark I think this must be taken into account because frequently the motive is not to subvert the authority of the management but to assert the merits of the defence. In this case both grievants believed that they were not getting a fair hearing and the motive behind their conduct was not in my opinion to subvert the management’s authority as much as to assert their rights. The

¹¹²At 1438 H-J.

“Applicant’s misconduct tested against the circumstances surrounding the commission of the offence, was not sufficiently serious to warrant dismissal, and respondent, having regard to the merits in casu, acted unfairly and too severely by awarding dismissal as sanction.” at 1439 A-B.

¹¹³At 1426 D-F.

¹¹⁴“If mere disinclination is an offence, then half the country’s population would lose their jobs” per Bulbulia in *Metal and Allied Workers Union and others v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd* (1988) 9 ILJ 129 (IC) at 138 I.

¹¹⁵*Metal and Allied Workers Union and others v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd* (1988) 9 ILJ 129 (IC) at 138 H-I.

¹¹⁶(1991) 12 ILJ 437 (Arbitration), before Brand, Arbitrator.

fact that they were unduly robust in doing this does not indicate a settled and wilful desire to subvert the authority of the company.”¹¹⁷

From the above, it is important in deciding the fairness of the dismissal for insubordination to identify the conduct as being insubordination and not some other intentional conduct. Intention is important because it indicates the employee’s blameworthy or wrongful state of mind in challenging the employer’s authority. Intention is essential, because it gives the misconduct its “insubordinate” nature.

4.3.3 The giving of a lawful and reasonable instruction under the “unfair labour practice”.

Under the common law, dismissal for disobeying a lawful and reasonable order was permitted. What was lawful, and reasonable, depended on legislation and the common law (See chapter 3). How these requirements, lawful and reasonable, were understood and applied by the courts under the “unfair labour practice” jurisdiction will now be discussed.

It was noted above that employers must exercise their “managerial prerogative” within the parameters of the law and binding contractual agreement, which include individual contracts and collective agreements. In addition, the instruction should be reasonable and fair. Clearly reasonable orders under the unfair labour practice was interpreted in light of “fairness” and “equity” which was wider than the understanding and interpretation thereof under the common law - where reasonableness was restricted to the common law’s understanding of *boni mores*. There seems little doubt that by the addition of fairness the legislator strengthened the employee’s position by restricting the employer’s contractual right to demand the employee to act according to his or her obligation to be subordinate. This will be highlighted more fully hereunder.

4.3.4 Lawful and reasonable orders.

4.3.4.1 Instructions when given must fall within the contractual relationship.

Employees are employed to perform specified tasks and when an instruction is given which unilaterally varies or falls outside of the contractual relationship that instruction is unlawful

¹¹⁷*Tubecon (Pty) Ltd and National Union of Metalworkers of South Africa* (1991) 12 ILJ 437 (Arbitration) at 446 E-H.

because it contradicts the relationship of the parties. The instruction, therefore, when given should fall within the bounds of the contractual relationship between the parties to be lawful and demand obedience.¹¹⁸

The decision of *Amalgamated Clothing and Textile Workers Union of SA and others v JM Jacobsohn (Pty) Ltd*¹¹⁹ illustrates the above. The employee was employed as a chopper-outer, besides this function he also did the “laying-up” of material and carried material from delivery points.¹²⁰ The employee objected to doing the duties of “laying up” as well as carrying material, he argued that these functions did not form part of his occupation.¹²¹ It was common cause that “not only did the chopper-outers carry the material but everybody at the company pitched in: the managing director(s); the factory manager and the cleaners.”¹²² One day when the delivery truck arrived the employee refused to carry the material.¹²³ The employee was then summoned to a disciplinary hearing where he was charged with insubordination.

Did the instruction fall within his job description - his contractual role? The court was not convinced that the carrying of material was part of his job description, in the true sense of the word, and the employee had accordingly not refused to obey a “lawful” request.¹²⁴ Though the order might have been reasonable, especially because the other employees helped and the applicant himself contributed in carrying material on a number of occasions, the order, nevertheless, fell outside the bounds of the contractual relationship, and therefore these duties did not form part of the employee’s job description. Therefore the instruction was unlawful and the employee was not obliged to obey. In a similar vein is the decision *National Union of Textile Workers and others v Jaguar shoes (Pty) Ltd*¹²⁵ wherein the court was concerned with the refusal by employees to work overtime, for which they were dismissed.¹²⁶ It appeared that the respondent had a

¹¹⁸Which is why the order should relate to working hours only. *Kahn v Rainbow Chicken Farms Pty Ltd* (1993) 14 ILJ 1566 (IC).

¹¹⁹(1990) 11 ILJ 107 (IC) per DA Basson AM.

¹²⁰At 110 C.

¹²¹At 110 F.

¹²²At 110 I.

¹²³*Ibid.*

¹²⁴At 115 C-G.

¹²⁵(1986) 7 ILJ 359 (IC) per Bulbulia M.

¹²⁶*National Union of Textile Workers and others v Jaguar shoes (Pty) Ltd* (1986) 7 ILJ 359 (IC) at 361 F.

longstanding practice, of almost 20 years, of requiring employees to engage in overtime work.¹²⁷ The dismissal of the employee was held to be unfair because the refusal to work the overtime was not a breach of the contract between the parties. The overtime was voluntary, there was no express or implied agreement between the parties to work compulsory overtime, thus the employee's refusal was not a breach of their contract.¹²⁸ As a consequence, there was no evidence that the employees disobeyed a lawful instruction, on the contrary it was the employer that had flouted the law.¹²⁹ The employees were not bound to perform the instruction as it did not fall within the contract between the parties. The above decisions clearly highlight that an instruction which does not fall within the ambit of the contractual relationship or which constitutes a unilateral variation of the contract - i.e. does not form part of the employee's job description - is unlawful and need not be obeyed by the employee. But when does an instruction actually fall outside the parameters of the contractual relationship?

An instructive and illustrative decision is *A Mauchle (Pty) Ltd v/a Precision Tools v National Union of Metalworkers of SA & others*.¹³⁰ The facts were that the appellant manufactured car parts and received an order for certain parts. The company wanted this opportunity to recover some of the losses which it had incurred. Further, they were concerned that if they could not fulfil the order then the car manufacturer would order the components from an overseas producer which would place the future business relationship at risk. In order to satisfy the order, the appellant proposed that machine operators should work overtime when required and that five operators should each operate two machines. The company regarded the latter proposal as reasonable because the operators had both the time and ability to do the work, in particular the operators were being paid for a full day's work although they were not fully occupied.¹³¹ The union was of the opinion that instead of some operators operating two machines, employees previously retrenched should be re-employed. After numerous meetings the position still did not

¹²⁷At 361 C.

¹²⁸Furthermore, the refusal to obey was justified because the work was in excess of the maximum number of overtime hours permitted by law. Thus the order was unlawful in that it fell outside the parameters of the contract between the parties and the order itself was illegal. *National Union of Textile Workers and others v Jaguar shoes (Pty) Ltd* (1986) 7 ILJ 359 (IC) at 366 E-1.

¹²⁹See *National Union of Textile Workers and others v Jaguar shoes (Pty) Ltd* at (1986) 7 ILJ 359 (IC) 365 I - 366 A.

¹³⁰(1995) 16 ILJ 349 (LAC). Before Myburgh J sitting with Campbell and Tip as Assessors, who concurred.

¹³¹At 353 B-C.

change. Thereafter the works manager addressed the union members in the production department and explained management's position. The stewards met with their members and reported back that they were no longer willing to work overtime unless retrenched employees were reinstated, which could be done on a temporary basis.¹³² This reply was a reversal of the union's previous position, which had been that overtime would be worked but that one operator would not operate two machines.¹³³

Later some of the machine operators were instructed to operate two machines and they refused. A written warning was given to Mr Molokomme that unless he operated two machines by 13:30 further disciplinary action would be taken against him.¹³⁴ He persisted in his refusal and the union gave the company written notice that a dispute was being declared about the disciplinary action taken against Mr Molokomme.

The company then requested the names of five machine operators who were to operate two machines, these were not produced and the machine operators were informed that they were dismissed for their collective refusal to comply with the company's lawful and reasonable instructions in relation to the performance of work.¹³⁵

The Industrial Court found for the union on three grounds:

- “(a) the company issued a request, not an instruction, and hence the applicants were not obliged to comply with it;
- (b) in making the ‘request’ the company intended to alter the terms of the contracts of employment of the applicants;
- (c) the ‘instruction’ was not a reasonable one (which the applicants had to obey).”¹³⁶

On appeal the Labour Appeal court disagreed and held:

“(t)he company had a valid reason for dismissing the applicants:

- an instruction was in fact given;
- the instruction was lawful;
- the instruction was reasonable;
- the refusal to obey the instruction was serious, deliberate and repeated.”¹³⁷

¹³²At 354 G.

¹³³At 354 H.

¹³⁴At 355 D.

¹³⁵At 356 D.

¹³⁶At 356 H-J.

¹³⁷At 359 E-G.

As to the instruction, and the lawfulness thereof, the Labour Appeal Court reasoned if the instruction constituted “a unilateral amendment to the terms of employment of the applicants, the instructions would have been unlawful. The narrower inquiry, consequently, is whether the instruction did constitute a unilateral amendment to the terms of employment of the applicants.”¹³⁸ In relation to the contracts of employment, which were vague as to the contractual obligations of the employees, the Labour Appeal Court was convinced that the employees had been employed as “operators” and continued:

“On those facts it was not a term of the contracts of employment that the applicants would operate only one machine. A description of the work to be performed as that of ‘operator’ should not, in my view, ‘be construed inflexibly provided that the fundamental nature of the work to be performed is not altered’ (Wallis *Labour and Employment Law* para 45 at 7-19). I agree with the view expressed by the learned author at 7-23 n 9 that employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin to work. It is only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner. ... The fundamental nature of the work of the applicants was not altered by the instruction to operate two machines. The nature of the work was precisely the same as it had been before. ... the instruction to operate two machines instead of one did not, as construed on behalf of the union, amount to an extensive change in the work to be performed by the applicants.”¹³⁹

Clearly employees should perform what they are contracted to perform. This, however, does not mean that their contracts are conclusive memorials of all the functions which they are to perform. Employees are to perform all instructions which do not contradict or which are not contrary to the “fundamental nature” of their contract. Employees have the contractual right to refuse to obey an instruction which would cause them to undertake an entirely different work. By instructing the employee to undertake an entirely different work the employer is in law attempting a unilateral amendment of the contract of employment, which is unlawful. Though employees do not have “a vested right to preserve their working obligations completely unchanged as from the moment when they first begin to work”¹⁴⁰ they nevertheless do have a right to act and be instructed according to the essential fundamental nature of their contract. It is within these parameters of the core nature of the employment contract that the employer may give instructions which, if not a

¹³⁸At 357 D.

¹³⁹At 357 F-358 D.

¹⁴⁰*Ibid.*

unilateral amendment of the essential nature of the contract, must be obeyed. In deciding if an instruction amounts to a unilateral variation of the contract the court will have to ask itself two related questions: firstly, what is the fundamental nature of the employee's contract, and secondly, does the instruction cause the employee to perform work of an entirely different description? Clearly the answers to the above related questions will depend on the terms of the contract and the ensuing practices of the parties in light of the surrounding circumstances.

An instruction may be lawful because it falls inside the parameters of any binding legal agreement and does not contradict the legislation, and the common law, but it may, nevertheless, still be found to be invalid because of its unreasonableness.¹⁴¹

4.3.4.2 Reasonable orders.

A lawful order may be held to be unreasonable.¹⁴² An unreasonable order may cause the instruction to be unfair, and such a finding could invalidate any dismissal based on the disobedience of the employee, or may justify the wilful disobedience of the employee, which in practical terms amounts to the same thing.

What is "reasonable" depends on the circumstances surrounding each case, and depends, to a certain degree, on the judge who makes the value judgement as to fairness. No strict formula can be produced or applied, as the facts of each case differ. Where an instruction was held reasonable on one occasion, it does not follow that the same instruction might be reasonable on another occasion. The court does not "understand the law to be ... that an instruction, reasonable on the face of it, may not, in the right circumstances, be found to be unreasonable."¹⁴³ Notwithstanding the above it may be stated that an instruction may be held unreasonable due to its content, or that the employer acted unreasonably in giving the instruction, or both. For example, in *A Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of SA & others*¹⁴⁴ (*supra*) the instruction to operate two machines instead of one at the same time was held to be lawful and

¹⁴¹*Ntsibande v Union Carriage and Wagon Co (Pty) Ltd* (1993) 14 ILJ 1566 (IC), per Bulbulia, Deputy President.

¹⁴²The "term 'reasonable' embodies the notion of moderation and also implies a limit to excessive expectation (see *The Concise Oxford Dictionary*)."*Ntsibande v Union Carriage and Wagon Co (Pty) Ltd* (1993) 14 ILJ 1566 (IC), per Bulbulia Deputy President at 1570J - 1571.

¹⁴³*Ellman v Moss gas (Pty) Ltd (1)* (1995) 16 ILJ 946 (IC) at 954 I - 955 A.

¹⁴⁴The facts are discussed above in relation to the lawfulness of the instruction.

reasonable.¹⁴⁵ The Court listed the following factors which made the instruction reasonable: only five of more than forty machine operators were required to do the additional work; the additional work was to be performed for a limited period; the second machine was to be operated when the operator was standing waiting; that each operator would have had the time to do the work and would physically have been able to do so; and the applicants' fellow colleagues on the night shift operators agreed that some of the night shift operators would operate two machines and in fact had done so in past months. In contrast in *Ntsibande v Union Carriage and Wagon Co (Pty)*,¹⁴⁶ the applicant held the position of transport clerk, but also performed ad hoc driving duties in the PWV area. He was instructed to transport goods to Botswana and refused, for which he was dismissed for refusing to carry out a lawful and reasonable instruction. With regard to the reasonableness of the instruction the following factors weighed heavy with the Court: the employee's main duties were clerical; his ad hoc driving was in practice restricted to Nigel and the PWV region; he had never travelled as far as Botswana; he would be alone in driving and would have to drive the two-ton truck with no assistance.¹⁴⁷ The court in light of the above held that the instruction was unreasonable, with the employee being entitled to refuse the instruction.¹⁴⁸

A decision which dealt with the reasonableness of the giving of the instruction was *Building Construction and Allied Workers Union and another v E Rogers and C Buchel CC and another*¹⁴⁹ wherein the court stated:

“It has also been pointed out that ‘it may be unfair to dismiss in circumstances in which it was unreasonable for the employer to issue the order in the first place and to insist on obedience to the point of dismissal’.”¹⁵⁰

The facts dealt with the dismissal of a worker who was busy clearing land with a loader. The applicant, who had previously worked as a lorry driver, was driving the loader. The brakes on the loader were defective, and a mechanic had given him advice that morning on how best to operate the loader to load stones onto another lorry. A Mr S observed that the applicant was having

¹⁴⁵*A Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of SA & others* (1995) 16 ILJ 349 (LAC) at 358.

¹⁴⁶(1993) 14 ILJ 1566 (IC), per Bulbulia, Deputy President.

¹⁴⁷At 1570 E - 1571 B.

¹⁴⁸At 1570 I.

¹⁴⁹(1987) 8 ILJ 169 IC per Bulbulia M.

¹⁵⁰*Building Construction and Allied Workers Union and another v E Rogers and C Buchel CC and another* (1987) 8 ILJ 169 (IC) at 173 E, citing Nazeer Cassim *Unfair dismissal* (1984) 5 ILJ 275 at 291; and refers to the decision of *Matshoba and others v Fry's Metals (Pty) Ltd* (1983) 4 ILJ 107 (IC).

difficulty in manoeuvring the loader, and was unable to load any stones. Mr S then gave the applicant instructions which resulted in the employee's dismissal due to his disobedience. Mr S agreed that the exchange between him and the second applicant had been heated, and that he had used abusive language. He further conceded that the applicant's unwillingness to operate the loader in the particular manner suggested by him was not *unreasonable* in the circumstances if one had regard to certain factors, them being:

- a) that the second applicant had scant experience as a loader operator;
- b) that the vehicle had defective brakes;
- c) that the mechanic had earlier told him how best to manoeuvre the vehicle to overcome the problem of the defective brakes; and
- d) that he honestly believed that it would have been unsafe for him to follow Mr S's instructions.

In light of the above surrounding circumstances the court held the dismissal to be unfair.

In contrast, in the decision of *Madlala v Vynne and Tedder t/a Thornville Engineering*¹⁵¹ which concerned a dismissed employee who was instructed to collect the workshop tools and lock them in the tool cupboard, he failed to obey this instruction for five days, even after receiving a verbal warning. The applicant claimed that the order was unreasonable because it would cause him to leave the working premises after 17h00, which was when the working day was completed, causing him to miss his bus home.¹⁵² Had this been the only evidence the employee might have succeeded in showing that the instruction was unreasonable, but evidence was led that another employee was instructed to collect the tools, subsequent to the applicant's dismissal, and this employee had not indicated that the collection caused him any difficulty or that it was an additional burden. Further, the court found that there was sufficient reason for the company to require one employee to collect and place the tools in the cupboard.¹⁵³ Therefore the instruction was reasonable when given, and the instruction itself was reasonable because it did not cause the employee any prejudice.

It is clear that the court will on a summation of the facts surrounding the instruction decide on the reasonableness of that instruction. This enquiry, however, will not be divorced from other relevant

¹⁵¹(1990) 11 ILJ 394 (IC) at 395 H per De Kock M.

¹⁵²At 396 F.

¹⁵³At 396 B.

factors which have a bearing on the instruction, as was the case in *E Rogers and C Buchel CC* (*supra*), or the circumstances that are instrumental in the instruction originally being given. It is here that the individuals and their “dispositions” may play a role in assisting the court in deciding on the reasonableness of the instruction. In particular the employer’s “insensitivity” towards his or her employees may cause an instruction to become unreasonable.

*SA Chemical Workers Union and others v CE Industrial (Pty) Ltd t/a Panvet*¹⁵⁴ may serve as an example of the above. The facts were that on 16 April the general manager of the factory called the two shop stewards to his office and informed them that 20 April, being Easter Monday, would be a working day. He gave them a memorandum which was addressed to all the factory staff in which was set out that 20 April was not a factory holiday, and that employees should ensure that they were at work.¹⁵⁵ The workers were asked if they understood and each acknowledged that they did. One of the workers asked if it was possible to work in the Saturday for the Monday but the manager responded that there were orders which had to go out on that day. Apparently, once the manager left the workers discussed the matter, and seeing that they had made other commitments decided not to work the Monday.¹⁵⁶ On 20 April the workers stayed away from work, and on the following day each was separately summoned to the manager’s office. The following day they had to find out the decision.¹⁵⁷ The attitude of the workers was that they did not wish to go and be informed individually but wanted to be informed collectively. The upshot was their dismissal.¹⁵⁸ The general manager justified the dismissal because they had flouted his authority and deliberately refused to obey his instructions, and not for the first time.¹⁵⁹ In the court’s view, the crux of the matter was whether the instruction, which was disobeyed, in relation to working on 20 April was a lawful and reasonable instruction.¹⁶⁰

“That it was lawful in the strictly legal sense there is no doubt, but whether it was reasonable and enforceable in the equitable sense is another matter. Not only is there

¹⁵⁴(1988) 9 ILJ 639 (IC) per John AM.

¹⁵⁵At 642 E-G.

¹⁵⁶At 642 H- 643 A.

¹⁵⁷At 643 I.

¹⁵⁸At 644 A.

¹⁵⁹“They had refused to work on 10 October despite an instruction that they should do so, and again on 25 February they had refused an instruction to return to work within ten minutes after he declined to telephone Beccham. This then was the third occasion on which they had deliberately refused to obey his instructions.” At 646 J-A.

¹⁶⁰At 646 D.

doubt as to whether it was a clearly understood policy of the company that work would ordinarily be required on non-factory holidays, including Easter Monday, but there were reasonable grounds, in the view of the court, for the workers to assume that they would have Easter Monday off.”¹⁶¹

In the court’s opinion any management with sensitivity at all would have taken the initiative in ensuring that Easter Monday could be given as a holiday, as had been the case in the previous two years.¹⁶² The time could have been worked in, and management could have approached the union to discuss the possibilities.¹⁶³ In the circumstances of the case, the giving of notice on the day prior to the long weekend was unfair.¹⁶⁴ Was the employer entitled to dismiss the workers for not heeding the instruction? The court held that even if the applicants were aware that Easter Monday was not a holiday it was unreasonable of the employer to postpone the notice that it was a working day to the last day before the Easter weekend. It was further unreasonable to ignore the indications of dismay of the applicants and to insist that they come to work on the Monday.¹⁶⁵ The manager was unbending in the sense of having given the instruction he required it to be obeyed, even if it was unreasonable and unfair, albeit lawful.¹⁶⁶ In light thereof, the court found the manner in which work on Easter Monday was handled in the factory had a distinct element of unfairness.¹⁶⁷ Thus the dismissal of the workers for failing to work on Easter Monday was an unfair labour practice because the instruction given was unreasonable when it was issued and remained so until the dismissal.

“A sensitive response to deeply felt needs of his work-force, even if objectively those needs are not reasonable in all respects, should be expected of any manager.”¹⁶⁸

Though the employer’s insensitivity may have a bearing on the reasonableness of the instruction, the insensitivity of the employer is not to be taken in isolation, or after the fact.¹⁶⁹

“In answering this question a court’s required to take account of all the relevant facts and to avoid falling into the trap of narrowing the enquiry to those which led directly to the

¹⁶¹ At 647 C-E.

¹⁶² At 647 F.

¹⁶³ At 647 H.

¹⁶⁴ At 647 I.

¹⁶⁵ At 649 G-H.

¹⁶⁶ At 649 H.

¹⁶⁷ At 650 A.

¹⁶⁸ *SA Chemical Workers Union and others v CF Industrial (Pty) Ltd t/a Panvet* (1988) 9 ILJ 639 (IC) at 649 J.

¹⁶⁹ See *Slagmont (Pty) Ltd v Building and Construction and Allied Workers Union and others* (1994) 15 ILJ 979 (A) at 989 D-F.

practice complained of.”¹⁷⁰

Nevertheless, it is a sound principle that when employers give instructions they should take into account the sensibilities of their employees.¹⁷¹ The court, however, would be slow to conclude that insensitive conduct on the part of the employer affected an otherwise lawful and reasonable instruction with unreasonableness. The courts should not apply wisdom after the fact.

4.3.5 Employees taking matters into their own hands.

In normal circumstances, a lawful and reasonable order should be obeyed in the employment relationship. In relation to the use of legitimate avenues for expressing grievances, it was highlighted in *Madlala (supra)* that the applicant had sufficient avenues for him to openly discuss his fears with his employers, these he should have exhausted and not merely refused to obey the instruction.¹⁷²

“An employee may not refuse to carry out an instruction which is, on the face of it, reasonable because he feels that it may cause him to be late. He must obey the instruction and if it has that consequence raise the particular problem it causes him with his employer.”¹⁷³

The court will not necessarily hold an instruction unreasonable where the employees are, so to speak, taking the law into their own hands. This was the issue in *Mabusa and others v D Cooper Corporation (Pty) Ltd*¹⁷⁴ where the employees had embarked on a strike with the aim of forcing the employer to acknowledge the union of the employees and speak to their representatives. The employer ordered the employees to return to work, the command was refused, and the employer responded by dismissing the workers. The dismissal was held to be justified and fair because the workers had other legitimate avenues of dealing with the grievance, and the union itself attempted

¹⁷⁰*Building and Construction and Allied Workers Union and others v Slagmont (Pty) Ltd* (1992) 13 ILJ 1168 (LAC) at 1172 C-D.

¹⁷¹*Ellman v Mossgas (Pty) Ltd (I)* (1995) 16 ILJ 946 (IC) before John AM.

¹⁷²*Madlala v Vynne and Tedder t/a Thornville Engineering* (1990) 11 ILJ 394 (IC) at 397 A-C.

¹⁷³At 396 I - 397.

¹⁷⁴(1985) 6 ILJ 473 (IC).

to discourage the strike.¹⁷⁵

Clearly a refusal may be deemed unreasonable if the employees had other effective remedies available to them and these were not utilised.

4.3.6 Reasonable and justified refusals

A dismissal may be unfair if the circumstances justify the refusal despite the lawfulness and reasonableness of the order. For example, in *Matshoba and others v Fry's Metals (Pty) Ltd*¹⁷⁶ a refusal to obey an instruction to work overtime resulted in the employee's dismissal. Although there was an express contractual stipulation to the effect that overtime work was compulsory, the employer's practice revealed that overtime was not in fact compulsory. All that the practice required was that an employee should give a reasonable explanation as to why he was unable to work the requested overtime. The applicants had furnished reasons for refusing to work the overtime requested, the court found that the refusal was reasonable given the circumstances, which were that: the instruction to work overtime was given on short notice, the urgency and importance of the overtime work appeared not to have been conveyed to the employees, and the employees had already made other arrangements for the period in question. Though the order was contractually valid and lawful, it was held that the dismissals were not fair in the light of the company's past dealings with overtime, and the refusal was thus reasonable.

On the other hand, on the facts of the case, the refusal may be held to be unreasonable.¹⁷⁷ In *Corobrick Natal (Pty) Ltd and Construction and Allied Workers Union*¹⁷⁸ the employee was dismissed for failing to carry out a duty which had been introduced 18 months before his

¹⁷⁵See "The workers disobeyed this lawful order to return to and resume their work. This entitled the employer to dismiss summarily the applicants. In view of the way in which the instruction to return to, and resume their work, was couched, the court is satisfied that the workers were summarily dismissed on their failure to return and resume their work. ... Does it matter then that the respondent refused...to negotiate with the trade union. I think not. This was not sufficient reason to go on strike. The applicants had a remedy under the Act. The trade union correctly advised the workers to return to their work as it (the trade union) would approach the matter in a different manner." *Mabuso and others v D Cooper Corporation (Pty) Ltd* (1985) 6 ILJ 473 (IC) at 477 H - 478 C.

¹⁷⁶(1983) 4 ILJ 107 (IC).

¹⁷⁷See also: *Thubane v Hendlers Industrial Carriers* [1997] 2 BLLR 131 (IC) at 138 I.

¹⁷⁸(1991) 12 ILJ 1140 (Arbitration), before Albertyn, Arbitrator.

dismissal.¹⁷⁹ After a number of warnings he was finally dismissed.¹⁸⁰ The change in duty was accepted by all the drivers, except for the employee, for which each received an extra weekly allowance, including the dismissed employee.¹⁸¹ As a result of the disobedience the company was losing R1000,00 a day.¹⁸² The arbitrator found that the instruction was not unreasonable, as all the other drivers performed the new duty and did not regard it as unreasonable,¹⁸³ and that the real reason why the dismissed employee did not comply with the new instruction was that he regarded it as being beneath his status. The instruction was lawful and reasonable; the refusal being unreasonable and the arbitrator concluded that the decision to dismiss the employee was fair.¹⁸⁴ Clearly much turns on the circumstances of the individual cases.

The investigation into the reasonableness of the refusal is much the same as in the assessment of the reasonableness of the instruction. The reasonableness of the instruction and that of the refusal are inversely correlated.

4.3.7 Shop stewards.

Notwithstanding the above, in the employment context not all employees are equal. A shop steward wears two hats in his or her relationship with senior officials and management. When the shop steward approaches and negotiates with senior officials or management in his or her capacity as shop steward he or she does so virtually on an equal footing and thus "the ordinary rules applicable to the normal employer-employee relationship are then somewhat relaxed".¹⁸⁵ This, however, should not be interpreted as a licence for rudeness, disrespectfulness or insolence¹⁸⁶ because the shop steward is still an employee. In the role of shop steward, the normal ordinary

¹⁷⁹*Corobrick Natal (Pty) Ltd and Construction and Allied Workers Union* (1991) 12 ILJ 1140 (arbitration) at 1140 I-J.

¹⁸⁰He was warned in July 1989 to perform the new term, on 11 September he was again confronted, also on 13 September. On 14 September upon returning to the company without performing the new duty a disciplinary case was opened, on 19 January 1990 he was issued with a final written warning. He ignored the instruction, on 31 January 1990 he was again instructed to perform the duty, on 25 June he was found guilty and was dismissed. (see 1143 in general)

¹⁸¹At 1142 F-G.

¹⁸²At 1142 J.

¹⁸³At 1145 D.

¹⁸⁴At 1147 I.

¹⁸⁵*Food and Allied Workers Union v Harvestime Corporation (Pty) Ltd* (1989) 10 ILJ 497 (IC). per De Villiers M at 498 D - F.

¹⁸⁶At 498 E.

rules relating to employee's conduct would to a certain extent have to be relaxed in order for the employee to be effective in protecting the interests of employees. This is highlighted in *Nguba and others v Hermes Laundry Works CC*¹⁸⁷ where the applicants were applying for reinstatement pending a determination in terms of s 46(9) of the Labour Relations Act 28 of 1956. The applicants were all members and shop stewards of the Black Allied Workers Union (BAWU) and employees of the respondent.¹⁸⁸ An Industrial Council meeting between BAWU and the respondent had been arranged. The applicants asked one of the members of the close corporation whether they could attend the abovementioned meeting in order to represent the other members of the union as their shop stewards. Only one of the five shop stewards was given permission to attend the meeting, the other four were refused and were specifically instructed not to leave the company's premises and not to attend the meeting. This instruction they disobeyed and went to the meeting, they were then dismissed for gross insubordination.¹⁸⁹ The Industrial Court found that the applicants had established that their dismissals were *prima facie* unfair because the other applicants were shop stewards and wished to attend the meeting to perform their "duties" as shop stewards. The respondent did not take proper account of the above, and should have.¹⁹⁰ The dismissal was therefore not warranted.

"I would like to add to the question of sanction that the case I referred to above, *Cullinan Power Equipment*, and an article by Landman 'A Unitary Theory of Industrial Discipline' *SA Mercantile Law Journal* vol 1 at 67 make it clear that one of the aspects an employer has to take into account in deciding on the appropriateness of the sanction, is the interests of other employees. It is contrary to the interest of other employees and counter-productive as far as sound labour relations is concerned, to discipline in the severest possible manner, namely, by dismissal, a shop steward who makes himself guilty of an infraction because he is performing his functions as a shop steward."¹⁹¹

From the above it would seem clear that shop stewards find themselves in a unique situation in that they are employees with special duties to serve the interests of other employees. It is in the fulfilment of these duties as a shop steward that the employer should permit some type of latitude in demanding obedience to orders and should not victimise the stewards. Notwithstanding the above, if the shop steward is disobedient and the disobedience is not related to his or her functions

¹⁸⁷(1990) 11 ILJ 591 (IC) before De Kock M.

¹⁸⁸*Nguba and others v Hermes Laundry Works CC* (1990) 11 ILJ 591 (IC) at 592 J-593 A.

¹⁸⁹At 593 B-D.

¹⁹⁰At 593 F-G.

¹⁹¹At 594 D-G.

and duties as a steward then that conduct is to be judged as any other normal employee, rudeness or insubordination for their own sake would not be tolerated. In the arbitration of *Mondi Paper Co Ltd v Paper Printing Wood and Allied Workers Union and another*,¹⁹² an employee was being disciplined for his action in a nationwide stayaway. The employee had disregarded notice on two separate occasions to attend a disciplinary hearing. Apparently the union intended discussing the consequence of the stayaway with the applicant's head office, as a result the employees decided that in the interim they would not submit themselves to disciplinary action. Following this failure to attend the disciplinary hearings the employee was given a final warning in his absence. The production manager summoned the employee to his office to inform him that a final warning had been issued. The employee arrived at the manager's office, with another employee who was a shop steward. The shop steward disrupted the meeting to such an extent that the warning could not be given.

"After an exchange of words, the second respondent left the meeting, taking Mr Motha along with him, in defiance of an express request by Mr Morgan (production manager) that Mr Motha should remain. After they had left the office, the second respondent told Mr Motha to disobey Mr Morgan's instruction to return to the meeting."¹⁹³

The Labour Appeal Court was of the opinion that the disruption of the meeting was unjustified, "[e]ven if Mr Morgan's conduct was unprocedural, and there was no evidence to show that it was, the second respondent's remedy was not simply to defy management and disrupt the meeting",¹⁹⁴ and consequently the dismissal of the shop steward was valid.

"The respondent's attorney submitted that the shop steward was entitled to pursue the interests of the union members fearlessly, vigorously and robustly, and that he should be permitted the latitude to do this. She referred us in this regard to remarks made in *Food & Allied Worker's Union v Harvestime Corporation (Pty) Ltd* (1989) 10 ILJ 497 (IC), concerning the position occupied by a shop steward. It was in this context, as I understand it, that the submission was made that there was nothing in the conduct of the second respondent which represented a challenge to the authority of management. No doubt a shop steward should fearlessly pursue the interests of the members he represents, and he ought to be protected from against being victimised for doing so. However this is no licence to resort to defiance and needless confrontation. I do not agree with the view of the court a quo that the fact that he is acting in his capacity as a shop steward serves to 'mitigate' conduct which objectively is unacceptable. Notwithstanding the position to which he has been elected, a shop steward remains an employee, from whom his employer

¹⁹²(1994) 15 ILJ 778 (LAC) per Nugent J with Mlambo and Watt-Pringle, assessors, who concurred.

¹⁹³*Mondi Paper Co Ltd v Paper Printing Wood and Allied Workers Union and another* (1994) 15 ILJ 778 (LAC) at 779 H-J.

¹⁹⁴At 780 C.

is entitled to expect conduct appropriate to the relationship. I agree with the finding of the court a quo that the second respondent's defiance of management's authority amounted to insubordination. It is clear too that his conduct was deliberate, and in my view warranted disciplinary steps being taken against him."¹⁹⁵

Clearly the shop steward's conduct was objectively unacceptable, as his duties and functions as a shop steward were not frustrated nor limited to provoke his insubordination, nor was his conduct necessary to protect the employee's interests. Due to his insubordination not being justified, he was guilty of a deliberate defiance of the manager's authority.

4.4 Conclusion.

Insubordination is the act of intentionally challenging the employer's authority, and disobedience is such an act. Disobedience was gradually seen as the only form of misconduct which conveyed the intention of challenging the employer's authority. The breach, which under the common law contract of employment justifies dismissal, under the unfair labour practice jurisdiction may justify dismissal provided the dismissal is fair. What is fair depends on the surrounding circumstances of the case, and is a value judgement of the objective circumstances surrounding the labour practice. This requirement of fairness is to be present throughout the labour practice.

In giving the instruction, the employer must issue a lawful and reasonable instruction. There is obviously no hard and fast rule as to what constitutes a reasonable order under the unfair labour practice jurisdiction, at best it seems that a fair order is a reasonable order. If the instruction is reasonable and lawful and the employee refuses to obey, wilfully, is the dismissal permitted?

The employee's intention is to be understood and interpreted in light of the surrounding circumstances, especially in the search for circumstances that may justify the refusal. Though the refusal might be wilful it may nevertheless be, in light of the surrounding circumstance, reasonable and justified. Once intention has been established the enquiry moves to the degree of the defiance exhibited.

If the employee in fact disobeyed a reasonable and lawful order, both wilfully and unreasonably, then the employee is guilty of insubordination. Once the reason for the dismissal has been shown

¹⁹⁵At 780 D-H.

to be valid the enquiry moves to consider whether the misconduct was so serious as to warrant dismissal. What is serious depends on the facts of the case and the implications of the misconduct, in particular the effect the misconduct had on the employment relationship.

It is with the addition of fairness that the employer has been restricted in the exercising of his or her contractual right, which has the effect of strengthening the employee's position in the employment relationship. This limitation of the employer's contractual right to demand the employee's obedience is further restricted if the employee is a shop steward. Shop stewards acting in their "role" as steward should be given, in performing their union activities, more latitude in their conduct towards employers, but shop stewards are, nevertheless, employees.¹⁹⁶

Essentially, the contractual right of the employer to demand that the employee not challenge his or her position of authority has been limited by the addition of the fairness.

¹⁹⁶*Sec Acrylic Products (Pty) Ltd v CWTU and another* [1997] 4 BLR 370 (LAC).

Chapter 5

INSUBORDINATION UNDER THE LABOUR RELATIONS ACT 66 OF 1995

5.1 Introduction

In this chapter dismissal for insubordination under the Labour Relations Act 66 of 1995 (hereafter “the Act”) will be discussed. This will be achieved by setting out what constitutes a dismissal under the Act, and the requirement of fairness in relation to dismissal. The interpretation and application of the Act is discussed in relation to the above.

5.2 Dismissal for misconduct

Dismissal as defined by the Act incorporates the following forms of termination:

1. when an employer terminates a contract of employment, with or without notice; or
2. when an employee reasonably expected the employer to renew a fixed term contract of employment, on the same or similar terms; or
3. when an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment; or
4. was absent for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child; or
5. when an employer offers selective re-employment to some but not all employees who were dismissed for a similar or same reasons; or
6. an employee terminated the employment contract because the employer made continued employment intolerable for the employee.¹

If the termination of the employment relationship falls under any of the above “categories” then that “termination” is a dismissal. Consequently, dismissal only occurs when the termination of the employment relationship falls squarely within one of the above “categories”.

A dismissal was held to have occurred when the employer’s action created the impression that the employee no longer had a job.² This impression would be supported by the conduct of either parties in the relationship. The employer would accordingly be held to have dismissed the

¹Section 186 of Act 66 of 1995.

²*SATDU v Marine Taxis CC* [1997] 6 BLLR 823 (CCMA) at 827 D-F.

employee where such action or inaction on his or her part created the impression of a dismissal.

In *Van Tonder v International Tobacco Co*³ one of the preliminary points which had to be decided was whether Van Tonder, the employee, had been dismissed. The facts, briefly, were that after a disciplinary hearing Van Tonder and a co-accused were informed that a decision had been taken that the parties were to be dismissed. The parties were offered the following options: either they could appeal against their dismissal or resign. They were informed that the benefit of the resignation would be that the company would not inform prospective employers that the parties had been dismissed. The parties were then given ten minutes in which to form their decision. Van Tonder then signed his letter of resignation.⁴ At the enquiry into the substantive fairness of the dismissal the company argued that Van Tonder had resigned, by virtue of signing the resignation letter, and was not dismissed. The Tribunal referred to section 186 of the said Act and pointed out that a dismissal occurred when the employer terminated the contract of employment with or without notice, and found "that because the Company told Mr Van Tonder that a decision had been taken to dismiss him, before offering him the option of resigning, the Company had in fact dismissed him, and thus his contract of employment terminated at that point."⁵

The Act states that when an unfair dismissal is alleged, the employee bears the onus of establishing the existence of that dismissal.⁶ It is the employee's duty not only to show that the employment relationship was in fact terminated, or that the employee was left with the impression thereof, but that the termination constituted a dismissal-which it would if it falls squarely under any of the categories listed in section 186 of the Act. An example of an employee failing to shift the above mentioned onus is *Engelbrecht v Cape Truss Manufacturing*.⁷ Herein employees embarked on a work stoppage on the last working day of the year, because the workers were not expecting to work but rather to clean up the workplace and then to hold the customary end of year "braai vleis". The employer's managing director approached the employees and after some discussion all the employees, except for Engelbrecht, agreed to finish the remaining work before the festivities

³[1997] 2 BLLR 254 (CCMA).

⁴At 255G- I.

⁵At 255J - 256A.

⁶Section 192 (1) of Act 66 of 1995: "In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal."

⁷[1997] 4 BLLR 431 (CCMA).

began. Engelbrecht refused to work stating: "Ek sal nie werk, gee net my geld, ek wil nou loop."⁸ The managing director enquired whether he was resigning. When this was confirmed, the managing director paid Engelbrecht off and issued him with a letter stating that Engelbrecht's immediate resignation was accepted and his blatant refusal to work and disregard for management was noted.⁹ Engelbrecht's version of the same event was that when the managing director addressed the staff Engelbrecht asked whether they were to be paid for that day only to be told, "Hou jou mond, jy loop vandag." In light of the above conflicting versions and because Engelbrecht did not bring witnesses to substantiate his dismissal; that the employer had two affidavits which supported its position; and that the contemporaneous letter bore out the employer's version, the CCMA found that Engelbrecht did not discharge the onus on him to show that he was dismissed.¹⁰

5.3 Fairness of the dismissal

Once the employee successfully proves that he or she was dismissed, the enquiry shifts to the employer who must show that the dismissal was fair.¹¹ This is achieved by meeting two related requirements. Firstly, that the dismissal was for a "fair reason" and, secondly, that the dismissal was effected in a procedurally fair manner.¹² In other words; the employer must satisfy the traditional distinction between substantive and procedural fairness.

With reference to the fair reason for dismissal, the Act expressly limits what type of reasons are

⁸At 432 B.

⁹At 432C

¹⁰At 433 B-D. See also with the employee failing to shift the onus *Mashaba v Van Der Merwe* [1997] 12 BLLR 1644 (CCMA) especially at 1647 A-C.

¹¹Section 192 (2) of Act 66 of 1995: "If the existence of the dismissal is established, the employer must prove that the dismissal is fair."

¹²Section 188 of Act 66 of 1995:

"(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

(a) that the reason for dismissal is a fair reason-

(1) related to the employee's conduct or capacity; or

(2) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of practice issued in terms of this Act." See also the Code of Good Practice Schedule 8, Item 2(1):

"A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below."

permitted for dismissal. A reason may be fair for dismissal when it relates to the employee's conduct, or capacity, or the employer's operational requirements.¹³ These reasons are the only reasons permitted for dismissal,¹⁴ provided, of course, that the reason itself is fair.

An employee, under the Act, has the right not to be unfairly dismissed;¹⁵ this right is also entrenched in the Constitution of the Republic of South Africa Act 108 of 1996.¹⁶

What constitutes "unfairness" is not defined in the Act.

"Under the 1956 LRA the courts acting under their general unfair labour practice jurisdiction identified a variety of employment practices which they pronounced unfair! The new LRA contains no general "open textured" definition of unfair labour practice, but has instead substituted for it specific statutory provisions which delineate the arena of permissible employer actions. The "residual unfair labour practice" has, however, been added in Schedule 7 to catch unfair actions which cannot be pigeon-holed in the Act itself."¹⁷

This "residual unfair labour practice" definition deals with issues not covered by specific provisions of the Act and is intended to cover situations which will ultimately be dealt with by specific legislation.¹⁸ According to the Act certain reasons for dismissal are automatically unfair, but where a finding of fairness follows automatically there is no onus to be discharged by the employer.¹⁹ What constitutes an automatically unfair dismissal is any infringement of the protections relating to the "right of freedom of association" and to members of workplace forums,²⁰ or if the reason

¹³The reason for the dismissal is important because different procedures for each is set out in the Act. The first two reasons for dismissal, misconduct and incapacity, are adjudicated by the CCMA (Commission for Conciliation, Mediation and Arbitration) while the latter, operational requirements, is adjudicated by the Labour Court. See Grogan *Workplace Law* 1996 page 89.

¹⁴Section 188 of Act 66 of 1995.

¹⁵Section 185.

¹⁶Section 23(1) of Act 108 of 1996:

"Everyone has the right to fair labour practices."

¹⁷Grogan *Workplace Law* 1996 page 135.

¹⁸Grogan *Workplace Law* 1996 page 74.

¹⁹Section 187 of Act 66 of 1995.

²⁰See section 5 of Act 66 of 1995. "(1) No person may discriminate against an employee for exercising any right conferred by this Act." Subsection (a) states that the employer may not require a person not to be a member of a union or work place forum. (b) or prevent the employee from exercising any right conferred in the Act.

is one of those listed in section 187.²¹

It is clear that the employer should show that the reason for the dismissal was fair. Accordingly the employer will need to prove that the employee was dismissed for a reason and that the reason was fair. If the employer is unable to prove that there was a reason for dismissing the employee then the dismissal is unfair. In *Bophani v Devinic Transport*²² an employee returned from vacation to resume his duties when he was informed that he should find his own truck and drive it himself. He was then instructed to leave and to return some days later to collect monies due, which he did. There was no explanation or reason offered to him as to what he was being paid for and accordingly the dismissal was substantively unfair.²³

Whether the reason for the dismissal is fair depends on and is determined by the facts of the case which includes assessing the “appropriateness” of the sanction dismissal,²⁴ which will depend on and be determined with reference to the facts of the case, as was the case under the 1956 unfair

²¹(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-

- (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter 4;
- (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of chapter 4 or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
- (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;
- (d) that the employee took action, or indicated an intention to take action, against the employer by-
 - (1) exercising any right conferred by this Act; or
 - (2) participating in any proceedings in terms of this Act;
- (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

(2) Despite subsection (1)(f) -

- (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;
- (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.”

²²[1997] 4 BLLR 428 (CCMA).

²³At 429 B-D and 430C. See also *Makatsi v Mamello pre-school* [1997] 5 BLLR 637 (CCMA), *Selepe v Pottlako Transport Services* [1997] 5 BLLR 677 (CCMA) at 679 D-F, and *Johnson v Diamond Fields Security Services CC* [1997] 7 BLLR 922 (CCMA) wherein the employer's conduct was found to be “reprehensible and does nothing to promote labour relations, productivity or a sound economics.” at 924F.

²⁴Item 2(1) of Schedule 8 of Act 66 of 1995.

labour practice jurisdiction. It is important to note, as does Rudd *et al*,²⁵ that the legislature does not use the distinction of “valid” and “fair” reasons for substantive fairness.

“Instead it used the term ‘fair reason’ to refer to what, in the context in which it appears, seems to be now referred to as a ‘valid reason’ and, instead of using the term ‘fair reason’ to deal with the sanction aspect of substantive fairness, reference is made instead to the appropriateness of dismissal as a penalty. Although, in the area of interpretation of statutes, a change in wording is usually indicative of a change in legislative intent, it is submitted that the difference in wording was probably not intended to signify a deviation from the currently accepted ‘valid and fair’ terminology but either constituted rather loose and sloppy drafting or, alternatively, arose from a perhaps somewhat misguided attempt to make the language of the 1995 LRA more accessible and user-friendly”.²⁶

It would seem that nothing much would turn on this “problem” as the assessment of fairness is dependent on all the relevant facts of the case. In this assessment both the reason for the dismissal and the appropriateness of the sanction must be substantively fair in the light of the facts. There does not seem to be any justification for retaining the valid and fair terminology because the tribunal must decide whether or not the dismissal was fair in *all* respects.

The Act requires that the employer must prove that the dismissal was both substantively and procedurally fair. Seeing that there is no definition of what constitutes fairness, it is submitted that the CCMA will rely on relevant judgements made under the 1956 Labour Relations Act as guides for those matters which are not contrary to the general purpose or object of the Act.

Section 188 raises two questions in relation to the substantive fairness of the dismissal which need to be answered: Is the employee guilty of the misconduct (being the reason for the dismissal); and, is dismissal an appropriate sanction for the misconduct? In answering these questions one must rely on the code of good practice.²⁷

5.4 Applying and Interpreting the Act

The Act is defined as including “the section numbers, the Schedules, except Schedules 4 and 8,

²⁵Rudd and Van Zyl *Guide to the 1995 Labour Relations Act* 1996 page 65.

²⁶Rudd and Van Zyl *Guide to the 1995 Labour Relations Act* 1996 page 65.

²⁷Section 1(2).

and any regulations made in terms of section 208,²⁸ but does not include the page headers, the headings or footnotes”.²⁹ In relation to the application and interpretation of the Act; the Act itself commands that any person who applies the Act must interpret its provisions to give effect to the Act’s *object, constitutional requirements* and *International Law* obligations.

“Any person applying this Act must interpret its provisions-

- (a) to give effect to its primary objects;
- (b) in compliance with the Constitution; and
- (c) in compliance with the public international law obligations of the Republic.”³⁰

The purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace.³¹ This purpose is to be achieved by fulfilling the primary objects of the Act, which are-

- “(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
- (c) to provide a framework within which employees and their trade unions, employers and employers’ organisations can-
 - (1) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
 - (2) formulate industrial policy; and
- (d) to promote-
 - (1) orderly collective bargaining;
 - (2) collective bargaining at sectoral level;
 - (3) employee participation in decision-making in the workplace; and
 - (4) the effective resolution of labour disputes.”³²

Jammy³³ argues that the Act, by the inclusion of the above, has obliged courts to engage in “purposive interpretation”. Purposive interpretation occurs when the court interprets the provisions of a statute in line with the “purpose” or “object” of the legislation. Purposive

²⁸Section 208 of Act 66 of 1995:

“The Minister, after consulting NEDLAC and when appropriate, the Commission, may make regulations not inconsistent with this Act relating to -

- (a) any matter that in terms of this Act may or must be prescribed; and
- (b) any matter that the Minister considers necessary or expedient to prescribe or have governed by regulation in order to achieve the primary objects of this Act.”

²⁹Section 213 of Act 66 of 1995.

³⁰Section 3 of Act 66 of 1995.

³¹Section 1 of Act 66 of 1995.

³²Section 1 of Act 66 of 1995.

³³Jammy *Interpreting the New Act: Getting Down to Business with the Labour Appeal Court* 1997 page 906.

interpretation, Jammy argues, was given new focus when used in the interpretation of the interim constitution,³⁴ and became a standard approach to constitutional interpretation.³⁵ Jammy highlights that although purposive interpretation has been adopted in the interpretation and application of the constitution neither *S v Zuma and others*,³⁶ nor the decisions following, suggested that the purposive approach that had been adopted with regard to the constitution should also be adopted in relation to other statutes.³⁷ So where does this directive for applying the purposive interpretation come from? Jammy continues:

“The injunction in the Labour Relations Act that the Act should be interpreted ‘in compliance with the Constitution’³⁸ is not a directive that the Act should be interpreted purposively. Rather, it should be taken to mean that having applied a purposive interpretation to the Constitution, the Act should then be interpreted (where possible) in accordance with accepted methods of statutory interpretation, in such a way so as to conform with the constitutional purpose so distilled. Seen in this light, it will always be the purpose of the Constitution that is determinative, not the purpose of the Act, or any particular provision thereof. ... In addition to requiring the Act to be interpreted so as to comply with the Constitution, s3 of the Act also requires interpretation so as to give effect to the Act’s primary objects.”³⁹

It is clear that legislation should be interpreted in light of constitutional provisions, but this is not a directive for purposive interpretation of the statute, rather in the Act itself the Act sets out the this directive by stating its own object.⁴⁰ Therefore in “cases of textual ambiguity purposive interpretation should be a first, rather than a last resort.”⁴¹ But, the Act does not rank its objects,

³⁴Kentridge AJ adopted the view that the meaning of a guaranteed right or freedom contained in the Constitution was to be ascertained with reference to the purpose of such guarantee.”Jammy *Interpreting the New Act: Getting Down to Business with the Labour Appeal Court* 1997 page 906 at page 909 relying on *S v Zuma and others* 1995 (2) SA 642 (CC) at 651 E-G.

³⁵Jammy *Interpreting the New Act: Getting Down to Business with the Labour Appeal Court* 1997 page 906 at page 909 relies on *S v Makwanyane and another* 1995 (3) SA 391 (CC).

³⁶ 1995 (2) SA 642 (CC).

³⁷This was emphasized in the decision in *Matiso v Commanding officer, Port Elizabeth Prison and another* 1994 (4) SA 592 (SE). In that judgement Froneman J stated:

“The interpretation of the constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the foundational values or principles of the Constitution. Constitutional interpretation in this sense is thus primarily concerned with the recognition and application of constitutional values and not with a search to find the literal meaning.”At 597 G-I. See Jammy *Interpreting the New Act: Getting Down to Business with the Labour Appeal Court* 1997 page 909.

³⁸S 3(b).

³⁹Jammy *Interpreting the New Act: Getting Down to Business with the Labour Appeal Court* 1997 page 910.

⁴⁰*Ibid*.

⁴¹*Ibid* page 911.

and therefore different emphasis could bring about different findings as to fairness.⁴² It is clear that in applying and interpreting the Act, “purposive interpretation” will have a major impact in the development of labour law in South Africa.

The interpretation and application of the Act in relation to misconduct, according to section 188(2) states that the tribunals must take into account the code of good practice, Schedule 8.⁴³

The code of good practice, being Schedule 8, is not part of the Act, but it is, nevertheless, instructive. Any person who is “considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.”⁴⁴ NEDLAC⁴⁵ may prepare and issue codes of good practice, which include changing or replacing any present code of practice. These relevant codes of good practice must be taken into account when applying and interpreting the Act.⁴⁶ This would, it is submitted, include an employer.

The code, however, has as its key principle:

“that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.”⁴⁷

⁴²“A number of different objects are expressed in the Act. These objects are not always harmonious, and the outcome of any attempt at purposive interpretation may often depend on which of the objects is given priority. The Act itself does not rank its primary objects according to their importance. The disagreement between the majority and minority views in the *Business South Africa* decision illustrates this.” Janmy *Interpreting the New Act: Getting Down to Business with the Labour Appeal Court* 1997 page 914.

⁴³See also section 203(3).

⁴⁴Section 188 (2) of Act 66 of 1995.

⁴⁵“means the National Economic Development and Labour Council established by section 2 of the National Economic, Development and Labour Council Act, 1994 (Act 35 of 1994)”. Section 213 of Act 66 of 1995.

⁴⁶Section 203 of Act 66 of 1995:

“(1) NEDLAC may-

(a) prepare and issue codes of good practice; and
(b) change or replace any code of good practice.

(2) Any code of good practice, or any change to or replacement of a code of good practice, must be published in the Government Gazette.

(3) Any person interpreting or applying this Act must take into account any relevant code of good practice.”

⁴⁷Schedule 8 item 1(3)

The code of good practice in schedule 8, deals with some of the key aspects of dismissal for reasons related to conduct and capacity. The code stresses that it is intentionally general, that each case is unique, and departures from the Code may be justified in proper circumstances.⁴⁸ Further, the code is not intended as a substitute for collective agreements or the outcome of joint decision-making by an employer and a workplace forum, especially when that outcome relates to disciplinary codes and procedures.⁴⁹

It is in the balancing of these competing interests of the employer and employee that the court and tribunals are to make their decisions as to fairness, particularly in light of the purpose and object of the Act. In dealing with fair reasons for dismissal the code states that:

- a) "A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below."⁵⁰
- b) "[the] Act recognises three grounds on which termination of employment might be legitimate. These are: the conduct of the employee, the capacity of the employee, and the operational requirements of the employer's business."⁵¹
- c) "[the] Act provides that a dismissal is automatically unfair if the reason for the dismissal is one that amounts to an infringement of the fundamental rights of employees and trade unions, or if the reason is one of those listed in section 187."⁵²
- d) "where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair."⁵³

Specifically in relation to dismissals for misconduct the code states that generally "it is not appropriate to dismiss an employee for a first offence, except if the misconduct is *serious* and of such *gravity* that it makes a *continued employment relationship intolerable*."⁵⁴

⁴⁸Schedule 8 item 1 (1).

⁴⁹Schedule 8 item 1 (2).

⁵⁰Schedule 8 item 2 (1).

⁵¹Schedule 8 item 2 (2).

⁵²Schedule 8 item 2 (3).

⁵³Schedule 8 item 2 (4).

⁵⁴Schedule 8 item 3 (4) the emphasis is mine.

Examples of what constitutes a serious misconduct are offered, subject to the “rule” that each case should be judged on its merits: “gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.”⁵⁵ Subparagraph 4 of paragraph 3 merely lists examples of serious misconduct that might justify instant dismissal, the list is in no way meant to be exhaustive.⁵⁶

In deciding whether or not to dismiss, the employer “should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.”⁵⁷ The foregoing is merely a guide⁵⁸ and the tribunals are called upon to adjudicate on the effect the misconduct has on the employment relationship, accordingly it is all these factors which are relevant in assisting the tribunal in deciding on the fairness of the dismissal. In applying the sanction of dismissal the employer should do so “consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.”⁵⁹ That is, like cases should be treated alike.⁶⁰ Unless they are different, “an employer may be justified in differentiating between employees, guilty of the same offence on the basis of differences in the personal circumstances of the employees (such as the length of service and disciplinary record) or the merits (such as the roles played in the commission of the misconduct)...”⁶¹ Notwithstanding the above, the trust relationship between the employer and employee is one of the paramount factors to be taken into account.⁶²

⁵⁵Schedule 8 item 3 (4).

⁵⁶*SIGASA v Kemklean Hygiene Systems* [1997] 4 BLLR 494 (CCMA) at 501E.

⁵⁷Schedule 8 item 3 (5), for a good illustration of the relevant schedule see *SIGASA v Kemklean Hygiene Systems* [1997] 4 BLLR 494 (CCMA) at 501F-J.

⁵⁸*SIGASA v Kemklean Hygiene Systems* [1997] 4 BLLR 494 (CCMA) at 501F.

⁵⁹Schedule 8 item 3 (6).

⁶⁰*Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 545 G, which relies on *NUMSA Hendred Freuhauf Trailers (Pty) Ltd* 1995 (4) SA 546 (A) at 463 G-J.

⁶¹*Ibid* at 545H.

⁶²See *Swiles v Pep Stores (Pty) Ltd* [1997] 4 BLLR 503 (CCMA) wherein the breach of the position of trust the employee holds in relation to the employer was emphasised in justifying dismissal, in spite of long service and clean record.

In relation to disciplinary procedures, prior to dismissal, the code stresses that employers should adopt disciplinary rules which establish the standard of conduct required of employees. These rules will vary from business to business but the rules “must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.”⁶³ The concept of corrective or progressive discipline as an “approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employee’s behaviour through a system of graduated disciplinary measures such as counselling and warnings.”⁶⁴

Nevertheless, consensual disciplinary codes and procedures will take precedence over the code of good practice.⁶⁵ Employees and employers would be well advised to set out exactly what is expected of employees and what the consequences of misconduct would be. This would clarify both the employee’s and employer’s rights and duties within the relationship towards each other.

5.5 Dismissal for insubordination under the Act

As this thesis focusses on dismissal for the misconduct of insubordination, the following summary of what the employer should remember, in attempting to dismiss an employee for insubordination under the Act, is submitted.

The dismissal should not go against the primary object of the Act, or the Constitution, or the public international legal obligations of the Republic. In other words, if the employee was exercising any of these rights or achieving the Act’s object then the dismissal, if it is not automatically unfair, may be held unfair in that the conduct of the employer is frustrating the purpose of the Act. It is obvious that the reason for the dismissal must not fall within the automatic unfair dismissal or infringe any fundamental rights of the employee or trade unions. Under this broad umbrella the employer may exercise his or her legal rights.

⁶³Item 3(1) of Schedule 8 of Act 66 of 1995.

⁶⁴Item 3(2) of Schedule 8 of Act 66 of 1995.

⁶⁵Rudd and van Zyl *Guide to the 1995 Labour Relations Act* 1996 page 76.

Insubordination is a form of misconduct and thus falls under section 188, but for the dismissal to be legally valid it must be fair. Dismissal is a sanction of last resort, therefore the Act requires that the misconduct must be serious or so grave that it caused the relationship between employer and employee to become intolerable. Gross insubordination is given as an example of a serious misconduct, but again this is merely an example and whether the misconduct was so serious or grave as to cause the relationship to be intolerable will depend on the facts of the case.

It is in assessing the circumstances of the case that the person should take special account of the following:

- a) The employee's circumstances;
- b) The nature of the job;
- c) The infringement itself;

In *Commercial Catering and Allied Workers Union of SA and another v Wooltru Ltd t/a Woolworths (Randburg)* the court equated insolence with impudence, cheekiness, disrespect or rudeness and distinguished it from insubordination.⁶⁶ Unlike in chapter 2 where it was argued that insolence was a challenge of the employer's authority. In the *Commercial Catering and Allied Workers Union of SA and another v Wooltru Ltd t/a Woolworths (Randburg)* insolence does not constitute a challenge directed to the employer's authority but rather is disrespect directed at authority. Though both forms of misconduct are directed towards the employer's position of authority, insubordination is behaviour which challenges this authority while insolence is behaviour which shows contempt for such authority. It could be argued that in the right context, the employee's disrespect could constitute a challenge of the employers authority and thus be insubordinate behaviour. Notwithstanding the above, insubordination, under the unfair labour

⁶⁶Grogan *Workplace Law* 1996 page 96. "It is clear that (even though he can be both at the same time) an employee can be insolent (impudent, cheeky, disrespectful or rude) without necessarily being insubordinate (disobedient or challenging authority). Mere disrespect for the employer (or insolence, impudence, cheekiness or rudeness) cannot by itself constitute insubordination which by its very nature requires disobedience or an outright challenge to authority. As has been fully explained above, insubordination can manifest itself in the refusal to obey a reasonable and lawful command or in the challenge (or resistance) to or defiance of ...the authority of the employer. It is, of course, required that the insubordination must be deliberate (wilful) and serious... . This is not to say that contemptuousness of authority (insolence, impudence, cheekiness, disrespect or rudeness) cannot constitute a ground for dismissal (provided, of course, that it is wilful and serious). One should, however, always distinguish between insubordination on the one hand and insolence on the other hand because they are definitely not the same kind of offence." *Commercial Catering and Allied Workers Union of SA and another v Wooltru Ltd t/a Woolworths (Randburg)* at 315 D - H.

practice jurisdiction of the 1956 Act is any conduct which is evidence of a wilful challenge of the employer's authority, of which disregarding the employer's authority or disobeying his or her instructions is evidence of such an intention. It is clear that under the Act insubordination is a misconduct and consists of the wilful disobedience of a lawful and reasonable instruction given within the bounds of the employment relationship. There is no reason to doubt why the tribunals under the Act would differ materially in their understanding of what constitutes insubordination. That is conduct by the employee which is a calculated breach of his or her duty to obey the employer's instructions.⁶⁷

Under the unfair labour practice of the 1956 Act a lawful instruction was one that did not contradict legislation, and fell within the contractual relationship of the parties, and was reasonable - reasonableness as understood in light of fairness. What was reasonable will depend on the facts surrounding the dismissal. No strict formula or complete list can be offered to cover all the factors that would have a bearing on the reasonableness of the instruction. It is clear that besides the instruction having to be fair, the Act states that the employer when giving the instruction should not fall foul of the purpose and object of the Act. Any instruction given which would frustrate the purpose of the Act may cause that instruction to be unreasonable and unfair. This submission is supported by the automatic unfair reasons for dismissal and also by the primary object of the Act. Thus any instruction which contradicts or limits the employee's "fundamental rights" in the Constitution or the Act - strike, freedom of association, picketing, workplace forums - if not already automatically unfair, may be unfair in that it frustrates the purpose of the Act.

If the instruction is shown to be lawful and reasonable the employer will have to show that the employee refused to obey the instruction, and that such refusal was both wilful and unreasonable. Again this would depend on the facts surrounding the case. Those facts which justify the refusal go to mitigate the wilfulness of the deliberate refusal; while those facts which do not, go to aggravate the employee's wilfulness - which in turn highlights the seriousness of the misconduct. It should be shown that the employee intended to challenge the authority of the employer by refusing to obey the lawful and reasonable instruction. If the employer successfully shows that

⁶⁷Grogan *Workplace Law* 1996 page 96.

the employee wilfully and unreasonably refused the lawful and reasonable order then the employer, having established the reason for the dismissal, will have to justify the dismissal by proving that the dismissal was an appropriate sanction.

In the assessment of the appropriateness of the dismissal the “gravity” of the misconduct will be assessed and it is here that many factors will have to be taken into account, of which the sensitivity of management, the general circumstances surrounding the misconduct and the personal circumstances of the employee, the nature of the job, the nature of the infringement, and the employee’s period of service will all play an important role.

“The court’s assessment of the gravity of the insubordination (or indeed of whether the refusal to obey an instruction amounts to insubordination at all) will depend on a number of factors, including the action of the employer prior to the alleged insubordination, and the reasonableness or otherwise of the order which the employee defied.”⁶⁸

Furthermore, in order to justify dismissal under the Act, the insubordination has to be “gross”. What is actually “gross behaviour” depends on the facts of each case, especially the effect the misconduct has on the employment relationship. If the insubordination was so gross, or serious, or grave that it caused the relationship between the employer and employee to become intolerable then the sanction of dismissal would be appropriate. Grogan interprets “gross” as indicating that the insubordinate conduct “must be serious, persistent and deliberate,”⁶⁹ and that the employer should adduce proof that the employee was in fact guilty of insubordination.”⁷⁰ The test is whether the misconduct makes the relationship intolerable.

“Intolerability is, of course, a word of wide and flexible meaning. One must assume, however, that an employment relationship becomes intolerable when the relationship of trust between employer and employee is irreparably destroyed. There is no magic formula for determining when such a point has been reached. However, a clue is to be found in the forms of misconduct chosen by the legislature as examples justifying dismissal. While they do not form a clear genus, they all betoken a wilful breach by the employee of norms essential to the maintenance of the productive enterprise. The list is also noteworthy for what it omits. But it is clearly not meant to be exhaustive.”⁷¹

⁶⁸Grogan *Workplace Law* 1996 page 97.

⁶⁹Grogan *Workplace Law* relies on the following at page 97 footnote 40: *Chemical Workers Industrial Union & another v AECL Paints (Pty) Ltd* (1988) 9 ILJ 1046 (IC); *Humphries & Jewell (Pty) Ltd v Federal Council of Retail & Allied Workers Union & others* (1991) 12 ILJ 1032 (LAC); *Armitage Shanks SA (Pty) Ltd v Mnize* (1995) 14 ILJ 61 (LAC).

⁷⁰Grogan *Workplace Law* 1996 page 97.

⁷¹Grogan *Workplace Law* 1996 page 92.

Rudd and van Zyl mention that:

“Perhaps what is envisaged here would be, for example, in the case of insubordination, the fact that the offence was committed in the presence of other employees or clients of the employer. Arguably, of course, a factor like this might fall under the gravity of the offence factor.”⁷²

No doubt, what is serious depends on the misconduct’s impact and effect on the employment relationship, or, put differently, the consequences of the insubordinate conduct. The effect of the misconduct on the employment relationship and grossness of the misconduct are all indicators of the seriousness of the misconduct. The seriousness of the misconduct will in turn indicate the appropriateness of dismissal as a sanction.

As an example of the appropriateness of the dismissal, in the arbitration award of *Dube v Sandton Sun and Towers Intercontinental*,⁷³ the employee was found guilty of the following charges and dismissed:

1. Threatening physical abuse to his line manager - Mr Pernusch.
2. Insolence.
3. Ignoring a direct instruction or insubordination.⁷⁴

The facts may be summarised as follows: the complainant Mr Dube was employed as a waiter in a five star hotel with intercontinental status. When the waiter’s bills were being cashed up after lunch Mr Dube asked aggressively what he was to do with the bill of a customer who had walked out without paying. Mr Dube’s immediate superior responded that Mr Dube would have to settle the unpaid bill himself in accordance with the normal rule. Mr Dube refused to do so and the superior continued to cash up the other waiters. When a Mr Pernusch walked past - who was the superior of Mr Khobhotlo - he was called over by Mr Khobhotlo to sort out the problem with Mr Dube because he had refused to pay the outstanding bill. “Mr Pernusch instructed Mr Dube to make arrangements to do so, if so instructed by his manager, to which Mr Dube responded loudly, ‘Who is this? This f...ing man is not my manager and I am not going to pay.’”⁷⁵ It was this outburst which formed the basis of the aggressive posture that the employee took towards Mr

⁷²Rudd and van Zyl *Guide to the 1995 Labour Relations Act* 1996 page 76.

⁷³[1997] 3 BLLR 302 (CCMA).

⁷⁴At 303 A- C.

⁷⁵At 303 G.

Pernusch and said in Zulu “I will kick you, you white pig.”⁷⁶

In relation to the charge of refusing to obey a lawful and reasonable instruction, which the CCMA held was insubordination, the CCMA concluded that the dismissal was appropriate.

“However as I have pointed out, what is clearly the most serious infringement in the present case was Mr Dube’s threatening and abusive conduct towards his superiors in the management line, and particularly his statement to Mr Pernusch which Mr Mothibe for the company had occasion to point out to him during cross examination was a racist statement hardly conducive to the building of race harmony and good racial relations between employers and employees in the new South Africa. ... There is evidence ...that the words allegedly addressed by Mr Dube to Mr Pernusch in Zulu were insulting and degrading to the latter in a manner comparable to a white man calling a black man a ‘kaffir’. Whilst insults and abuse of this kind are as hurtful and objectionable if spoken to an employee of one’s own rank and position as to a superior like Mr Pernusch, what aggravates the offence in the latter case is the potential to undermine the staff’s respect for his position and authority and that of others in the line structure, respect for and recognition of which is obviously required if management is to retain the control and order necessary to manage a business. It is a trite principle restated many times by our labour courts that our common law contract hinges on the element of subordination which in turn require employees to abide by lawful and reasonable instructions by line superiors, failing which the latter would not be enabled to fulfil their managerial responsibilities.”⁷⁷

What also aggravated the seriousness of the offence and rendered dismissal appropriate, from the company’s perspective, was that the insulting and insubordinate behaviour towards the superior took place in front of clients and staff.⁷⁸ The arbitrator found, “that the offence was such as to justify the sanction of dismissal and that it will be intolerable for the company to continue the employment relationship in these circumstances.”⁷⁹

5.6 Conclusion

It has been shown that the dismissal for insubordination under the Act is to be treated in much the same manner as under the unfair labour practice jurisdiction. The employer has to have a valid and fair reason for dismissing, and the misconduct must be serious enough to warrant the sanction of dismissal.

Insubordination is the wilful and unreasonable refusal of the employee to obey a reasonable and

⁷⁶At 303 G-J.

⁷⁷At 306E-307A.

⁷⁸At 307 A.

⁷⁹At 308 C.

lawful instruction of the employer. The 1995 Act further restricts the employer's and employee's conduct by demanding that their conduct falls within the purpose of the Act, and does not contradict the constitution, international obligations and object of the Act, and it is within these parameters of the above and fairness that the employer's and employee's conduct will be judged.

Chapter 6

CONCLUSION**6.1 Introduction.**

At this point an overview of the main points raised in this thesis will be summarised so that some of the implications thereof can be discussed in the light of the reasoning of Nugent J in *Cobra Watertech v National Union of Metalworkers of SA*,¹ who feels that certain contractual rights may not be relevant under the unfair labour practice jurisdiction, as a result of their limitation during the development of the employment relationship.

2. Conclusion

This thesis has shown that contract is the source of the employment relationship.² It is the contract which expresses or contains the true intention of the parties, and as such contains the true nature of the parties' intended relationship. It is this contract between the parties which should be approached in enquiring into the nature of the relationship. The obligation that the employee occupy a position of subordination in the employment relationship is an essential term of the employment contract.³ This *de facto* position of subordination is evidence of the employee's contractual obligation to be subordinate. The correlative of the employee's obligation to be subordinate is the employer's contractual right to demand that the employee act according to his or her contractual obligation. The breach of the employer's contractual right will be a breach of the contract of employment and justify dismissal, provided the breach is material, because the term is one of the *essentialia* of the contract, and would constitute insubordination. Insubordination is then any conduct which breaches the employer's contractual right to demand that the employee be subordinate, accordingly no conclusive list may be offered. Notwithstanding this it may be highlighted that disobedience and disrespect no doubt constitute insubordination.⁴

Under the common law the employment relationship was treated as any other contractual relationship. And in relation to the defining of the nature of insubordination the courts tended to associate disobedience with insubordination, and to a lesser extent insolence. Disobedience

¹(1995) 16 ILJ 607 (LAC).

²See chapter one.

³See chapter two.

⁴See chapter two.

constituted the wilful refusal of the employee to obey a lawful and reasonable instruction. What was lawful depended on the law and contract between the parties, and what was reasonable depended on what in law was unreasonable with reference to public morals. Because the employment relationship under the common law was understood as a contractual arrangement the courts did not interfere therein on grounds of equity or fairness. Therefore in light of the common law interpretation of the nature of the misconduct insubordination, the employer's contractual right was restricted to include disobedience and, to a lesser degree, insolence. Furthermore the contractual right of the employer was restricted, understandably so, in requiring the employee to obey all lawful and reasonable instructions, which was reasonableness narrowly construed as opposed to fairness and equity. The employer was restricted by the contractual agreement between the parties and only instructions which fell squarely therein were lawful, an employee was obliged to obey these instructions. The above were the limitations placed on the employer's contractual right to demand that the employee occupy a subordinate position in the relationship.

With the advent of the unfair labour practice the Labour Courts were no longer bound to the common law but rather to equity and fairness. The determination of fairness was dependent on a value judgement derived from the circumstances of the case, in which unlawful conduct was unfair, but lawful conduct had to be shown to be fair. Under the unfair labour practice jurisdiction, insubordination constituted a challenge directed at the employer's position of authority, and was distinguished from insolence. This intention of challenging the employer's authority could be manifested by the employee's wilful disobedience, or disregard of the employer's authority. Insolence, on the other hand, did not constitute such a challenge to the employer's authority and hence did not constitute insubordination.

Though the requirement of fairness was added for the protection of the employee, which is understandable, it still does not detract from underlying consequence that the addition of fairness the legislature limited the "prerogative of management". This is a limitation of the employer's right to command the employee. It is clear from the Labour Court's treatment of insubordination, and their understanding thereof, that the contractual right of the employer to demand the employee be subordinate was limited. This point is further supported with reference to the employer's

treatment of shop stewards.⁵

Under the 1995 Labour Relations Act dismissal for insubordination is fair provided that the employee committed the offence and the sanction of dismissal was appropriate. That the employee committed the act would depend on whether or not the employee wilfully and unreasonably disobeyed a lawful and reasonable instruction. This investigation would depend on the facts of the case. If the employee in fact committed the breach the enquiry shifts, as in the unfair labour practice jurisdiction, to the appropriateness of the dismissal. The appropriateness of the dismissal would be determined in relation to the seriousness of the misconduct, and the effect the misconduct had on the employment relationship, in particular if the misconduct caused the relationship to become intolerable. Stated as such there seems to be no difference in the manner that the dismissal for a misconduct is dealt with under the 1995 Act compared to the 1956 Act, but there are indeed differences.

The 1995 Act moves further in its enforcement of “positive rights” in limiting the employer’s contractual right. Clearly the main thrust of the 1995 Act is to prevent the employer from acting in a manner contrary to measures aimed at achieving collective bargaining or the realisation of constitutional rights, the stated purpose of the Act. Therefore no instruction should frustrate the purpose of the Act by acting against the primary objectives thereof, and/or the Constitution and/or international obligations. The disobedience of a employee which was aimed at fulfilling or enabling the employee to enjoy the objectives of the 1995 Act or the rights under the constitution or international obligations would be justifiable. If the “primary objectives” of the Act were frustrated by the conduct of either party, then the purpose of the Act would be frustrated and the conduct accordingly held unfair. If what has been said above is true, then the employer’s contractual right to demand the employee’s obedience is further restricted by the fundamental rights of the employee as enshrined in the Constitution, international obligations, and measures created to enable a framework to facilitate collective bargaining, employee participation in decision making, and effective resolution of labour disputes.

Clearly what has been traced throughout the thesis is the development and understanding of

⁵See chapter 3.

insubordination as a form of misconduct which is a breach of the employer's contractual right to oblige the employee to be subordinate. What has been shown in this thesis is the restriction or limitation of the employer's contractual common law right to demand subordination in the employment relationship. This has been achieved by the requirement of fairness and now by the interpretation and application of the 1995 Act. That there has been a limitation of the employer's contractual right cannot be doubted, but what are the implications of this limitation?

No doubt a positive implication is that the employee's position in the employment relationship has been strengthened, and the employer's authority has been curtailed in a general attempt to foster a healthier and more peaceful working environment, to enable collective bargaining and mutual decision making. However, what of the essential term of the employment relationship that the employee has an obligation to be subordinate?

Nugent J in *Cobra Watertech v National Union of Metalworkers of SA*⁶ expressed the view that the legislature by introducing into our law the remedy against the commission of an "unfair labour practice" shifted the relationship of employment from the contractual domain to the new domain of fairness. Nugent J continued that he had difficulty with the notion of a contractual "right" which was unenforceable, because in the context of the "unfair labour practice" a contractual right being sought to be relied upon which could not be enforced amounts to no right at all. As a result of the new enquiry into fairness, employers and employees have to conduct their relationship on certain new norms, which have been left to the courts to "shape and mould" in line with the concept of fairness, which entails a value judgement.⁷

"While rights which are recognized in other branches of the law may play a role in making that value judgement they are not decisive, and nor ought they necessarily be the starting-point from which the enquiry proceeds. What relevance such rights may have will lie in their underlying values rather than their mere existence."⁸

As a result the true enquiry in each case, for Nugent J, is whether the conduct at issue was in conflict with the norms envisaged by the concept of fairness. And in that context the only "right" held by the employer and employee is one that is consistent with those norms.⁹ If we agree with

⁶(1995) 16 ILJ 607 (LAC).

⁷At 611C-J.

⁸At 611C-J.

⁹At 614 B-C.

the thinking of Nugent J and hold that the contractual right of the employer to demand subordination in the employment relationship has been limited to such an extent that it is superficial to talk of a “contractual right” as such then what would be the implications of the above be?

Clearly, if there is no “contractual right” to demand subordination then there is no “contractual obligation” on the part of the employee to be subordinate. Consequently, one of the *essentialia* of the common law contract of employment is missing and therefore there is no longer a contractual relationship of employment proper. Consequently it would seem that the legislature may have made such inroads into the common law contract of employment that the previously essential common law term of subordination may no longer be a requirement of the employment relationship.¹⁰

¹⁰See *Hart v Pickels* 1909 TS-TH244 and *Zieve v National Meat Suppliers Ltd* 1937 AD 177.