

**THE DOMESTIC WORKER: SOME
CONSIDERATIONS FOR LAW REFORM**

THESIS

**Submitted in fulfilment of the
requirements for the Degree of**

**MASTER OF LAWS
of Rhodes University**

by

LIRIEKA MEINTJES

30 November 1992

To Godfrey, husband and father extraordinaire
and our daughter, Stephané

Abstract

This thesis examines ways in which domestic workers in South Africa could be included within the scope of existing industrial legislation. At present the legal position of a work force of 862 000 is regulated by the common law contract of service. Socio-economic factors form the background of this investigation, which first sets out to determine whether the common-law contract of employment is capable of equitably regulating the employment relationship. The fallacy of the assumption that individuals agree on the terms of exchange in the employment contract on the basis of juridical equality, and the tenuous nature of the common-law employment relationship in the case of domestic workers are revealed. In the absence of any current statutory minima the employment contract is used to deprive domestic workers of what little protection they enjoy at common law. The two ways in which the individual employee's conditions of service can be protected from terms favouring the stronger of the two contracting parties are discussed. These are collective bargaining and statutory regulation. Difficulties experienced by domestic workers in respect of collective bargaining, whether they be included under the Labour Relations Act or not, are indicated. Proposals for including domestic workers under the Basic Conditions of Employment Act are evaluated in the light of legislation in the United States of America, Zimbabwe, Swaziland and Namibia. Ways of minimum-wage fixing are investigated, and it is concluded that the provisions of the Wage Act could be adapted for domestic workers. The 'unfair labour practice' concept is examined and the implications of its application for the domestic labour sector evaluated. It is recommended that the concept 'fairness' in the Labour Relations Act should apply to domestic workers, but that a code of practice be drafted to provide *conceptions* of 'fairness' as guidelines for employment behaviour. It is suggested that the parties refer disputes to mediation before being granted access to a Small Labour Court established for this purpose. In conclusion a draft code of practice is presented, as a basis for negotiation at a forum representative of the major actors in the domestic labour arena.

CONTENTS

	Page
Abstract	iii
Contents	iv
Works referred to	x
Table of cases	xviii
Table of statutory instruments	xxvii
List of abbreviations	xxviii
Table of ILO conventions and recommendations	xxx
Acknowledgements	xxxi
 CHAPTER ONE - INTRODUCTION	
1.1 Purpose and scope of the study	1
1.2 Structure of the thesis	5
 CHAPTER TWO - DEFINITIONS AND SOCIO-ECONOMIC BACKGROUND	
2.1 Introduction	8
2.2 'Domestic worker'	9
2.2.1 Socio-economic aspects	9
2.2.2 The term 'domestic servant' used but not defined	12
2.2.3 The term 'domestic servant' used and defined in case law	14
2.2.4 'Domestic worker' as defined in other countries	27
2.2.5 Categories of domestic workers	29

	Page
2.2.6 A definition of a 'domestic worker' for law reform	35
2.3 'Employer'	35
2.3.1 Introduction	35
2.3.2 Socio-economic aspects	37
 CHAPTER THREE - THE PRESENT LEGAL POSITION: THE CONTRACT OF EMPLOYMENT	
3.1 Introduction	40
3.2 Status or contract	41
3.3 Contract and the employment relationship	47
3.4 Formation of the contract	52
3.5 Conditions of employment	56
3.5.1 Remuneration	56
3.5.2 Working hours	62
3.5.3 Leave	64
3.5.3.1 Holiday leave	65
3.5.3.2 Sick leave	67
3.5.3.3 Maternity leave	68
3.5.4 Safe working conditions	69
3.6 Conclusion	71
 CHAPTER FOUR - THE PRESENT LEGAL POSITION: TERMINATION OF SERVICE AND REMEDIES	
4.1 Introduction	74
4.2 The concept 'termination'	75

	Page
4.3 The right to terminate	77
4.3.1 Summary dismissal	77
4.3.1.1 Incompetence	78
4.3.1.2 Insubordination	79
4.3.1.3 Misconduct	81
4.3.1.4 Refusal or failure to work	82
4.3.1.5 Summary termination by the employee	83
4.3.2 Termination on notice	84
4.4 Dismissal and the eviction of employees from their employers' premises	87
4.5 Dismissal procedure	92
4.6 Remedies	99
4.6.1 Will the courts strike down on unreasonable or unfair contract?	100
4.6.2 Specific performance	104
4.6.3 Damages	108

**CHAPTER FIVE – CONSIDERATIONS AND RECOMMENDATIONS FOR LAW
REFORM: CONDITIONS OF SERVICE (COLLECTIVE
BARGAINING)**

5.1 Introduction	110
5.2 Collective bargaining	111
5.3 Collective bargaining for domestic workers?	117
5.3.1 Introduction	117
5.3.2 Trade unions and employer organisations	118
5.3.2.1 Trade unions	118
5.3.2.2 Employers' organisations	123
5.3.2.3 Conclusion	124

	Page
5.3.3 Collective action	125
5.3.4 Observance of collective agreements	130
5.4 Conclusion	133

**CHAPTER SIX - CONSIDERATIONS AND RECOMMENDATIONS FOR
LAW REFORM: CONDITIONS OF SERVICE
(PROTECTIVE LEGISLATION)**

6.1 Introduction	137
6.2 The Basic Conditions of Employment Act 3 of 1983	139
6.2.1 Working hours	140
6.2.1.1 Ordinary working hours	140
6.2.1.2 Meal intervals	143
6.2.1.3 Overtime	145
6.2.1.4 Proposal with regard to working hours	147
6.2.2 Work on Sundays	149
6.2.2.1 Proposal with regard to work on Sundays	151
6.2.3 Work on public holidays	152
6.2.3.1 Proposal with regard to work on public holidays	154
6.2.4 Vacation leave	154
6.2.4.1 Proposal with regard to vacation leave	157
6.2.5 Sick-leave	157
6.2.5.1 Proposal with regard to sick-leave	159

	Page
6.2.6 Employment rights and pregnancy	159
6.2.6.1 Proposal with regard to employment rights and pregnancy	163
6.2.7 Termination of services	164
6.2.7.1 Proposal with regard to the termination of services	165
6.2.8 A certificate of service	165
6.2.9 The right to recover in a civil court	165
6.3 Conclusion	166
 CHAPTER SEVEN – CONSIDERATIONS AND RECOMMENDATIONS FOR LAW REFORM: STATUTORY WAGE DETERMINATIONS AND ALTERNATIVES	
7.1 Introduction	169
7.2 National statutory minimum wage	172
7.3 Minimum wages by administrative body determination	178
7.4 Considerations and recommendations	182
 CHAPTER EIGHT – THE UNFAIR LABOUR PRACTICE CONCEPT	
8.1 Introduction	187
8.2 The unfair labour practice	189
8.2.1 Unfair dismissal	193
8.2.1.1 Substantive fairness	193
8.2.1.2 Procedural fairness	200
8.3 Dismissal during probation	206
8.4 Appropriate relief	208
8.5 Conclusion	210

CHAPTER NINE - CONSIDERATIONS AND RECOMMENDATIONS FOR LAW**REFORM: DISPUTE RESOLUTION PROCEDURES**

9.1	Introduction	213
9.2	Mediation	216
9.3	Arbitration	218
9.4	Court adjudication	219
9.5	Methods of conflict prevention	222
9.5.1	Education	222
9.5.2	The contract of employment	222
9.5.3	A code of practice	223
CHAPTER TEN - A CODE OF PRACTICE		225

Works Referred to

- Anon
 'An Act of Contract' 1986 (5) Industrial Relations Data 2
- 'Recognition-Dispute and Grievance Procedures' 1985 (2) Employment Law 4
- Atiyah, P S
An Introduction to the Law of Contract 3rd ed (Clarendon Press, 1982)
- The Rise and Fall of Freedom of Contract (Clarendon Press, 1979)
- Baker, J H
 'From Sanctity of Contract to Reasonable Expectation?' 1979 CLP 19
- Baldwin, R
 'Why Rules Don't Work' 1990 MLR 336
- Barbagelata, H
 'Different Categories of Workers' in Blanpain (ed) Comparative Labour Law and Industrial Relations (Kluwer, 1985)
- Batt, F R
The Law of Master and Servant 5th ed by G J Webber (Pitman, 1967)
- Baxter, L G
 'Fairness and Natural Justice in English and SA Law' 1979 SALJ 607
- Administrative Law (Juta, 1984)
- Beaton, R G
 'The Enforceability of Labour Agreements' 10 (1989) ILJ 388
- Beatty, D M
 'Labour is not a Commodity' in Reiter & Swan (eds) Studies in Contract Law (Butterworths, 1980)
- Benjamin, P
 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187
- Bendix, S
Industrial Relations in South Africa 2nd ed (Juta, 1992)
- Bercovitch, J
Social Conflicts and Third Parties (Westview Press, 1984)
- Brassey, M S M
 'The Contractual Right to Work' (1982) 3 ILJ 247
- 'The Dismissal of Strikers' (1990) 11 ILJ 213
- 'Specific Performance - A New Stage of Labour's Lost Love' (1981) 2 ILJ 57
- Cameron, E, Cheadle, H & Olivier, M
The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice (Juta, 1987)

- Brown, C Gilroy, C Kohen A
'The Effect of the Minimum Wage on Employment and Unemployment' 20 (1982) Journal of Economic Literature 487
- Cameron, E
'The Right to a Hearing before Dismissal - Part 1 (1986) 7 ILJ 183
- 'Overview of the Industrial Court' in Benjamin (ed) Strikes, Lock-outs and Arbitration in SA Labour Law: Proceedings of the Labour Conference 1988 (Juta, 1989)
- Cheadle, H & Thompson, C
The New Labour Relations Act - the Law after the 1988 Amendments (Juta, 1989)
- Card, D
'Minimum Wages and the Teenage Labour Market: A Case Study of California, 1987-1989' (Proceedings of the IR Research Association, 1990)
- Cheadle, H
'Employment (including Master and Servant)' in Coaker & Zeffert (eds) Wille & Millin's Mercantile Law of South Africa 18 ed (Rustica Press, 1984)
- 'Retrenchment: The New Guidelines' (1985) 6 ILJ 127
- Clarke, Duncan G
Domestic Workers in Rhodesia: the Economics of Masters and Servants (Mambo Press, 1974)
- Clark, G
'Recent Developments in Working Patterns' (1982) Employment Gazette 284
- Clegg, H A
The Changing System of Industrial Relations in Great Britain (Basil Blackwell, 1979)
- Cock, J
'Domestic Servants in the Political Economy of South Africa' 1980 Africa-Perspective 44
- Black and White Women: a Socio-historical Study of Domestic Workers and their Employers in the Eastern Cape PhD-thesis (Rhodes University, 1981)
- Conciliation and Arbitration Procedures in Labour Disputes (ILO, 1980)
- Corbett, M M
'Aspects of the Role of Policy in the Evolution of our Common Law' 1987 SALJ 52
- CSS
Survey of Houses, Sectional Title Units and Domestic Workers Central Statistical Service (October 1990)
- David R and Brierly, J E C
Major Legal Systems in the World Today 3rd ed (Stevens, 1985)
- Deakin, S and Wilkinson, F
'The Law and Economics of the Minimum Wage' 1992 Journal of Law and Society 379

- Delpont, E
 'The Legal Position of Domestic Workers: a Comparative Perspective' 1992 CILSA 181
- Delpont, J T
 'Social Change and Legal Development' in Two Lectures on Law Reform (SA Law Commission, 1987)
- Donovan Report
Royal Commission on Trade Unions and Employers' Associations 1965-1968 (HMSO, 1968)
- Douwes Dekker, L C G
 'Guidelines for Reconciling Industrial Conflicts' (1985) Industrial Relations Journal of South Africa 32
- Dworkin
Taking Rights Seriously (Duckworth, 1977)
- Eiselen, G T S
 'Kontrakteervryheid, Kontraktuele Geregtigheid en die Ekonomiese Liberalisme' 1989 THRHR 516
- Elias, P
 'The Structure of the Employment Contract' 1982 CLP 95
- Flanders, A
 'Collective Bargaining: A Theoretical Analysis' (1968) 6 British Journal of Industrial Relations 1
- Flint, S
 'Protection of Domestic Workers in South Africa' (Part 2) (1988) 2 ILJ 187
- Fourie, J S A
 'Status en Kontrak in die Suid-Afrikaanse Arbeidsreg' (1979) 42 THRHR 79
- Fox, A
Beyond Contract: Work, Power and Trust Relations (Faber, 1974)
- Freedland, M R
The Contract of Employment (Clarendon Press, 1976)
- Fuller, Lon L
 'The Forms and Limits of Adjudication' 92 (1978) Harvard Law Review 353
- Ganz, G
Quasi-Legislation: Recent Developments in Secondary Legislation (Sweet and Maxwell, 1987)
- Gatskell, D et al
 'Class, Race and Gender: Domestic Workers in South Africa' 1984 Review of African Political Economy 86
- Gon, S Trollip, A T Wendland, W
 'Maternity Rights and Benefits under South African Law' 1988 Industrial Relations Journal of South Africa 57
- Government Gazette
 GN 850 GG No 13511 13 September 1991
 GN 348 GG No 13925 16 April 1992

- Grogan, J
 'Dismissal of Probationary Employees - A Postscript' (1990)
 11 ILJ 266
- 'When is the "Expectation" of a Hearing "Legitimate"?' 1990
SAJHR 36
- Halsbury
Halsbury's Law of England Vol 16 4th ed (Butterworth Law
 Publishers, 1982)
- Haffajee, F
 'Bringing Justice to the Kitchen' The Weekly Mail 20-26
 November 1992
- Haysom, N and Thompson C
 'Labouring under the Law: South Africa's Farmworkers'
 (1986) 7 ILJ 218
- Haysom, N
 'Dismissal and the Eviction of Employees from their
 Employers' Premises' (1981) 2 ILJ 259
- Hazlitt, H
Economics in One Lesson (Arlington House Publishers, 1979)
- Hepple, B
 'Restructuring Employment Rights' (1986) 15 ILJ (UK) 69
- Hepple, B A
Hepple and O'Higgins: Employment Law 4th ed (Sweet and
 Maxwell, 1981)
- Jordaan, B
 'The Law of Contract and the Individual Employment
 Relationship' 1990 Acta Juridica 73
- 'Herindiensstelling as Remedie vir Onbillike Ontslag' 1990
SA Merc LJ 207
- Joubert, D J
 'Enkele Aspekte in verband met die Onbepaalde Loon' in
Huldigings-bundel Daniel Pont (A.A. Balkema, 1970)
- Kahn-Freund, O
 'Legal Framework' in Flanders and Clegg (eds) System of
 Industrial Relations in Great Britain (Basil Blackwell,
 1954)
- Kahn-Freund's Labour and the Law 3rd ed Davies & Freedland
 (eds) (Stevens, 1983)
- 'A Note on Status and Contract in British Labour Law'
 (1967) 30 MLR 635
- Kerr, A J
The Law of Sale and Lease (Butterworths, 1984)
- Kirby, M
Reform the Law (Oxford UP, 1983)

- Llewellyn, Karl N
Jurisprudence: Realism in Theory and Practice (University of Chicago Press, 1962)
- Lipton, M
 'Minimum Wages, Exploitation and Botswana's Unemployment Crisis 1980 SALB 51
- Lyster, L K
Poverty and the Wage Act LLM-thesis (University of Natal, 1990)
- Mahomed, I
 'Law and Poverty' in Second Carnegie Inquiry into Poverty and Development in Southern Africa (1984)
- Maine, H S
Ancient Law (10th ed) (Murray, 1909)
- Marais, N J
Onbillike Arbeidspraktyke in die Suid-Afrikaanse Reg (Juta, 1989)
- McCrudden, C
 'Codes in a Cold Climate: Administrative Rulemaking by the Commission for Racial Equality' 1988 MLR 409
- McNeil, C
Contradictory Forces in the Domestic Worker's Struggle MA-thesis (University of Natal, 1989)
- Meintjes-Van der Walt, L
 'Die Regsposisie van Huishoudelike Werkers' 1989 De Rebus 605
- Mureinik, E
 'The Contract of Service: An Easy Test for Hard Cases' (1980) SALJ 247
- Najwah, Allie
Directory of South African Trade Unions (SALDRU, 1991)
- Napier, B
 'The Contract of Employment' in Lewis (ed) Labour Law in Britain (Basil Blackwell, 1986)
- 'Judicial Attitudes towards the Employment Relationship - Some Recent Developments' 1977 ILJ (UK) 1
- NMC report
The Influence of Relevant Labour Legislation on the Small Business Sector July 1991
- Arbeidswetgewing vir Huiswerkers (August, 1991)
- Report and Recommendations of the Domestic Workers Committee Regarding the Legal Position of Domestic Workers (July, 1991)
- Norman-Scoble, C and Gordon-Lloyd, R
The Law of Master and Servant in South Africa (Butterworths, 1956)

- Olivier, M
 'The Supreme Court and the Protection of Employment: Some important Developments' 1991 De Rebus 52
- O'Regan, C
 'The Development of Private Labour Arbitration in South Africa - A Review of the Arbitration Awards' (1989) 10 ILJ 557
- Paoli, C
 'Women Workers and Maternity: Some Examples from Western Europe' 1982 International Labour Review 1
- Parker, R
 'New Body to assist Bosses formed' Eastern Province Herald 29 August 1988
- Pond, C
 'Wages Councils, the Unorganised, and the Low Paid' in Bain (ed) Industrial Relations in Britain (Basil Blackwell, 1983)
- Pothier
Letting and Hiring translated by G A Mulligan (Butterworths, 1953)
- Potgieter, J F
The Household Subsistence Level in the Major Urban Centres of the Republic of South Africa September 1990 Fact Paper No 84 (UPE, 1990)
- Powell, R
 'The Relationship between Property Rights and Civil Rights' (1963) Hastings Law Journal 131
- Pretorius, P J and Pitman, D J M
 'Good Cause for Dismissal: The Unprotected Employee and Unfair Dismissal' 1990 Acta Juridica 133
- Radin, M
 'Contract Obligations and the Human Will' (1943) 42 Columbia Law Review 575
- Rideout, R W
 'The Contract of Employment' 1966 CLP 111
- Principles of Labour Law 3 ed (Sweet and Maxwell, 1979)
- Riekert, J
Basic Employment Law (Juta, 1987)
- Robertson, M (ed)
Human Rights for South Africans (Oxford UP, 1991)
- Roos, J
 'Labour Law in South Africa 1976-1986: The Birth of Legal Discipline' 1987 Acta Juridica 94
- Roux, R
 'Reviving the Living Wage Campaign: but what about the Minimum Wage?' 1990 SALB 22
- Rycroft, A and Jordaan, B
A Guide to South African Labour Law (Juta, 1990)

- Sanders, A J G M
 'In Search of Disciplined Law Reform' in Sanders (ed)
Southern Africa in Need of Law Reform (Butterworths, 1981)
- Selznick, P
Law, Society and Industrial Justice (Russel Sage, 1969)
- Shindler, G
 'The Effect of Influx Control and Labour-saving Appliances
 on Domestic Servants' 1980 SALB 22
- Simamba, B A
 'The International Labour Organization and the Right to
 Collective Bargaining - An African Perspective' 1989 SALJ
 517
- Slabbert, J A et al (eds)
Managing Industrial Relations in South Africa (Digma, 1990)
- Smital, T I
 'Is Employment Properly Analysed in terms of Contract'
 (1975) 6 NZ Univ LR 341
- Starr, G
 'Minimum Wage Fixing: International Experience with
 alternative Roles' 1981 International Labour Review 545
- Summers, C
 'Patterns of Dispute Resolution: Lessons from four
 Countries' in Rycroft (ed) The Private Regulation of
 Industrial Conflict (Juta, 1990)
- Sverdup, Tone
 'Employees in Private Homes' Working papers in Women's Law
 No 33 (University of Oslo, 1990)
- Swanepoel, J P A
Introduction to Labour Law (Lexicon, 1992)
- Swinton, K
 'Contract and the Employment Relationship' in Reiter and
 Swan (eds) Studies in Contract Law (Butterworths, 1980)
- Taylor, B J & Whitney, F
Labour Relations Law 3rd ed (Prentice Hall, 1979)
The Concise Oxford Dictionary 6th ed (Oxford UP, 1979)
The Shorter Oxford English Dictionary (Clarendon Press, 1982)
- Unger, R M
Law in Modern Society: toward a Criticism of Social Theory
 (Free Press, 1976)
- Van der Heever, C F
 'Audi Alteram Partem, Contracts and Existing Rights' 1991
SAJHR 203
- Van Jaarsveld, F R and Coetzee, W N
Die Suid-Afrikaanse Arbeidsreg (Lex Patria, 1986)
- Van Onselen, C
 'The Witches of Suburbia: Domestic Service on the
 Witwatersrand, 1890-1914' in Studies in Social and Economic
 History of the Witwatersrand 1890-1914 Volume 2 (Longman,
 1982)
- Ver Loren Van Themaat, A A H
 'Reinstatement and Security of Employment - Part One: South
 Africa' (1989) 10 ILJ 205

- Vlastos, G
 'Justice and Equality' in Waldron Theories of Rights
 (Oxford University Press, 1984)
- Voet, J
 Commentarius Ad Pandectas translation by Percival Gane, sub
 nom The Selective Voet (Butterworth, 1955) Cited as Voet
- Wages
 Wages: A Worker's Manual (ILO, 1988)
- Watanabe, S
 'Minimum Wage in Developing Countries: Myth and Reality'
 1976 International Labour Review 346
- Wedderburn K W (Lord)
 The Worker and the Law 2 ed (Penguin, 1986)
- Wiehahn, N
 The Complete Wiehahn Report Parts 1-6 (Lex Patria, 1982)
- Wille and Millin
 Mercantile Law of South Africa 18 ed Coaker and Zeffert
 (eds) (Rustica Press, 1984)
- Yawitch, J
 'Women in Wage Labour' 1983 SALB 83
- Zander, M
 The Law Making Process (Weiderfeld and Nicolson, 1980)
- Zweigert, K
 'Methodological Problems in Comparative Law' 1972 Israeli
 Law Review 465

Table of cases

- Administrator, Transvaal v Zenzile 1991 (1) SA 21 (A)
- Administrator of the Transvaal v Traub (1989) 10 ILJ 823 (A)
- Amalgamated Black Workers Union v Sparkle Dry Cleaners 1 April 1987 NH 13/2/1865 (unreported)
- Anglo American Farms t/a Boschendal Restaurant v Komjwayo (1992) 13 ILJ 573 (LAC)
- Beretta v Rhodesia Railways Ltd 1947 (2) SA 1075 (SR)
- Bester Homes (Pty) Ltd v Cele (1992) 13 ILJ 877 (LAC)
- Black Allied Workers Union & Others v One Rander Steakhouse
- Bleazard v Argus Printing & Publishing Co Ltd (1983) 4 ILJ 60 (IC)
- Bloch v Cohen 1933 TPD 100
- Bohani v Golden Gate Take Aways (1990) 11 ILJ 406
- Borg-Warner SA (Pty) Ltd v National Automobile and Allied Workers Union (1991) 12 ILJ 549 (LAC)
- Boyd v Stuttaford 1910 AD 101
- Brown v Sessell 1908 TS 1137
- BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union 1992 (3) SA 673 (A)
- Cameron v Royal London Ophthalmic Hospital [1941] 1 KB 350
- Carstens v Ferreira 1954(4) TPD 704
- Cele v Bester Homes (1990) 11 ILJ 516 (IC)
- Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union of SA (1991) 12 ILJ 340 (LAC)
- Chatzkelowitz v Goodman 1914 TPD 190

- Checkers SA Ltd (South Hills Warehouse) v SA Commercial Catering & Allied Workers Union (1990) 11 ILJ 1357 (ARB)
- Cholota v Trek Engineering (Pty) Ltd (1992) 13 ILJ 219 (IC)
- Clarke v Ninian and Lester (Pty) Ltd (1988) 9 ILJ 651 (IC)
- Clouston and Co Ltd v Corry 1906 AC 122 (PC)
- Coin Security (Cape) v Vukani Guards & Allied Workers Union (1989 (4) SA 234 (CPD)
- Collier v Sunday Referee Publishing Co Ltd [1940] 2 KB
- Colman v Dunbar 133 AD 141
- Colonial Mutual Life Assurance Society Ltd v MacDonald 1931 AD 412
- Commerical Catering & Allied Workers Unions of SA v Wooltru (Ltd) t/a Woolworths (Randburg) (1989) 10 ILJ 311 (IC)
- Consolidated Frame Cotton Corporation Ltd v Minister of Manpower (1985) 6 ILJ 159 (N)
- Continental Bakery (Pty) Ltd v Giannakakis 1956 (4) SA 62 (W)
- CSAR v Cooke 1904 TS 531
- Dadoo v Krugersdorp Municipal Council 1920 AD 530
- De Beers v Thomson 1918 TPD 70
- Denny v SA Loan Mortgage & Mercantile Agency Co (1883) 3 EDC 47
- Die Raad van Mynvakbonde v Die Kamer van Mynwese van SA (1984) 5 ILJ 344 (IC)
- East London Municipality v Thomson 1944 AD 56
- Embling v The Headmaster, St Andrew's College (Grahamstown) 1991 (12) ILJ 277 (IC)
- Faberlan v McKay and Fraser 1922 WLD 22

Food & Allied Workers Union v Ameens Food Products & Butchery
(1988) 9 ILJ 659 (IC)

Food & Allied Workers Union v SA Breweries Ltd (Denver) (1992)
13 ILJ 209 (IC)

Food and Allied Workers Union v Spekenham Supreme (2) (1988) 9
ILJ 628 (IC)

Friedlander v Hodes Bros 1944 CPD 169

Froom v Butcher [1975] 3 WLR 379

Fulton v Nunn 1904 TS 123

Gaupoulous v Harris and Dickson 1906 (16) CTR

Genac Properties Jhb (Pty) Ltd v NBC Administrators CC
(Previously NBC Administrators (Pty) Ltd 1992 (1) SA 566 (A)

Gladys Hlongwa and Others v Rydal Mount Flats NHH 1312/1249
(unreported)

Gogi v Wilson & Collins 1927 NLR 21

Govender v SASKO (Pty) Ltd t/a Richards Bay Bakery (1990) 11 ILJ
1282 (IC)

Gumede v Richdens t/a Richdens Foodliner (1984) 5 ILJ 84 (IC)

Hankey Municipality v Pretorius 1922 EDL 306

Holt v Clarke 8 EDL 182

Hunt v Eastern Province Boating Co 1883 EDC 12

In re the Junior Carlton Club [1922] 1 KB 166

In re North and Ingram [1922] 1 KB 188

In re Vellacott 69 LT 316

Jackson v Hamilton [1923] 129 LT 307

Jamieson v Elsworth 1915 AD 115

- Johnson v Shrewsbury Birmingham Railway Company (1853) 3 De GM & G 914
- Kaplan v Penkin 1933 CPD 223
- King v Vanes 12 EDC 171
- Kompecha v Bite My Sausage CC (1988) 9 ILJ 1077 (IC)
- Lloyd v Brassey [1969] ITR 100 (CA)
- Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd 1961 (1) SA 704 (C)
- Looyen v Simmer and Jack Mines Ltd 1952 (4) SA 547 AD
- Lunt v University of Cape Town 1989 (2) SA 438 (C)
- M McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A)
- Macsteel (Pty) Ltd v National Union of Metalworkers of SA (1990) 11 ILJ 955 (LAC)
- Madayi v Timpson Bata (Pty) Ltd (1987) 8 ILJ 494 (IC)
- Magawo v Caledon Divisional Council 1972(3) SA 365 (C)
- Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)
- Malloch v Aberdeen Corporation [1971] 1 WLR 1578 (HL CS)
- Marievale Consolidated Mines Ltd v The President of the Industrial Court (1986) 7 ILJ 152 (IC)
- Metal and Allied Workers Union v Screenex Wire Weaving Manufacturers (1985) 6 ILJ 75 (IC)
- Metal and Allied Workers Union v BTR Sarmcol (1987) ILJ 815 (IC)
- Metal and Allied Workers Union v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd (1986) 7 ILJ 703 (IC)

Metal & Allied Workers Union v Natal Die Casting Co (Pty) Ltd
(1986) 7 ILJ 520 (IC)

Metal & Allied Workers Union v Barlows Manufacturing Company Ltd
(1983) 4 ILJ 283 (IC)

Middleton v Carr 1949(2)SA 374 (A)

Miles v Jagger & Co 1904 SC 513

Monckten v British South African Co 1920 AD 324 at 330

Monnig & Others v Council of Review 1989 (4) SA 866 (C)

Moonian v Balmoral Hotel 1925 NPD 215

Muehlendorf v Rand Steam Laundries 1945 TPD 317

Mullin (Pty) Ltd v Benade Ltd 1952 (1) SA 211 (AD)

Myburgh v Daniëlskuil Municipality 1985 (3) SA 335 (NC)

Myers v Sieradzki 1910 TPD 869

Myers v Abramson 1952 (3) SA 121 (C)

Nasionale Suiwelkoöperasie Bpk v Food & Allied Workers Union
(1989) 10 ILJ 712 (IC)

National Automobile & Allied Workers Union v Pretoria Precision Castings (1985) 6 ILJ 369 (IC)

National Union of Mineworkers v Durban Roodepoort Deep Ltd (1987)
8 ILJ 156 (IC)

National Union of Metalworkers of SA v Elm Street Plastics t/a ADV Plastics (1989) 10 ILJ 328 (IC)

National Union of Mineworkers v Durban Roodepoort Deep Ltd (1987)
8 ILJ 156 (IC)

National Union of Metalworkers of SA v Macsteel (Pty) Ltd 1992
(3) SA (A) 809

National Union of Mineworkers v Buffelsfontein Gold Mining Co
(1991) 12 ILJ 346 (IC)

National Union of Mineworkers v East Rand Gold and Uranium Co Ltd
(1991) 12 ILJ 1221 (A)

National Union of Textile Workers v Stag Packings (Pty) Ltd
(1982) 3 ILJ 285 (T)

National Union of Mineworkers v East Rand Proprietary Mines Ltd
(1987) 8 ILJ 315 (IC)

National Union of Mineworkers v Driefontein Consolidated (1984)
5 ILJ 101 (IC)

National Union of Textile Workers v Braitex (Pty) Ltd (1987) 8
ILJ 794 (IC)

Nchobaleng v Director of Education (Transvaal) 1954(1) SA 432 (T)

Ndamase v Fyfe-King 1939 EDL 259

Ngewu v Union Co-operative Bark and Sugar Co Ltd (NPD) 24 April
1981 (unreported)

Ngewu v Union Co-operative Bark and Sugar Ltd 1982 (4) SA 390
(NPD)

Ngubane v NTE Ltd (1991) 12 ILJ 138 (IC)

Nixon v Blaine and Co 1879 Buch 217

Nodlele v Mount Nelson Hotel (1984) 5 ILJ 216 (IC)

Nouwens Carpets (Pty) Ltd v National Union of Textile Workers
(1989) 10 ILJ 44 (N)

Nowlan v Ablett 2 C M and R 54

NTE Ltd v Chemical Workers Union (1990) 11 ILJ 43 (N)

O'Connel v Flischman 1948 4 SA 191 (T)

Oaten v Bentwich & Lichtenstein 1903 TH 118

- Ogle v Morgan (1852) 1 De GM and G 359
- Paper Printing Wood & Allied Workers Union v Mondi Paper Waste Co Ltd t/a Mondi Paper Waste (1992) 13 ILJ 640 (IC)
- Pearce v Lansdowne 69 LT 316
- Pemberton v Kessell 1905 TS 174
- Perskor v Media Workers Association of SA (1991) 12 ILJ 86 (LAC)
- Pretoria City Council v Minister of Labour 1943 TPD 238
- Printing and Numerical Registering Co v Sampson (1875) LT 19 Eq 462
- R v Smit 1955 (1) SA 239 (C)
- Radio Television Electronic & Allied Workers Union v Tedelex (Pty) Ltd (1990) 11 ILJ 1272 (IC)
- Randall v Progress Knitting Textiles Ltd (1992) 13 ILJ 200 (IC)
- SA Electrical Workers Association on behalf of De Bruyn v Duiker Exploration Ltd (Tweefontein) (1991) 12 ILJ 1128 (IC)
- Randfontein Estates Gold Mining Co (Witwatersrand) Ltd v Forbes (1992) 1 SA 646 (WLD)
- Rhodes v SA Bias Binding Manufacturers (Pty) Ltd (1985) 6 ILJ 106 (IC)
- Rooiberg Minerals Development Co Ltd v Du Toit 1953 (2) SA 505 (T)
- Rosenberg v Mega Plastics (Pty) Ltd (1984) 5 ILJ 29 (IC)
- S v Prefabricated Housing Corporation (Pty) Ltd 1974(1) SA 535 (A)
- SA Clothing & Textile Workers Union v Maroc Carpets & Textile Mills (Pty) Ltd (1990) 11 ILJ 1101 (IC)

SA Chemical Workers Union v Control Chemicals (1989) 9 ILJ 606
(IC)

SA Woodworkers Union v Rutherford Joinery (Pty) Ltd (1990) 11 ILJ
695 (IC)

SA Chemical Workers Union v C E Industrials (Pty) Ltd t/a Panvet
(1988) 9 ILJ 639 (IC)

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (AD)

Schierhout v Minister of Justice 1926 AD 99

Schneier & London Ltd v Bennett 1927 TPD 346

Sentraal-Wes (Koöp) Bpk v Food & Allied Workers Union (1990) 11
ILJ 977 (LAC)

Shirlaw v Southern Foundries Ltd 1957 A C 555

Sibiya v Administrator, Natal 1991 (2) SA 591 (D & CLD)

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A)

Smith v Cycle and Motor Trade Supply Co 1922 TPD 324

Spencer v Gostelow 1920 AD 617

Steel Engineering & Allied Workers Union v BRC Weldmesh (1991)
12 ILJ 1304 (IC)

Steel, Engineering and Allied Workers Union of SA v Bushco
Manufacturing 9 March 1987 NH 11/2/649

Stewart Wrightson (Pty) Ltd v Thorpe 1977 (2) SA 943 (A)

Stinise v Kayo Shoes Manufacturers (Pty) Ltd 1991(1) SA 643 (Ck)

Stocks and Stocks Natal (Pty) Ltd v Black Allied Workers Union
(1990) 11 ILJ 369 (IC)

Strachan v Prinsloo 1925 TPD 709

Stuttaford v Batty's Estate 1917 CPD 639

Techni-Pak Sales (Pty) Ltd v Hall 1968 3 SA 231 (W)

Transport and General Workers Union v Putco (1987) 8 ILJ 801 (IC)
The Moorcock (1889) 14 P.O. 64
Tiopaizi v Bulawayo Municipality 1923 AD 317
United African Motor and Allied Workers Union v S Thompson (Pty)
Ltd t/a Thomson Sheet Metal Works
United African Motor and Allied Workers Union v Fodens (SA) (Pty)
Ltd (1983) ILJ 212 (IC)
Van Vuuren v Pienaar 1941 TPD 122
Van der Merwe v Colonial Government (1904) 14 CTR 732
Vaughan v Booth (1852) 16 Jur 808
Venter v Livni 1950(1) SA 524(T)
Vleissentraal (Koöperatief) Bpk h/a Supreme Meat Products v Food
& Allied Workers Union (1990) 11 ILJ 1267 (LAC)
Wallace v Rand Daily Mails Ltd 1917 AD 479
Wallach's Printing and Publishing Co v Wallach 1932 AD 49
Wright v St Mary's Hospital (1992) 13 ILJ 987 (IC)
Young v Lifegro Assurance Ltd (1991) 12 ILJ 1256 (LAC)
Zieve v National Meat Suppliers 1937 AD 181

Table of statutory instruments

SOUTH AFRICA

Abolition of Influx Control Act 68 of 1986
 Act 15 of 1856 (Cape Colony)
 Basic Conditions of Employment Act 3 of 1983
 Factories, Machinery and Building Work Act 22 of 1946
 Guidance and Placement Act 62 of 1981
 Industrial Conciliation Amendment Act 94 of 1979
 Labour Relations Act 9 of 1991
 Labour Relations Act 28 of 1956
 Law 13 of 1880 (Transvaal)
 Machinery and Occupational Safety Act 6 of 1983
 Manpower Training Act 56 of 1981
 Ordinance 2 of 1850 (Natal)
 Ordinance 7 of 1904 (Orange Free State)
 Public Service Act 111 of 1984
 Trespass Act 6 of 1956
 Unemployment Insurance Act 30 of 1966
 Wage Act 5 of 1957
 Workmen's Compensation Act 25 of 1914
 Workmen's Compensation Act 13 of 1917
 Workmen's Compensation Act 59 of 1934
 Workmen's Compensation Act 30 of 1941

UNITED KINGDOM

Employment Protection (Consolidation) Act 1978
 Employment Protection Code of Practice Order 1977 SI 1977/867
 Employment Protection Act 1975
 Labour Relations Act 1976
 Road Traffic Act 1972
 Trade Union Act 1974
 Truck Act 1940
 Unemployment Insurance act 1920
 Workmen's Compensaiton Act 1880
 Workmen's Liability Act 1875

ZIMBABWE

Employment Act 13 of 1980
 The Employment (Domestic Workers) Regulations SI 925C of 1981

SWAZILAND

Regulation of Wages (Domestic Employees) Order 1985
 Wages Act 16 of 1964

UNITED STATES OF AMERICA

Industrial Welfare Commission Order No 5-80 regulating Wages,
 Hours and Working Conditions in the Public Housekeeping
 Industry (State of California)
 The Fair Labor Standards Act 1938

NAMIBIA

Labour Act 6 of 1992
 Act 1 of 1990 (Namibian Constitution)

List of abbreviations

A	Decision of the Appellate Division of the Supreme Court
A C	Law Reports, Appeal Cases (UK)/Appeal Case
AD	Appellate Division Reports
ARB	Arbitration
Buch	Buchanan's Appeal Cases
C	Cape Provincial Division
Ch	Chancery Division Reports (UK)
CILSA	The Comparative and International Law Journal of Southern Africa
Ck	Decision of Ciskei Supreme Court
CLP	Current Legal Problems
C M and R	Carrington & Marshman (Nisi Prius) (UK) & The Reports 1893-1895 (UK)
Col LR	Columbia Law Review
COSATU	Congress of South African Trade Unions
CPD	Cape of Good Hope Provincial Division Reports
CTR	Cape Times Reports
D & CLD	Decision of the Durban and Coast Local Division of the Supreme Court
De GM and G	De Gex, Macnaghten & Gordon (Chancery) (UK)
EDC	Eastern Districts Court Reports
EDL	Eastern District Local Division Reports
Eq	Equity Cases
GG	Government Gazette
GN	Government Notice
IC	Industrial Court
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IMSSA	Independent Mediation Services of South Africa
IR Journal	Industrial Relations Journal
ITR (CA)	Industrial Tribunal Reports (Court of Appeal) (UK)
Jur	Jurist Reports (UK)
KB	King's Bench Division Reports (UK)
LAC	Labour Appeal Court
LT	Law Times Reports (UK)
MLR	Modern Law Review
N	Decision of the Natal Provincial Division of the Supreme Court
NACTU	National Council of Trade Unions
NC	Decision of the North Cape Local Division of the Supreme Court
NH	Nywerheidshof
NMC	National Manpower Commission
NPD	Natal Provincial Division Reports
NUM	National Union of Mineworkers
NZ Univ LR	New Zealand University Law Review
PC	Privy Council
SACCOLA	South African Employers' Consultative Committee on Labour Affairs
SACWU	South African Chemical Workers Union
SADWU	South African Domestic Workers Union
SAJHR	South African Journal for Human Rights

SALB	South African Labour Bulletin
SALJ	South African Law Journal
SC	Cape Supreme Court Reports
SI	Statutory Instrument
SR	Official Reports of the High Court of Southern Rhodesia
T	Decision of the Transvaal Local Division of the Supreme Court
TH	Witwatersrand High Court
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
T L R	Times Law Reports (UK)
TPD	Decision of the Transvaal Provincial Division of the Supreme Court
TS	Transvaal Supreme Court
UAMAMU	United African Motor and Allied Workers Union
W	Witwatersrand Local Division
WLD	Witwatersrand Local Division Reports
WLR	Weekly Law Reports (UK)
WLR (HL CS)	Weekly Law Reports House of Lords Court of Session (Scotland)

**Table of International Labour Organisation
Conventions and Recommendations**

Convention 47 of 1935	Forty-Hour Week
Convention 1 of 1919	Hours of Work (Industry)
Convention 131 of 1972	Minimum Wage Fixing, with Special Reference to Developing Countries
Convention 26 of 1930	The Creation of Minimum Wage Fixing Machinery
Convention 103 of 1952	Maternity Protection (Revised)
Convention 98 of 1949	The Right to Organise and Collective Bargaining
Convention 158 of 1982	Termination of Employment
Convention 14 of 1921	Weekly Rest (Industry)
Convention 106 of 1957	Weekly Rest (Commerce and Offices)
Recommendation 91 of 1951	Collective Agreements
Recommendation 130 of 1967	Examination of Grievances within the Undertaking with a view to their Settlement
Recommendation 135 of 1970	Minimum Wage Fixing, with Special Reference to Developing Countries
Recommendation 166 of 1982	Termination of Employment

Acknowledgements

I should like to thank the following persons:

My husband, Godfrey, for his encouragement, assistance and support that enabled me to bring the thesis to conclusion;

My parents, Johan and Ruth van der Walt, who have always encouraged academic endeavour and who have given me the opportunities to do so;

My supervisor, Prof John Grogan, for his time, guidance and suggestions, both contextually and stylistically;

The HSRC and the SA Union of Jewish Women, for financial assistance;

Ann Hayward, for her patience and many hours of typing;

Shirley MacLennan for her assistance and many cups of tea in the Law Library; Sue van der Riet for facilitating inter library loans and Betty Clark for sharing her expertise at the reference library.

Deo gloria

'Social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; these societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.'

Sir Henry Maine

CHAPTER ONE

INTRODUCTION

1.1 Purpose and scope of the study

There are 862 000 domestic workers in South Africa.¹

At the conclusion of the most comprehensive sociological study on domestic workers and their employers undertaken in South Africa to date, Cock² remarks that domestic workers comprise a group of ultra-cheap and ultra-exploited labour. She then enumerates the following factors as evidence of what she calls 'ultra-exploitation': the deprivation of family life; of reasonable working hours; of time to pursue social and leisure interests of their own choice; of a just, negotiated wage; of favourable working conditions; of respectful treatment; of legal protection; of membership of an effective workers' organisation; of effective bargaining power and of regular paid leave.³

Benjamin refers to domestic employment as 'the most neglected

¹ According to an NMC Report there were 862 000 domestic workers in 1989. The Report and recommendations of the domestic workers committee regarding the legal position of domestic workers (1991) 1007. See also NMC Report on Arbeidswetgewing vir Huiswerkers (Augustus 1991) 5.

² J Cock Black and White Women: Socio-historical Study of Domestic Workers and their Employers in the Eastern Cape PhD-thesis (Rhodes University, 1981).

³ Ibid at 417.

area of a very neglected body of law.⁴

Historically domestic workers were governed by the Masters and Servants Legislation. The original Masters and Servants Act in the Cape Province was enacted in 1856,⁵ seven years after the legal emancipation of slaves in the Cape. Masters and Servants legislation was enacted in Natal in 1850,⁶ in the Transvaal in 1880⁷ and in the Orange Free State in 1904.⁸ These Acts made breach of contract by master and servant an offence. Insubordination, neglect, insulting behaviour and desertion by an employee were all breaches of contract and the offending worker was liable for a fine and/or imprisonment. The Masters and Servants Acts were repealed in 1974.

In 1978 the Wiehahn Commission was set up to investigate labour legislation. The Commission addressed itself to virtually the entire field of existing labour legislation and made numerous recommendations in connection therewith, inter alia: that 'the exclusion of persons in respect of their employment in farming operations and domestic household from the provisions of the Industrial Conciliation Act be deleted.'⁹

⁴ P Benjamin 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187.

⁵ Act 15 of 1856.

⁶ Ordinance 2 of 1850.

⁷ Law 13 of 1880.

⁸ Ordinance 7 of 1904.

⁹ 4.70.1. The Complete Wiehahn Report Parts 1-6 (1982) 533.

By and large the recommendations of the Wiehahn Commission were implemented by the legislature: Firstly, the collective bargaining and dispute settlement avenues provided by the Labour Relations Act were made accessible to black workers, whereas previously recourse in terms of the Industrial Conciliation Act of 1956 was only available to white workers. Secondly, the Industrial Court was established.

In 1982 the Minister of Manpower announced that the National Manpower Commission would investigate methods of laying down minimum conditions of employment for workers in the domestic and agricultural sectors. This report has never been made public. In September 1990 it was noted in the 'Laboria Minute'¹⁰ that the National Manpower Commission would undertake an investigation to consider the extension of basic labour relations rights currently enjoyed by workers under the Labour Relations Act or other suitable legal mechanisms. The recommendations of the National Manpower Commission regarding the extension of labour legislation to domestic workers were published in September 1991.¹¹ These recommendations have not yet¹² been published as draft legislation.

At present the domestic worker is excluded from: the Basic

¹⁰ The agreement signed by SACCOLA, COSATU, NACTU and the Minister of Manpower on 14 September 1990.

¹¹ GN 850 in GG 13511 of 13 September 1991.

¹² 30 November 1992.

Conditions of Employment Act;¹³ the Wage Act;¹⁴ the Labour Relations Act;¹⁵ the Workmen's Compensation Act;¹⁶ the Unemployment Insurance Act.¹⁷

However, statutory regulation of the domestic labour sector appears to be imminent. This thesis is an inquiry into the ways in which the law can accommodate and facilitate greater equity in the domestic labour sector. For the purposes of this thesis, statutory extension of the first three acts is examined specifically.

Using the law as an instrument to reform the labour dispensation of domestic workers is what Fuller¹⁸ calls a 'polycentric' task:

'We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the double pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" - each crossing of strands is a distinct center for distributing tensions.'¹⁹

¹³ Act 3 of 1983.

¹⁴ Act 5 of 1957.

¹⁵ Act 28 of 1956.

¹⁶ Act 30 of 1941.

¹⁷ Act 30 of 1966.

¹⁸ Lon L Fuller 'The Forms and Limits of Adjudication' 1978(92) Harvard Law Review 363.

¹⁹ Ibid at 395.

1.2 Structure of the thesis

The law is not an autonomous, abstract entity, but is related to the world which generates it and which it may in turn influence. 'Law reform' is, to quote Sanders, 'the art of making normative response to ever-changing social reality.'²⁰ The socio-economic background of domestic employment which serves as a foundation of law reform, is discussed in Chapter 1. This chapter specifically looks at the concepts 'domestic work', 'domestic worker' and the 'employer' of domestic worker(s). In my opinion it is necessary to arrive at a clear understanding of the nature of domestic work, the different categories of domestic workers and domestic employment patterns. These are relevant factors to consider before legislative provisions or labour policies pertaining to other categories of workers are applied to domestic workers.

Chapter 3 concentrates on the current legal position of domestic workers. In general, domestic workers are employed in terms of an oral agreement between the employer and employee. Alan Fox refers to the 'asymmetry to this relationship'²¹ and argues in effect that the contract and its theory of free and equal partners in bargaining provided an ideological cloak for the realities of domination and exploitation. As the employment contract seldom specifically sets out all the terms of the

²⁰ A J G M Sanders 'In Search of Disciplined Law Reform' in A J G M Sanders (ed) Southern Africa in Need of Law Reform (1981) 237.

²¹ A Fox Beyond Contract Work, Power and Trust Relations (1974) 184.

employment relationship, the common law determines the legal position with regard to these aspects. The effect of the common law on the domestic employment relationship is discussed.

In Chapter 4 I investigate the present legal position and deal exclusively with the common law pertaining to termination and remedies. A special enquiry is made as to whether judicial activism could serve to interpret the common law in such a way that unfair and unreasonable terms, concluded by the domestic worker as a result of her weak bargaining power, could be equitably adjusted.

Chapter 5 introduces the chapters that deal with considerations for law reform. The possibility and practicality of the domestic worker bargaining collectively for better conditions of service, is discussed.

Legislation as an alternative or supplementary method to the common-law contract of service or to collective bargaining, is investigated in Chapter 6. The main enquiry of this chapter is to ascertain whether the provisions of the Basic Conditions of Employment Act are adequate to provide minimum employment conditions for the domestic sector. The proposals of including domestic workers under this Act are discussed with regard to legislation in a developed country such as the United States of America on the one hand and legislation in developing countries such as Zimbabwe, Swaziland and Namibia on the other hand.

Further considerations for law reform are discussed in Chapter 7. Statutory wage determinations and alternatives are expounded.

In Chapter 8 the question arises whether the 'unfair labour practice' concept can meaningfully apply to domestic employment. By applying the existing unfair dismissal law principles to the domestic labour sector, the consequences which comprehensive inclusion would have are explored and the justification for special provisions and exclusions from the Act for domestic workers are investigated.

Methods of dispute resolution are discussed in Chapter 9 and ways of resolution recommended.

Chapter 10 concludes the present investigation with a draft code of practice.

CHAPTER TWO

DEFINITIONS AND SOCIO-ECONOMIC BACKGROUND

2.1 Introduction

The lawyer who concerns himself with law reform has to consider all aspects of the society in which he works. Because he is involved with the improvement of society through its laws, practices and procedures¹ he is to a great extent dependent on the empirical research done by sociologists, political scientists, economists and other researchers in the humanities.² Reforming law is not a mere technical exercise, but a process involving consideration of competing values. A general insight into the economic and social structure of the employment relationship is required in order to ascertain what these competing values are in the domestic employment sphere. This chapter deals with the socio-economic background of the individual domestic labour relationship.

The concepts 'domestic worker' and 'employer' are examined within the context of South African society in order to identify the parties to the service contract.

¹ M Zander The Law Making Process (1980) 303.

² J T Delport 'Social Change and Legal Development' in Two Lectures on Law Reform (1987) 1 at 5.

2.2 'Domestic worker'

Halsbury³ defines domestic workers as those employees who, forming part of the employer's residential establishment, are engaged in work of such a character that it brings them into close personal proximity with the employer and who are mainly concerned with the employer's household. An employee in turn can be defined as an individual who has entered into or works under a contract of service⁴ with an employer.

2.2.1 Socio-economic aspects

Two-thirds of all white private households employ either a full-time or a part-time domestic worker.⁵

³ Halsbury's Laws of England 4th ed Vol 16 par 508.

⁴ The nature of the contract of employment is discussed in chapter three.

⁵ Survey of Houses, Sectional Title Units and Domestic Workers Central Statistical Service 1990. According to a CSS census of October 1990 over two thirds of all white South African households employ domestic workers, with the figure ranging from 75 percent in Durban/Pinetown to 47 percent in the Cape Peninsula. The figures for the percentage of households employing one or more domestic workers are as follows: Durban/Pinetown - 76 percent; Pretoria/Verwoerdburg/Akasia - 74,1 percent; Pietermaritzburg - 71,3 percent; Bloemfontein - 73,8 percent; Kimberley - 66,9 percent; East London - 62,5 percent; OFS Goldfields - 66 percent; Witwatersrand - 66,6 percent; Klerksdorp/Stilfontein/Orkney - 63,5 percent; Vaal Triangle - 57,8 percent; Port Elizabeth/Uitenhage - 53,4 percent; Cape Peninsula - 48,2 percent. On average 66 percent of white South African households employ one or more domestic workers. There has been a decrease of 3,7 percent in the employment of domestic workers since 1987 CSS.

Gatskell et al⁶ observe that domestic service is often the point of entry to wage employment by newcomers to the labour market, although most domestic workers tend to remain in that type of work all their lives. Domestic employment is often entered into not by choice, but because there is no other option available.⁷ The labour itself is generally looked upon as inferior, servile, low in status and is poorly paid.⁸ It is usually the members of the weakest and most subordinate social strata who end up in the job; such as women, immigrants and ethnic minorities. Eighty-nine percent of South African domestic workers are female and black.⁹ Only 1,1 percent are black men who are either employed as houseworkers or gardeners.¹⁰ Apart from the agricultural sector, the private domestic sector is the largest single source of employment for Black women in South Africa.¹¹

The following characteristics serve to differentiate domestic

⁶ D Gatskell et al 'Class, Race and Gender: Domestic Workers in South Africa' 1984 Review of African Political Economy 88.

⁷ E Delport 'The Legal Position of Domestic Workers: a Comparative Perspective' 1992 CILSA 181 at 205.

⁸ See the discrepancy between monthly cash wages as represented in CSS for October 1990 and the HSL (Household Subsistence Level) for September 1990 in J F Potgieter The Household Subsistence Level in the Major Urban Centres of the Republic of South Africa. See also fn 1 in Chapter 7 below.

⁹ Central Statistical Service (1990). The census indicates that 89,7% of domestic workers are black and female, 8,9% "Coloured" women and 1.1% are black men. On the basis of the predominance of female workers in this sector, the pronouns 'she' and 'her' will be used throughout this thesis to refer to domestic workers.

¹⁰ Ibid.

¹¹ Central Statistical Service (1990).

workers from other wage-workers in modern industrial society:

- i) Domestic workers, frequently work irregular hours and often receive part of their payment in kind,¹² while other employees generally sell their labour power as a commodity during fixed hours in exchange for a money wage.
- ii) Domestic work involves ministering to the personal needs of the employer's family, and therefore brings about a close relationship between employer and employee. In the case of domestic workers who are accommodated at the work place, the limits of the employment relationship become even more blurred. The work relationships between other workers and their employees are usually more impersonal and involve a clear separation between the place of employment and home in both temporal and spatial terms. Where a domestic worker is in residence, she is available for her employer and the danger exists that her actual working hours could be extended well beyond those times that have been agreed upon.
- iii) Although not a distinctive feature of domestic service, the level of skill and education of domestic workers is generally low.
- iv) The work is often physically demanding.
- v) Recruitment occurs mainly by word of mouth; selection is very informal and job security is not entrenched by law.
- vi) The domestic worker also differs from other wage-earners in industry and the agricultural sector in that the employment

¹² J Cock 'Domestic Servants in the Political Economy of South Africa' 1980 Africa-Perspective 44.

relationship is usually on a one-to-one basis, with direct, face-to-face control by the employer over the employee.

As a group, domestic workers, living and working in isolation from each other, are fragmented and lack the cohesion and identity of workers in a centralised workplace. This fragmentation makes domestic workers less accessible to trade union organisation than other workers such as factory or even farm workers.¹³

A definition of the concept 'domestic worker' for law reform purposes necessitates an enquiry into the use of this term in statutes and case law.

2.2.2 The term 'domestic servant'¹⁴ used but not defined

'Domestic service' is a generic term which encompasses a very large field of services which can be considered domestic in nature. However, the domestic worker who is the subject of the present research, finds herself in a category of employment the members of which are specifically excluded from the most

¹³ C van Onselen 'The Witches of Suburbia' in Studies in the Social and Economic History of the Witwatersrand (1980) 30.

¹⁴ The term 'servant' is not used in a derogatory sense. 'Master' and 'servant' are synonymous with 'employer' and 'employee', but the latter are 'better sounding to democratic ears' (De Beers v Thomson & Son 1918 TPD 70 at 76). Norman-Scoble defines a servant as 'a person who voluntarily agrees to give his personal services to another for a certain time in return for an ascertainable wage. C Norman-Scoble & R Gordon-Lloyd The Law of Master and Servant in South Africa (1956) 2. For purposes of this thesis the term 'domestic worker' is used, except where the context requires 'domestic servant'.

important labour legislation in South Africa, namely:

- i) the Basic Conditions of Employment Act;¹⁵
- ii) the Labour Relations Act;¹⁶
- iii) the Wage Act;¹⁷
- iv) the Workmen's Compensation Act;¹⁸
- v) the Unemployment Insurance Act.¹⁹

Although the terms 'domestic service' and 'domestic servants' are used to exclude this labour category from legislation, there are no statutory definitions of these terms.

The following labour legislation does apply to domestic workers, namely:

- i) the Machinery and Occupational Safety Act;²⁰
- ii) the Guidance and Placement Act;²¹

¹⁵ Section 1(2) of Act 3 of 1983 'The following persons shall for the purposes of this Act be deemed not to be employees, namely (c) any person employed in domestic service in private households'.

¹⁶ Section 2(2) of Act 28 of 1956 'This Act shall not apply to persons in respect of their employment...in domestic service in private households'.

¹⁷ Section 2(2) of Act 5 of 1957 uses the same wording as the Labour Relations Act.

¹⁸ Section 3(2)(f) of Act 30 of 1941 'domestic servants employed as such

- i) in a private household; or
- ii) in a boarding house or institution in which are ordinarily employed not more than five such servants'.

¹⁹ Section 2(2)(i) of Act 30 of 1966 'domestic servants employed as such in private households'.

²⁰ Act 6 of 1983.

²¹ Act 62 of 1981.

iii) the Manpower Training Act.²²

Where domestic workers have specifically been excluded from legislation, it has been left to the courts to determine the exact scope of domestic work and the meaning of the concept 'domestic worker'.

2.2.3 The term 'domestic servant' used and defined in case law.

A study of South African cases below, reveals that the courts more often than not rely on the definition of domestic servants as established by the English courts.²³

a) English case law.

Early English cases seem to differentiate between 'menial' and 'domestic' servants. In Nowlan v Ablett²⁴ the Court of Exchequer held that a head gardener who lived on the estate of his master but in a house some distance away, was a menial servant.

²² Act 56 of 1981.

²³ Although our law of employment has been said to be a rich amalgam of Roman-Dutch and English law (J Riekert Basic Employment Law (1987) 2, the Appellate Division held that the Roman-Dutch ordinances applicable to 'diensboden' had either never been received into our law or had been repealed by the master and servant legislation. See Spencer v Gostelow 1920 AD 617 at 618. The 'diensboden' was either a domestic servant who lived in the house of his master or a person in intimate relationship with the master or mistress of the house, such as a coachman, stableboy etc.

²⁴ 2 C M and R 54.

In Ogle v Morgan²⁵ a head gardener was held not to be entitled to qualify for a legacy left to 'each person in my domestic establishment at the time of my decease.' In Vaughan v Booth²⁶ a legacy was left 'to each of my domestic servants.' It was held that the gift did not apply to the head gardener.

In these cases 'menial' seems to have been interpreted in the light of the Latin *intra moenia*, meaning 'within the walls' and was therefore held to have a more extended meaning than the term 'domestic' which was generally confined to servants residing in the master's dwelling.

In time, however, the view evolved that the word 'menial' is derived from the Saxon word 'meine' or 'mesnie', meaning a household or family, just as 'domestic' is derived from 'domus' which means house or home. In Pearce v Lansdowne²⁷ the court held that the terms 'menial' and 'domestic' were interchangeable and when these terms were applied to a servant it meant the same thing.²⁸

Pearce v Lansdowne²⁹ was decided under the English Workmen's Compensation Acts of 1875 and 1880, which excluded menial or

²⁵ (1852) 1 De GM and G 359.

²⁶ (1852) 16 Jur 808.

²⁷ 69 LT 316.

²⁸ This view was also followed in Jackson v Hamilton ([1923] 129 LT 307 where a gardener living in a cottage at the testator's country house, was deemed to be a domestic servant.

²⁹ 69 LT 316.

domestic servants from the definition of 'workman'. The question was whether the duties of a 'pot-boy' at a public house should be regarded as domestic or menial service. The pot-boy had to clean the windows, sweep the floor of the bar and had to take out beer to people who had purchased it, but he had nothing to do with the sale of beer. The court applied the following definition to 'menial' servants:

'those persons whose duty it is to do actual bodily work as servants for the personal comfort, convenience or luxury of the master, his family and his guests, and who for this purpose became part of the master's residential or quasi-residential establishment.'³⁰

The Court held that a 'pot-boy' was a domestic or menial servant and that these two adjectives were synonymous.

Pearce v Lansdowne³¹ marks the shift in the test for a 'domestic' or 'menial' servant from the place where the employee resides to the nature of the duties of the employee.

The case In re the Junior Carlton Club³² was decided in terms of the Unemployment Insurance Act 1920 which provides that persons in domestic service are excluded from the Act, 'except where the employed person is employed in any trade or business carried on for the purposes of gain'.

Roche J refrained from actually formulating a definition of what domestic servants are, but described them as:

³⁰ 69 LT 316 at 318.

³¹ 69 LT 316 at 318.

³² [1922] 1 KB 166.

'servants whose main or general function it is to be about their employers' persons or establishments, residential or quasi-residential, for the purpose of ministering to their employers' needs or wants, or to the needs or wants of those who are members of such establishment, or of those resorting to such establishments, including guests.'³³

The description in In re the Junior Carlton Club³⁴ is wider than that laid down in Pearce v Lansdowne.³⁵ In the latter the duty is to do actual bodily work as a servant, while in the former the functions of the servant is to be about the employer's person or establishment in order to minister to the employer's wants or needs.

In terms of the Junior Carlton Club test, the following were held to minister to the employer's wants and needs and therefore were regarded to be in domestic service: a cashier, a billiard marker, a commissionaire, a wine butler, a hall porter, a housekeeper, a coffee-room superintendent, waiters, cooks, housemaids and even an engineer.

In re Vellacott³⁶ Roche J referred to his decision in the Junior Carlton Club case and confined the 'needs or wants' of the employer, to his 'personal or ordinary needs or wants', including the 'amusement of the establishment', and the tending of gardens, but in his opinion it did not include the transaction of the

³³ [1922] 1 KB 166 at 170.

³⁴ [1922] 1 KB 166.

³⁵ 69 LT 316.

³⁶ [1922] 1 KB 466.

business of the employer outside the household any more than it included the education of the employer's children.³⁷

In re North and Ingram³⁸ concerned appeals against decisions of the Minister of Labour. The employment of inter alia a matron or a lady housekeeper at a private preparatory boarding school was exempted from the protection of the Unemployment Insurance Act. The court had to decide on the same exclusion clause as in In re the Junior Carlton Club.³⁹ It held that these employees were domestic servants. In evaluating this judgment it is important to note that the appeal was based on the ground that the school did not carry on a 'trade or business for the purposes of gain'. The court remarked that although there was a greater commercial element present in the 'case of a private preparatory school than it is in the case of a public school, (sic)'⁴⁰ it was not sufficient to convert that institution into a business for the purposes of the Act.

In Cameron v Royal London Ophthalmic Hospital⁴¹ a stoker in a hospital was held to be a 'domestic servant' (and thus outside the scope of the Truck Act 1940, which did not apply to domestic

³⁷ [1922] 1 KB 475.

³⁸ [1922] 1 KB 188.

³⁹ [1922] 1 KB 166.

⁴⁰ [1922] 1 KB 188 at 190 - 191. It seems non sequitur that private preparatory schools in England are run more on a commercial basis than public schools, if private preparatory school is meant to be state run and public schools, schools run by private institutions.

⁴¹ [1941] 1 KB 350.

servants). At first sight a stoker is not one which would normally be associated with domestic service. The court, emphasising that it was not laying down a general rule intended to apply to every case, put forward the following test:

'...where there is what can properly be termed a domestic establishment, and some of the work in the establishment is done by a particular person for the purposes of the upkeep of the home and for the convenience of the members of the family, that person is a domestic servant. Sometimes he is a highly skilled person.'⁴²

The court found on the facts that the hospital fell within the description of a domestic establishment or domus, and the employee was therefore a domestic servant. On this interpretation the place and circumstances of a person's work rather than, or at least in addition to, the actual work he does may be the determining factors whether he should be included in a particular category of employment.

The following can be concluded from the English case law:

- i) The terms 'domestic' and 'menial' work have acquired the same meaning.
- ii) The English law tends to regard all people employed in residential or quasi-residential establishments as domestic workers. In In re the Junior Carlton Club⁴³ the test was whether the employee was required to minister to the needs or wants of the employer or his guests in the context of a residential or quasi-residential establishment. There the meaning was so widely construed as to include cashiers and

⁴² [1941] 1 KB 350 at 358.

⁴³ [1922] 1 KB 166.

engineers, employed in a non-profit-making establishment. In my opinion this decision was influenced by the exemption clause which resulted in statutory protection for domestic workers who would otherwise be excluded from the Act, except where they were employed 'in any trade or business carried on for the purposes of gain.'

- iii) The English courts refrain from defining 'domestic servant'⁴⁴ and warn against the danger of arguing too strongly from the meaning of certain words as used in one Act of Parliament, to mean the same thing in another Act.⁴⁵ A warning has been sounded against the 'double danger' when interpreting the concept 'domestic servant':

'First of all, it may be forgotten that it is a question of fact and there may be a temptation to follow the decisions of other judges in cases where the facts were not precisely similar, and, secondly, a judge may be induced to pay too much attention to the interpretation of the same phrase in another Act'.⁴⁶

b) South African case law

The meaning of the words 'domestic service' was first considered in Stuttaford v Batty's Estate.⁴⁷ An application was made by

⁴⁴ See In re the Junior Carlton Club *supra* at 170.

⁴⁵ Cameron v Royal London Ophthalmic Hospital [1941] 1 KB 350 at 356.

⁴⁶ Cameron v Royal London Ophthalmic Hospital [1941] 1 KB 350 at 356. This casuistic approach of the English law must be kept in mind by the lawyer looking for 'legal rules' or 'definitions' of concepts in the English case law. 'The English "legal rule" is situated at the level of the case for which - and only for which - it has in fact been found and enunciated in order to decide it.' R David and J E C Brierly Major Legal Systems in the World Today 3rd ed (1985) 358.

⁴⁷ 1917 CPD 639.

the executor in the estate of Batty, for an award of compensation under the Workmen's Compensation Act 1914, against the respondent Stuttaford. Batty had been the private chauffeur of Stuttaford, and it was alleged that Batty had suffered a personal injury arising out of and in the course of his employment. The court a quo found that Batty was a workman within the meaning of the Act, and gave judgment in favour of the executor for the amount claimed. One of the grounds of appeal was that Batty was not a workman within the meaning of the Act, but a 'domestic servant'.

The court considered the wide definition of 'domestic or menial service' as set out in Pearce v Lansdowne⁴⁸ and concluded that it was by no means clear that the domestic service referred to in the Workmen's Compensation Act was intended to have the same meaning as domestic or menial service of the Employers and Workmen's Liability Act 1875. It was further held that the term 'domestic servant' did not have the same meaning as 'menial servant'. As technology developed, so did the meaning of the term 'workman' in English law. The result is that the cases decided since the inception of the Union of South Africa, are not applicable to cases under the Workmen's Compensation Act 1914.⁴⁹

The principle involved in the exclusion of domestic service from the benefits of industrial welfare legislation, seems to be that the 'domestic' is regarded as one of the family, so to speak, who takes all the risks of what happens in the household. For this

⁴⁸ 69 LT 316.

⁴⁹ 1917 CPD 639 at 649.

reason Searle J preferred a narrower meaning for the term 'domestic service'.⁵⁰ The court referred to the notion that the availability of an action for compensation in case of injury would give rise to conflict in the close set-up of the household. Gardiner J, however, quite rightly remarked that the likelihood of friction would indeed be less where an action for compensation were possible.⁵¹

The court noted that all the legislatures of the Colonies before Union distinguished between domestic service and the employment of a driver of a vehicle, and it therefore seems reasonable to suppose that the legislature also had this distinction in mind when it passed Act 25 of 1914.⁵² The court held that a chauffeur who did not reside on his master's premises was not in 'domestic service' within the meaning of the Act.

In Van Vuuren v Pienaar⁵³ an assistant matron in a school hostel was seriously injured in the course of her duties by an explosion of spirits in the hostel's pantry. She claimed compensation under the Workmen's Compensation Act 59 of 1934. The respondent denied liability on the ground that her duties were of a domestic nature and therefore she was not a workman in terms of the Act.

It was common cause that her work involved supervision in the

⁵⁰ 1917 CPD 639 at 649.

⁵¹ 1917 CPD 639 at 650.

⁵² 1917 CPD 639 at 652.

⁵³ 1941 TPD 122.

kitchen and pantry of the school hostel. In addition she attended to the health and well-being of the children in the hostel. She did no manual work.

The court applied the wide description of 'domestic servant' formulated in In re the Junior Carlton Club⁵⁴ and held that the plaintiff was in fact about the employer's quasi-residential establishment, namely a school, for the purpose of ministering to the employer's needs or wants.⁵⁵ Neither the fact that the appellant supervised, nor the fact that she did no bodily work, was of importance in deciding the question.⁵⁶

The court determined the meaning of 'domestic service' for purposes of the Workmen's Compensation Act 59 of 1934. It observed:

'That being the way in which the Act has been framed, I am of the opinion that the words "domestic service" should be interpreted as meaning domestic work, and that in considering whether or not an alleged workman is employed in domestic service the court is concerned only with the nature of the work which the employee has contracted to perform and not with the question whether he would, in the popular sense, be called a servant in the household or establishment in which he works.'⁵⁷

The court accepted the view held in In re the Junior Carlton Club that employment in domestic service was concerned solely with the

⁵⁴ [1922] 1 KB 166.

⁵⁵ 1941 TPD 122 at 129.

⁵⁶ 1941 TPD 122 at 129.

⁵⁷ 1941 TPD 122 at 130.

nature of the duties performed and that this description in no way depended on the social relation between employer and employee or the degree of responsibility attaching to the work.⁵⁸ An assistant matron of a school's hostel was therefore a domestic servant.

The court attached great importance to the case of In re North and Ingram⁵⁹ but took it out of the context of the Act for which the terms were to be interpreted. The court relied on the mere factual similarity of the situations of the assistant matron at a school hostel, and a matron at a private preparatory school in England.⁶⁰ The warning not to argue too strongly from the meaning of certain words used in one Act of Parliament to mean the same thing in another Act, was not heeded.⁶¹

Benjamin⁶² is of the opinion that in Van Vuuren v Pienaar the wide definition of domestic service was used in the light of the intention of the legislature in the Act at issue, but that with reference to the common law, a more limited meaning should be given to 'domestic worker'. In my opinion there is no reason for the use of the wide definition in statutory exclusion determinations. It would appear that Benjamin accepts that the

⁵⁸ 1941 TPD 122 at 129.

⁵⁹ [1922] 1 KB 188.

⁶⁰ 1941 TPD 122 at 125.

⁶¹ Stuttaford v Batty's Estate 1917 CPD 639 at 649.

⁶² P Benjamin 'The Contract of Employment and Domestic Workers' (1981) 1 ILJ 187 at 198-199.

court in Van Vuuren v Pienaar correctly reflected the intention of the legislature.⁶³ In that case the court held that what the legislature had done was to relieve the employers of domestic and agricultural workers of liability for insuring employees against the risk of injury. Clearly the legislature intended to exclude domestic workers from the scope of the Act, but such an exclusion clause should be interpreted in the light of the purpose of the Act as a whole. Looking at the history of the Workmen's Compensation Act, evolving from Act 25 of 1914, Act 13 of 1917, Act 59 of 1934 and its consolidation in Act 30 of 1941, it is clear that the legislation was introduced so that a worker who had suffered disability or death as a result of an accident at work or one having taken place within the scope and course of his duties, could claim compensation.

To apply an extended meaning to domestic service is not only contrary to the generally-accepted every-day meaning of the word established by subsecuta observatio, but also contrary to the rule of interpretation as laid down in Dadoo v Krugersdorp Municipal Council.⁶⁴ 'It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights.' The term 'domestic servant' should therefore no longer be interpreted as in Van Vuuren v Pienaar for statutory exclusion purposes. It is submitted that the approach adopted by the Appellate Division decision in Looyen v Simmer and Jack Mines Ltd is to be

⁶³ 1941 TPD 122.

⁶⁴ 1920 AD 530.

preferred.⁶⁵ In that case the court held that the Workmen's Compensation Act 30 of 1941 was remedial in character, and the exclusion provision referring to domestic workers had therefore to be construed so as to extend the remedy as far as the words would permit. This notion would not only result in 'domestic servant/worker' being given a meaning in accordance with the accepted every-day meaning of the word, but also in accordance with the view taken in other jurisdictions:

'Because it is understood that the legislation on domestic servants deprives them of benefits in comparison with those enjoyed by other workers, the law circumscribes this condition to persons who in the home of the employer look after the comfort of that family.'⁶⁶

Although the courts have tended towards a wider definition when construing domestic service for exclusion purposes,⁶⁷ and although such decisions might be based on other policy considerations, they are in fact contrary to established rules of interpretation.

⁶⁵ 1952 (4) SA 547 AD.

⁶⁶ H Barbagelata 'Different Categories of Workers' in R Blanpain (ed.) Comparative Labour Law and Industrial Relations (1985) 326. In Gladys Hlongwa and Others v Rydal Mount Flats NHH 1312/1249 (unreported) the applicants applied in terms of S43 of the Labour Relations Act 28 of 1956 for a status quo order following their dismissal as cleaners. The Court pointed out that the Act does not apply to domestic service in private households and that although the nature of the services rendered were clearly domestic, the applicants also rendered service in the common property of the share block. They did not only serve in private households and therefore fell under the Act.

⁶⁷ See discussion supra. See also Cameron v Royal London Ophthalmic Hospital [1941] 1 KB 350. The court had to determine the meaning of "domestic servant" for statutory exclusion purposes. It held that a hospital is a domestic institution and a stoker was therefore a domestic servant.

It is clear that the descriptions of 'domestic service' enunciated in the case law above, cannot be an acceptable guide to establish a *numerus clausus* of employees deemed to be domestic workers.

The casuistic approach, applied in the different cases where the term had to be interpreted in the context of the specific Act in question, was not sufficient. The concept 'domestic worker' cannot be understood fully nor can its ambit be determined, unless one knows all the facts of the case in which it was enunciated.

A comprehensive and clear definition of 'domestic worker' is essential, as the effects of any legislation affecting domestic workers would ultimately depend on the definition of the term.

In order to arrive at such a definition it would be useful to examine attempts at defining 'domestic workers' in countries with a socio-economic environment similar to that of South Africa.⁶⁸

2.2.4 'Domestic worker' as defined in other countries

In Zimbabwe a domestic worker is defined as:

'a person employed in a single private household for rendering such services as yard/garden work,

⁶⁸ An abbreviated version on the different categories of workers was submitted by the author to the National Manpower Commission and published in the Report and Recommendations of the Domestic Workers Committee Regarding the Legal Position of Domestic Workers (June 1991) 1016-1026 and NMC Report Arbeidswetgewing vir Huiswerkers (Augustus 1991) 6-8.

cook/housekeeping and baby-minding, regardless of whether the place of employment is urban or rural, but exclusive of any person rendering such services to any other type of employer.⁶⁹

In Swaziland the position of domestic workers is governed by Regulation of Wages (Domestic Employees) Orders, periodically promulgated in terms of section 11 of the Wages Act 16 of 1964. 'Domestic employee' in terms of Regulation of Wages (Domestic Employees) Order, 1985 is defined as:

'any person employed in or about any private household or part thereof in the capacity of cook, house attendant, waiter, butler, children's nurse, valet, groom, gardener, laundress, or watchman.'

The definition section⁷⁰ defines each of these positions in

⁶⁹ Act 13/80 Employment (Domestic Workers) Regulations, 1981.

⁷⁰ "children's nurse" means a person who takes care of children and oversees their activities, gives children all necessary assistance, carries out such other duties in connection with the care of children, including the washing of their clothes, as may be required;

"cook" means a person who is capable of, and is mainly or wholly engaged in, preparing and cooking meals suitable to the dietary and other requirements of the household in which he is employed and who may be required to assist in other household duties;

"gardener" means a person who carries out all gardening activities, including the planting and cultivation of flowers, shrubs and vegetables, maintains lawns and paths and attends to cleanliness of compounds and yards and, who may be required to carry out other duties such as cleaning vehicles;

"house attendant" means a person who carries out domestic duties including the preparation of food, washing of dishes, cleaning rooms, dusting and polishing furniture, washing windows, washing clothes and textiles by hand and ironing them, making beds etc;

"laundress" means a person who is mainly employed to carry out washing of clothing using either the washing machine or washing the clothing by hand and ironing them using any kind of iron;

turn.

These definitions are useful and important in determining the scope of the employee's duties when a new employee is engaged and especially when disputes arise with regard to duties and remuneration.

2.2.5 Categories of domestic workers

For the purpose of this study it is necessary to distinguish between the different categories of domestic work. These distinctions are very important when consideration is given to including domestic workers in the Basic Conditions of Employment Act or other industrial legislation. The significance of this will be seen in the following discussion of the various categories of 'domestic workers':

i) Full-time:

A full-time domestic worker is one who works for one employer on a full-time basis normally about 9 hours per day on 5 of 6 days per week. Such an employee may live on the employer's premises but need not necessarily reside there. Full-time domestic work is a diminishing sector of employment mainly due to factors such as the increasing use

"watchman" means a person who is responsible for the safeguard of his employer's property against fire, theft and illegal entry, carries out such other duties as are ancillary to these responsibilities, as required by his employer.'

of labour-saving domestic appliances and fewer households being able to afford full-time domestic workers. In 1979 already there were 8 per cent fewer full-time domestic workers than in the previous year.⁷¹

ii) Part-time:

During the same period (1978/79) the number of part-time domestic workers increased by 30 per cent. Part-time domestic workers work for various employers for various periods of time on one or more days per week. Some of these workers may work on regular days for specific employers while others may work irregularly on a casual basis.

In order to avoid confusion and to reflect the realities of the work situation it is necessary that two sub-categories of part-time workers should be distinguished, namely, 'regular day workers'⁷² and 'casual employees'.

(a) Regular day workers:

An employee is a regular day worker if she works for the same employer at least once a week on a regular basis or has worked for the same employer at least

⁷¹ J Cock Black and White Women: a Socio-historical Study of Domestic Workers and their Employers in the Eastern Cape PhD-thesis (Rhodes University, 1981) 15.

⁷² GN 850 in GG 13511 of 13 September 1991.

four weeks irrespective of the number of hours per day.⁷³ It is possible that such a worker who works for several employers may work as many hours in total per week as does a full-time employee for one employer.

(b) Casual employees:

A casual employee is a worker who is not employed on a regular basis. The Manpower Commission describes a casual employee as 'a day worker who is not employed on a regular basis and does not work for the same employer for more than three days in a week'. These employees would cease to be casual employees once they have worked for the same employer for four consecutive weeks.⁷⁴

In Swaziland workers who work one day at a time and are paid at the end of that day are designated 'casual employees'.⁷⁵ The South African Basic Conditions of Employment Act which contains the only statutory reference to casual workers, defines a casual employee as 'one who does not work on more than three days in

⁷³ GN 850 GG 13511 13 September 1991 at 44.

⁷⁴ GN 850 GG 13511 13 September 1991 at 44.

⁷⁵ Section 2 of The Regulation of Wages (Domestic Employees) Order, 1985.

any one week.⁷⁶ The Swaziland Order also defines a 'part-time employee' which means 'a domestic employee, other than a casual employee, who is employed for less than twenty-four hours in any week'.⁷⁷

The criterion for deciding whether an employee is a 'regular day worker' or a 'casual employee' should be the existence of a permanent agreement to work on a regular basis for a single employer. This distinction is of importance to the basic conditions of employment of these workers which are discussed in Chapter 6.

iii) Resident:

Originally the provision of accommodation on the employer's premises was a strong motivating factor for women to engage in live-in domestic service, especially for those who came from rural areas.⁷⁸ Currently living-in domestic workers no longer account for the larger percentage of domestic workers.

⁷⁶ Section 4(1) of Act 3 of 1983; A casual employee may work up to nine and a quarter hours on any day; may qualify for special public holiday pay; but not for annual leave or accumulative leave pay (S12) or paid sick leave (S13) and does not have to give or be given notice of termination of employment (S8).

⁷⁷ Section 2 of The Regulation of Wages (Domestic Employees) Order, 1985.

⁷⁸ S Flint 'Protection of Domestic Workers in South Africa' (Part 2) (1988) 9 ILJ 187 at 197.

A worker resident with one employer need not necessarily be in the full-time employment of that person. 'Regular day workers' have emerged who are resident with one employer but also work for other employers during the week.

iv) Non-resident:

As the number of part-time domestic workers increased, so the number of resident workers has decreased. Black people can more easily find accommodation in townships since the abolition of influx control measures.⁷⁹

Domestic workers should further be categorised as 'skilled' or 'unskilled'. In Van Vuuren v Pienaar the court referred to the wide scope of domestic service: 'The class domestic servants is a very wide class "which includes servants of various grades from a housekeeper of great attainment and high position down to a scullery maid"'.⁸⁰

In spite of the different skills that may be acquired by different domestic workers, it is possible that the cordon bleu cook employed specifically for her culinary skills will fall within the same employment designation of domestic service as the 'char' who attends only to simple manual duties.

There has been no authoritative study on measuring the level of

⁷⁹ Abolition of Influx Control Act 68 of 1986.

⁸⁰ 1941 TPD 122 at 124.

skill of the different categories of domestic workers. The question arises whether workers who are at opposite ends of the skill continuum should be treated equally when matters such as the establishment of minimum wages arise.

In industry the levels of skill of employees are determined by means of Job Evaluation and wage rates are then determined according to the level of skill. The same principle should be applied to skills levels in domestic work.

Law reform should also take account of the changing pattern of work in the past few decades.⁸¹ Employment has moved from full-time employment in the domestic sector towards part-time and temporary work. This pattern has emerged in the English Law where work has changed from full-time employment in the core of the labour market towards part-time, temporary employment, and a variety of forms of self-employment or even work in the grey area between employment and self-employment. The latter is a problem facing Britain today. One of the proposals put forward by Hepple⁸² in an article on the restructuring of employment rights in English Law is for legislation to be extended to the increasing number of 'marginal'⁸³ workers.

⁸¹ G Clark 'Recent Developments in Working Patterns' (1982) Employment Gazette 284.

⁸² B Hepple 'Restructuring Employment Rights' (1986) 15 ILJ (UK) 69.

⁸³ In England 'marginal' workers make up an estimated one-third of the labour force among whom it is difficult to extend union organisation.

Napier⁸⁴ mentions the other problems connected with marginal employment, which could have consequences for domestic workers. These workers, because the employment relationship is atypical, may find themselves excluded from statutory benefits. They might not work the required minimum working hours to qualify for protection or the legal nature of their work relationship might be such, where they give their services through an intermediary, that they are excluded from statutory rights.⁸⁵

2.2.6 A definition of a 'domestic worker' for law reform purposes

The following definition of a domestic worker might be considered for law reform purposes:

'Any person employed in or about any private household for rendering services such as, but not limited to, housekeeping, cooking, attending children and the elderly, gardening and ministering to the employer's needs or wants.'

2.3 'Employer'

2.3.1 Introduction

The Labour Relations Act as amended, defines 'Employer' in Section 1 as 'any person whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him or who subject to subsection (3) permits any

⁸⁴ B Napier 'The Contract of Employment' in R Lewis (ed) Labour Law in Britain (1986) 334.

⁸⁵ Attention is given to this problem in Chapter 6.

person whomsoever in any manner to assist him in the carrying on or conducting of his business; and "employ" and "employment" have corresponding meanings.'

This definition appears to be comprehensive and inclusive of all categories of employers including the employer of a domestic worker. However, Section 2(2) stipulates that the Act shall not apply to persons in respect of their employment '...in domestic service in private households...'

The Basic Conditions of Employment Act as amended, contains an identical definition of 'Employer' and also excludes persons employed in connection with domestic service in private households.⁸⁶

The Labour Relations Act applies to every 'undertaking, industry, trade or occupation'⁸⁷ and for brevity the word 'industry' is normally used to embrace the other three terms also and refers to productive work or manufacture. The Basic Conditions of Employment Act⁸⁸ specifically covers factories, shops and offices.

The employer of a domestic worker differs from corporate employers in several respects: the employer is a private individual, separate and isolated from other private employers

⁸⁶ Section 1(2)(c).

⁸⁷ Section 2(1).

⁸⁸ No 3 of 1983.

whose circumstances may be totally different from his; there are no employers' organisations to which he can belong and he is not bound by the same industrial legislation as the corporate employer. The employer employs the domestic workers to provide personal services to his household.

2.3.2 Socio-economic aspects

The private household is traditionally not seen as a profit-making commercial enterprise and it has been argued that it was thus not possible to include employees in such households under industrial legislation. A counter-argument is that the employment of domestic labour in the household enables members of the household to be released from work which would otherwise have had to be performed by them. This enables them to invest their own labour in the employment market which yields a return well above the cost of employment of the domestic worker.

It is also possible that housework could be allocated to different members of the family and that with the help of labour-saving devices⁸⁹ the domestic worker could become redundant. This would be in keeping with the existing trend of diminishing

⁸⁹ G Shindler demonstrates that the introduction of labour saving devices into the home, does not necessarily mean that families will not employ domestics. Her research showed, on the contrary, that labour saving devices were kept by white women for their use only and that the rest of the time, the domestics did all the same work manually. 'The Effect of Influx Control and Labour-saving Appliances on Domestic Servants' 1980 SALB 22.

employment in the domestic service sector.⁹⁰

Clarke⁹¹ has constructed an economic model applicable to all employers of domestic workers in the former Rhodesia. This model is not bound by time and place and can therefore also apply to the behaviour of employers of domestic workers in South Africa. He considers the household as a production unit which seeks to maximise its own welfare through meeting a combination of income and leisure objectives at a given level of household efficiency. As in a business enterprise such employers will attempt to maximise the difference between their income and operating costs. One of the costs over which employers have control, is the cost of domestic labour. Employers will therefore adopt a strategy of obtaining the necessary domestic service at the lowest price.⁹²

It is clear that there are potential conflicts of interests in the relationship between employer and employee. Kahn-Freund⁹³ succinctly describes the relationship between an employer and employee as typically a relationship between a bearer of power and one who is not a bearer of power.

⁹⁰ Yawitch indicates that in 1946 93,1% of all service workers were domestic workers. By 1960 this had dropped to 85,9% and in 1970 to 71,4%. In 1980 only one third of the total number of black women in paid employment were in domestic work. J Yawitch 'Women in Wage Labour' 1983 SALB 83.

⁹¹ Duncan G Clarke Domestic Workers in Rhodesia: the Economics of Masters and Servants (1974) 16.

⁹² Op cit at 18.

⁹³ Sir Otto Kahn-Freund Labour and the Law ed. by P L Davies & M Freedland (1983) at 18.

Employees in domestic service, as indicated above, are not included in current industrial legislation. Increasing numbers of workseekers are available in a declining labour market and this situation weakens the position of the individual domestic worker.

The implications of the imbalance of power between employer and employee will receive closer attention in the following chapter.

CHAPTER THREE**THE PRESENT LEGAL POSITION:****THE CONTRACT OF EMPLOYMENT****3.1 Introduction**

Kirby¹ submits that law reform implies some degree of preservation or conservation of the object of the reform exercise, if the etymology of the English word 'reform' is taken to mean 'reform that you may preserve'. In this sense the aim is to 're-form' with a view to improvement without total change, albeit with modifications and adaptations necessary for new times, new needs and new circumstances.

This chapter will consider the present legal position, in other words that which has to be 're-formed'. As has been indicated above, current industrial legislation, which provides statutory protection with regard to basic conditions of employment and which facilitates collective bargaining and recourse to the industrial court, specifically excludes domestic workers in private households.

This chapter poses the question whether the common-law contract of employment is capable of adequately regulating the domestic employment relationship.

¹ M Kirby Reform the Law (1983) 8.

The first part of the chapter deals with the individual employment relationship. Reasons are given for the view that the relationship between employer and employee is founded on the contractual relationship rather than status. The next section deals with the question whether the principles of contract are compatible with the nature of the employment relationship.

Finally the formation of the contract is discussed, particularly the express or implied terms, in order to give insight into the present regulation of conditions of employment.

3.2 Status or contract

Contemporary writers often reiterate that Western Labour Law is moving from 'contract to status', taking a course in a direction opposite to that traced by Maine.² But as Kahn-Freund³ so succinctly explains, the 'status' that Maine had in mind is not the same as status in modern societies, which is based on agreement but regulated by imperative provisions of law.

² O Kahn-Freund 'A Note on Status and Contract in British Labour Law' (1967) 30 MLR 635 at 640. See Sir H S Maine Ancient Law Chap V (1920) 174: 'If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.'

³ Kahn-Freund op cit 635 at 644.

As a result of legislative developments and their cumulative impact on the traditional employment relationship, it has been argued that South African Labour Law has reached a stage where the law of contract has been displaced and the labour relationship has in law developed into a relationship that is based on status.⁴ Although this may be true of the labour law regarding workers in general, domestic workers have not progressed along the 'contract-status' spectrum.

In order to understand this proposition it is necessary briefly to consider the development of labour law in the common-law countries.

From the fourteenth until the end of the eighteenth century the employment relationship was deemed part of the law pertaining to 'Domestic Relations'.⁵ During this time the basis for the employment relationship as status relationship was the result of characteristics peculiar to the Law of Persons.⁶ The meaning assigned to the term 'status' by Maine⁷ thus connotes an element of social and legal differentiation between categories of

⁴ J Roos 'Labour Law in South Africa 1976-1986: The Birth of a Legal Discipline' 1987 Acta Juridica 94 at 95.

⁵ P Selznick Law, Society and Industrial Justice (1969) 122.

⁶ J S A Fourie 'Status en Kontrak in die Suid-Afrikaanse Arbeidsreg' (1979) 42 THRHR 79.

⁷ O Kahn-Freund 'A Note on Status and Contract in British Labour Law' (1967) 30 MLR 635 at 636.

persons. It could be argued that the law imposed certain obligations on the 'master' and 'servant', merely because they had the status of 'master' and 'servant'.⁸

In the increasingly laissez-faire atmosphere of the nineteenth century there was a change in judicial approach, and employment was increasingly explained in terms of one party voluntarily agreeing to serve another party, under agreed conditions.⁹

Towards the end of the eighteenth century, the idea of freedom

⁸ P Selznick op cit 124.

⁹ T I Smital 'Is Employment Properly Analysed in Terms of Contract' (1975) 6 NZ Univ LR 341 at 342.

'...[M]ost writers have taken it as axiomatic that classical contract theory reached its zenith somewhere in the nineteenth century. Legal folklore has linked it with laissez faire economic theory, as if both were born of the spirit of individualism which pervaded all intellectual activity in the wake of Bentham. The thinking was that, although the common law could proscribe wrongful conduct, it should not as a rule impose involuntary obligations to take positive action; there are few crimes or torts of nonfeasance. Positive duties might be laid on people by legislation; but once everyone was represented in parliament this could be regarded, at least in theory, as a form of voluntary assumption of obligation. The only other way of binding someone to act was by private agreement...What they have agreed is therefore sacrosanct in the eyes of the law. Freedom of contract was enshrined in Bentham's utilitarian philosophy of law. Contracting parties were the best judges of their own happiness, and since private contracts were only made with a view to reciprocal advantage they could not be restrained without injuring the happiness of individuals'.

See also P Baker 'From Sanctity of Contract to Reasonable Expectation?' (1979) CLP 18.

of contract heralded a new age in politics and trade. Instead of being part of the law dealing with personal status, employment was brought within the fold of the expanding law of contract. To stress that the employment relationship was a contract, was to emphasise the freedom and equality of the contending parties and the limited nature of the commitment made by the parties to each other.¹⁰ As the form of the relationship of master and servant changed, so too did the content. The transition from, what Fox calls, a 'high-trust' to a 'low-trust' relationship brought with it the abandonment of some of the rules which had existed in earlier law for the protection of the weaker party.¹¹

¹⁰ P Selznick Law, Society and Industrial Justice (1969) 131.

¹¹ A Fox Beyond Contract: Work, Power and Trust Relations (1974) 181-90 B Napier 'The Contract of Employment' in R Lewis Labour Law in Britain (1986) explains this development as follows:

'In the case of *Limland v Stephen* ((1801) 3 Esp 269, at 270) at the beginning of the century, Lord Kenyon could say there were 'reciprocal duties between masters and servants. From the servant is due obedience and respect; from the master protection and good treatment.' While the principle of employer's control remained largely unaffected under the changing law, except in so far as the duty to obey was now explained as an implied term of the contract and not as an essential part of the relationship of master and servant (Selznick, 1969:136), the master's obligations in respect of welfare were watered-down in several important respects. For example, the obligation to pay wages and to provide medical assistance to sick servants was cut back by a judiciary increasingly aware of the phenomenon of industrial employment and the appropriateness of linking payment of wages directly with productive effort.'

The emergence of collective bargaining during the first half of the nineteenth century caused tension between the traditional contract theory and the developing law of collective bargaining.¹² Increasingly status, conferred by statute and collective bargaining, has become an important source of legal rights and obligations:

'The employment relationship is so shot through by Statute and collective bargaining agreements that it has become an inextricable complex of rights and obligations with its sources in contract, common law, trade custom and practice, legislation and collective bargaining.'¹³

The result has been that in terms of express statutory provisions and collective agreements that have statutory effect, employees have been prohibited to contract to their detriment.¹⁴

It has been said that status involves 'a complex of legal relations, obligations, rights, privileges, powers...imposed on us without our previous self-determination [and which] cannot be

¹² J S A Fourie 'Status en Kontrak in die Suid-Afrikaanse Arbeidsreg' (1979) 42 THRHR 74 at 80.

¹³ See H Cheadle 'Employment (including Master and Servant)' in Wille & Millin's Mercantile Law of South Africa 18 ed J F Coaker & D T Zeffertt (1984) 340.

¹⁴ Section 25 of Act 3 of 1983. The most important ones are those created to enforce compliance with provisions relating to maximum permissible working hours, spread-over limits, maximum time which may be worked without a break, minimum wage rates, leave allowances, termination of contract etc.

shaken off or seriously modified by any act of will'.¹⁵ Status in the sense used by Maine¹⁶ means the imposition of rights and duties irrespective of the volition of the person concerned, but status in the sense used by Kahn-Freund means mandatory norms used to shape a contractual relation freely entered into.¹⁷

Fox¹⁸ argues that the employment relationship in general, has never really been fully assimilated into the law of contract, but that the conventional contract doctrine was combined with aspects of the old master-servant (status) relationship. His argument implies that the status nature of the relationship does not result from increasing statutory or collective regulation of the content of the contract of employment, but from the very nature and structure of the relationship.

The law relating to domestic employment has not reached a point of development where the legal phenomenon of status as described by Kahn-Freund would apply to it. At best it could be described in the words of Fox as an employment contract with strong aspects of the old master-servant status relationship. This

¹⁵ M Radin 'Contract Obligations and the Human Will' (1943) 43 Col LR 575 at 577.

¹⁶ See fn 2 at p41 *supra*.

¹⁷ O Kahn-Freund 'A Note on Status and Contract in British Labour Law' (1967) 30 MLR 636 at 640.

¹⁸ A Fox Beyond Contract: Work, Power and Trust Relations (1974) 181-90.

contention will be pursued in 3.3, where the aspect of subordination is given closer scrutiny.

3.3 Contract and the employment relationship

At the heart of the contract theory is the doctrine of freedom of contract. Freedom of contract embraces two closely-connected but distinct concepts. In the first instance it indicates that contracts are based on mutual agreement, while in the second place it emphasises that the creation of a contract is a result of free choice.¹⁹

The important assumption is the reciprocal exchange between equals.²⁰ However, the questions arise whether the two parties

¹⁹ P S Atiyah An Introduction to the Law of Contract 3 ed (1979) at 5. The only restriction of the freedom to contract is the fact that the courts will not enforce or recognise any agreement of which the purpose is deemed by the law to be illegal or contra bonos mores. F R Batt The Law of Master and Servant 5th ed by G J Webber (1967) 117. As P Baker 'From Sanctity of Contract to Reasonable Expectation?' 1979 CLP comments at 18-19:

'...[I]f what the parties had agreed to did not contravene public policy, it could not be set aside or modified by the courts; that would be to relieve one party of that which by agreement had been made the price of the obligation of the other. Public policy in this context was, of course, kept to a minimum. Fairness required every individual to be treated equally. Particularities of person and subject matter were eliminated from legal consideration. What bound the wise man would also bind the fool.'

²⁰ N Haysom and C Thompson 'Labouring under the Law: South Africa's Farmworkers' (1986) 7 ILJ 218 at 221. Also see B Jordaan 'The Law of Contract and the Individual Employment

to a contract of employment are equal at the time of the negotiation of the contract, and whether the parties are equal once the contract has been concluded.

Against the socio-economic background sketched in chapter 2 it is clear that the aspirant domestic worker and her respective employer are not on an equal negotiating footing. According to Beatty²¹ the essence of bargaining power is the ability to withhold or deny something of value to another. When the employee's contribution, measured in economic terms, is compared to what the employer has to offer by way of a livelihood, it is negligible.

In practice individuals wishing to enter the domestic employment market do not negotiate about contractual terms. The reality of free-market forces in this arena of employment explains the relative powerlessness of the prospective employee.

In the context of domestic employment there are seldom negotiations in which the parties can present demands. In a vacuum in which no collective agreements, codes of conduct, or statutory minima exist, more often than not the employer

Relationship' 1990 Acta Juridica 73 at 77: '[The contract doctrine] conceals the fact of employees' generally weak bargaining position, as well as their dependence on the employer.'

²¹ D M Beatty 'Labour is not a Commodity' in B Reiter & J Swan (eds) Studies in Contract Law (1980) 313 n27 at 335.

sketches an arrangement which the worker either accepts or rejects by refusing the job. Employers can abuse this power and the contract of employment can indeed become a device for entering into 'legally unsupervised relations'.²²

A service contract, as defined by Mureinik²³ is 'an agreement in which one party (the servant) agrees to work for another (the master) and in which the servant occupies a subordinate position'. According to this view it follows that it is one of the essentialia of the contract that the servant²⁴ owes a duty to be subordinate and the master reserves the correlative right to demand subordination.

Rycroft and Jordaan²⁵ contend that the servant's traditional subordination to the authority of the master, is incorporated into the contract by means of an implied term.

This implied term of subordination is attacked by Selznick²⁶

²² P Selznick Law, Society and Industrial Justice (1969) 132.

²³ E Mureinik 'The Contract of Service: An Easy Test for Hard Cases' 1980 SALJ 247 at 263.

²⁴ E Mureinik op cit 263 fn 92 remarks that he uses the older terminology of 'master' and 'servant' as the use of employer-employee phraseology tends to distract attention from the imbalance in the relationship.

²⁵ A Rycroft and B Jordaan A Guide to South African Labour Law (1990) 50.

²⁶ P Selznick Law, Society and Industrial Justice (1969).

when he says:

'In the first place a contract giving broad powers of decision to one party and establishing the subordination of another was hardly an ordinary contract. It was at best a Hobbesian compact giving full discretion to the sovereign employer... Secondly this authority was an incident of ownership...not a contractual agreement alone'.²⁷

Elias²⁸ sees the employment relationship functioning on two levels. The first is the primary economic level that consists of the wage-work bargain, the exchange of labour for remuneration. The second level consists of the relational dimension that encompasses the social, psychological and personal value of employment. It involves the exchange of mutual obligations for future performance, the promise to employ, on the one hand, and to be employed, on the other. It is the second level that gives the relationship continuity. The application of the principles of a commodity exchange to the employment relationship has caused the ordinary courts to overlook this relational dimension, hence depriving employees of a legitimate interest in job security.²⁹

The contractual form of the employment relationship is

²⁷ P Selznick Law, Society and Industrial Justice (1969) 132.

²⁸ P Elias 'The Structure of the Employment Contract' 1982 CLP 95 at 99-100.

²⁹ Ibid at 99-100.

criticized by Rycroft and Jordaan³⁰ on two grounds: In the first instance the employer, under the guise of contract, reserves virtually full authority of direction and control over both the content of the contract and the employee himself.³¹ Secondly, the common law treats the contract of employment as a simple, commercial or market transaction.³² This, it is argued, results in both the inequality of the parties' exchange and the employee's personal and psychological interest being ignored.³³ This approach ignores the fact that the employment relationship consists of more than an exchange of money and labour; and also entails 'an exchange of mutual obligations for future

³⁰ B Jordaan 'The Law of Contract and the Individual Employment Relationship' 1990 Acta Juridica 73 at 76-77. A Rycroft and B Jordaan A Guide to South African Labour Law (1990) 13.

³¹ See also Kahn-Freund's Labour and the Law P L Davies & M Freedland (eds) 3ed (1983) 18.

'But the relation between an employer and an isolated employee or workers 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 that is concealed by that indispensable figment of the legal mind known as the "contract of employment".'

³² Ibid at 14. The commercial rationale is not only applied to be the common law but has also been applied by the Industrial Court when making 'unfair labour determinations'. See MAWU v BTR Sarmcol (1987) ILJ 815 (IC) at 839A-D; NUTW v Braitex (Pty) Ltd (1987) 8 ILJ 794 (IC) at 799; TGWU v Putco (1987) 8 ILJ 801 (IC) at 806; M S M Brassey et al The New Labour Law (1987) 60 ff.

³³ D Beatty 'Labour is not a Commodity' in B Reiter & J Swan (eds) Studies in Contract Law (1980) 328 K Swinton 'Contract and the Employment Relationship' in B Reiter & J Swan (eds) Studies in Contract Law (1980) 362.

performance'.³⁴ The fundamental weakness of the common law contract of service is that it has failed to recognise any legitimate interest in job security.³⁵

There is, accordingly, a need to protect the employee, by legislation or other measures. By limiting the employee's contractual freedom, the employee can be afforded protection from detrimental contractual terms.

3.4 Formation of the contract

The contract of employment can be defined as follows: 'an agreement in terms of which one party (the employee) voluntarily undertakes to place his personal services at the disposal of the other party (the employer) 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.'³⁶

The contract³⁷ need not be in writing, but may also be entered

³⁴ M R Freedland The Contract of Employment (1976) 20.

³⁵ A Rycroft & B Jordaan A Guide to South African Labour Law (1990) 15.

³⁶ J Riekert Basic Employment Law (1987) 14.

³⁷ The contract depends for its validity on compliance with the normal contractual requirement of agreement, capacity to contract, possibility of performance, legality and certainty. A Rycroft and B Jordaan A Guide to South African Labour Law

into verbally or tacitly, by conduct. Even if a contract is reduced to writing, it would be rare to find one which contains all the contractual terms and conditions applicable to the employment concerned. Where the parties fail to provide expressly for a particular contingency, a term may be implied.³⁸

Where an 'implied term' is used to describe an unexpressed provision of the contract which the law imports therein, without reference to the actual intention of the parties, but usually not in conflict with an express provision, it is a naturalium of the contract.³⁹ In this sense certain common-law duties are implied. The duty of obedience to the employer's lawful instructions; a duty of fidelity; a duty of care and a duty of reasonable efficiency or competence can be implied on the employee's side. On the employer's side there is the duty to receive the employee into service; the duty to provide reasonably safe working conditions and the duty to remunerate the employee.⁴⁰

In the second place, an 'implied term' can also be used to denote an unexpressed provision of the contract which derives

(1990) 25.

³⁸ R W Rideout Principles of Labour Law 3 ed (1979) 21.

³⁹ M McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531.

⁴⁰ J Riekert Basic Employment Law (1987) 40.

from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances.⁴¹

Implied terms of fact are therefore needed where the parties for some reason did not reduce everything to express terms. The primary approach has been to determine whether the parties would have agreed to it if they had thought of it. This is called the 'officious bystander' test.⁴²

This simplistic solution is not always possible because in many cases there is either little objective evidence to rely upon, or there is complete disagreement among the parties as to whether there could ever have been any such term. The other test which is usually accepted is the 'business efficacy' test.⁴³ This is

⁴¹ M McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974(3) SA 506 (A) at 533.

⁴² MacKinnon L J explained the test in Shirlaw v Southern Foundries Ltd 1957 A C 555:

'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if, while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"'

See M McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 533.

⁴³ The Moorcock (1889) 14 P O 64. '...what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men' (my emphasis).

clearly one stage further removed from the 'officious bystander' test, for it leaves the court to decide what is necessary to give business efficacy to the transaction, and then concludes that, that is what the parties must have intended. What would be considered to be conducive to 'business efficacy' in the realm of domestic contracts of employment is an open question, as a private domestic establishment can hardly be run according to the lines applicable to a business.

The courts have not yet implied a term simply on the ground that it seemed reasonable in all the circumstances. This is in accordance with the court's attitude not to interfere with the outcome of contractual relations, albeit unfair and unreasonable.⁴⁴

Under the fiction of the 'freely-bargained' contract judges deem the employee to have voluntarily accepted whatever condition he works under, and generally accept that it is not the business of third parties or the courts to prescribe to the two individuals what the content of their private contract should be. Rabie J explains this notion:

'[D]ie feit dat 'n ooreenkoms vir een van die partye onredelik of onbillik werk, [is] in ons reg normaalweg nie 'n grond waarop die ooreenkoms aangeveg kan word nie.'⁴⁵

⁴⁴ Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 839H-I.

⁴⁵ Ibid.

This same idea was reiterated by the Industrial Court in UAMAWU v S Thompson (Pty) Ltd t/a Thomson Sheet Metal Works:⁴⁶

'[It] cannot be overlooked that the basis of a contract of employment is that the parties voluntarily agree to the terms and conditions. It is in principle not in the interests of the freedom of association or the freedom of the individual that there should be unnecessary compulsion in regard to the terms and conditions of a contract of employment.'

With the employer's power of command and the employee's subordination, the court's construction of the 'intention' of the employment agreement more often than not resulted 'in the consolidation of the superior powers of the employer'.⁴⁷

3.5 Conditions of employment

3.5.1 Remuneration

In terms of the common law the nature and amount of remuneration paid to domestic workers are determined by the employer and employee. Provided that employees make their services available to their employers, they are entitled to receive the consideration for that service, whether or not they have actually worked.⁴⁸ Brassey⁴⁹ explains this rule in the light

⁴⁶ (1988) 9 ILJ (IC) 266 at 272D-E.

⁴⁷ Lord Wedderburn The Worker and the Law 2 ed (1986) 142.

⁴⁸ Faberlan v McKay and Fraser 1922 WLD 22 In Collier v Sunday Referee Publishing Co Ltd [1940] 2 KB 647 Asquith J observed at 650: "Provided I pay my cook her wages regularly she

of the fact that the workers' work is seen not for their benefit but for their employers'. Consequently workers are seen as mechanisms in the process of production. Money is their reward for services rendered. Drawing on the Roman Dutch law the employment relationship has repeatedly been characterized as one of letting and hiring of things.⁵⁰

With regard to the contract of lease, the formula the 'usual' or 'customary' amount is acceptable.⁵¹ In his exposition on indeterminate wages Joubert⁵² refers to the common law rules relating to the contract of letting and hiring of things. Where the wages can be ascertained by custom, Voet⁵³ and Gothofredus⁵⁴ hold that the customary wage must be paid. Gothofredus and Pothier agree that it should be the customary

cannot complain if I chose to take any or all my meals out".

⁴⁹ M S M Brassey 'The Contractual Right to Work' (1982) 3 ILJ 247.

⁵⁰ Nixon v Blaine and Co 1879 Buch 217 at 222; Denny v SA Loan Mortgage & Mercantile Agency Co (1883) 3 EDC 47 at 60; Spencer v Gostelow 1920 AD 617 at 626 and Schierhout v Minister of Justice 1926 AD 99 at 107.

⁵¹ Voet 19 2 7; Pothier Letting and Hiring para 40; Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd 1961 (1) SA 704 (C) at 708-709.

⁵² D J Joubert 'Enkele Aspekte in verband met die Onbepaalde Loon' in Huldigingsbundel Daniel Pont (1970) 180.

⁵³ Voet 19 2 7.

⁵⁴ Tractatus de Salario 2 1 4 as quoted by Joubert in 'Enkele Aspekte in verband met die Onbepaalde Loon' in Huldigingsbundel Daniel Pont (1970) 187.

compensation of the place where the services were rendered.⁵⁵ Where there is any doubt regarding the custom in question, the interpretation should favour the debtor, that is the employer.⁵⁶ If these common-law principles were to be applied to an employment contract for domestic services, it would first have to be determined whether regional customary wages have been established. Statistics show that the national average monthly wages are not uniform throughout the country. Domestic workers in Cape Town are the highest paid, and those in the OFS Goldfields the lowest.⁵⁷

If there is no custom, Joubert advises that a reasonable remuneration should be paid.⁵⁸ In such cases before an amount of money can be awarded, the court has to be satisfied that an agreement to remunerate fairly or reasonably for the service is to be implied and it has to be satisfied that the rate or amount of fair or reasonable remuneration can with sufficient certainty, be fixed on the evidence.⁵⁹ It is not enough to say that it would be a 'reasonable thing' to draw such an inference, it must be a 'necessary implication' considering the terms of

⁵⁵ Joubert op cit at 190.

⁵⁶ Ibid.

⁵⁷ Survey of Houses, Sectional Title Units and Domestic Workers Central Statistical Service (October 1990) 12, 20.

⁵⁸ D J Joubert 'Enkele Aspekte in verband met die Onbepaalde Loon' in Huldigingsbundel Daniel Pont (1970) 180 at 203.

⁵⁹ Middleton v Carr 1949(2)SA 374 (A) at 386.

the contract in 'a reasonable and business manner (sic)'.⁶⁰

It is clear that a term to pay reasonable remuneration will not be implied merely because it could reasonably form part of the contract:

'The Court has no power to supplement the bargain between the parties by adding a term which they would have been wise to agree upon, although they did not. The fact that the suggested term would have been a reasonable one for them to adopt or that its incorporation would avoid an inequity or a hardship to one of the parties, is not enough. The suggested term must, in the first place, be one which was necessary as opposed to merely desirable, to give business efficacy to the contract; and, what is more, the Court must be satisfied that it is a term which the parties themselves intended to operate if the occasion for such operation arose, although they did not express it.'⁶¹

In Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (Previously NBC Administrators (Pty) Ltd⁶² the controversial question of a lease for a reasonable rent was raised before the Appellate Division. In casu, Nicholas A J A held that the word 'reasonable' was used in relation to an amount in respect of the landlord's maintenance and running expenses.⁶³ The word 'reasonable' is used in relation to the actual expenses which

⁶⁰ Mullin (Pty) Ltd v Benade Ltd 1952 (1) SA 211 (AD) at 214C-215A.

⁶¹ Techni-Pak Sales (Pty) Ltd v Hall 1968 3 SA 231 (W) at 326E-F.

⁶² 1992 (1) SA 566 (A).

⁶³ At 578D.

are readily ascertainable from the landlord's financial records.⁶⁴ The indications are that if the Appellate Division were to be faced with the issue directly, it may rule in favour of validity. However, the question as to what the words 'reasonable rent' mean, remains.

Kerr⁶⁵ submits that the best approach in cases where parties agree upon a 'reasonable amount' as rent, is to consider what they intend by the words and, then, whether evidence is available to establish the amount in money in the circumstances. The evidence may show that they had a certain formula in mind to calculate the amount of rent payable. As an example he suggests that the parties may have meant 'the usual amount' for that kind of property in the area in which it is situated.⁶⁶ If this line of argument is transferred to the determination of wages, it would mean that a 'reasonable' wage would be the usual amount paid to a domestic in the area in which she works. Application of both the principles suggested by Joubert and Kerr would lead to a circular argument, because Joubert suggests that where the usual amount is not ascertainable, the wage should be reasonable, while Kerr suggests that a 'reasonable rent' could mean 'the usual amount'. Whether the wages paid in the

⁶⁴ Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (Previously NBC Administrators (Pty) Ltd 1992 (1) SA 566 (A) at 578D.

⁶⁵ A J Kerr The Law of Sale and Lease (1984) 175.

⁶⁶ Ibid.

particular areas should be deemed customary wage for that region is a question of fact. I contend that where a wage cannot be ascertained by facts as evidence of the 'usual' or 'customary' wage, the contract of employment is invalid.

The common law determines no minimum wage, and payment can be made in money or kind. The worker's compensation can be made up of wages, second-hand clothes, food and lodging, medical care and school fees for her children.

Often the same 'interweaving of contractual and inter-personal aspects' that influence contracts such as au pair agreements,⁶⁷ can also be observed in the content of the agreement between the employer and the domestic worker. It would appear, however, that the reciprocity principle of remuneration for services rendered is not consistently applied in many domestic employment relationships. Informal arrangements often tend to supplant it. For example, the parties exchange 'services' or 'compensation' without demanding wages or services in return. An example would be where the domestic worker works half an hour extra, while waiting for her employer to return home from the office, without being paid overtime; where on another occasion the employer gives the domestic worker a day off and does not deduct this from her monthly wage. It therefore appears that in practice

⁶⁷ Tone Sverdup 'Employees in Private Homes' Working papers in Women's Law No 33 (University of Oslo, 1990) 20.

the contractual principle of 'money for work' is not always made to apply to all details of the arrangement between the parties.

3.5.2 Working hours

The common law places no restriction on the number of working hours of a domestic worker. If no specific provision is made in the contract of employment with regard to the working hours, they are regulated by existing practice or custom. The question whether an unreasonably long working day can be struck down as unconscionable will be discussed below.

If the law had to imply terms relating to working hours from existing practice and custom, it would confirm very long working hours for domestic workers. According to a survey⁶⁸ done in 1981, more than 77 per cent of domestic workers were working a week of 48 hours or more. Twenty-three percent were working more than 75 hours a week, while the median for full-time domestic workers was 59 hours a week.

The Basic Conditions of Employment Act,⁶⁹ which excludes domestic workers from the statutory definition of employee,

⁶⁸ J Cock Black and White Women: a Socio-historical Study of Domestic Workers and their Employers in the Eastern Cape Ph.D. (Rhodes University, 1981) 64.

⁶⁹ The Basic Conditions of Employment Act 104 of 1992 published in GG 14094 3 July 1992 which relate to farm workers will be discussed in Chapter 6 below.

prescribes maximum weekly ordinary working hours. It provides that no employer may require an employee (except a security guard) to work for more than 46 hours per week.⁷⁰ The maximum daily ordinary working hours is fixed at 9 hours and 15 minutes for employees who work for 5 days per week and not more than 8 hours per day for employees who work for 6 days per week.⁷¹ There are separate provisions applicable to shift workers.⁷² No employee may work continuously for longer than five hours without a meal interval of at least one hour.⁷³ Should an employer and employee agree that the meal interval be shortened to 30 minutes, written notice of such agreement should be given to an inspector.⁷⁴ An employer may not require an employee to perform any work during his meal interval.⁷⁵

Unless the contract of employment makes special provisions for overtime work and payment, no such provisions can be implied by common law. Currently employees who are afforded statutory protection cannot be required to work overtime except in terms of an agreement between the employer and the employee.⁷⁶

⁷⁰ Section 2. The maximum for guards is 60 hours.

⁷¹ Section 4.

⁷² Section 5.

⁷³ Section 7.

⁷⁴ Section 7(2).

⁷⁵ Section 7(1)(b).

⁷⁶ Section 8.

Payment for overtime is calculated at a rate of one and a third of a worker's hourly wage, except in respect of overtime on Sundays or public holidays when payment is calculated according to whether the employee has worked a whole or only a half day. If the employee has worked for four hours or fewer, he is entitled to a normal day's full pay. Should he have worked for more than four hours, he becomes entitled to double pay, either calculated at the total time actually worked, or the flat rate for an ordinary day's work, whichever is the greater.⁷⁷ No such provisions and restrictions apply to domestic workers and they are open to exploitation by unscrupulous employers who may require them to work long working days or unreasonable overtime without commensurate compensation.

3.5.3 Leave

The term 'leave' is discussed in East London Municipality v Thomson:⁷⁸

'...[I]n its primary sense "leave" means "permission to do something", the word is also used as an abridgement of the expression "leave of absence" in the sense of "permission to be absent from a post of duty", and this comes to mean the period of such absence.'

There is a limited obligation imposed on an employer by the

⁷⁷ Section 9.

⁷⁸ 1944 AD 56 at 61.

common law to pay an employee his wages during certain enforced absences from work.⁷⁹ This, however, is treated as distinct from an obligation on an employer to grant leave.⁸⁰

3.5.3.1 Holiday leave

The common law gives an employee no right to claim 'leave' in the sense stated above.⁸¹ In terms of the common law a domestic worker is therefore not entitled to holiday leave and often a working holiday away with her employer is deemed to be a worker's holiday leave.⁸²

The right to leave, if it exists, arises solely from the terms of the contract between the parties.⁸³ Leave or payment in lieu of leave can be negotiated between the parties in the contract of employment. A right to leave arises only from express contractual agreement. Should the services of the employee be terminated during the course of a year, she forfeits any

⁷⁹ See Boyd v. Stuttaford 1910 AD 101.

⁸⁰ East London Municipality v Thomson 1944 AD 56 at 61.

⁸¹ East London Municipality v Thomson 1944 AD 56 at 61.

⁸² S Flint 'Protection of Domestic Workers in South Africa' (Part 2) (1988) 9 ILJ 176 at 196. See section 12(1)(b) of the Basic Conditions of Employment Act 3 of 1983 which prohibits an employee from working during his leave.

⁸³ Wallach's Printing and Publishing Co v Wallach 1932 AD 49 at 65.

entitlement to accrued leave benefits.⁸⁴ An employee, therefore, is not entitled to leave pay upon termination of service for leave due to her, but which she, for reasons not attributable to the employer, did not take.⁸⁵

If the employee is prevented by the employer from taking his leave during the currency of the service contract, an action for damages lies.⁸⁶

Whereas workers covered by industrial legislation are entitled to two or three weeks' paid leave as well as public holidays,⁸⁷ Cock found in 1980 that 22 per cent of domestic workers had no annual leave, while 34 per cent had one week leave per year or less. Eighty-three per cent of domestic workers in the survey had to work on public holidays.⁸⁸

⁸⁴ Carstens v Ferreira 1954(4) TPD 704 at 705.

⁸⁵ J P A Swanepoel Introduction to Labour Law (1992) 15.

⁸⁶ Wallach's Printing and Publishing Co v Wallach 1932 AD 49 at 66.

⁸⁷ The Basic Conditions of Employment Act 3 of 1983 provides for at least fourteen consecutive days' leave on full pay in respect of each period of twelve consecutive months for which the employee had worked for a single employer. (S12(1)(ii)) Vacation leave may also not be concurrent with sick leave or with a period of notice of termination of a contract of service. (S12(2)(b)) For every public holiday which falls within the employee's period of leave and which would otherwise be an ordinary working day for the employee, his leave must be extended by one working day with full pay. (S12(2)(c))

⁸⁸ J Cock Black and White Women: a Socio-historical Study of Domestic Workers and their Employers in the Eastern Cape Ph.D (Rhodes University, 1981) 70.

3.5.3.2 Sick leave

The general rule is that an employer is under no obligation to pay the employee for periods of absence due to illness unless there has been an agreement to the contrary.⁸⁹ Voet⁹⁰ enunciated the following exception:

'Quin immo, si modico tantum temporis spatio famuli aut ancillae valetudine impediti non per omnia operas promissas impleverint, non statim ob id deductionem ex mercede eorum facere oportet'

[On the other hand, however, if menservants or maidservants, through incapacity arising from sickness have failed in the full performance of the proper work, for a short time merely, one ought not on that account immediately make a deduction from the wages.]

In Boyd v Stuttaford⁹¹ the court noted the extreme narrowness of the guarded nature of the language employed. So construed the rule would mean that in all other cases of illness, save those of domestic servants, a master is justified in making an immediate deduction from the salary of the employee, who is so hindered from the full performance of his duties.

A temporary disability which prevents a party from fulfilling his obligations under a contract does not in common law bring

⁸⁹ Boyd v Stuttaford 1910 AD 101 at 123.

⁹⁰ Voet 19 2 27.

⁹¹ 1910 AD 101 at 123.

the contract to an end.⁹² If the disability persists for a period which renders it unreasonable that the other party should be bound by the contract, the latter party may be entitled to terminate the contract.⁹³ For this reason it has been held that where a monthly employee was absent due to illness for six consecutive weeks, the employer lawfully terminated his services.⁹⁴

3.5.3.3 Maternity leave

The domestic sector is predominantly female.⁹⁵ In terms of the common law a domestic worker is not entitled to maternity leave and maternity benefits since the South African common law has its roots in the period when women had not entered the labour market.⁹⁶ Female industrial workers are also not entitled to paid maternity leave, unless so agreed in a collective

⁹² Magawo v Caledon Divisional Council 1972(3) SA 365 (C) at 367F.

⁹³ Beretta v Rhodesia Railways Ltd 1947 (2) SA 1075 (SR) at 1080.

⁹⁴ Myers v Sieradzki 1910 TPD 869.

⁹⁵ D Gatskell et al 'Class, Race and Gender: Domestic Workers in South Africa' 1984 Review of African Political Economy 88 at 93; Survey of Houses, Sectional Title Units and Domestic Workers CSS 1990.

⁹⁶ L Meintjes-Van der Walt 'Die Regsposisie van Huishoudelike Werkers' 1989 De Rebus 605.

bargaining agreement.⁹⁷

If a domestic worker were to take leave for maternity purposes this leave would be unpaid and she could risk dismissal assuming, of course, that the length of absence is deemed 'unreasonable'.

Domestic workers are excluded from the Unemployment Insurance Act.⁹⁸ Although this Act does not specifically provide for maternity leave, a woman in other types of employment can, where she has made contributions to the Unemployment Insurance Fund, claim maternity benefits.⁹⁹

3.5.4 Safe working conditions

Many accidents causing death or injury occur in the home. An important principle was laid down in Colman v Dunbar:¹⁰⁰

'If the circumstances are such that a person of common sense who has the custody or control of a certain thing could recognise that it is likely to be a danger to others, then it is his duty to take reasonable care to avoid such injury.'¹⁰¹

⁹⁷ S Gon et al 'Maternity Rights and Benefits under South African Law' 1988 IR Journal 59.

⁹⁸ Act 30 of 1966.

⁹⁹ Section 37.

¹⁰⁰ 1933 AD 141.

¹⁰¹ At 157.

The Machinery and Occupational Safety Act¹⁰² provides for the protection not only of employees in factories and on building sites, but also of persons in other forms of employment, including those working in diverse spheres such as agriculture, commerce, local government and domestic service. The definition of 'employee' in this Act includes any person who is employed by or working for an employer, who is receiving or is entitled to receive any remuneration, or who works under the direction or supervision of an employer.¹⁰³

In terms of section 17(3) incidents occurring in a private household must be reported to an inspector, unless the householder has reported the incident to the South African Police or to a local authority of the area in which the incident occurred. The police or the local authority must then notify an inspector of the matter.

In terms of section 28(2) an employer or user of machinery commits an offence should a person be injured through the negligence of the employer or user, even though the latter did not necessarily contravene a provision of the Act. The employer is however not liable if the injury cannot be ascribed to his negligence. It is to be noted that in terms of section 30(2) an employee, agent or mandatory of an employer or user of machinery

¹⁰² No 6 of 1983.

¹⁰³ Section 1.

may be liable for prosecution, if the injury was caused by the negligence of the employee, agent or mandatory.

If convicted, a person can be sentenced to a fine of R10 000 or to imprisonment for up to two years, or both.

It should be noted that if an employee should die as a result of the negligence of an employer, the latter may be charged with culpable homicide under the common law.

The Machinery and Occupational Safety Act makes no provision for compensation to be paid to injured workers. Domestic workers must therefore institute an action against the employer at common law. At present, the Workmen's Compensation Act¹⁰⁴ does not apply to domestic workers¹⁰⁵ who are thus not precluded, as are 'workmen' under the Act, from seeking damages in civil actions against their employers.

3.6 Conclusion

The question was raised at the beginning of this chapter whether the common-law contract of employment could achieve employment justice. The discussion that followed indicated that the contract idea which was favoured as the great cure-all by

¹⁰⁴ No 30 of 1941.

¹⁰⁵ Section 3(2)(f).

nineteenth century laissez-faire, may only be a device for entering 'legally unsupervised relations.'

This criticism stems from the fact that it is assumed that a contract is voluntary entered into by juridically equal individuals who agree on the terms of a contractual exchange. This assumption is false in the case of the employment relationship, but even more so in the case of domestic workers. Domestic workers, finding their services to be oversupplied and under-priced in a buyer's market, are hardly in a position to dictate the terms of the employment contract.

Vlastos emphasises the danger hidden in the presumption of equality in justice:

'A more positive evil is that, in so far as we thus reduce to equality, we may fall into habits of thought which obfuscate the real task basic to the doing of justice in contemporary Western democracies. These are first and above all the identification and explication of differences between human beings which are relevant to making justifiable discriminations between them; and second the structuring of justice-rules corresponding to these differences.'¹⁰⁶

The present situation reveals a position where more often than not all the terms and conditions are unilaterally determined by the employer. Instead of protecting the domestic worker, the contract could cause her to relinquish the little protection she

¹⁰⁶ G Vlastos 'Justice and Equality' in J Waldron Theories of Rights (1984) 41.

enjoys under the common law.

There is, accordingly, a need to protect the employee, by legislation or other measures. By limiting the employee's contractual freedom, the employee can be afforded protection from detrimental contractual terms. Kahn-Freund explains this paradox of freedom:

'...to restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may be constrained to impose upon himself through an act of his legally free and socially unfree will.'¹⁰⁷

¹⁰⁷ Kahn-Freund's Labour and the Law 3rd ed P L Davies & M Freedland (eds) (1983) 24.

CHAPTER FOUR

THE PRESENT LEGAL POSITION:

TERMINATION OF SERVICE AND REMEDIES

4.1 Introduction

'Under common law, a contract of employment can be terminated by an employer on various common-law grounds, either summarily or after having demanded compliance with the provisions of the contract. Another possibility is where a contract of employment is not for a fixed period, to terminate it by notice and the notice period depends on either the terms of employment or, inter alia, on the fact whether the employee is paid on a weekly or monthly basis, etc. The one cancellation is, therefore, based on breach of contract and the other one is a termination by notice.'¹

Hayson and Thompson² observe that the common-law contract facilitates the employer's ability to terminate the contract not only to suit production requirements, but also to discipline his labour force. They also emphasise the fact that at common law, as long as notice is given, 'the employer was free to dismiss an employee for whatever reason he wished, with no obligation to reveal his reason to the employee, much less to justify it.'³

¹ Stinise v Kayo Shoes Manufacturers (Pty) Ltd 1991(1) SA 643 (Ck) at 326-327.

² N Hayson and C Thompson 'Labouring under the Law: South Africa's Farmworkers' (1986) 7 ILJ 218 at 221.

³ Ibid at 221.

The Donovan Report⁴ remarked on the precarious nature of employment and the dismal effects of termination for the employee:

'In practice there is usually no comparison between the consequences for an employer if an employee terminates the contract of employment and those which will ensue for the employee if he is dismissed. In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations dismissal is a disaster.'⁵

We must investigate the obligations of the employer and employee under the contract of employment in order to understand the ways in which the contract can come to an end. However, the legal meaning of termination has to be established first.

4.2 The concept 'termination'

The employment contract can be terminated in the following ways: in terms of the provisions of the contract; by consent; by operation of law; by supervening impossibility of performance and by cancellation for breach of contract.⁶

The question is what happens to the legal rights of the

⁴ Royal Commission on Trade Unions and Employers Associations ('The Donovan Report') (1967).

⁵ Ibid at 143.

⁶ A Rycroft & B Jordaan A Guide to South African Labour Law (1990) 68.

contractual parties at termination? It can be argued that the structure of the employment contract is only important as far as the common law is concerned, and if statutory reform is to be considered this would no longer be necessary. I shall endeavour to indicate that the meaning of the concept of 'termination' of contract plays a deciding role in the interpretation and application of statutory provisions. Kahn-Freund's assertion that the contract of employment is 'the cornerstone of the edifice of labour law,'⁷ has long been challenged. Rideout contends that the contract has only come to play an incidental and largely irrelevant role in labour law and should be decently buried.⁸ Elias, however, explains that the contract of employment has not been cowed by statutory assault, but has paradoxically become more resilient, because statutory rights have been built upon the common law contractual framework.⁹ The contract may be of diminishing importance as an independent source of right, yet it remains central to the operation of the statutory provisions, for the simple reason that it applies only to 'employers' and 'employees'.

In Borg-Warner SA (Pty) Ltd v National Automobile and Allied

⁷ O Kahn-Freund 'Legal Framework' in A Flanders and H Clegg (eds) System of Industrial Relations in Great Britain (1954) 45.

⁸ R W Rideout 'The Contract of Employment' 1966 CLP 111.

⁹ P Elias 'The Structure of Employment Contract' 1982 CLP 95. See also Wedderburn The Worker and the Law (1986) 176: 'Concepts of common law, above all of contract law, filter back into the language of the statute as applied.'

Workers Union¹⁰ it was held that an act of employment or re-employment is not an act performed by an 'employer' towards an 'employee'. Such an act is therefore not an unfair labour practice:

'There is no common-law basis for the notion of extended or continuing employment relationship outside the contract of employment. Employer and employee have no independent existence. An employment relationship can therefore exist only in the context of an employment contract.'¹¹

Once a contract has been terminated, the rights and duties that an employer has vis-à-vis an employee and the rights and duties which an employee has vis-à-vis an employer cease to exist. The employment relationship provides the nexus upon which statutory rights are built, and ceases to exist when the contract is terminated.¹²

4.3 The right to terminate

4.3.1 Summary dismissal

At common law an employer is entitled to dismiss an employee summarily if the employee's action amounts to a repudiation of the contract or has rendered the continuation of the working

¹⁰ (1991) 12 ILJ 549 (LAC) at 557G-H.

¹¹ At 557G-I.

¹² Ngubane & Others v NTE Ltd (1991) 12 ILJ 138 (IC) at 146D.

relationship impossible.¹³ When the employer dismisses an employee, he in fact cancels the contract and the legal consequences of the repudiation of a contract follow.¹⁴

Summary dismissal means that the employer terminates the contract of employment without notice to the employee, as a result of the employee's breach of contract. Whether or not an employee's conduct justifies summary dismissal, will be determined by the relevant facts of the case.¹⁵

The following have been accepted as valid grounds for summary dismissal:

4.3.1.1 Incapacity or Incompetence

An employee may not be dismissed because he makes errors in his work except if they are gross errors or occur repeatedly.¹⁶ The degree of incapacity will have to be examined in order to determine whether it justifies summary dismissal.¹⁷ Relevant factors to be considered are the nature of the employee's job, the extent of the incompetence and the actual or potential

¹³ Zieve v National Meat Suppliers 1937 AD 181 at 192; Venter v Livni 1950(1) SA 524(T) at 528.

¹⁴ F R Van Jaarsveld & W N Coetzee Die Suid-Afrikaanse Arbeidsreg (1986) 108A.

¹⁵ Clouston and Co Ltd v Corry 1906 AC 122 (PC) at 129.

¹⁶ Wallace v Rand Daily Mails Ltd 1917 AD 479 at 491.

¹⁷ Hankey Municipality v Pretorius 1922 EDL 306 at 309.

prejudice to the employer.¹⁸

4.3.1.2 Insubordination

Subordination of the employee to the employer is one of the factors distinguishing the employee from the independent contractor.¹⁹

The South African courts have found breach of contract to exist in the following instances: where a rude letter was written to the employer;²⁰ where rude language was used in the presence of the employer;²¹ and where refusal to obey an order was a deliberate and serious challenge to his immediate superior's authority.²²

¹⁸ Wille and Millin's Mercantile Law of South Africa (18th ed) 361.

¹⁹ In Colonial Mutual Life Assurance Society Ltd v MacDonald 1931 AD 412 at 433 Roos JA, distinguishing *locatio conductio operis* and the contract of service, said: 'The crucial difference between these two cases lies in the fact that where a master engages a servant to work for him the master is entitled under the contract to supervise and control the work of the servant. He is entitled at any time to order the servant to desist, and if the matter is sufficiently serious may even dismiss him for disobedience.'

²⁰ Jamieson v Elsworth 1915 AD 115 at 120.

²¹ Oaten v Bentwich & Lichtenstein 1903 TH 118; Miles v Jagger & Co 1904 SC 513.

²² Moonian v Balmoral Hotel 1925 NPD 215 at 219.

In an early case Denny v SA Loan Co²³ it was held that an employer is not permitted to pick a quarrel with a servant by giving an unreasonable order, and then rely on the employee disobeying the order as justification for summary dismissal.

South African precedent reflects a strong master-servant status with regard to cases of insubordination especially where black or menial workers are concerned. In Kaplan v Penkin²⁴ it was speculated that the breach of contract by a menial servant was less excusable than on the part of managerial staff. Race has also at times been a major factor in the determination of the seriousness of the insolence: 'It is difficult to imagine anything more insulting...than a remark of that kind deliberately and gratuitously made by a black servant to the white representative of his master's customer.'²⁵

Whether the insubordination is incompatible with the continuance of the employment relationship is a question which must be judged in the context of current attitudes to employment and not those of a bygone age.²⁶

²³ (1883) 3 EDC 56 at 58.

²⁴ 1933 CPD 223 at 225.

²⁵ Gogi v Wilson & Collins 1927 NLR 21 at 22.

²⁶ J Riekert Basic Employment Law (1987) 33-35; See also B Napier 'Judicial Attitudes towards the Employment Relationship - Some Recent Developments' with regard to the position in Britain: 'Industrial tribunals....have evolved a new view of the role played by discipline...Such developments may suggest a

4.3.1.3 Misconduct

The degree of misconduct that justifies summary dismissal could vary according to the relationship between the contractual parties. In Kaplan v Penkin²⁷ it was held that absence during working hours may justify the dismissal of a menial servant, while the same extent of absence would not justify the dismissal of the manager of a business.²⁸ A breach of trust goes to the root of the contract and of the relationship between employer and employee.²⁹

Summary dismissal will only be sanctioned by the common law if the misconduct is serious.³⁰ It has been held that the facts should disclose that the continuance of the relationship would be impossible or intolerable.³¹

need to modify the traditional view that the employment relationship is characterised by the employer's right of command and the employee's duty to obedience' 1977 ILJ (UK) 1.

²⁷ Kaplan v Penkin 1933 CPD 223.

²⁸ At 225.

²⁹ Holt v Clarke 8 EDL 182; King v Vanes 12 EDC 171; Schneider & London Ltd v Bennett 1927 TPD 346.

³⁰ Zieve v National Meat Suppliers 1937 AD 181 at 190; Brown v Sessell 1908 TS 1137; Strachan v Prinsloo 1925 TPD 709.

³¹ Chatzkelowitz v Goodman 1914 TPD 190.

4.3.1.4 Refusal or failure to work

The object of the contract of service is the rendering of personal services by the employee to the employer.³² The employee must be ready and willing to work within the terms of the contract. In Van der Merwe v Colonial Government³³ the plaintiff was ready and willing to perform, but due to vis major could not. As the employer did not terminate the contract, he was liable to pay the full wages for the period. A servant, however, who declines to work is not entitled to his wages for the period he has not worked, merely because his employer did not dismiss him.³⁴

The period of absence that will justify summary dismissal will depend on the circumstances of each case.³⁵ At common law a strike constitutes a refusal to work and justifies summary dismissal.³⁶

³² Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at 61A-B.

³³ (1904) 14 CTR 732.

³⁴ Bloch v Cohen 1933 TPD 100.

³⁵ Myers v Sieradzki 1910 TPD 869.

³⁶ R v Smit 1955 (1) SA 239 (C).

4.3.1.5 Summary termination by the employee

At common law an employee is entitled to summarily terminate the employment contract in the following instances:

- a) Where the employer fails to pay wages at the agreed time³⁷
- b) Where her status is impaired by the employer³⁸
- c) Where the employer fails to ensure the employee's safety³⁹
- d) Where the employer unilaterally amends the terms of the contract

A unilateral amendment of terms and conditions of employment amounts to a repudiation of the contract and entitles the employee to accept and thereby cancel the contract or to hold the employer to the contract. In the former case, it would amount to 'the termination of one contract of service and the substitution of another and so it might be said to constitute a discharge and re-employment of the employee on the new terms agreed upon.'⁴⁰

³⁷ O'Connel v Flischman 1948 4 SA 191 (T).

³⁸ Smith v Cycle and Motor Trade Supply Co 1922 TPD 324.

³⁹ Gaupoulous v Harris and Dickson 1906 (16) CTR.

⁴⁰ Muehlendorf v Rand Steam Laundries 1945 TPD 317 at 327.

4.3.2 Termination on notice

Brassey⁴¹ reiterates the widely-acknowledged principle that 'the common law does not, in the absence of an express agreement to the contrary, require the parties to have a good reason for terminating the relationship.'⁴² All that is demanded of employers is that they should 'time the termination properly and precede it by the requisite notification or notice'. Provided, therefore, that the employer gives proper notice, the employer is entitled to dismiss for virtually any reason or no reason at all.⁴³

In Nchobaleng v Director of Education (Transvaal)⁴⁴ the court found that the common law conferred a right to dismiss without giving reasons and observed that 'to require a hearing...would involve too great an inroad upon the common-law freedom of action of the employer'.⁴⁵

⁴¹ M S M Brassey et al The New Labour Law (1987).

⁴² Ibid at 3.

⁴³ A Rycroft and B Jordaan A Guide to South African Labour Law (1990) 69.

⁴⁴ 1954 (1) SA 432 (T).

⁴⁵ At 438H - 439A. See also Embling v The Headmaster, St Andrew's College (Grahamstown) & Another 1991 (12) ILJ 277 (IC) where Cooper J held that: 'The rules of natural justice - succinctly expressed in the maxim audi alteram partem - have no application in the field of contract' (186C-D).

Contracts for employment can either be for a fixed or an indefinite period. Where the parties have not agreed on a determined or determinable period, the contract is deemed to be for an indefinite period.⁴⁶ A contract for a fixed term may not be terminated on notice before expiry of the term, except where the fixed-term employee is appointed on probation.⁴⁷ In Ndamase v Fyfe-King⁴⁸ Gane J described a probationer as an employee whose every action is a proper subject of scrutiny and judgment and added that:

'[i]f at any time it becomes clear that the purpose of the probation has already been frustrated, then there is no object in continuing the probation and no objection to a dismissal on reasonable notice.'⁴⁹

A fixed-term contract expires at the end of its term and no notice of termination is required.⁵⁰

⁴⁶ Hunt v Eastern Province Boating Co 1883 EDC 12; Continental Bakery (Pty) Ltd v Giannakakis 1956 (4) SA 62 (W).

⁴⁷ Ndamase v Fyfe-King 1939 EDL 259 at 263.

⁴⁸ 1939 EDL 259.

⁴⁹ At 263.

⁵⁰ However, it has been decided in terms of the Labour Relations Act in Koyini v Strand Box (Pty) Ltd that the expiry of a fixed term migrant labour contract is no bar to the grant of a reinstatement order. Neither the employer nor employee in casu, it was held, would expect that the relationship would necessarily end when the contract came to an end, and this expectation provided the basis for the grant of reinstatement (1985) 6 ILJ 453 (IC) at 461A-F. In MAWU v Screenex Wire Weaving Manufacturers it was held that where annual migrant contracts are not going to be renewed after the first renewal, there rests an obligation on the employer to give the employee reasonable notice that he is not going to renew that contract

In the case of contracts for an indefinite period, the parties to the contract have not agreed upon the notice period and 'reasonable' notice must be given.⁵¹ The periodicity of the payment will play an important role in determining what is reasonable.⁵² It is, however, possible that although an employee is paid monthly, she was appointed on a weekly basis. Where this is the case, the periodicity of the payment of wages will be the deciding factor.⁵³ Employees who are paid a daily wage are neither entitled to notice nor required to give notice of termination.⁵⁴

Depending on whether the employee is entitled to a week or a month notice period, the notice must be given on the first day of the period for which notice is required. At common law a different position applied to domestic workers.⁵⁵ In Pemberton v Kessel⁵⁶ it was held that domestic workers can be given a month's notice expiring at any point. This was confirmed in

(1985) 6 ILJ 75 at 89H-I.

⁵¹ Tiopaizi v Bulawayo Municipality 1923 AD 317 at 326, Pemberton v Kessel 1905 TS 174.

⁵² Ibid at 320, 326.

⁵³ CSAR v Cooke 1904 TS 531.

⁵⁴ Pretoria City Council v Minister of Labour & Others 1943 TPD 238 at 244.

⁵⁵ Tiopaizi v Bulawayo Municipality 1923 AD at 321, 327.

⁵⁶ 1905 TS 174.

Tiopaizi's⁵⁷ case, which stressed, however, that domestic workers were nevertheless entitled to notice. Benjamin⁵⁸ argues that it is unreasonable to deprive domestic workers of the right to demand that notice expires at the end of a period of service such as a week or a month. He illustrates this by drawing a parallel between Fulton v Nunn⁵⁹, which concerned a contract of lease, and the contract of employment for domestic workers.⁶⁰ In Fulton v Nunn⁶¹ it was held that it is reasonable that notice should run from the beginning to the end of the month, because the end of a month is the best time for a landlord to find new tenants. Similarly, he argues, in the master-servant relationship reasonable notice runs to the end of a month because employment and employees are most readily available at that time.⁶²

4.4 Dismissal and the eviction of employees from their employers' premises

Domestic workers may either 'live in' or commute to their places

⁵⁷ Tiopaizi v Bulawayo Municipality 1923 AD 317.

⁵⁸ P Benjamin 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187 at 193-194.

⁵⁹ 1904 TS 123.

⁶⁰ Benjamin supra at 194.

⁶¹ 1904 TS 123 at 126.

⁶² Benjamin supra at 194.

of work. Where accommodation has been tied to the employment, a question arises with regard to the legal position at dismissal.

The case of Venter v Livni⁶³ concerned the dismissal of a farm manager who during her term of service was accommodated on the farm. When Mrs Venter was summarily dismissed she refused to vacate the farm. The court of appeal confirmed the decision of the court a quo that irrespective of whether the dismissal of the manager was justified or whether it was wrongful, the manager had no right to remain in possession of the farm and in occupation of the house.⁶⁴ An ejectment order was issued.

In Coin Security (Cape) v Vukani Guards & Allied Workers Union⁶⁵ Friedman, J, draws attention to the fact that the terms of employment of the employee in Venter v Livni did not give her as part of the package of her remuneration, the right of occupation of the farm or the dwelling house situated on it.⁶⁶ She was merely in occupation of the farm because it was necessary for her to be there in her capacity as manager. This situation was distinguished from one where accommodation forms part of the

⁶³ 1950 (1) SA 524.

⁶⁴ At 528.

⁶⁵ 1989 (4) SA 234 (CPD).

⁶⁶ At 242E-G.

terms of employment.⁶⁷ This distinction seems artificial, because on the facts in Venter v Livni one could argue that even if accommodation was not expressly part of her written terms of employment, the fact that she had to be accommodated in her capacity as farm manager and the fact that she derived the benefit of free accommodation which she otherwise would have had to provide, imply that accommodation was part of her package of remuneration.

From the facts of the Coin Security case⁶⁸ and Randfontein Estates Gold Mining Co (Witwatersrand) Ltd v Forbes⁶⁹ the employee's right to remain in accommodation, after dismissal depends on the lawfulness of the dismissal. Where dismissal is lawful in terms of the common law, for example where a contract was terminated in terms of the provisions of the contract of employment, the employee's right to remain on the premises expires and the worker can be ejected.⁷⁰ Where the dismissal is unlawful, such an employee is entitled to refuse to accept the unlawful repudiation of the contract, and can insist upon receiving what is due to her, which could include her right to

⁶⁷ Coin Security (Cape) v Vukani Guards & Allied Workers Union 1989 (4) SA 234 (CPD) at 242H.

⁶⁸ Ibid.

⁶⁹ 1992 (1) SA 648 (WLD).

⁷⁰ Ibid at 651F.

free accommodation.⁷¹

Haysom is of the opinion that although termination of a contract may be effected by the unilateral decision of one of the parties, the actual ejectment of workers accommodated by their employer from the premises must be effected by due process of the law.⁷² He bases his argument on the decision in Rooiberg Minerals Development Co Ltd v Du Toit⁷³ where it was held that where the termination of the contract is in dispute, the worker is entitled to reside on the premises until the courts have decided on the legality of the dismissal.⁷⁴ From the decision in Coin Security⁷⁵ and Randfontein Estates⁷⁶ this is not necessarily so, because the employee's right to remain in accommodation depends on the lawfulness of the dismissal. It seems therefore that dismissed workers can be evicted from their erstwhile accommodation, provided that the dismissal was lawful. Where the lawfulness of the dismissal is in dispute the actual ejectment from the premises must be effected by due process of the law.

⁷¹ Coin Security Cape v Vukani Guards & Allied Workers Union 1989 (4) SA 234 (CPD) at 242H-I.

⁷² N Haysom 'Dismissal and the Eviction of Employees from their Employers' Premises' (1981) 2 ILJ 259.

⁷³ 1953 (2) SA 505 (T).

⁷⁴ At 506.

⁷⁵ *Idem*.

⁷⁶ *Idem*.

Where application is made to the supreme court for an ejectment order, the fact that the applicant's conduct in terminating the contract allegedly constituted an unfair labour practice and that the dispute has been submitted to the industrial court for determination of an unfair labour practice, do not deprive the supreme court of jurisdiction to hear an eviction order.⁷⁷ The applicant merely has to prove that the termination was lawful (irrespective of fairness) for the court to grant an eviction order.

Aggrieved resident employees who have been unlawfully dismissed and ejected from their place of accommodation can apply to court for an interim spoliation order reinstating them in their accommodation.⁷⁸ In deciding whether to grant the spoliation order, the court considers the applicant's prospects of success in the main action in conjunction with the 'balance of convenience'. The court also has to determine whether there was a justifiable apprehension of irreparable harm for which there was no other adequate remedy. In Ngewu's case, the applicants failed to prove on the return date that they had unlawfully been deprived of their accommodation and the court consequently

⁷⁷ Randfontein Estates Gold Mining Co (Witwatersrand) Ltd v Forbes (1992) 1 SA 646 (WLD).

⁷⁸ Ngewu & Other v Union Co-operative Bank and Sugar Co Ltd (NPD) 24 April 1981 (unreported).

dismissed the applications.⁷⁹

Where lawfully dismissed workers, residential or non-residential, attempt to gain access to their employer's residence or remain on the premises they may find themselves open to a charge of trespass.

The Trespass Act⁸⁰ provides that any person who, without the permission of the lawful occupier of any land or any building, or of the owner or person in charge of any land or building that is not lawfully occupied by any person, enters or is upon such land or enters such building commits an offence unless he has lawful reason to enter or to be upon such land or enter such building.⁸¹

Where lawfully-dismissed workers enter or remain on the premises for any reason other than collecting their belongings or remain there without their erstwhile employer's permission, they will have committed trespass.⁸²

⁷⁹ Ngewu & Others v Union Co-operative Bank and Sugar Ltd 1982 (4) SA 390 (NPD).

⁸⁰ No 6 of 1956.

⁸¹ S(1)(1).

⁸² Ngewu & Others v Union Co-operative Bank and Sugar Co Ltd 1982 (4) SA 390 (NPD) at 407E-F.

4.5 Dismissal procedure

Baxter sees procedural fairness as a means to an end: a process 'which is deemed to make fair and reasonable decisions more likely.'⁸³ He also sees the enforcement of procedural standards as having an independent process value on the basis that we 'attach value to the individual's *being told why* the agent is treating him unfavourably and to his *having a part in the decision*.'⁸⁴

The rules of natural justice have not been imported in ordinary master-servant relationships⁸⁵ nor in cases of offices held at pleasure. Such a procedure, it has been said, would make 'too great an inroad upon the common law freedom of action of the employer.'⁸⁶ This point emerges clearly from the position in English law in Malloch v Aberdeen Corporation⁸⁷ where the following exposition was given:

'One may accept that if there are relationships in which all requirements of the observance of the rules

⁸³ L G Baxter 'Fairness and Natural Justice in English and SA Law' 1979 SALJ 607 at 629.

⁸⁴ Ibid.

⁸⁵ Monckten v British South African Co 1920 AD 324 at 330; Myburgh v Daniëlskuil Municipality 1985 (3) SA 335 (NC) at 341C-D; Embling v The Headmaster, St Andrew's College (Grahamstown) & Another (1991) 12 ILJ 277 (IC) at 286 C-F.

⁸⁶ Nchobaleng v Director of Education (Transvaal) 1954(1) SA 432 (T) at 439A.

⁸⁷ [1971] 1 WLR 1578 (HL CS).

of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what I have called 'pure master and servant cases', which I take to mean cases in which there is not element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then...whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void.'⁸⁸ (my emphasis)

The question can be asked whether the so-called 'pure master and servant cases', such as the contract for domestic employment has 'nothing in the nature of an office or a status which is capable of protection'? Kahn-Freund was first to notice that the employment law is essentially concerned with the regulation of power between employer and employee,⁸⁹ and the question can therefore be asked whether it would not be justified if the courts insisted that an employer should be subject to the same constraints as are imposed on other power-wielding bodies. There is, after all, nothing in principle which distinguishes the public-sector employee from his private-sector counterpart in this regard. For both, loss of employment carries similarly prejudicial consequences. Both are wage-earners. In both cases, principle requires that the bearer of the power to deprive the employee of his vested right to his job, should

⁸⁸ [1971] 1 WRL 1578 (HL CS) at 1595H - 1596B.

⁸⁹ Kahn-Freund's Labour and the Law 3rd ed P L Davies & M Freedland (eds) (1983) 15.

exercise that power for good cause.

In recent years important developments have taken place in the South African supreme court's approach towards the protection of employment and these developments relate to the many employers and employees who are still excluded from the ambit of the Labour Relations Act. The potential impact and practical importance of this trend is that although the decisions are based on the common law, they relate to the application and gradual extension of existing principles of administrative law.⁹⁰ The question arises whether principle and precedent prevent the courts from going beyond the confines of public sector employees also to include other employees who have no recourse to the Labour Relations Act, within the application of this extension.

One such development is the acceptance by our courts of the 'legitimate expectation doctrine'. The concept of quasi-judicial acts which originated in England and entered South African law via English law has, for many years, been the object of severe criticism. Injustice arises from the strict adherence to the rule that an individual is entitled to the benefit of the audi alterem partem rule only if it can be shown that existing rights have been impinged upon. In recent years this situation

⁹⁰ M Olivier 'The Supreme Court and the Protection of Employment: Some important Developments' 1991 De Rebus 52.

has been ameliorated by the application of the so-called doctrine of legitimate expectation in Administrator of the Transvaal v Traub.⁹¹

The Appellate Division accepted that, in certain circumstances, fairness demands that a public official or body should afford a person a hearing where there is some reasonable basis upon which he could entertain a legitimate expectation that he will be permitted to put his case, even though he has no vested or antecedent right.⁹²

Corbett C J also includes 'certain domestic tribunals' with reference to the application of the doctrine of legitimate expectation.⁹³ Grogan⁹⁴ contends that this inclusion is important, 'for it extends the legitimate expectation doctrine not only to clubs and institutions such as churches, but also, most notably in the employment field, to employees at institutions (such as, for example, teachers at private schools) who are covered neither by the Public Service Act nor the Labour Relations Act'. A case which concerned the dismissal of a private school teacher is Embling v The Headmaster, St Andrew's

⁹¹ (1989) 10 ILJ 823 (A).

⁹² At 840I - 841A.

⁹³ At 840D.

⁹⁴ J Grogan 'When is the "Expectation" of a Hearing "Legitimate?"' 1990 SAJHR 36 at 45.

College (Grahamstown)⁹⁵ Counsel for the applicant argued that the length of his employment at the time of his dismissal (eight years) had created a legitimate expectation that his contract would not be terminated without a hearing. Counsel also relied on Lunt v University of Cape Town⁹⁶ where the court rejected the argument that because the relationship between universities and their students was contractual, the rules of natural justice did not apply.⁹⁷ In the Embling case Cooper J distinguished the contractual relationship between a master and servant, from the contractual relationship between a student and a university as in Lunt's case and held that where an agreement makes provision for the termination of a contract, there is not room for the operation of the audi alteram partem rule.⁹⁸ It was also held that it was difficult to see how applicant's substantial period of service can objectively justify his expectation of a hearing.⁹⁹ The judge disagreed with the view in Lunt that the 'legitimate expectation approach' applied 'even in a contractual context.'¹⁰⁰ After the Traub decision, the legitimate expectation doctrine was welcomed 'as a means of achieving natural justice while avoiding the limitations that had come to

⁹⁵ (1991) 12 ILJ 277 (IC).

⁹⁶ 1989 (2) SA 438 (C).

⁹⁷ At 447 - 448D.

⁹⁸ Embling 286H-J.

⁹⁹ At 287C-D.

¹⁰⁰ At 288 D-E.

be placed on the audi alteram partem principle',¹⁰¹ especially the reasoning which prevented the principle from operating in some contractual contexts. Embling's case seems to have placed the same limitations on the operation of the legitimate expectation as had traditionally been imposed on the audi alteram partem rule.

At the same time as the Embling decision, however, the Appellate Division handed down a decision¹⁰² which forms a logical link in the Appellate Division's chain of reasoning on procedural justice over the previous two years. In Administrator Transvaal v Zenzile three hospital workers employed 'temporarily in a full-time capacity' in terms of the Public Service Act 111 of 1984, who had been summarily dismissed for breaches of their conditions of service, were held to be entitled to benefits of the audi alteram partem rule. The court refused to accept the 'purely contractual' characterisation of the relationship between the parties.¹⁰³ In Sibiya and Another v Administrator Natal¹⁰⁴ the applicants were employed by the Provincial Administration as labourers and dismissed on notice. Didcott J held that there was no reason in principle or logic to prevent

¹⁰¹ C F van der Heever, 'Audi Alteram Partem, Contracts and Existing Rights' 1991 SAJHR 203.

¹⁰² Administrator Transvaal v Zenzile 1991 (1) SA 21 (A).

¹⁰³ At 35B-C.

¹⁰⁴ 1991 (2) SA 591 (D & CLD).

the operation of the audi alteram partem rule.¹⁰⁵ 'The contemplated invasion of an existing right is, by and large, sufficient in the field of employment to bring the rule into operation. And that right is surely threatened once a dismissal by notice is on the cards, no less than when summary dismissal happens to be.'¹⁰⁶

From the discussion above it is clear that the position of public sector employees in regard to the protection of their employment, has undergone a remarkable development in recent years and increasingly tends to resemble the position of employees who are covered by the provisions of the Labour Relations Act. It can be argued that as domestic workers are also a class of employees who are excluded by the Labour Relations Act, the possibility of judicial activism could also afford procedural protection to these workers.

It would however be expensive to bring a test case involving a domestic worker before the supreme court and even then our courts, steeped in the doctrine of *iudicis est ius dicere non dare*, may be loath to apply judicial lawmaking.

¹⁰⁵ At 593 D.

¹⁰⁶ At 593 E-F. It may well be arguable that Zenzile and Sibiya are distinguishable from cases involving common-law employees in that both cases concerned the dismissal of public-sector employees, and were accordingly dealt with in terms of the principles of administrative law. The courts have not yet taken the step of extending the principles of natural justice to the ordinary common-law contract of service.

4.6 Remedies

On the face of it the common law affords employers and employees equal remedies for breach of contract. The assumption is that the employee is free to sell her services in the labour market, supposedly at the price and on the terms most advantageous to her. When the relationship is no longer to the employee's advantage, she may withdraw from the relationship and seek employment elsewhere. But social reality often dictates otherwise, for, given the reality of endemic unemployment, the range of the employee's alternatives in the market-place is severely limited in comparison to that available to the employer. There is also currently no legal remedy for unfair, arbitrary dismissal on notice. Legal remedy only exists for dismissal that constitutes a breach of contract.

The common law places no restrictions on the terms that parties can come to in contract, except if they are illegal or contra bonos mores.¹⁰⁷ It is now apposite for a brief excursus to determine whether any remedies exist for a contractual party who is bound to an unfair or unreasonable contract.

¹⁰⁷ Magna Alloys and Research SA (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 891G.

4.6.1 Will the courts strike down an unreasonable or unfair contract?

Eiselen¹⁰⁸ explains that the freedom-of-contract idea in its modern sense is a development which started with the pacta sunt servanda rule in Canon Law.¹⁰⁹ Over the centuries this rule changed under the influence of rationalism, the social contract idea and human rights philosophies.¹¹⁰ Originally, the law of contract was based on the fundamental principle of contractual justice. The principle of iustitia commutativa propounded by Aristotle, found its way into the legal thought of the Middle Ages.¹¹¹ De Groot based his principle of pacta sunt servanda on this more fundamental principle of contractual justice.¹¹²

In the English law the Chancery Court interfered with the contractual parties on the ground of equity. Atiyah¹¹³ remarks:

¹⁰⁸ G T S Eiselen 'Kontrakteervryheid, Kontraktuele Geregtigheid en die Ekonomiese Liberalisme' 1989 THRHR 516.

¹⁰⁹ Ibid at 520.

¹¹⁰ Ibid at 519-532.

¹¹¹ Ibid at 534.

¹¹² Ibid at 534.

¹¹³ P S Atiyah The Rise and Fall of Freedom of Contract (1979).

'The notion which came to be widely adopted in the nineteenth century, that the Court would not make a contract for the parties, had no place in eighteenth-century Equity. The Court was constantly making contracts for the parties.'¹¹⁴

Initially the classical economists' ideas on economic freedom did not directly influence the courts' decisions. The courts continued to interfere where unfairness justified it. But the new spirit of the freedom of the individual soon found fertile ground in the courts. The famous statement of Sir George Jessel MR in Printing and Numerical Registering Co v Sampson¹¹⁵ bears witness to this:

'[I]f 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. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract.'

The Hon Mr Justice M M Corbett,¹¹⁶ at present Chief Justice of South Africa, in an article on the role of policy in the evolution of our common law, clearly expresses his reservations on striking down a contract on the ground of public policy:

'Over the years the courts have recognised the truth and have counselled a measure of caution in the

¹¹⁴ Ibid at 173.

¹¹⁵ (1875) LT 19 Eq 462.

¹¹⁶ M M Corbett 'Aspects of the Role of Policy in the Evolution of our Common Law' 1987 SALJ 52.

exercise of the power to refuse to enforce a contract on the ground of public policy; for it is also recognized that public policy demands that in general men of full age and competent understanding should have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, should be enforced by the courts.'¹¹⁷

Pretorius and Pitman¹¹⁸ seek to extend employment protection of the individual in line with developments in other fields of the common law in accordance with changes in public policy.¹¹⁹ They cite the example of a dismissal that would have the effect of undermining the principle of association. Such a dismissal would not be permitted by our courts as it would be deemed to be against the public policy.¹²⁰ However, the courts can only intervene on the grounds of public policy in circumscribed instances. This was affirmed by the Appellate Division:¹²¹

'The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the 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.'¹²²

¹¹⁷ 1987 SALJ 52 at 64.

¹¹⁸ P J Pretorius and D J M Pitman 'Good Cause for Dismissal: The Unprotected Employee and Unfair Dismissal' 1990 Acta Juridica 133.

¹¹⁹ Ibid at 135.

¹²⁰ Ibid at 136.

¹²¹ Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (AD).

¹²² At 9B-C.

Despite the opposition to the idea of striking down a contract that is unjust or unfair, one can argue with Eiselen¹²³ that our judiciary should revert to an idea more fundamental than freedom, namely, contractual justice. Eiselen suggests that contractual justice could be established by looking at the reasonable expectations of the parties. One could, therefore, argue that unreasonable contractual terms, such as unreasonable terms regarding hours of work, frustrate the reasonable expectation¹²⁴ of the employee and are accordingly in breach of contractual justice.

4.6.2 Specific performance

Where a party to a contract is guilty of breach of contract, the other party may choose either to cancel or repudiate the contract and claim damages or continue the contract notwithstanding the breach, and sue for specific performance. Traditionally, our courts have been loath to enforce an employment contract specifically, whether at the instance of the

¹²³ G T S Eiselen 'Kontrakteervryheid, Kontraktuele Geregtigheid en die Ekonomiese Liberalisme' 1984 THRHR 516 at 537.

¹²⁴ But see J H Baker 'From Sanctity of Contract to Reasonable Expectation?' 1979 CLP 19 at 33: 'The weakness of the reasonable expectation principle is its dependence on the notion of reasonableness. Despite many judicial expeditions to find him, the reasonable man has not been reduced into captivity. In truth, as any man on the Clapham omnibus could tell us, the reasonable man does not exist at all.'

employer for services or the employee for reinstatement.¹²⁵ In Schierhout v Minister of Justice¹²⁶ a clear distinction was drawn between the dismissal of an employee in contravention of a statute and 'ordinary employees' who were not statutorily entrenched. The court held that specific performance could not be granted to 'ordinary employees' on three grounds, namely: that the intimate relationship of trust would render the granting of the remedy inappropriate; that it would be difficult and undesirable to enforce such an order and that the employee was in any event entitled to sue for damages.¹²⁷

Brassey¹²⁸ states that it was the Victorian judges who first relied on the breakdown of the relationship as a reason for refusing reinstatement. They used the relationship between master and domestic servant as an example:

'A man may have one of the best domestic servants, he may have a valet whose arrangement of clothes is faultless, a coachman whose driving is excellent, a cook whose performances are perfect, and yet he may not have confidence in him: and while on the one hand all the servant requires or wishes (and that reasonably enough) is his money, you are, on the other hand, to destroy the comfort of the man's [employer's] existence for a period of years, by compelling him to have constantly about him in a confidential situation

¹²⁵ M Olivier 'The Supreme Court and the Protection of Employment: Some important Developments' 1991 De Rebus 52 at 54.

¹²⁶ 1926 AD 99.

¹²⁷ At 196-112.

¹²⁸ M S M Brassey 'Specific Performance - A New Stage of Labour's Lost Love.' (1981) 2 ILJ 57.

one to whom he objects.'¹²⁹

From the above quotation it is clear that one of the principal reasons for denying specific performance of the contract of employment is 'the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship.'¹³⁰ Elias¹³¹ comments on the fact that although the courts traditionally see the element of personal relationship as fundamental, they have emphasised its importance only when the contract has been broken in order to justify not rebuilding it, as follows:

'Indeed, it is perhaps the supreme irony in this area that this emphasis on the social and psychological factors which make up the personal relationship should have enabled the contract doctrines to reflect economic market assumptions.'¹³²

An additional obstacle to granting specific performance was that repudiation of an employment contract was seen in most cases as resulting in its automatic termination, without the need for the other party to accept it.¹³³ In Stewart Wrightson (Pty) Ltd v

¹²⁹ Johnson v Shrewsbury Birmingham Railway Company (1853) 3 De GM & G 914 at 926.

¹³⁰ Schierhout v Minister of Justice 1926 AD 99 at 107.

¹³¹ P Elias 'The Structure of the Employment Contract' 1982 CLP 95.

¹³² Ibid at 110.

¹³³ A A H Ver Loren Van Themaat 'Reinstatement and Security of Employment - Part One: South Africa' (1989) 10 ILJ 205 at 210-211.

Thorpe¹³⁴ it was held that fundamental breach of the contract of employment in question 'as in other contracts...did not per se end the contract, but served only to vest the [employee] with an election either to stand by the contract or to terminate it.'¹³⁵

In National Union of Textile Workers v Stag Packings (Pty) Ltd¹³⁶ it was held that since the remedy of specific performance is available to enforce contracts generally, there was no reason in principle why it should not also be available to enforce employment contracts.

Van Dijkhorst J stated that it would be wrong to elevate the considerations mentioned in the Schierhout decision to legal rules.¹³⁷ He held that these were factors that should be taken into account when the court exercises its discretion.¹³⁸ These considerations have some force, but none of them is decisive. In addition to these traditional reasons there may be circumstances under which it would be inequitable or unconscionable to order reinstatement.¹³⁹ Public policy may

¹³⁴ 1977 (2) SA 943 (A).

¹³⁵ At 952A.

¹³⁶ (1982) 3 ILJ 285 (T).

¹³⁷ At 291D.

¹³⁸ At 292E.

¹³⁹ At 292F-G.

also dictate against reinstatement.¹⁴⁰

One could argue that where the relationship of trust between an employer and a domestic worker has not been affected, a court could at common law exercise its discretion in favour of reinstatement. In fact, not to do so, in such circumstances, would be inequitable and unconscionable. However, at common law the remedy of specific performance for unlawful summary dismissal will be ineffective, as all that the employer needs to do once the employee has been reinstated, is to terminate her services by notice.

4.6.3 Damages

Where the employer does unlawfully terminate the contract, all the employee will be entitled to is to recover her actual patrimonial loss, represented by the sum due to her for the unexpired period of the contract less any sum she earned or could reasonably have earned during the latter period in similar employment.¹⁴¹

Damages for breach of contract in the sense of *id quod interest* have to be mitigated, whereas an order for payment of wages,

¹⁴⁰ National Union of Textile Workers v Stag Packings (Ptdy) Ltd (1982) 3 ILJ 285 (T) at 292H.

¹⁴¹ Myers v Abramson 1952 (3) SA 121 (C) at 127.

which is also sometimes called damages as surrogate for specific performance, need not be mitigated, because it deals with a contractual debt and not damages.

Ver Loren Van Themaat's¹⁴² comment is apposite:

'While the damages may amount to a "paltry sum" for the employer, for the employee it may mean the end of his employment and, almost as consolation, wages in lieu of notice. The view of employment as a purely economic transaction in which the worker has struck the weaker bargain by far, is reinforced. This does not contribute to a sense of security of employment or equality for the worker.'¹⁴³

¹⁴² A A H Ver Loren Van Themaat 'Reinstatement and Security of Employment - Part One: South Africa' (1989) 10 ILJ 205.

¹⁴³ Ibid at 214.

CHAPTER FIVE

CONSIDERATIONS AND RECOMMENDATIONS FOR LAW REFORM:
CONDITIONS OF SERVICE (COLLECTIVE BARGAINING)5.1 Introduction

Bargaining in the commodity-exchange context has been defined as 'the process by which the antithetical interests of supply and demand of buyer and seller, are finally adjusted so as to end in the act of exchange.'¹ The individual bargain concluded between employers and employees in the labour market, which is given a legal expression in employment contracts, accords with this definition. In Chapter 3 it is pointed out that the aspirant domestic worker and her prospective employer are not on an equal footing when it comes to bargaining regarding conditions of service.² Domestic employment is seldom preceded by negotiations which afford the applicant an opportunity to make demands. The employer, being the bearer of power, is therefore able to conclude employment contracts that are primarily to his advantage.

There are two ways in which the individual employee's conditions of service can be, if not improved, at least protected from

¹ A Flanders 'Collective Bargaining: A Theoretical Analysis' (1968) 6 British Journal of Industrial Relations 1 at 11.

² pp47-52 supra.

terms that favour only the stronger of the two contractual parties. The first is by collective agreement. Collective agreements can regulate, among other things, terms of employment contracts for employees of particular categories. The rule-making functions of collective bargaining may go beyond the limits of a particular bargaining unit. Conditions of employment that have been established in collective agreements frequently apply, through extension, to other workers in the given industry who are not members of the union which negotiated the agreements. The second means of redressing the imbalance between the employers and individual employees is by protective legislation, where the state intervenes in the private employment relationship in order to protect employees against the superior bargaining power of and (possible) exploitation by their employers by establishing minimum conditions of employment.

5.2 Collective bargaining

Bendix³ describes the collective bargaining process as:

'...a process, necessitated by a conflict of needs, interests, goals, values, perceptions and ideologies, but resting on a basic commonality of interests, whereby employees/employee collectives and employers/employer collectives, by the conduct of continued negotiation and the application of pressure and counterpressure, attempt to achieve some balance between the fulfilment of the needs, goals and

³ S Bendix Industrial Relations in South Africa 2nd ed (1992).

interests of management on the one hand and employees on the other - the extent to which either party achieves its objectives depending on its source and use of power, the power balance between them, the organizational and strategic effectiveness of each party, the type of bargaining structure and on prevalent economic socio-political and other conditions.'⁴

Collective bargaining has been held to be 'the corner-stone in any labour relations system'.⁵ It is therefore not surprising that the International Labour Organisation assumes the obligation to recognise and promote among member states the right of employers and employees to bargain collectively. This commitment has led to Convention 98 of 1949 on the Right to Organise and Collective Bargaining as well as to the Collective Agreements Recommendation 91 of 1951. Both these instruments are aimed at the promotion, development and full utilisation of negotiation between employers and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements.

The Labour Relations Act makes it possible for industry to govern itself by means of collective bargaining between employers and their employees. The object of the Act is to allow employers through their organisations, and employees through their trade unions, by negotiation to prevent and settle

⁴ S Bendix Industrial Relations in South Africa (1992) 93.

⁵ National Union of Mineworkers & Others v Buffelsfontein Gold Mining Co (1991) 12 ILJ 346 (IC) at 351H.

disputes between themselves and to determine terms and conditions of employment in their industry by agreement or by arbitration. The Act provides for the registration and regulation of employers' organisations and trade unions as well as for the establishment of an industrial court.

Before the 1979 amendments⁶ the Act merely encouraged collective bargaining, but the amendments introduced a system of compulsory adjudication of disputes arising from unfair labour practices. This change has led to the development, by the industrial court, of a general duty on employers to negotiate in good faith with representative unions.⁷ In this regard a presiding officer of the industrial court recently⁸ stated:

'There is no longer any doubt that there is a general duty to bargain collectively to prevent and to resolve disputes between employers and employees'.⁹

In reaching this conclusion reference is made to the following quotation from Macsteel (Pty) Ltd v National Union of Metalworkers of SA:¹⁰

⁶ Industrial Conciliation Amendment Act 94 of 1979.

⁷ UAMAWU v Fodens (SA) (Pty) Ltd (1983) ILJ 212 (IC) at 226; Metal & Allied Workers Union v Natal Die Casting Co (Pty) Ltd (1986) 7 ILJ 520 (IC) at 546.

⁸ Steel Engineering & Allied Workers Union v BRC Weldmesh (1991) 12 ILJ 1304 (IC).

⁹ Ibid at 1307C-D.

¹⁰ (1990) 11 ILJ 995 (LAC).

'In my view the LRA creates machinery which makes collective bargaining not only possible but compulsory. Its aim is to avoid if possible industrial strife and to maintain peace'.¹¹

In terms of the Labour Relations Act collective bargaining with regard to conditions of employment is concerned with so-called disputes of interest, as distinguished from disputes of right. 'Disputes of right' refer to an existing contractual right such as a claim for payment of wages in accordance with the agreed terms of an existing contract of employment.¹² 'Disputes of interest', on the other hand, refer to a claim for recognition of new rights. Such disputes concerning the creation of rights are the main focus of collective bargaining for the establishment of conditions of service.

In terms of the provisions of the Labour Relations Act the collective bargaining process can take place in industrial councils which are established voluntarily for an industry by one or more registered employers' associations and one or more registered trade unions which are representative of the employees in that industry.¹³ The two main functions of an industrial council are collective bargaining and dispute

¹¹ (1990) 11 ILJ 995 (LAC) at 1006B.

¹² A dispute of right involves the interpretation or application of existing rights established by collective bargaining or statute.

¹³ Section 18.

settlement¹⁴ and through these functions it is meant to provide and maintain labour peace. The parties on the industrial council negotiate periodically and reach agreement on substantive issues such as wage rates and other conditions of employment. If the agreement is published in the Government Gazette it becomes delegated legislation and is enforceable in terms of the Labour Relations Act.¹⁵ Such an agreement may be extended to cover all employers and employees in the industry and area for which the industrial council is registered, regardless of whether they are parties to the agreement or not.

Collective bargaining may also take place at plant level when an employer accepts that a trade union is representative of his employees or a group of his employees (the bargaining unit) and then negotiates a recognition agreement with that union. The courts have held that there is an obligation to bargain even in the absence of a formal recognition agreement.¹⁶ It is the duty of an employer to negotiate conditions of employment for his employees when so requested by a trade union which is

¹⁴ Section 23.

¹⁵ Section 48.

¹⁶ Stocks & Stocks Natal (Pty) Ltd v Black Allied Workers Union (1990) 11 ILJ 369 (IC); SA Clothing & Textile Workers Union v Maroc Carpets & Textile Mills (Pty) Ltd (1990) 11 ILJ 1101 (IC).

representative of its employees.¹⁷ The recognition agreement lays down the parameters, rules and procedures of how the relationship between the parties will be conducted and in certain respects resembles the constitution of an industrial council. In-plant collective bargaining plays an important role in establishing wages and conditions of employment and in the settling of disputes in industrial undertakings which are not under the jurisdiction of industrial councils. Plant-level bargaining often takes place even in concerns which are parties to the industrial council or in concerns which are covered by an industrial council agreement by extension. This is where the parties consider the council agreement as stipulating minimum conditions only, and they therefore wish to extend certain aspects thereof.¹⁸

Many of the new non-racial trade unions in the early 1980's wanted plant-level bargaining, but lately there appears to be a movement towards more centralised bargaining. NUMSA (The National Union of Metalworkers of South Africa) and the employers in the automobile manufacturing industry have been

¹⁷ Bleazard v Argus Printing & Publishing Co Ltd (1983) 4 ILJ 60 (IC) at 77H - 78A; United African Motor & Allied Workers Union of SA v Fodens (SA) (Pty) Ltd (1984) 5 ILJ 212 (IC) at 226; Food and Allied Workers Union v Spekenham Supreme (2) (1988) 9 ILJ 628 (IC) at 636J - 637A; Nasionale Suiwel-koöperasie Bpk v Food & Allied Workers Union (1989) 10 ILJ 712 (IC) at 717.

¹⁸ SA Woodworkers Union v Rutherford Joinery (Pty) Ltd (1990) 11 ILJ 695 (IC) at 701C-D; Steel Engineering & Allied Workers Union v BRC Weldmesh (1991) 12 ILJ 1304 (IC) at 1311I-J.

bargaining in a specially created National Bargaining Forum since 1989. All seven major employers in this industry are now participating in the centralised negotiations.

5.3 Collective bargaining for domestic workers?

5.3.1 Introduction

Trade unions developed from the belief that workers could maintain and improve their lot only by organising together with their colleagues to form a corporate body that could speak for them adequately and from a position of strength. The single employee has no real leverage in dealing with her employer on an individual basis. Therefore, if employees come together in a trade union to voice their demands and grievances collectively and pool their bargaining power to get a better deal from their employer,¹⁹ they are better placed than a single employee, whose services are easily replaceable. The employer of a group of employees will find it much more difficult to replace a group of workers. However, the collective strength at the employment level is not significant in the domestic sector, as usually no more than one or two domestic workers are employed in each household.

¹⁹ Radio Television Electronic & Allied Workers Union v Tedelex (Pty) Ltd (1990) 11 ILJ 1272 (IC) at 1282A.

Two of the prerequisites cited by Simamba²⁰ for the success of collective bargaining, is that the parties should have reached a sufficient degree of organisation in order to ensure the bargaining strength and in the second instance the representatives of each party should have the skills necessary to cope with the intricacies of collective bargaining.

To establish whether these requirements could be met in the domestic labour sector, an excursus into the structure and operation of organisations for domestic employees and employers is apposite.

5.3.2 Trade unions and employers' organisations

5.3.2.1 Trade Unions

The Labour Relations Act defines a trade union as:

'Any number of employees in any particular undertaking, industry, trade or occupation associated together for the purpose, whether by itself or with other purposes, of regulating relations in that undertaking, industry, trade or occupation between themselves or some of them and their employers or some of their employers.'²¹

Trade unions cannot function if workers are not free to join

²⁰ B A Simamba 'The International Labour Organization and the Right to Collective Bargaining - An African Perspective' 1989 SALJ 517 at 520.

²¹ Section 1.

them. The right to freedom of association is a fundamental human right²² and as such it ranks with freedom of speech, freedom of religion and freedom from arbitrary arrest and seizure.

Freedom of organisation consists of two aspects:

- 1) the absence of prohibitions or restraints; and
- 2) the presence of positive guarantees for its exercise.²³

Although the common law places no restraint on the formation of trade unions, the common law, by the same token, does not prohibit an employer from dismissing a worker after notice as a result of trade union activities.

The trade unions organising domestic workers in South Africa nationally, are the South African Domestic Workers Union (SADWU), the Black Domestic Workers Union (BDWU)²⁴ and the Cape-based Domestic Workers Association (DWA). SADWU has 28 000 paid-up members, BDWU 8434 paid-up members and the DWA 15 000

²² The right to freedom of association appears in the following international declarations and covenants: Universal Declaration of Human Rights 1948, Art 23(4); International Covenant on Economic, Social and Cultural Rights 1966, Art 8; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 11; The International Labour Organisation (ILO) Convention 98.

²³ Kahn-Freund's Labour and the Law 3 ed P Davies & M Freedland (eds) (1983) 202.

²⁴ Allie Najwah Directory of South African Trade Unions (1991).

paid-up members.²⁵ Presently there are approximately 51 500 domestic workers of the 862 000 workforce represented by trade unions. Although these trade unions may not register under the Labour Relations Act as they are currently excluded from this Act, they may operate within the frame-work of the common law. Exclusion from registration means that these trade unions inter alia, cannot acquire legal personality.

SADWU was launched on 29 November 1986,²⁶ and represented the first move among domestic worker organisations in South Africa to present a united front for domestic workers' rights.²⁷ This idea is clearly stated in the preamble to the trade union's constitution:

'Therefore we believe that the interests of the workers are alike irrespective of colour, religion or creed and that domestic workers cannot improve their lot until they organise themselves into a powerful, united domestic workers' union.'²⁸

SADWU is affiliated to the largest trade union federation in South Africa, namely the Congress of South African Trade Unions (COSATU). Apart from SADWU, COSATU has fifteen affiliated trade

²⁵ A Najwah Directory of South African Trade Unions (1991) at 154 and at 377 for the paid-up membership of BDWU and SADWU respectively. Weekly Mail 20-26 November 1992 at 17 in respect of DWA.

²⁶ SADWU Newsletter [Vol 1 No 1] 3.

²⁷ C McNeil Contradictory Forces in the Domestic Worker's Struggle. MA-thesis (University of Natal, 1989) 228.

²⁸ SADWU constitution.

unions with a membership of 983 181.²⁹

SADWU organises on a countrywide basis and has a paid-up membership of 28 000 members.³⁰ Street Committees are seen as the foundations of the union as this grass-roots level of organising provides the first level of union membership. The objective of the street committee is for domestic workers to see themselves as part of a group rather than as individuals.

SADWU's main objectives are the following:

- (a) The protection and improvement of wages, conditions of employment and working conditions of domestic workers;
- (b) the settlement of disputes between employers and domestic workers;
- (c) the improvement or support of (depending on the case) any proposed legislation and other events that affect the interests of domestic workers;
- (d) the organising of unorganised domestic workers;
- (e) the provision of training and education in order to improve the skills and expertise of domestic workers;
- (f) the publishing of articles and newsletters; and
- (g) organising domestic workers as a class of employees and uniting them as part of the national freedom struggle in

²⁹ A Najwah Directory of South African Trade Unions (1991) 499.

³⁰ Ibid at 377.

South Africa.³¹

The following factors contribute to the low level of trade union organisation among domestic workers. As Chapter 2 indicates, usually only one domestic worker is employed per household which presents practical difficulties for unions in their recruitment attempts, as unions naturally tend to concentrate their efforts and resources on larger establishments. Because domestic workers are excluded from the provisions of the Labour Relations Act, unions have no statutory right to any form of contact with these workers. Union representatives could expose themselves to prosecution under the provisions of the Trespass Act when they attempt to make contact with workers at their places of employment. Difficulties are compounded by the fact that perceptions of common interest and solidarity are weakened where workers do not share the same workplace. Where people work in close proximity with their employer, personal relationships develop which inhibit workers in asserting their own interests.

It is also likely that there would be logistical problems for trade unions in negotiating with individual employers. The process could be very time-consuming and unproductive. The number and dispersion of the employers could hamper the achievement of a clear mandate by the employers' organisation, if any.

³¹ SADWU Newsletter [Vol 1 No 1] 1.

if any.

At this stage it would be fair to say that trade unions for domestic workers suffer from negotiation impotence.³² Not only is bargaining with individual employers difficult, but there is also no corresponding nationally-organised employers' organisation with which to negotiate.

5.3.2.2 Employers' organisations

Kahn-Freund³³ contends that there can be collective bargaining with a single employer, because the individual employer 'represents an accumulation of material and resources' and is therefore a collective power. Is this true of the employer of domestic labour? The employer of a domestic worker, unlike the employer who generates an income from the work of his employees, cannot be said to be an 'accumulation of material and resources' and housework is mainly non-productive labour. It can be argued that the single employer vis-à-vis the collective strength of a trade union is possibly in an unequal bargaining position.

A start was made, however, on 6 June 1988 to change the situation of the domestic employer when the inaugural meeting of

³² L Meintjes-Van der Walt 'Die Regsposisie van Huishoudelike Werkers' 1989 De Rebus 610 at 612.

³³ Kahn-Freund's Labour and the Law 3 ed P Davies and M Freedland (eds) (1983) 17-18.

the Eastern Cape Domestic Employers' Association was held.³⁴
The aims of this association were set out as follows:

- 1) to assist in formulating a contract between employers and employees
- 2) to assist in language/communication skills between employers and employees
- 3) to assist both employers and employees in any legal dispute
- 4) to assist in placing employees.

No national employers' body has yet been established.³⁵

5.3.2.3 Conclusion

The introduction of employees' and employers' organisations in the domestic service sector is likely to be affected also by the following factors inherent in the status quo: Resistance from employers (paradoxically even from those who perceive themselves to be worker-orientated)³⁶ and inexperience of unionists and

³⁴ R Parker 'New Body to assist Bosses formed' Eastern Province Herald 29 August 1988 at 11.

³⁵ F Haffajee 'Bringing Justice to the Kitchen' The Weekly Mail 20-26 November 1992 at 15.

³⁶ Bulbulia M made the following comment on paternalism: 'the idea of paternalism - that the employer is the best judge to decide on what is good or beneficial for his workers, or that he is the best person to protect them against their individual or collective folly - can certainly be regarded as antediluvian and therefore not acceptable as a sound basis for the conduct of modern industrial relations. An employer has a duty, imposed by statutory requirements, to make the work-place safe and healthy and if possible, congenial, for his workers. Beyond this, his

employers in the complex field of collective bargaining.

From the above discussion on trade unions and employers' organisations in the domestic labour field it appears that the impediments to collective bargaining arise not only from the fact that domestic workers are currently excluded from the Labour Relations Act, but also from the factors which are inherent in the nature of domestic labour. At this stage neither the employer party nor the employee party in the domestic service sector has reached a sufficient degree of organisation or a sufficient number of members, nor is it clear whether the respective local representatives have acquired the necessary skills to cope with the intricacies of collective bargaining.

5.3.3 Collective action

The Appellate Division has accepted that collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour

solicitude for their social and economic welfare probably becomes a matter for collective bargaining, because unilateral solutions imposed by an employer often contain the seeds of discontent and industrial unrest.'

SA Chemical Workers Union v Control Chemicals & Others (1989) 10 ILJ 606 (IC) at 617A-C.

disputes.³⁷ It was further held that the strike is an essential and integral element of collective bargaining.³⁸

A strike may be defined as 'a temporary, collective withholding of labour, its objective being to stop production thereby to oblige the employer to take cognizance of the demands of employees.'³⁹

The strike is a means of compelling the parties to commence and continue collective bargaining.⁴⁰ In this regard Kahn-Freund expounds the following view:

'[I]f workers could not, in the last resort, collectively refuse to work, they could not bargain collectively. The power of management to shut down the plant (which is inherent in the right of property) would not be matched by corresponding power on the side of labour...There can be no equilibrium in industrial relations without a freedom to strike.'⁴¹

A work stoppage by a single employee does not constitute a strike, as a strike is, by its very nature, a demonstration of the collective strength of workers. However, if a group of

³⁷ National Union of Mineworkers v East Rand Gold and Uranium Co Ltd (1991) 12 ILJ 1221 (A) at 1230J-1231A.

³⁸ National Union of Mineworkers v East Rand Gold and Uranium Co Ltd (1991) 12 ILJ 1221 (A) at 1231F-G.

³⁹ S Bendix Industrial Relations in South Africa (1992) 240.

⁴⁰ M S M Brassey et al The New Labour Law (1987) 243.

⁴¹ Kahn-Freund's Labour and The Law 3rd ed P Davies & M Freedland (eds) (1983) 292.

workers, whether employed by a single employer, or by different employers, were to withdraw their labour for a common cause, there would be a strike. If domestic workers, who are presently still excluded from the Labour Relations Act, were to strike, such action would at common law constitute a material breach of the contract of employment justifying summary dismissal,⁴² and there would subsequently be no grounds for reinstatement.

The Labour Relations Act promotes collective bargaining as a means of resolving labour disputes, and therefore criminalizes industrial action which is embarked upon before the conciliation machinery provided for in the Act has been exhausted.⁴³ Section 65(1A) prohibits all industrial action by employees for some purpose other than those listed in the 'strike' definition. The definition of strike in Section 1 is limited to disputes relating to wages, working conditions and matters relating to the employment of employees.⁴⁴ Section 65 establishes the procedures which must be followed before a strike is lawful and provides that the dispute must either be referred to an industrial council or a conciliation board depending on the circumstances.⁴⁵ A strike is not permitted where the parties

⁴² R v Smit 1955 (1) SA 239 (C) at 241H.

⁴³ Section 65(d).

⁴⁴ Section 1(a).

⁴⁵ Section 65(d)(i)&(ii).

agreed to resolve the dispute through arbitration.⁴⁶

The deficiencies in the organisation of both employers and domestic workers have been discussed and it is therefore difficult to imagine that the industrial council system could function effectively with regard to collective bargaining in the domestic sector. The procedure for the establishment of a conciliation board is complex. Both employers and employees in the domestic sector would find it difficult to understand and implement conciliation board procedures. In Chapter 7 a simplified dispute resolution procedure is discussed. If domestic workers were included in the Labour Relations Act, section 65 could be adapted to require that a dispute must first be referred to mediation before domestic workers can lawfully embark on strike action. Section 65 (2) also stipulates that unless the majority of the members of a registered union who are paid-up members, have voted by ballot in favour of strike action, it is an offence to call or take part in a strike. The actual physical dispersion of domestic workers and the fact that they do not have a common workplace, could hamper compliance with this requirement.

Compliance with section 65 protects those who engage in lawful strikes from criminal prosecution, while section 79 provides that no civil legal proceedings shall be brought in any court of

⁴⁶ Section 65(d)(iii).

law against a registered trade union or its members, office-bearers or officials in respect of any wrongful act committed in furtherance of the strike. This provision does not, however, protect any act committed that is in contravention of section 65 or any act that would otherwise be criminal.

It is common practice to refer to a strike which contravenes section 65 as an 'illegal strike' and to other strikes⁴⁷ as 'legal strikes'. Spoelstra J explains in the Perskor-case⁴⁸ that the last mentioned expression creates the impression that so-called 'legal strikes' are approved of and protected by the law, which is not the case. He agrees with Booysen J in NTE Ltd v Chemical Workers Union⁴⁹ that:

'Section 65 does not convert a strike or lock-out which would at common law constitute a breach of contract into something other than a breach of contract which does not have the normal consequences of a breach of contract.'⁵⁰

The following question arises: If the Labour Relations Act does not change the consequences of strike action, would there be any benefit for the domestic workers to be included within the scope of the Act? When the industrial court is faced with the

⁴⁷ Perskor v Media Workers Association of SA (1991) 12 ILJ 86 (LAC) at 103G-I.

⁴⁸ Ibid.

⁴⁹ (1990) 11 ILJ 43 (N).

⁵⁰ At 46D-E.

question of reinstating dismissed strikers, the enquiry is shifted away from strictly legal considerations to aspects of fairness and to whether there was an attempt at genuine collective bargaining.⁵¹ The lawfulness of the dismissal is not a bar to the court's unfair labour practice jurisdiction:

'...[T]he submission that an unfair labour practice cannot include or refer to a lawful exercise of rights by an employer is not supported by the wording of the relevant provisions, or by the authority to which I have referred or by the patent intention and underlying philosophy of the Act.'⁵²

Therefore, the legality of a strike would be an important but not conclusive factor in assessing whether strikers will be given protection by the industrial court.

5.3.4 Observance of collective agreements

The observance of collective agreements by the parties is essential to successful collective bargaining.

In Britain the view which has long been associated with the writings of Kahn-Freund, is observed. This view holds that collective labour agreements are unenforceable because the

⁵¹ National Union of Metalworkers of South Africa v Elm Street Plastics t/a ADV Plastics (1989) 10 ILJ 328 (IC) at 335B.

⁵² Marievale Consolidated Mines Ltd v The President of the Industrial Court (1986) 7 ILJ 152 (IC) at 167A-B; National Union of Metalworkers of SA v Macsteel (Pty) Ltd 1992 (3) SA (A) 809 at 817F-H.

parties do not intend to make a legally-binding contract and views a collective agreement as binding in honour only.⁵³

France and Germany, on the other hand, view the collective agreement as being contractually binding and it is treated as a compulsory and automatic code of employment terms.⁵⁴

Any collective agreements concluded between domestic workers' trade unions and their employers' organisations will be in the same category as agreements concluded in industries without industrial councils.⁵⁵ In this regard the question arises whether these collective agreements would be enforceable either as contracts or because their breach would constitute an unfair labour practice. Once a collective agreement has been concluded, it is important to determine whether the terms of the agreement has any binding effect for the parties.

⁵³ O Kahn-Freund The System of Industrial Relations in Great Britain A D Flanders and H A Clegg (eds) (1954) at 683. Section 18(1) of the Trade Union and Labour Relations Acts of 1974 and 1976 raises a rebuttable presumption that the parties to collective bargaining do not intend their agreements to have the force of contract.

⁵⁴ Kahn-Freund's Labour and the Law 3rd ed P Davies & M Freedland (eds) (1983) 161-2.

⁵⁵ In S v Prefabricated Housing Corporation (Pty) Ltd 1974(1) SA 535 (A) at 539-40 it was held that an 'agreement' that is 'entered into' by the parties to an industrial council is not a contract in the legal sense, but a piece of subordinate, domestic legislation made in terms of the Labour Relations Act.

In Nouwens Carpets (Pty) Ltd v National Union of Textile Workers⁵⁶ it was held that a conciliation board agreement has the status of a common-law contract unless and until promulgated by the Minister of Manpower, whereupon it assumes the character of subordinate legislation. It can therefore be argued that where a domestic workers' union and an employers' organisation reach a genuine agreement, there is no reason why it should not be given its common-law effect.⁵⁷

In Metal and Allied Workers Union v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd⁵⁸ the court states that 'the concept of stipulatio alteri in our law, unknown in English law, may well permit a union to make a contract...with an employer for the benefit of its members...The principle of our law that two parties can make a contract for the benefit of a third, is clear...'⁵⁹

If domestic workers were to be included under the Labour Relations Act, the question arises whether a breach of collective agreement would constitute an unfair labour practice. In Consolidated Frame Cotton Corporation Ltd v Minister of

⁵⁶ (1989) 10 ILJ 44 (N).

⁵⁷ R G Beaton 'The Enforceability of Labour Agreements' (1989) 10 ILJ 388 at 389.

⁵⁸ (1986) 7 ILJ 703 (IC).

⁵⁹ At 708I-J.

Manpower⁶⁰ it was held that an unfair labour practice need not consist of a breach of a contractually-binding agreement and even if an agreement or undertaking was not legally enforceable, breach thereof could be construed as an unfair labour practice.

5.4 Conclusion

Domestic workers in private households usually only involve one worker in each place of employment and collective bargaining would therefore not be the appropriate method to resolve disputes of rights. The explanation by Taylor and Whitney is apposite:

'[t]he very nature of collective bargaining makes the process unwieldly for the solution of each and every human problem within the employment relationship. Collective bargaining is collective in nature, and deals with problems common to large groups of workers...'⁶¹

Disputes of interest which affect all domestic workers are issues that could be bargained collectively. Negotiations at this level, 'is a job for professionals, and the negotiators - the management involved in this process and the trade-union

⁶⁰ (1985) 6 ILJ 159 (N). See also the Labour Appeal Court decision in Vleissentraal (Koöperatief) Bpk h/a Supreme Meat Products v Food & Allied Workers Union (1990) 11 ILJ 1267 (LAC) where the Court found that the appellant's denial of the existence of a duty to honour the collective agreement amounted to an unfair labour practice.

⁶¹ B J Taylor and F Whitney Labour Relations Law (3rd ed) (1979) 4.

leaders - must be highly trained and experienced in Industrial Relations and collective bargaining.⁶²

In respect of collective bargaining domestic workers experience specific difficulties. If they are to remain excluded from the Labour Relations Act the following problems would arise:

- (i) employees would not be protected against victimisation;
- (ii) employees could be dismissed on notice for belonging to a trade union;
- (iii) union organisers could be prosecuted for contacting employees at their places of work;
- (iv) contact would have to be made after working hours when the women are busy in their own households;
- (v) in cases of non-observance by employers of collective agreements there would be no access to the industrial court and its unfair labour practice jurisdiction;
- (vi) striking would be construed as breach of contract and lead to summary dismissal.

If they should be included in the Labour Relations Act the following specific difficulties could arise:

- (i) the existing Act would be too involved and difficult for both employers and employees to understand;

⁶² J A Slabbert et al (eds) Managing Industrial Relations in South Africa (1990) 18:83.

- (ii) the procedural requirements would be difficult to comply with.

In the case of inclusion as well as in the event of exclusion from the Act the following difficulties with regard to collective bargaining would remain:

- (i) the unions do not have enough members to be sufficiently representative to negotiate on behalf of all domestic workers in the country;
- (ii) the negotiators do not have the necessary skills or experience;
- (iii) negotiation does not imply that agreement will be reached. In a deadlock situation where strike action could be used it could be difficult to organise the workers dispersed in different households thus rendering the bargaining process ineffective and obtaining no improvement for the workers concerned.
- (iv) of a workforce of 862 000 workers only approximately 51 000 workers are unionised.

It is clear that domestic workers face formidable obstacles in regard to collective bargaining but that does not mean that they should be excluded from the Labour Relations Act. A revised and simplified Labour Relations Act would address those problems specific to the extension of the present Labour Relations Act. Most workers in industry are covered by the Basic Conditions of

Employment Act to provide basic protection, and they then supplement these basic rights through collective bargaining. In the case of domestic workers protective legislation providing for a basic floor of rights should be adopted. At the same time, workers should not be excluded from collective bargaining and protection in terms of the Labour Relations Act.

CHAPTER SIX

CONSIDERATIONS AND RECOMMENDATIONS FOR LAW REFORM:
CONDITIONS OF SERVICE (PROTECTIVE LEGISLATION)6.1 Introduction

Clegg,¹ with reference to Kahn-Freund, contends that 'the law seeks to stimulate collective bargaining and the application of collective agreements by indirect inducements in preference to direct compulsion, and, where this fails, to provide substitute standards enforceable by legal sanctions...All statutory methods of fixing wages and other conditions of employment are by law considered as a second best.'²

The object of this chapter is to consider measures which are alternative or supplementary to the common-law contract of service or to collective bargaining, whereby domestic workers could be protected against abuse by employers of their freedom to contract.³

Proposals for minimum conditions of employment cannot be evaluated in a vacuum. The Basic Conditions of Employment Act

¹ H A Clegg The Changing System of Industrial Relations in Great Britain (1979).

² Ibid at 290.

³ See Chapter 3 above.

will be used as point of departure for the analysis which follows. Proposals for including domestic workers under this Act are compared with legislation in other jurisdictions.

Zweigert⁴ cautions:

'Special problems...are encountered where solutions of legal problems or legal systems are being compared, which materially differ in ideology or state of development...

General social facts may set a further limit for a meaningful comparative evaluation. Possibly, even excellent solutions of highly developed systems of law may be totally unsuitable for developing countries.'⁵

For comparative law purposes labour legislation that governs domestic workers in a developed country like the United States of America⁶ as well as legislation in developing countries such

⁴ K Zweigert 'Methodological Problems in Comparative Law' 1972 Israeli Law Review 465.

⁵ Ibid at 474.

⁶ Labour legislation in the United States of America applies at two levels. Labour legislation applying at federal level is contained in the United States Labor Code. The Fair Labor Standards Act 1938 forms part of the US Labor Code. In terms of the Fair Labor Standards Act an employee is defined as 'any individual employed by an employer' (S203) and the definition is therefore wide enough to include domestic workers. The United States Labor Code provides that each State may promulgate Orders providing for reasonable wages, hours and working conditions.

For purposes of this analysis the Industrial Welfare Commission Order No 5-80 regulating Wages, Hours and Working conditions in the Public Housekeeping Industry (State of California) will be used as an example. According to S2(K) this order applies to 'personal attendants' which include babysitters and people looking after a person who, as a result of reason of advanced age or physical disability or mental deficiency needs supervision.

as Zimbabwe, Swaziland and Namibia will be considered.

6.2 The Basic Conditions of Employment Act 3 of 1983

Since domestic workers are not included in the Basic Conditions of Employment Act,⁷ they have inter alia no right to paid leave, there are no restrictions on their working hours and no limitation of overtime work which may be required of them. No uniformity exists in the domestic employment sector and there is uncertainty on the part of employers and employees in respect of conditions of employment. Legislation in this regard will therefore bring about greater certainty for both employers and employees in terms of what constitutes fair conditions of employment.

The purpose of this Act is the regulation of basic conditions of employment of a large part of the labour force in South Africa. Provisions contained in this Act were included in the earlier Factories, Machinery and Building Work Act⁸ and the Shops and Offices Act.⁹

⁷ Section 2(c). Farmworkers who have hitherto been excluded from the Act (S2(b)) have been provisionally brought under the BCEA. See GG 14094 3 July 1992.

⁸ No 22 of 1941.

⁹ No 75 of 1964.

6.2.1 Working hours

6.2.1.1 Ordinary working hours

The Basic Conditions of Employment Act regulates the maximum weekly ordinary working hours and provides that no employer may require an employee (except a security guard) to work for more than 46 hours per week.¹⁰ The maximum daily ordinary working hours is fixed at not more than 9 hours and 15 minutes for employees who work 5 days per week and at not more than 8 hours per day for employees who work 6 days per week.¹¹ Separate provisions apply to shift workers.¹² The Basic Conditions of Employment Act further provides for a maximum spread-over¹³ of 12 hours.¹⁴ The provisional amendments with regard to farm workers determine that they may not be required to work more than 48 hours per week or 9 hours and 36 minutes per day (except when on extended working hours in terms of Section 6A). The

¹⁰ Section 2(1)(b).

¹¹ Section 4(c)(i)8(ii).

¹² Section 5 of the Basic Conditions of Employment Act 104 of 1992. GG 14094 (not yet in force) determines that the shift of a farm worker shall not be longer than 9 hours and 36 minutes.

¹³ The formula to calculate the maximum permissible spread-over is: [permissible ordinary hours] + [prescribed meal interval] + [up to three hours permissible daily overtime] = maximum spread-over.

¹⁴ Section 3(1).

maximum spread-over in their case is 14 hours.¹⁵

The International Labour Organisation (ILO) Forty-Hours Week Convention 47 provides for a working week of 40 hours, with the proviso that such a limit may not lower the standard of living of the worker. Furthermore, this principle should be adapted to different types of work.

SADWU is striving for a working week of 40 hours; in other words, a 5-day working week with 8 hours per working day. This union also advocates overtime payment at R3,50 per hour. It does not distinguish between working hours for full-time and part-time domestic workers.¹⁶

In the United States of America the Fair Labor Standards Act 1938 provides that domestic workers may not work for more than 40 hours per week. Provisions regarding maximum hours do not, however, apply to employees who are employed in domestic service in a household and who reside in that household.¹⁷

The Employment (Domestic Workers) Regulations¹⁸ which are

¹⁵ Section 2 of Act 104 of 1992 GG 14094 3 July 1992.

¹⁶ SADWU Recommended Minimum Wage 1991. Endorsed per letter on 10 November 1992 from Eastern Cape Office.

¹⁷ Section 213(b)(21).

¹⁸ Statutory Instrument 925C of 1981.

promulgated in terms of the Employment Act¹⁹ in Zimbabwe determine that normal hours of work, exclusive of overtime, are 54 hours per week. The hours may not exceed 9½ hours a day.²⁰ In Swaziland the working week for domestic workers is 48 hours, spread over 6 days of the week, each of either 8 hours or as may be agreed between employer and employee.²¹

The Namibian Labour Act²² which applies to all employees, including domestic workers, provides that no employer shall require an employee (except a security guard or guard) to work for more than 45 hours during any week.²³ A casual employee is not allowed to work more than 9 hours a day.²⁴ A 'casual employee' means a day worker who is employed by the same employer on not more than two days a week.²⁵ Employees who work not more than 5 days during a week, may not work more than 9 hours a day,²⁶ while those who work six days during the week may

¹⁹ Act 13 of 1980.

²⁰ Section 5.

²¹ Section 6 of The Regulation of Wages (domestic employees) Order 1985 promulgated in terms of section 11 of the Wages Act 16 of 1964.

²² Act 6 of 1992.

²³ Section 26(b).

²⁴ Section 27(1)(b).

²⁵ Section 1.

²⁶ Section 27(c)(i).

not work more than 7½ hours a day.²⁷ Section 30- provides that no employer shall require or permit an employee to work a spread-over of more than 12 hours.²⁸

The Manpower Commission²⁹ proposes that domestic workers be included under the Basic Conditions of Employment Act with regard to working hours, with the following special provisos:

- A maximum spread-over of 14 hours should be allowed in respect of resident or live-in domestic workers if agreed to in writing between the domestic worker and the employer.
- Regular day workers, and, where applicable, casual workers, may not work more than 9 hours and 15 minutes per day.

6.2.1.2 Meal intervals

The Basic Conditions of Employment Act provides for the regulation of meal intervals³⁰ in that an employee may not work continuously for longer than 5 hours without a meal interval of at least 1 hour. In certain circumstances a meal interval may be shortened to 30 minutes.³¹ An employer may not require an employee to perform any work during his meal interval. The Act

²⁷ Section 278(c)(ii).

²⁸ Section 30(1).

²⁹ GN 850 in GG 13511 of 13 September 1991.

³⁰ Section 7.

³¹ Section 7(2).

makes no provision for tea breaks.

In the United States a domestic worker may not work without a meal period of less than 30 minutes, except when a work period of not more than 6 hours will complete the day's work and the meal period is waived by mutual consent of the employer and employee. Unless the employee is relieved of all duties during a 30-minute meal period, that period will be considered to be an 'on duty' meal period and will be counted as time worked.³²

In Zimbabwe an unpaid meal break of at least 30 minutes after a continuous working period of 6½ hours must be granted by the employer to his domestic worker.³³

Meal intervals are not specifically regulated in Swaziland.

In Namibia an employee is not permitted to nor may be required to work for more than 5 hours continuously without a meal interval of not less than one hour,³⁴ during which time no work shall be performed. An employer may conclude an agreement with his employee to shorten such employee's meal interval to not

³² Section 11 of The Industrial Welfare Commission Order No 5-80 regulating Wages, Hours and Working Conditions in the Public Housekeeping Industry (State of California).

³³ Section 5(1) of Employment (Domestic Workers) Regulations 1981.

³⁴ Section 31(1)(a) of Act 6 of 1992.

less than 30 minutes.³⁵

6.2.1.3 Overtime

The Basic Conditions of Employment Act stipulates that no employer may require an employee to work overtime except in terms of an agreement between the employer and the employee.³⁶ Such overtime must not exceed 3 hours per day or 10 hours per week.³⁷ Payment for overtime must be calculated at a rate of 1 1/3 of the wage per hour, except in respect of overtime on Sundays or public holidays³⁸ when other special rates are applicable.

The International Labour Organisation Convention 1, Hours of Work (Industry) Convention 1919, makes provision for the rate of payment for overtime not to be less than 1½ times the regular rate for the overtime period.

³⁵ Section 31(2).

³⁶ Section 8(1).

³⁷ Section 8 of the Basic Conditions of Employment Amendment Act 104 of 1992 provides that overtime in the case of a farm worker shall not exceed 2 hours and 30 minutes in any day or 6 hours per week while he is working extended hours i.e. agreed in writing that his ordinary working hours may be extended by not more than 4 hours per week for a maximum period of 4 months. The extended hours have to be offset by reduced hours over a similar period.

³⁸ Section 9(1).

In terms of the Fair Labor Standards Act in the United States of America, a non-resident domestic worker who works a work week longer than 40 hours, must receive remuneration for the excess hours worked, at not less than $1\frac{1}{2}$ times the regular rate at which she is employed.³⁹

In Zimbabwe a domestic employee is deemed to be working overtime when the worker works longer than 54 working hours per week or $9\frac{1}{2}$ hours per day.⁴⁰ A distinction is drawn between different 'types' of overtime: For overtime worked during an ordinary week, an employee is entitled to $1\frac{1}{2}$ times her current hourly wage for the overtime hours. For overtime worked during the stipulated weekly day off, the employee is entitled to double her current hourly wage for the overtime. For overtime on a national holiday, the employee is entitled to her current daily wage and overtime wages.⁴¹

In Namibia overtime is by mutual agreement provided it does not exceed 3 hours in any day or 10 hours during any week.⁴² For overtime during any day other than a Sunday or a public holiday, an employee is entitled to a rate not less than $1\frac{1}{2}$ times her current hourly wage and in the case of a Sunday or a public

³⁹ Section 207.

⁴⁰ Section 6(1).

⁴¹ Section 6(3)-(6).

⁴² Section 32(2) of Act 6 of 1992.

holiday a rate double her current hourly rate.⁴³

The recommendation of the Manpower Commission is that overtime should not exceed 10 hours per week, but no daily limit should be specified for resident domestic workers. The 3-hour limit per day should, however, apply to the regular day worker and the casual worker.⁴⁴

The following special provisions are suggested by the Manpower Commission:⁴⁵

- a) Domestic workers should be able to consent to work an additional four hours per week overtime (i.e. in addition to the 10-hour per week limitation) when looking after children or the elderly, the sick or the frail. Such overtime should be entirely voluntary.
- b) There should be protection for the domestic worker who does not wish to work additional overtime.

6.2.1.4 Proposal with regard to working hours

The 40-hour working week suggested by the International Labour Organisation, although an ideal for developed countries, carries within it the provisos that such limit should not lower the

⁴³ Section 32(3).

⁴⁴ GN 850 in GG 13511 of 13 September 1991 at 46.

⁴⁵ Ibid.

standard of living of the worker and that it can be adapted to different types of work. Even in a developed country such as the United States of America, this principle does not apply to resident domestic workers.

The maximum normal weekly working hours of 46 hours per week applicable to most employees in terms of the Basic Conditions of Employment Act of South Africa, is much shorter than the 54 hours laid down in Zimbabwe and the 48 hours prescribed in Swaziland and more or less the same as the 45 hours in Namibia.

There is no reason why the maximum weekly hours and meal interval provisions of the Basic Conditions of Employment Act should not be applied to domestic workers and there is no justification for an extension of these hours to 48 hours a week as in the case of farm workers.

Where the domestic worker is charged with the care of the elderly, the frail or children, it may not be feasible for meal intervals to be taken. I propose the adoption of a general provision similar to that in the United States of America which stipulates that unless the employee is relieved of all duties during the 30-minute meal period, that period will be considered to be an 'on duty' meal and counted as time worked.

The exceptions proposed by the National Manpower Commission with

regard to the maximum spread-over and overtime, and the distinction made between resident, non-resident, regular day workers and casual employees could lead to confusion if reduced to legislation. As indicated in Chapter 2, a resident domestic worker could in fact be a regular day worker with regard to her 'host' employer, where she resides with one employer, but could work on a regular basis for other employers as well.

I suggest that the regulation should be simplified, by providing for a maximum spread-over of 14 hours and additional weekly overtime of four hours, only to be effective if voluntarily agreed to by the employee in writing.

6.2.2 Work on Sundays

Although the ILO Convention 14, Weekly Rest (Industry) Convention 1921 and Convention 106, Weekly Rest (Commerce and Offices) Convention 1957 do not apply to the domestic sector, the principle is that provision should be made for a period of rest within the course of 7 days, the duration of which is not less than 24 hours.

Work on Sundays is not expressly regulated in Zimbabwe and Swaziland. In Zimbabwe an employee is entitled to 24 continuous

hours off work each week.⁴⁶ The employer and employee may agree on a mutually acceptable day.⁴⁷ In Swaziland an employee must be granted 1 rest day each week, which day is fixed by mutual agreement between the employer and employee.⁴⁸

The Labour Act of Namibia excludes domestic workers⁴⁹ from the general prohibition with regard to work on Sundays and public holidays.⁵⁰ Where a domestic worker does work on a Sunday, she may request that she either be paid at a rate not less than double her usual rate or remuneration in respect of time actually worked by her on such Sunday, or 1½ times her usual rate of remuneration and be granted an equal period of time off work during the next succeeding week.⁵¹

The Basic Conditions of Employment Act stipulates that when an employee works on a Sunday,⁵² there are two ways in which his employer can remunerate him:

- i) Where the employee works up to 4 hours, he should be paid

⁴⁶ Section 5(3) of the Employment (Domestic Workers) Regulations 1981.

⁴⁷ Section 5(3).

⁴⁸ Section 12 of the Regulation of Wages (Domestic Employees) Orders 1985.

⁴⁹ Section 33(2)(c).

⁵⁰ Section 33(1).

⁵¹ Section 33(3).

⁵² Section 10.

an amount equal to the wage normally paid to him on a working day. Where the employee works more than 4 hours, he should be paid an amount calculated at a rate of double his wage rate in respect of the whole time worked by him on that Sunday,⁵³ or

- ii) the employer can pay him an amount calculated at a rate of not less than 1 1/3 times his wage rate in respect of the whole time worked by him on that Sunday and grant him, within 7 days of that Sunday, one day's leave with payment.⁵⁴

This remuneration for his Sunday work must be paid to the employee not later than the pay day next succeeding the day in respect of which such remuneration is earned.

6.2.2.1 Proposal with regard to work on Sundays

It is an existing practice to require some domestic workers to work on Sundays. An afternoon off during the week compensates for such work. Work on a Sunday should therefore not be prohibited but it should also not be compulsory. This should be dealt with in the contract of employment.

It seems that the provisions of the Basic Conditions of Employment Act would be adequate in that Sunday work should be

⁵³ Section 10(2)(a).

⁵⁴ Section 10(2)(b).

on a voluntary basis only and workers should be entitled to elect either of the statutory ways to be paid their extra remuneration for working on a Sunday. The only exception that can be considered is where a domestic worker can only work for a specific employer on a Sunday, and elects to do so, then such Sunday should be treated as a normal work day.

6.2.3 Work on public holidays

In terms of the Basic Conditions of Employment Act the following days are public holidays: New Year's Day, Good Friday, Ascension Day, Republic Day, Day of the Vow and Christmas Day.⁵⁵ The Act also provides that employees in shops and offices are entitled to 11 public holidays.⁵⁶ An employee must be fully remunerated for public holidays on which he does not work, but which would otherwise be an ordinary working day.⁵⁷ If an employee does in fact work on a public holiday, he must be paid the same wage that he would be entitled to for working on an ordinary working day, plus:

- an amount calculated at his wage rate for the whole time worked by him on that day,⁵⁸ or
- an amount calculated at a rate of at least 1/3 of his wage

⁵⁵ Section 1.

⁵⁶ As stipulated in the Public Holidays Act 5 of 1952.

⁵⁷ Section 11(1).

⁵⁸ Section 11(2)(a).

rate as well as one day's paid leave within 7 days of such public holiday.⁵⁹

The above remuneration must be paid not later than the next pay day.

In Zimbabwe employees are entitled to fully paid leave of absence on national holidays.⁶⁰ If an employee consents to work on a national holiday, she will be paid at overtime rates.⁶¹

National holidays may not be set off against regular work days without the employee's consent. The employee is then entitled to at least 2 days off for each national holiday or half a national holiday on which she worked, or a day off for any lesser part of the national holiday worked.⁶²

In Swaziland 9 public holidays are listed in the Second Schedule of the Order⁶³ In terms of the Order domestic workers are not prohibited from working on a public holiday. An additional day's wages is payable or, alternatively, by mutual agreement, the employee may be granted a day off work on full pay at a time

⁵⁹ Section 11(2)(b).

⁶⁰ Employment Regulations Statutory Instrument 9256 of 1981.

⁶¹ Section 7(2).

⁶² Section 7(3).

⁶³ The Regulation of Wages (Domestic Employees) Order 1985.

convenient to both parties.⁶⁴

In Namibia public holidays are provided for in the same manner as for work on Sundays.⁶⁵

6.2.3.1 Proposal with regard to work on public holidays

The same provisions as those contained in the Basic Conditions of Employment should also apply to domestic workers. The provisions of the Act should also apply to a regular day worker, as defined in chapter 2, if she ordinarily would have worked on such a public holiday.

6.2.4. Vacation leave

The Basic Conditions of Employment Act provides for at least 14 consecutive days' leave on full pay in respect of each period of 12 consecutive months for which the employee has worked for a single employer.⁶⁶ The employer may not require an employee to work during his leave.⁶⁷ Vacation leave may also not run concurrently with sick leave or with a period of notice of

⁶⁴ Section 10.

⁶⁵ Section 33 of Act 6 of 1992.

⁶⁶ Section 12(1)(ii).

⁶⁷ Section 12(1)(b).

termination of a contract of employment.⁶⁸ For every public holiday within the employee's period of leave and which would otherwise be an ordinary working day for the employee, his leave must be extended by one working day with full pay.⁶⁹

Upon termination of employees' service their employers must pay them their wage in respect of leave that they have not taken.⁷⁰ In addition to this leave pay, a further sum calculated at 1/6 of one week's wage should be paid in respect of each month of service completed after the date on which they last became entitled to leave or, in the case of employees who have less than 12 months of service, after the date on which they commenced service. Employees are entitled to the above provided that notice of the termination of the contract of employment has been given.⁷¹ The provisions of this section are not applicable to casual employees.⁷²

The Employment (Domestic Workers) Regulations 1981 in Zimbabwe provide that a worker, on completion of one year's service with the same employer, shall be entitled to a continuous paid leave

⁶⁸ Section 12(2)(b).

⁶⁹ Section 12(2)(c).

⁷⁰ Section 12(4)(a).

⁷¹ Section 12(4)(b).

⁷² Section 12(10) A 'casual employee' means 'a day worker who is employed by the same employer on not more than three days a week' (S1).

period of at least 12 days. National holidays or days which would have been weekly days off are excluded.⁷³

In Swaziland an employee is entitled to 12 working days' paid leave.⁷⁴ Section 7 provides further that an employee receives an additional day's wages where a public holiday falls within the period of annual leave. Where the employment of an employee is terminated after a period exceeding 12 months from the date of commencement, the employee is paid an amount equal to one day's pay for each month of service during which she earned, but had not taken annual leave.⁷⁵

The Namibian Labour Act entitles an employee to at least 24 consecutive days' leave of absence on full remuneration in respect of each period of 12 consecutive months for which the employee has been employed.⁷⁶ Upon termination the employer shall pay the domestic worker any leave which accrued to her, but which was not granted before termination.⁷⁷ These provisions do not exclude casual employees from the leave provisions as in the case of the Basic Conditions of Employment

⁷³ Section 8.

⁷⁴ Section 7 of the Regulation of Wages (Domestic Employees) Order 1985.

⁷⁵ Ibid.

⁷⁶ Section 39(1) of Act 6 of 1992.

⁷⁷ Section 39(4)(a).

Act of South Africa.

6.2.4.1 Proposal with regard to vacation leave

Where two weeks' paid leave is the minimum for most other workers in industry, they are usually able to negotiate at plant level or centrally, for better leave conditions. In view of the difficulty which domestic workers will have to bargain collectively, their conditions of employment should include a three weeks' paid leave entitlement. Regular day workers should also be entitled to the same annual leave, on a pro rata basis.

6.2.5 Sick-leave

Sick-leave entitlement in terms of the Basic Conditions of Employment Act 3 is calculated on the basis of 'leave-cycles' of three years.⁷⁸

An employee who works a five-day week is entitled to 30 working days sick-leave per three year cycle and those working a six-day week to 36 working days per three year cycle on full pay.⁷⁹ It is not necessary for the worker to have worked the full cycle before she becomes entitled to take sick-leave. This means that

⁷⁸ J P A Swanepoel Introduction to Labour Law 3rd ed (1992) 253.

⁷⁹ Section 13.

a five-day week worker is entitled to one day's sick-leave after every 5 weeks worked and a worker who works a six-day week is entitled to one-day's sick leave after every calendar month that he has worked.⁸⁰ Section 13(3) stipulates that a worker who is absent for a period longer than 2 days without a medical certificate, is not entitled to sick-leave payment.

Casual workers as defined by the Act are excluded from its sick-leave provisions.⁸¹

Sick-leave is not expressly regulated in the state of California.

In Zimbabwe there is no provision for paid sick-leave. After a year's continuous service, every employee shall be entitled to unpaid sick-leave of up to at least two months.⁸²

In Swaziland after three months service with an employer, and subject to the production of a medical certificate, an employee is entitled to 15 working days sick-leave on full pay during each period of 12 months employment.⁸³ In lieu of the medical

⁸⁰ Section 13(b).

⁸¹ Section 13(5)(c).

⁸² Section 10(1) Employment (Domestic Workers) Regulations 1981.

⁸³ Section 8(1) of Regulation of Wages (Domestic Employees) Order 1985.

certificate, an employer may accept such other evidence of incapacity as he considers appropriate.⁸⁴

Sick-leave entitlement in Namibia is identical to the provisions of the Basic Conditions of Employment Act in South Africa, except that the Namibian Labour Act does not expressly exclude 'casual employees' from sick leave entitlement,⁸⁵ as the South African Act does.

6.2.5.1 Proposal with regard to sick-leave

The sick-leave provisions of the Basic Conditions of Employment Act should be applied to domestic workers. Consideration should also be given to easing the requirement that a medical certificate must be submitted for any absence as the result of sickness longer than two days, because the circumstances of the domestic worker may make it difficult for her to obtain a medical certificate. This situation can be contrasted to workers in industry who often have access to medical staff on the premises and who belong to medical aid funds.

6.2.6 Employment rights and pregnancy

Since the turn of the century protective legislation has been

⁸⁴ Section 8(3).

⁸⁵ Section 40 of Act 6 of 1992.

passed in many European countries, with the intention of protecting women workers from those aspects of wage labour that would detrimentally affect them in their role as mothers.

A factor which has largely contributed to the recognition of the social function of maternity, which ensures the renewal of society, is the increased participation of women, particularly married women, in economic activity.⁸⁶ This trend focuses the spotlight on the problem of reconciling the function of motherhood with an occupational activity.⁸⁷

The provisions of the Basic Conditions of Employment Act are inadequate not only for the domestic workers, but also for all female employees in all sectors of the economy, since they are not guaranteed their jobs back after the period of pregnancy and confinement. There is no provision for maternity leave in the Act. Section 17 only prohibits an employer from requiring or permitting a female employee to work during the four week period

⁸⁶ C Paoli 'Women Workers and Maternity: Some Examples from Western Europe' 1982 International Labour Review 1.

⁸⁷ Convention 103 Maternity Protection Convention (Revised), 1952 of the International Labour Organisation is in fact applicable to women in the domestic sector, but provision is also made for the possibility of excluding them. The Convention determines, among other things, that pregnant women should be granted maternity leave of at least 12 weeks, which includes compulsory leave of at least 6 weeks after confinement. During maternity leave the woman is also entitled to cash and medical benefits. Guidelines are laid down according to which payment of these benefits may be made and the employer is not held responsible for this payment. Dismissal during maternity leave is furthermore forbidden.

prior to the expected date of her confinement and eight weeks after the date of her confinement.

Contravention of or failure to comply with section 17 of the Basic Conditions of Employment Act is an offence. This section does not expressly protect a pregnant female employee from dismissal as a result of her absence from work on account of her pregnancy. The result is that in many cases employers terminate the services of their female employees when they have to leave to have a child. It is arguable that the legislature did not intend women to be dismissed on account of pregnancy and this is an aspect of the law that needs review. In addition, South African legislation places no obligation on employers to pay their employees who are on the obligatory maternity leave provided for by this section.⁸⁸ These workers are usually entitled to benefits in terms of the Unemployment Insurance Act 30 of 1966, from which domestic workers are excluded. Debating the practical difficulties of including domestic workers under the Unemployment Insurance Act, does not fall within the scope of this thesis.

In Zimbabwe an employee is entitled, on request, to unpaid leave of up to 42 days prior to and up to 42 days following the

⁸⁸ S Gon, A T Trollip and W Wendland 'Maternity Rights and Benefits under South African Law' 1988 Industrial Relations Journal of South Africa 57.

anticipated date of delivery.⁸⁹ This means that she might be absent from work 168 days in a two-year period. No notice of termination of employment may be given to an employee who is on or has requested maternity leave.⁹⁰ In Swaziland after 9 months of continuous service with an employer and subject to the production of a medical certificate, an employee is entitled to 13 working days maternity leave on full pay and thereafter without pay.⁹¹

The Namibian Labour Act provides for at least four weeks' unpaid maternity leave before the employee's confinement and another eight weeks thereafter.⁹² In addition, safeguards protecting certain employment rights of such a woman is also provided. A female employee shall not be deprived of any rights which are vested in her by virtue of her employment on the date immediately before the date on which her maternity leave commences, and such rights, including any rights in relation to seniority, promotion and any benefits to which she is entitled by virtue of her membership of a medical scheme or fund or a pension scheme or other retirement scheme, shall continue as if her period of employment were not interrupted during the period of any

⁸⁹ Section 11(1) of Employment (Domestic Workers) Regulations 1981.

⁹⁰ Section 11(3).

⁹¹ Section 9(1)(2) of The Regulation of Wages (Domestic Employees) Order 1985.

⁹² Section 41(1) & Section 41(2)(b).

maternity leave granted to her in terms of that subsection.⁹³

The National Manpower Commission recommends that domestic workers should be entitled to:

- i) 12 weeks' maternity leave, for the period during which the Basic Conditions of Employment Act prohibits employment before and after their expected date of confinement.
- ii) unemployment benefits through an Unemployment Insurance scheme.

6.2.6.1 Proposal with regard to employment rights and pregnancy

The Basic Conditions of Employment Act should be amended to provide for 12 weeks unpaid maternity leave for domestic workers and in addition provision should be made in the Act that a domestic worker may not be dismissed as a result of her pregnancy. This protection should be similar to the Namibian Labour Act which stipulates that '[a]n employer shall not terminate any contract of employment of a female employee during any period of her maternity leave or at the expiry of such leave on account of the re-organization of the business carried on by such employer or for economic or technological reasons; or on account of such female employee being incapable of continuing to perform the work she performed on the date immediately before her maternity leave commenced, unless such employer has taken

⁹³ Section 41(2)(a).

all reasonable steps to offer her another appropriate work or such female employee has unreasonably refused to accept any such offer.'⁹⁴

Such a provision would at least prohibit the dismissal of a worker as a result of her pregnancy, even though it would not compensate her for the loss of her employment. In a recent Industrial Court case a dismissal by an employer of an employee on account of her pregnancy was held to be unfair.⁹⁵

6.2.7 Termination of services

For notice to be effective in terms of the Basic Conditions of Employment Act, it has to be given in writing, except where given by an illiterate employee.⁹⁶ During the first four weeks of employment, a minimum of one working day's notice is required.⁹⁷ Thereafter one week's notice must be given to or by an employee who receives his pay weekly, while two weeks' notice is required of, or to be given to an employee receiving a monthly salary.⁹⁸

⁹⁴ Section 41(3).

⁹⁵ Randall v Progress Knitting Textiles Ltd (1992) 13 ILJ 200 (IC) at 204B. Possible inclusion for domestic workers under the Labour Relations Act will be discussed in Chapter 8.

⁹⁶ Section 14(2).

⁹⁷ Section 14(1)(a)

⁹⁸ Section 14(1)(b).

6.2.7.1 Proposal with regard to the termination of services

Domestic workers who are employed on a monthly basis should be entitled to a month's notice of the termination of their services as provided for in the common-law. It would be inappropriate to deprive domestic workers of one of the few protections they currently enjoy under the common-law. I agree with the special provisions suggested by the Manpower Commission Committee, that where accommodation is provided, a calendar month's notice must be given to put the worker in a better position to find alternative accommodation.

6.2.8 A certificate of service

The Act makes provision for a certificate of service.⁹⁹ This provision should also apply to domestic workers. An appropriate annexure to the Act containing a pro forma certificate of service for use in the domestic sector should be drawn up.

6.2.9 The right to recover in a civil court

The Basic Conditions of Employment Act restricts the capacity of employees protected by labour legislation to bring civil claims for an employer's failure to comply with statutory obligations. They may only do so after the conclusion of a criminal case in

⁹⁹ Section 15.

which the employer is acquitted or if the Attorney-General provides the employee with a certificate of nolle prosequi.¹⁰⁰ This system places a great strain on state departments to investigate complaints of underpayment and to institute prosecutions and it greatly delays the institution of actions. The system has outlived its usefulness in respect of all employees and there should be direct access to the civil courts. The State would retain the discretion to prosecute any person who breaches the provisions of the Basic Conditions of Employment Act or any other statute.

6.3 Conclusion

The Basic Conditions of Employment Act, as indicated above, would, if made applicable to domestic workers, provide workers in this sector with a floor of rights. The proposals offered above, also indicate that domestic workers could, with minimal adjustments in the form of special provisions, as indicated, be included in this Act.

However, there would be no sense in including domestic workers

¹⁰⁰ See SA Electrical Workers Association on behalf of De Bruyn v Duiker Exploration Ltd (Tweefontein) (1991) 12 ILJ 1128 (IC) where the court found that S19(2) of the Basic Conditions of Employment Act regulated the payment of wages to an employee and that an employee could not, in terms of S30, recover from his employer any amount of wages due unless he produced a certificate by the attorney-general stating his refusal to prosecute or his employer had been acquitted on a charge of contravention or failure to pay the amount claimed.

under the Basic Conditions of Employment if these conditions would not extend to 'regular day workers' as described in Chapter 2 above where this category of worker is defined as a worker who has entered into an agreement to work on a regular basis for a single employer or who has worked for the same employer for at least four weeks irrespective of the number of hours a day.¹⁰¹ The existing section 1 of the Basic Conditions of Employment defines a 'casual employee' as 'a day worker who is employed by the same employer on not more than three days a week'. This definition is wide enough to include the definition of a 'regular day worker'. If this section remains unamended, it would mean that regular day workers would be excluded from the most important provisions of the Act such as vacation and sick-leave provisions.

In Chapter 2 it is indicated that statistics show that full-time domestic work is on the decline in South Africa.¹⁰² In a country such as Namibia, where the Labour Act does define a 'casual employee', this category of workers is not excluded from any provisions for basic conditions of employment,¹⁰³ as is the case with the Basic Conditions of Employment Act.

Law reform contemplated at this stage should take full

¹⁰¹ Chapter 2 p31 supra.

¹⁰² Chapter 2 p30.

¹⁰³ Part IV of the Labour Act 1992.

cognisance of the part-time nature of domestic employment. In Britain, despite the transformation of the employment relationship, the protection of workers' rights continues to be framed largely in terms of the traditional contract of employment which visualizes a full-time, unionized male employee who is not engaged in the service sector.¹⁰⁴ The proposals above specifically endeavour to avoid a situation in South Africa, where, after law reform, domestic workers could find themselves in a position as untenable as that of marginal workers in Britain.

To prevent this from happening the existing definition of 'casual employee' in the Basic Conditions of Employment Act should either be amended to refer only to 'day workers who are employed by the employer on not more than three days a week and not continuously for more than a month' or to prescribe that an employee who is not a full-time employee, but employed by an employer on a regular basis, should receive pro rata benefits in terms of this Act.

¹⁰⁴ B Hepple 'Restructuring Employment Rights' (1986) 15 ILJ (UK) 69-75.

CHAPTER SEVEN**CONSIDERATIONS AND RECOMMENDATIONS FOR LAW REFORM:****STATUTORY WAGE DETERMINATIONS AND ALTERNATIVES****7.1 Introduction**

Domestic workers are excluded from the provisions of all South African labour legislation, including the Basic Conditions of Employment Act. But even if domestic workers were included in the latter Act no provision would be made for the determination of wage levels.

Article 25 of the Universal Declaration of Human Rights states:

'(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'

In Chapter 3 the low status of domestic work in South Africa, and the bargaining impotence of the individual worker with regard to the negotiation of higher wages are discussed.¹

In countries with strong trade unions the regulation of wages by collective agreements is widely regarded as the best wage fixing method. It is argued that the parties have full knowledge of the problems of the specific labour sector and that agreements between them are likely to be appropriate and workable.

¹ See Chapter 3 pp47-52 supra.

The difficulties with regard to collective bargaining in the domestic labour sector are discussed in Chapter 5. Not only is domestic work characterised by an absence of collective bargaining, but also by low pay.² Skills associated with women's unwaged work in the home, such as caring and cleaning, have customarily commanded lower pay in the wage-labour market.³

Low-paid workers are more vulnerable to the interruption or loss of employment and, because they are less able to accumulate savings, pension or property rights, are more likely to experience poverty during periods of unemployment.⁴

A person who cannot obtain basic social goods like food, adequate clothing, housing and medicine, becomes trapped in a cycle of poverty from which it is almost impossible to escape.

² The discrepancy between the average monthly cash wages of domestic workers in Cape Town, East London, Port Elizabeth and Kimberley and the Household Subsistence Level for a family of six in these centres can be used as an index of the relatively low wages of workers in the domestic sector.

	Average monthly cash wage	HSL
East London	R192,15	R614,11
Port Elizabeth	R220,35	R659,98
Kimberley	R175,16	R677,92
Cape Town	R318,25	R676,30

Survey of Houses, Sectional Title Units and Domestic Workers (CSS, 1990); J F Potgieter The Household Subsistence Level in the Major Urban Centres of the Republic of South Africa (September, 1990).

³ S Deakin and F Wilkinson 'The Law and Economics of the Minimum Wage' 1992 Journal of Law and Society 379 at 385.

⁴ C Pond 'Wages Councils, the Unorganised, and the Low Paid' in G S Bain (ed) Industrial Relations in Britain (1983) 177.

In a paper on law and poverty Mahomed⁵ argues that:

'Although the ultimate sanction of the law is the physical force of the State, its practical survival is possible only if it secures the respect of those subject to it. Avoidable poverty affecting substantial sections of the community, imperils this order. It does so because it alienates the poor from the system of law.'⁶

It can therefore be said that the law has a 'vested interest in the crusade against poverty'.⁷

Low pay is inevitably a relative and subjective concept, and a search for a value-free and objective measure is likely to end in frustration. In countries where trade unionism and organised collective bargaining are too weak in a large part of the labour market to provide satisfactory systems for fixing wages, governments enact laws which provide methods of fixing minimum wages. There are three ways in which the law can be used directly in the fight against exploitive wages: a) it can fix minimum wages by means of general decrees; b) it can confer powers on administrative bodies (e.g. Wage Boards) to determine minimum wages for particular jobs; or (c) it can strengthen the employees' bargaining strength by confirming the right to strike.

⁵ I Mahomed 'Law and Poverty' Carnegie Conference Paper No 305 Second Carnegie Inquiry into Poverty and Development in Southern Africa (1984).

⁶ Ibid at 3.

⁷ Mahomed at 3.

7.2 National statutory minimum wage

The possible implementation of a national statutory minimum wage which will include the domestic sector will be considered first. This would require special legislation that would lay down a national minimum wage.

The South African government has hitherto refrained from taking responsibility for setting minimum wages and has left it to the machinery provided by the Labour Relations Act and the Wage Act to set wages for specific groups of industrial and commercial employees. Industrial Council agreements covering 97 industries and 1 000 000 workers have set minimum wages for the various groups of employees in those industries.⁸

In contrast to South Africa, national minimum wage legislation has long ago been introduced in countries such as the United States of America (1937), Canada (1945), Japan (1945), Luxembourg (1945), France (1950), the Netherlands (1969), Spain (1963), Portugal (1974), Belgium (1975) and Zimbabwe (1975).⁹ It should be noted that of these countries only Zimbabwe can be classified as a developing country.

The role that statutory minimum wage fixing plays in developed countries, can differ from the role it is called to play in

⁸ M Robertson (ed), Human Rights for South Africans (1991) 174.

⁹ R Roux 'Reviving the Living Wage Campaign: but what about the Minimum Wage?' 1990 SALB 22.

developing countries. In industrialised market economies minimum wage fixing is used to establish a basic floor to the wage structure. This conception views minimum wage fixing as providing 'safety-net' protection against unduly low wages.¹⁰ In many developing African countries, the conception of minimum wage fixing after independence has been to use it as an instrument of macro-economic policy to raise the general level of wages and to achieve major shifts in the distribution of income.¹¹

In an attempt to illustrate national minimum wage legislation, the United States of America and Zimbabwe are used in this discussion as examples of a developed country and a developing country, respectively.

The Fair Labor Standards Act in the United States prescribes that any employee who in any working week is employed in domestic service in a household, must be paid wages at a rate not less than the minimum hourly wage stipulated in the Act. Not only full-time domestic workers, but also any employee who in any week is employed in domestic service in one or more households, and is employed for more than 8 hours in total, is also entitled to wages not less than the minimum wage rates.¹² The provisions regarding minimum wages do not apply in respect of any employee

¹⁰ G Starr 'Minimum Wage Fixing: International Experience with alternative Roles' 1981 International Labour Review 545 at 547.

¹¹ Ibid at 559.

¹² Section 106(f) of the United States Code Service.

who is employed for babysitting on a casual basis, or to provide companionship services for individuals who, because of age and infirmity, are unable to care for themselves.¹³ As a result of differences in economic conditions between different regions, there is no uniform national minima. Wage levels are therefore lower in some southern states (for example in Mississippi and Louisiana) than in New York State and other parts in the north-east and the north-west.¹⁴ Although America does have a basic floor to the wage structure, certain exemptions do exist. Regional economic differences are also taken into consideration.

In Zimbabwe a minimum wage for domestic workers is prescribed under the provisions of the Minimum Wages Act 1980. In terms of the Employment (Domestic Workers) Regulations¹⁵ it shall be optional for the employer to provide and for the employee to

¹³ Section 213(a)(15). United States Code Service.

The term 'babysitting services' is defined by the regulations as referring to the custodial care and protection, during any part of the 24-hour day, of infants or children in or about the private home in which the infants or young children reside, but does not include services relating to the care and protection of infants or children which are performed by trained personnel (CFR 551.4).

The term 'casual basis' is defined by the regulations as referring to employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting (CFR 551.5).

The requirement that the employment be on a 'casual basis' does not apply to the exemption of domestic companions for aged or infirmed individuals (CFR 551.106).

¹⁴ ILO Wages: A Worker's Manual (1988) 90.

¹⁵ Statutory Instrument 925C of 1981 promulgated in terms of S5 of the Employment Act 13 of 1980.

accept rations.¹⁶ No employer shall deduct from the employee's wages rations¹⁷ or any other benefits such as accommodation, fuel, lights or transport, unless an employer is paying an employee above the minimum wage and the deductions do not reduce the employee's wage to below the minimum wage for that grade.¹⁸ Since payment in kind is only sanctioned where it is above the minimum wage, there is no incentive for the employer to provide any benefits, as the minimum wage would have to be paid in any event. In this way the employee could lose out on valuable benefits, which could in fact exceed the financial value of the minimum wage.

This role also accords with the International Labour Organisation's Recommendation (No.135) on Minimum Wage Fixing, with Special Reference to Developing Countries:

- '1. Minimum wage fixing should constitute one element in a policy designed to overcome poverty and to ensure the satisfaction of the needs of all workers and their families.
2. The fundamental purpose of minimum wage fixing should be to give wage earners the necessary social protection as regards minimum permissible levels of wages.'

The ANC's Freedom charter advocates a national minimum wage for all workers and at the launch of COSATU in 1985 a resolution was adopted to campaign for a legally-enforced minimum wage

¹⁶ Section 3(1).

¹⁷ Section 3(2).

¹⁸ Section 3(3).

automatically linked to inflation.¹⁹ By 1987 Cosatu's emphasis had shifted from a *legal minimum* to a *living wage*.²⁰ A living wage does, however, create difficulties in its application to the practice of regulating wages. A living wage is usually considered as the amount sufficient for a family of average size. The question arises whether a living wage only means enough for the mere subsistence necessary to maintain physical health or whether it should provide at least a few simple comforts in addition to a meagre subsistence. Arguments by Cosatu *against* setting an amount to a minimum or living wage included: (a) the difficulty of determining what the amount should be because of the huge wage gaps existing between the different employment sectors and (b) the economy cannot afford a minimum wage and its imposition will put many workers out of work - Zimbabwe was cited as an example where domestic workers were retrenched after a minimum wage was legislated.²¹ In arguments for a minimum wage it was stated that certain non-productive sectors, such as domestic work, could be exempted from minimum wage legislation.²²

Even though SADWU is affiliated to COSATU it takes a different view and demands that the following minimum wages should be paid:

¹⁹ A Roux 'Reviving the Living Wage Campaign: but what about the Minimum Wage?' 1990 SALB 14 at 20.

²⁰ The main object of a "living wage" is to enable the worker to maintain a certain living standard, and to make it possible for the worker to satisfy certain basic needs particularly with regard to clothing, food, housing and health.

²¹ Roux *supra* at 20.

²² *Ibid.*

R450 per month for an 8 hour day for 5 days per week providing full meals, transport costs and protective clothing in respect of a full-time skilled worker and R350 per month, R80 per week or R3,50 per hour for a semi-skilled worker.²³

The 'top-down approach' of statutory minimum wage fixing may not be sensitive to characteristics of different labour sectors, especially in a country where at present most of the workers have no vote in the parliament that is to legislate on a minimum wage that could affect them.

Deciding upon an appropriate level for the 'basic floor' can be more problematic than the fixing of rates for individual labour sectors and occupations. It is difficult to assess at which point the economic disadvantages associated with higher labour costs will more than offset the social gains achieved by the raising of low wages.²⁴ However, in the developed countries where the general minimum wage has become a feature, despite controversy over the precise form and level of general minimum wages, there have been no instances where this form of state intervention has been abandoned.²⁵

In developing countries where minimum wage fixture has been used

²³ SADWU Recommended Minimum Wage 1991. Endorsed per letter 10 November 1992 from Eastern Cape Office.

²⁴ G Starr 'Minimum Wage Fixing: International Experience with alternative Roles' 1981 International Labour Review 545 at 555.

²⁵ Ibid at 556.

as a policy instrument, governments have used it as a direct and visible means to demonstrate that they are moving towards the goal of social justice.²⁶ Watanabe contends that it is quite conceivable that these countries have used minimum wage fixing with the knowledge that the statutory rates will not be enforced in sectors where they might have immediate economic repercussions.²⁷

It has been found that the introduction of a minimum wage substantially reduces the economic appeal to employers of unskilled work-seekers, women and rural people²⁸ and could lead to unemployment.²⁹

7.3 Minimum wages by administrative body determination

Minimum wage fixture can also be pursued by establishing a process for wage regulation that resembles collective bargaining. Minimum wages can thus be fixed through a decentralised system of boards and councils that, although tripartite in form, in fact places the main responsibility for initiating the proceedings and for arriving at agreed decisions on the representatives of

²⁶ G Starr 'Minimum Wage Fixing: International Experience with alternative Roles' 1981 International Labour Review 545 at 556.

²⁷ S Watanabe 'Minimum wages in Developing Countries: Myth and Reality' 1976 International Labour Review 346 at 350.

²⁸ M Lipton 'Minimum Wages, Exploitation and Botswana's Unemployment Crisis' 1980 SALB 51 at 67.

²⁹ As unemployment is argued to be a consequence of all types of minimum wage fixings, this issue will be discussed at the conclusion of this chapter.

workers and employers from the industries concerned. A Wage Board established in terms of the Wage Act³⁰ is an example of such an administrative body. At present domestic workers are excluded from the Wage Act.³¹

The Wage Act is to a large extent supplementary to the Labour Relations Act in providing for minimum conditions of employment in unorganised industries where conditions of employment are not and cannot be arranged by means of collective bargaining. The Wage Board makes recommendations with regard to minimum conditions of employment to the Minister of Manpower. These conditions, on publication in the Government Gazette, become a wage determination (which is enforceable).³² The Act establishes certain criteria that the Wage Board has to take into consideration in its recommendations with regard to conditions of employment, including, inter alia:

- i) the ability of the employer to carry on his business successfully should the recommendations of the Wage Board come into effect;³³
- ii) the cost of living in the geographical area to which the wage determination will apply;³⁴ and
- iii) the value of remuneration in kind (for example housing and

³⁰ Act 5 of 1957.

³¹ Section 1(2).

³² Section 14.

³³ Section 7(d).

³⁴ Section 7(e).

food).³⁵

The recent Labour Act of Namibia³⁶ also provides for the establishment of a Wages Commission³⁷ which can make recommendations on the minimum remuneration which ought to be paid to any employee, employees or category of employees.³⁸ The Commission shall in the course of its enquiry and with a view to its recommendations have regard to the aims of Article 95 of the Namibian Constitution³⁹ and give consideration to, inter alia, the following:

- '(a) the ability of the employer or employers or category of employers involved in the industry or area in question to carry on his or her or their businesses on a profitable basis in the event that any proposed recommendation is carried into effect;
- (b) the cost of living in Namibia or in any particular area in which the industry in question is situated;
- (c) the minimum subsistence level in any such area;
- (d) the value of any board, lodging or other benefits provided by any employer or employers or category of employers to any employee or employees or category of employees in the industry in question.'⁴⁰

³⁵ Section 7(f).

³⁶ Act 6 of 1992.

³⁷ Section 84.

³⁸ Section 91(2).

³⁹ Article 95 includes, inter alia, the payment to workers of 'a living wage adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities' as a policy objective obliging the state to 'actively promote the welfare of the people' by 'adopting appropriate policies'.

⁴⁰ Section 90.

The active association of workers' representative on the boards gives opportunity for them to submit their views about fair and reasonable wages and to influence the decisions.

Although there may be inadequate representative bodies of employers at present, the publication of an invitation to employers of domestic workers inviting them to make representations in respect of minimum wage legislation, would in all probability soon lead to the establishment of an employer negotiating body.⁴¹

The role played by minimum wage fixing by a system of wage boards and councils, is seen by Starr as a means of protecting a small number of delineated low-paid workers who, because of their special characteristics, are considered to occupy an especially vulnerable position in the labour market.⁴² According to the International Labour Organisation Convention No 26 it is generally expected that these groups should be characterised by both an absence of collective bargaining and low pay.⁴³ Domestic work is characterised by both. One of the reasons for establishing a minimum wage fixing system that resembles collective bargaining, is the desire to encourage the voluntary

⁴¹ The Department of Manpower reported that employer organisations 'mushroomed' as soon as the NMC recommendations for legislation for domestic workers were published The Weekly Mail 20-26 November 1992 at 15.

⁴² G Starr 'Minimum Wage Fixing: International Experience with alternative Roles' 1981 International Labour Review 545 at 547.

⁴³ Convention No 26 The Creation of Minimum Wage Fixing Machinery.

development of collective bargaining. In Britain, however, the Donovan Report concludes that minimum wage council fixing has not resulted in a significant improvement of the lowest paid nor in the voluntary extension of collective bargaining.⁴⁴ Despite this criticism the system has been retained in Britain.

It should, however, be noted that the 1983 National Manpower Report recorded that wage determinations were generally 25% below the Poverty Datum Line⁴⁵ as defined by various sources. Lyster,⁴⁶ in her thesis on Poverty and the Wage Act asks incisively:

'Again, to determine a wage below a poverty datum line may be construed as unjust, but given the context of a pool of unemployed workers, is it wrong to set a wage at a rate, as it is, above the rate which market forces would probably determine?'⁴⁷

7.4 Considerations and recommendations

It could be argued that it would be unwise for governments to prescribe minimum wages as this would increase unemployment, and that it is far better for a worker to be employed at a low wage than not to have a job at all because the employer cannot afford

⁴⁴ Royal Commission Report on Trade Unions and Employers' Associations (1968) 56-66.

⁴⁵ Now called the Household Subsistence Level (HSL).

⁴⁶ L K Lyster Poverty and the Wage Act LLM-thesis, (University of Natal, 1990).

⁴⁷ Ibid at 226.

to pay the prescribed minimum wage.⁴⁸ Henry Hazlitt⁴⁹ explains:

'The first thing that happens, for example, when a law is passed that no one shall be paid less than \$100 for a forty-hour week is that no one who is not worth \$100 a week to an employer will not be employed at all [sic]. You cannot make a man worth a given amount by making it illegal for anyone to offer him anything less. You merely deprive him of the right to earn the amount that his abilities and situation would permit him to earn, while you deprive the community even of the moderate services that he is capable of rendering. In brief, for a low wage you substitute unemployment.'⁵⁰

Hazlitt adds that in industry it may be possible to shift the burden of paying higher wages to consumers by charging higher prices for the product.⁵¹

It can consequently be argued, that domestic workers are not engaged directly in productive activities and are therefore not able to support their claims for higher wages by reference to profits, increased productivity and other arguments which workers in industry may use to back up their demands.

Empirical studies on the effect of the minimum wage are not conclusive. The introduction of the minimum wage in the United States has given rise to many economic publications on its effects. Many of these studies have found evidence that the legal minimum wage produces a rise in teenage and sometimes in

⁴⁸ M Robertson (ed) Human Rights for South Africans (1991) 174.

⁴⁹ H Hazlitt Economics in One Lesson (1979).

⁵⁰ Ibid at 135.

⁵¹ Idem.

adult unemployment.⁵² However, as indicated by Deakin and Wilkinson it is significant that all these studies were based on long-term aggregate data of teenage employment, derived from a single data source, the US Current Population Survey.⁵³ These econometric studies are based upon simulated modelling and it is difficult to hold them to be definitive, especially as there is no empirical evidence of what the employment pattern would have been in the absence of a minimum wage. In contrast case studies that made use of a control group of employees not affected by the statutory minimum, did not exhibit the negative employment effects measured by econometric accounts using time series data.⁵⁴ One such recent study was done in California.⁵⁵ The consequences for the teenage labour market after raising the California state minimum wage in 1987 was measured against the trends in employment in comparable states which did not enact a similar increase in their state minima. It was found that both the earnings and the employment of teenage workers increased.

Even if unemployment sometimes follows minimum wages, it need not lead to unemployment in the domestic labour sector. Convention

⁵² C Brown, C Gilroy and A Kohen 'The Effect of the Minimum Wage on Employment and Unemployment' 20 (1982) Journal of Economic Literature 487 at 491.

⁵³ S Deakin and F Wilkinson 'The Law and Economics of the Minimum Wage' 1992 Journal of Law and Society 379 at 382.

⁵⁴ S Deakin and F Wilkinson 'The Law and Economics of the Minimum Wage' 1992 Journal of Law and Society 379 at 383.

⁵⁵ D Card 'Minimum Wages and the Teenage Labour Market: A Case Study of California, 1987-1989 (1990)' 43 Proceedings of the Industrial Relations Research Association 234.

No 131⁵⁶ mentions the desirability of attaining and maintaining a high level of employment as one of the factors to be taken into consideration in determining minimum wage levels. Where employers cannot afford to employ a worker full-time at the minimum wage hourly rate, the worker could be employed for the time that the minimum wage rate can be afforded. This would enable the employee to engage in other employment during the remainder whereby her income could be supplemented. In this way a wage is paid commensurate with the employers' ability to pay, yet, at the same time, the worker is protected against exploitation.

Given that since the turn of the century almost all countries have adopted minimum wage regulation in some form or another;⁵⁷ that individual domestic workers are too weak in bargaining with employers for higher wages and given that organised collective bargaining in the domestic labour sector is non-existent, minimum wage fixing as a means of protecting workers from exploitive wages, is an option that cannot be ignored.

It now remains to be decided which kind of wage fixing mechanism would be best suited to the particular circumstances of domestic work. Starr's categorising of the different roles minimum wage fixing is called upon to play, is pertinent. One function of minimum-wage fixing is the protection of vulnerable groups of

⁵⁶ Convention No 131 concerning Minimum Wage Fixing with Special Reference to Developing Countries.

⁵⁷ G Starr 'Minimum Wage Fixing: International Experience with alternative Roles 1981 International Labour Review 454.

workers. Domestic workers, because of their weak bargaining position, fit this category. Wage determination by administrative bodies is often used to fulfil this role. This system enables participation of both workers' and employers' representatives in a system that closely resembles collective bargaining. The minima fixed are not confined to a single wage rate for the entire labour sector and can establish rates differentiated in accordance with attendant differences.⁵⁸ At the same time the machinery could be used to regulate other terms of employment. Moreover in South Africa the infrastructure created by the Wage Act already exists. Only minor amendments need to be made to the Wage Act to include domestic workers.

⁵⁸ Section 19 of the Wage Act inter alia provides that an exemption can be granted to an employer from provisions of a wage determination if special circumstances exist which will justify such an exemption in the interests of the employee concerned. Circumstances that could give rise to such an exemption could be where a domestic worker risks unemployment because her employer faces economic difficulties. In such circumstances it could be 'in the interests' of the employee to be paid less than the wage determination, rather than face complete unemployment.

CHAPTER EIGHT

CONSIDERATIONS & RECOMMENDATIONS FOR LAW REFORM:

THE DOMESTIC WORKER AND 'THE UNFAIR LABOUR PRACTICE' CONCEPT

8.1 Introduction

Brassey¹ makes the following observation on the Labour Relations Act:

'The Act differs from the common law in two important respects: it gives the collective precedence over the individual, and it acknowledges that the broader community also has an interest in industrial peace and stability. Where the common law only sees a bi-polar relationship between the individuals, the statute sees as triangle of interests - capital, labour and society at large - each represented by collectives - trade unions, employers or employers' organisations, and the state.'²

An employment relationship governed by the Act is infused with rights and duties that do not 'originate in fictitious assent, but have their roots in societal values'.³ Admittedly it can be said that the domestic employment relationship is not an industrial concern, because it is not a branch of trade or manufacture. But this does not mean that society has no interest in the content of the employment relationship. It has

¹ M S M Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213.

² Ibid at 235.

³ B Jordaan 'The Law of Contract and the Individual Employment Relationship' 1990 Acta Juridica 73 at 86.

been argued that society has an interest in the way in which rights are exercised in the employment relationship so that contracts are not used by employers in the words of Powell⁴ as 'a shibboleth to cloak conduct which adversely affects the health, safety, the morals and welfare of others.'⁵

Although, as indicated in Chapter 5, domestic workers might not stand to gain much from their inclusion in the collective bargaining structures of the Labour Relations Act, the same cannot be said if they were to be given access to the industrial court and its unfair labour practice jurisdiction. We shall now examine the latter possibility.

The recommendation of the National Manpower Commission⁶ is that domestic workers should be included under the provisions of the Labour Relations Act, with certain exceptions to meet the circumstances of the domestic sector. Consequently this would mean that the definition of 'unfair labour practice' introduced by the 1991 Amendment Act⁷ should apply to employers and employees of the domestic labour sector by the necessary amendment to section 2 of the Act. The definition reads as

⁴ R Powell 'The Relationship between Property Rights and Civil Rights' (1963) Hastings Law Journal 131.

⁵ Ibid at 135.

⁶ GN 850 GG No 13511 13 September 1991 at 42.

⁷ Labour Relations Amendment Act 9 of 1991.

follows:

'unfair labour practice' means any act or omission other than a strike or lock-out which has or may have the effect that -

- i) 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 jeopardized thereby;
- ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
- iii) labour unrest is or may be created or promoted thereby;
- iv) the labour relationship between employer and employee is or may be detrimentally affected thereby'.⁸

The question can be asked whether the various guidelines laid down by the industrial court in the exercise of its unfair labour practice jurisdiction practically apply in the domestic sector.

8.2 The unfair labour practice

In making an unfair labour practice determination the industrial court is not primarily concerned with the enforcement of legal rights in accordance with the common law, but with the principles of fairness.⁹ The Shorter Oxford English Dictionary

⁸ Section 1(1).

⁹ National Union of Mineworkers v East Rand Gold & Uranium Co Ltd (1991) 12 ILJ 1221 (A).

describes the word 'fair' as 'free from bias, fraud or injustice; equitable, legitimate' and the word 'fairness as 'the quality or condition of being fair.'

'Fairness' according to UAMAWU v Fodens¹⁰ 'is the righteousness of the particular case; it can therefore only become relevant in specific situations....In so far as fairness is applicable all relevant matters surrounding the specific case in the framework that reasonably belongs to the actual supposition are to be taken into account and the deciding criteria are to be uncovered, evaluated and weighed.'¹¹ Fairness is subjective and must take account of human fallibility and of the fact that reason is seldom the sole-guide of human behaviour.¹² It can therefore be expected of the employer sensitively to respond to deeply felt needs of his work-force, yet at the same time not to abdicate his responsibilities and refrain from imposing discipline.¹³

In Die Raad van Mynvakbonde v Die Kamer van Mynwese van SA¹⁴ the court stated that although the common-law principles were still

¹⁰ (1983) 4 ILJ 212 (IC).

¹¹ At 225.

¹² SACWU v C E Industrials (Pty) Ltd t/a Panvet (1988) 9 ILJ 639 (IC) at 649J.

¹³ At 650A.

¹⁴ (1984) 15 ILJ 344 (IC) at 362E-H.

valid and had to be taken into account, the consequences of these principles might be altered by the remedy granted after the determination of an unfair labour practice. Justification for a dismissal at common law will not render a dismissal fair.¹⁵ It is not necessarily sufficient to give notice of termination of employment in accordance with the provisions of a contract of service.¹⁶ Fairness, then, is a concept that goes much further than mere legality in the context of the common law contract of employment. The industrial court has stated that:

'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 provision of such jurisdiction nugatory, for the employee would then be given no further rights than those he has all along enjoyed at common law'.¹⁷

Attempts to define 'fairness' generally emphasise the amorphous nature of the concept.

In conclusion to an analysis of the different ways in which the industrial court has gone about giving content to the concept of

¹⁵ Gumede v Richdens t/a Richdens Foodliner (1984) 5 ILJ 84 at 92D; NUM v Driefontein Consolidated (1984) 5 ILJ 101 (IC) at 1461 et seq.

¹⁶ Clarke v Ninian and Lester (Pty) Ltd (1988) 9 ILJ 651 (IC) at 645I-J.

¹⁷ Metal & Allied Workers Union v Barlows Manufacturing Company Ltd (1983) 4 ILJ 283 (IC) at 294A.

'fairness', Marais¹⁸ says the following:

'Ná ontleding van die abstrakte begrip "billikheid" en die nywerheidshof se werksyfes kan 'n mens nie anders as om tot die gevolgtrekking te kom dat die nywerheidshof geensins daarin geslaag het om sinvolle praktiese inhoud aan die begrip "billikheid" soos vervat in die definisie van "onbillike arbeidspraktyk" te verleen nie, maar daarby volstaan het om in spesifieke situasies afhangende van die feite en omstandighede van die saak, sekere riglyne neer te lê. Hierdie riglyne word nie deur die nywerheidshof as rigiede vereistes toegepas nie, maar eerder as 'n vae omlýning van wat billike optrede in die arbeidsverhouding-sfeer behels. Die nywerheidshof voel hom geensins aan hierdie riglyne gebonde nie. Dit is duidelik dat die nywerheidshof tot op hede gefaal het om die sentrale begrip "billikheid", in die begrip "onbillike arbeidspraktyk" na behore te omlýn en te struktureer en daardeur 'n praktiese inhoud te gee aan die begrip en die uitoefening van sy jurisdiksie ten opsigte van "onbillike arbeidspraktyke".'¹⁹

There is no numerus clausus of acts that constitute an unfair labour practice. Most decisions of the industrial court stem from disputes originating from dismissals. The principles formulated by the industrial court in regard to these cases will, if domestic workers are to be governed by the Act, apply. At present dismissals form the majority of Small Claims Court cases which involve domestic workers.²⁰

The remainder of this chapter will therefore specifically look

¹⁸ N J Marais Onbillike Arbeidspraktyke in die Suid-Afrikaanse Reg (1989).

¹⁹ Ibid at 39.

²⁰ In Johannesburg Small Claims Court an average of 50 cases involving the dismissal of domestic workers are heard per month.

at the implications of unfair dismissals.

8.2.1 Unfair dismissal

For a dismissal to be fair it has to be both substantively and procedurally fair: 'The employer's *right* to take disciplinary action against an employee may not be divorced from the employer's *duty* to observe and implement the tenets of industrial justice, of which the need to hold a fair and proper enquiry is invariably an essential ingredient.'²¹

8.2.1.1 Substantive fairness

Where it has been alleged that employees have been unfairly dismissed, the first question which the court must investigate is whether the dismissals were substantively fair. The court will accordingly enquire whether the grounds on which the employer relies to justify the dismissals actually exist, and whether the gravity of the offence warranted dismissal.

'Valid' does not mean the employer must necessarily have a reason which would entitle him lawfully to terminate employment summarily. In Govender²² 'valid' was taken to mean that the

²¹ National Union of Mineworkers v Durban Roodepoort Deep Ltd (1987) 8 ILJ 156 (IC) at 164I-J.

²² Govender v SASKO (Pty) Ltd t/a Richards Bay Bakery (1990) 11 ILJ 1282 (IC).

facts on which the reason is based are established - that the reason is 'sound and germane to the question of employment'.²³ '[T]he reason for dismissing is the basis of the enquiry in any dismissal case; it is by reference to this reason that the fairness must be judged.'²⁴ On the question of fairness the employer's belief, however reasonable, should not be decisive.²⁵

Basic industrial relations lore²⁶ permits dismissal on three grounds only: for misconduct, for incompetence/incapacity and for operational requirements.²⁷

Valid and current²⁸ prior warnings with regard to related

²³ Govender v SASKO (Pty) Ltd t/a Richards Bay Bakery (1990) 11 ILJ 1282 (IC) at 1286G.

²⁴ M S M Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 217.

²⁵ Food & Allied Workers Union v SA Breweries Ltd (Denver) (1992) 13 ILJ 209 (IC) at 214I-J.

²⁶ International Labour Organisation Convention 158 and Recommendation 166 require that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the misconduct of the worker, the capacity of the worker to perform her job, or the operational requirements of the employer's business.

²⁷ At common law gross misconduct or incompetence are the only two grounds for summary dismissal. An employer who wishes to dismiss for operational reasons must wait for the contract to expire: see, for example, C Norman-Scobbe The Law of Master and Servant in SA (1956) 158.

²⁸ A warning does not usually remain in force for an indefinite period and in National Union of Mineworkers v East Rand Proprietary Mines Ltd (1987) 8 ILJ 315 (IC) it was held that a written warning only remains valid for six months.

offences²⁹ could have a bearing on the assessment of the fairness of the case.³⁰

The existence of prior warnings does not, however, on its own justify the decision to dismiss.³¹ The nature and seriousness of the breaches committed by the employee must be investigated and considered.³²

A warning will indicate that the employee knew that the employer did not condone his conduct and that he was given the opportunity to improve his conduct. The giving of warnings constitutes a way in which employees are notified that their conduct might lead to dismissal.³³

A code of practice could probably give direction on a graded warning system in the domestic sector. The code of practice could make use of a grid system of offences, which provides for a progression of warnings. The existence of prior warnings does

²⁹ Cholota v Trek Engineering (Pty) Ltd (1992) 13 ILJ 219 (IC) at 224D Contra Paper Printing Wood & Allied Workers Union v Mondi Paper Waste Co Ltd t/a Mondi Paper Waste (1992) 13 ILJ 640 (IC) at 646A-B.

³⁰ E Cameron et al The New Labour Relations Act: The Law after the 1988 Amendments (1989) 145.

³¹ Nodlele v Mount Nelson Hotel (1984) 5 ILJ 216 (IC) at 225B-C.

³² At 225C-D.

³³ National Unions of Metalworkers of SA v Elm Street Plastics t/a ADV Plastics (1989) 10 ILJ 328 (IC).

not on its own justify the decision to dismiss. Mitigating factors may therefore be taken into account to impose lesser punishment.

Acts of misconduct such as theft,³⁴ insubordination,³⁵ drunkenness,³⁶ and absence without leave will constitute valid reasons for the employer to take disciplinary steps.

Where incompetence is the complaint it should, just as in the

³⁴ The gravity of this form of misconduct was emphasised in a recent decision of the Labour Appeal Court. It stated:

"In my view it is axiomatic to the relationship between employer and employee that the employer should be entitled to rely on the employee not to steal from the employer. This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and the relationship between employer and employee." Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union of SA (1991) 12 ILJ 340 (LAC) at 334F-H.

³⁵ In a recent arbitration award (Checkers SA Ltd (South Hills Warehouse) v SA Commercial Catering & Allied Workers Union (1990) 11 ILJ 1357 (ARB) Cameron remarks that with regard to the lawful amount of an employee's responsibilities management's prerogative to act unilaterally is considerably restricted (1365H). Managerial prerogative cannot be held to make the employee submissable to instructions of whatever kind the employer might choose to impose (1366A). Employers of domestic workers should therefore be clear on what exactly is required to do or how she is required to do it. Once the boundaries of the employee's agreed contractual duties have been established, it will be easier to determine whether she disobeyed instructions.

³⁶ In Rosenberg v Mega Plastics (Pty) Ltd (1984) 5 ILJ 29 (IC) an employee who was driving under the influence of alcohol was said to be more serious than that of a drunk on the premises. (33A) A domestic worker who is in charge of her employer's house and equipment and is drunk, also poses a very serious threat to the property entrusted to her.

common law,³⁷ be of a serious degree.³⁸ Usually the employer should warn the employee that her work is not satisfactory and that she will be dismissed if her work does not improve.³⁹ The employer should also, where reasonable and applicable, provide the necessary training to enable the employee to improve herself.⁴⁰

'Incompatibility and the breakdown of the relationship of trust' are recommended by the Manpower Commission as factors to be taken into account as a fair and valid reason for dismissal.⁴¹ In Wright v St Mary's Hospital⁴² the industrial court held that the breakdown of the working relationship should be irremediable, before dismissal becomes the only solution.⁴³ The domestic employment relationship is of its very nature a very personal, private and individualistic one: The home of the employer and the place of employment is one. In the case of resident workers their work place and their home is present within the privacy of the family circle. In the interest of

³⁷ Friedlander v Hodes Bros 1944 CPD 169.

³⁸ Madayi v Timpson Bata (Pty) Ltd (1987) 8 ILJ 494 (IC) at 496F.

³⁹ At 497A.

⁴⁰ Rhodes v SA Bias Binding Manufacturers (Pty) Ltd (1985) 6 ILJ 106 (IC) at 120E-F.

⁴¹ GN 850 GG No 13511 13 September 1991 at 40.

⁴² (1992) 13 ILJ 987 (IC).

⁴³ Ibid at 1004 A-D.

good labour relations it is important that the employer and employee should be compatible. According to the The Concise Oxford Dictionary 'compatible' means 'able to co-exist; mutually tolerant; able to be used in combination'. The personal and intimate aspects of the employment relationship in the case of domestic workers could go far to prove that the breakdown of the working relationship has in fact become irremiable.

In a relationship in the nature of the domestic service contract, compatibility between the employer and employee should carry considerably more weight than in employment relationships where the contact between the employer and employee is not of such direct and close a nature. Even though incompatibility can constitute a valid reason for dismissal, a fair procedure should also be adhered to.⁴⁴

What should happen where an employee's employment has become superfluous due to economic reasons? A useful point of departure should be that an employee should be entitled to the

⁴⁴ A fair procedure requires that the employee must be advised what conduct allegedly caused the disharmony; who has been upset by the conduct; what remedial action is suggested to remove the incompatibility; that the employee be given a fair opportunity to consider the allegations and prepare his reply thereto; that he is given a proper opportunity of putting his version; and where it is found that he was responsible for the disharmony he must be given a fair opportunity to remove the cause for disharmony. See Wright v St Mary's Hospital (1992) 13 ILJ 987 at 1004I-J.

maintenance of the security of his job.⁴⁵ The employer should therefore consider ways to avoid retrenchment, for example allowing the employee to work fewer days. If these measures fail, the employee should be given prior warning of the retrenchment.⁴⁶

Where domestic workers of long standing are dismissed because they are no longer needed, it seems fair to ameliorate their situation by the payment of severance benefits.

In Cele v Bester Homes⁴⁷ the court, following Lord Denning's remark in Lloyd v Brassey⁴⁸ that 'a worker of *long standing* is now recognised as having accrued rights in his job...[which] *gain value over the years*', imposed a threshold of one year's service for entitlement of severance benefits⁴⁹ and awarded two weeks' pay for each year of service.⁵⁰

The adoption of the foregoing approach would transfer the spirit of equity to the domestic labour sector where collective

⁴⁵ Food & Allied Workers Union v Ameens Food Products & Butchery (1988) 9 ILJ 659 (IC) at 668B-F.

⁴⁶ H Cheadle 'Retrenchment: The New Guidelines' (1985) 6 ILJ 127 at 129.

⁴⁷ (1990) 11 ILJ 516 (IC).

⁴⁸ [1969] ITR 100 (CA).

⁴⁹ Cele v Bester Homes *supra* at 513A-B.

⁵⁰ At 532A.

bargaining is in its infancy and where the workers are not entitled to unemployment benefits. However, the labour appeal court has held that in the absence of legislation, contract or a collective agreement to that effect, severance pay is not a legal right.⁵¹

In a recent labour appeal court⁵² decision of the Cele case, Thring J held that a dispute about the payment of severance benefits is a matter of substantive economic interest, which should be the subject of either individual or collective bargaining⁵³ and it would therefore be undesirable for the industrial court to become involved in such a matter.⁵⁴ Neither can the unfair labour practice jurisdiction be extended to disputes of pure economic interest.⁵⁵

8.2.1.2 Procedural fairness

The Roman Seneca said the following more than 2 000 years ago:
'He who has come to a finding without hearing the other party,

⁵¹ Young v Lifegro Assurance Ltd (1991) 12 ILJ 1256 (LAC) at 1265G-H.

⁵² Bester Homes (Pty) Ltd v Cele (1992) 13 ILJ 877 (LAC).

⁵³ At 893F.

⁵⁴ At 894H.

⁵⁵ At 897I.

has not been just, even though his finding may have been just'.⁵⁶ It has been held that the process of a hearing has value which in the context of industrial relations practice is to be encouraged for its own good, as it satisfies the expectation of the person who stands accused that he will be given a fair hearing and recognizes his or her worth as a human being.⁵⁷

The object of the enquiry is 'to endeavour to investigate any complaint against an employee, as honestly and as objectively as is possible, so that he or she is not dismissed for want of a just cause and without having been afforded a fair and a reasonable opportunity of speaking in rebuttal or in mitigation of the complaint in accordance with the audi alterem partem rule.'⁵⁸

The question now arises whether with regard to the one-on-one nature of the employment relationship in the domestic sector, the requirement of a hearing should not be dispensed with.

The nature and size of the employment concern has been taken into account in certain industrial court decisions.

⁵⁶ L Baxter Administrative Law (1984) at 537 fn11.

⁵⁷ National Automobile & Allied Workers Union v Pretoria Precision Castings (1985) 6 ILJ 369 (IC) at 378-9.

⁵⁸ National Union of Mineworkers & Others v Durban Roodepoort Deep Ltd (1987) 8 ILJ 156 (IC) at 165A-B.

In Bohani v Golden Gate Take Aways⁵⁹ it was the court's view that in a one-man establishment insistence on an enquiry would mean going through the motions and ending up in a complete charade. The court also held that such an enquiry would have made no difference to the outcome. This case was decided in terms of para (a)(ii) of the unfair labour practice definition of the 1988 Act, which made dismissal possible in the absence of a disciplinary enquiry if it could not reasonably be expected of an employer to hold an enquiry.

However in two unreported industrial court cases⁶⁰ discussed in a National Manpower Commission Report,⁶¹ although a less formal and less technical disciplinary hearing was conceded, it was held that small businesses⁶² are still required to comply with the basic requirements of a fair hearing.

There is a danger in likening the domestic employment

⁵⁹ (1990) 11 ILJ 406.

⁶⁰ Amalgamated Black Workers Union v Sparkle Dry Cleaners 1 April 1987 NH 13/2/1865; Steel, Engineering and Allied Workers Union of SA v Bushco Manufacturing 9 March 1987 NH 11/2/649.

⁶¹ The Influence of Relevant Labour Legislation on the Small Business Sector July 1991.

⁶² The concessions to small businesses with regard to labour legislation as envisaged by Manpower Commission Recommendations stated in GN 348 GG 13925 1992 only relate to businesses which inter alia employ no more than five permanent employees (see 2.7), therefore the Buscho Manufacturing case supra is not a good example of a small business.

relationship to those in small businesses. The above cases cited involved a workforce of several individuals, where the household usually only employs one domestic worker. A small business is usually more structured than a household to provide for an unbiased hearing: Where the employer in domestic employment is the only other person concerned, it is difficult to see how one of the fundamental principles of a fair hearing namely *nemo index in sua causa* can be overcome.

In a recent decision of the labour appeal court,⁶³ where the chairperson of the hearing had peripherally been involved in events which gave rise to the hearing, bias of prejudice was not found. The court referred to the following exposition by Cameron:⁶⁴

'The principle seems to be this: while allowance will be made for the unavoidable practicalities of prior contact, personal impression and mutual reaction in the employment relationship, any further feature which precludes the person hearing the complaint from bringing an objective and fair judgment to bear on the issues involved - such as bias or presumed bias stemming from a closed or prejudiced mind or from a family or other relationship - will render the procedure unfair. The importance of appearances in this area must not be left out of account and it is submitted that where an employee has a reasonable basis for believing that something more than merely the traces unavoidably left by prior contact in the employment relationship is present and that this precludes a fair hearing, a complaint on the grounds

⁶³ Anglo American Farms t/a Boschendal Restaurant v Komjwayo (1992) 13 ILJ 573 (LAC).

⁶⁴ E Cameron 'The Right to a Hearing before Dismissal - Part 1 (1986) 7 ILJ 183.

of bias should be upheld.⁶⁵

The court also referred to Monnig v Council of Review.⁶⁶ The test put forward there was: '[whether] it appears that there is, or is feared to be, a real likelihood, that is to say, a probability, of (actual) bias on the part of the decision-maker or adjudicator.'⁶⁷ The court found it unnecessary to find which should be the applicable test in the case and held that the test is whether the hearing is fair when the proceedings are judged in their broad perspective.⁶⁸ Subsequently the Appellate Division⁶⁹ has held that in an application for recusal the existence of a reasonable suspicion of bias by a lay litigant satisfies the test to determine whether bias is present in a judicial tribunal.⁷⁰ The apprehension of a real likelihood that the decision-maker will be biased is not a prerequisite for disqualifying bias; all that needs to be proved is whether the reasonable man would have had an apprehension of bias on the part of the decision-maker.⁷¹ Application of this test to the

⁶⁵ E Cameron 'The Right to a Hearing before Dismissal - Part 1 (1986) 7 ILJ 183 at 213.

⁶⁶ 1989 (4) SA 866 (C).

⁶⁷ At 879H-I.

⁶⁸ At 583F-G.

⁶⁹ BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union 1992 (3) SA 673 (AD).

⁷⁰ At 693I-J.

⁷¹ Ibid.

domestic service sector, would probably always result in disqualifying the decision-maker on the grounds of bias. The endemic conflict of interests embedded in the employment relationship, the perceived inequality of status and probably the difference of race between employer and employee, would time and again form reasonable grounds for an apprehension of bias. If the employer is prevented in this way from complying with the procedural requirement, inevitably no procedure will be followed at all. The hearing in BTR Industries SA (Pty) Ltd v Metal & Allied Workers' Union can however be distinguished from a hearing afforded an employee by an employer. In the former a judicial tribunal, viz. the industrial court was at issue, whereas in the latter a domestic disciplinary tribunal is involved. In the employment situation, I propose that the principles applied in Komjawyo⁷² should apply. It can therefore be argued that where the employee knows the nature of the accusation against her, where she is given an opportunity to state her case and where the employer acts in good faith, the basic requirements for a fair procedure have been met.⁷³

There are, however, situations where a hearing would in fact be nothing more than a 'charade' of 'going through the motions'. Matters which involve insolence or insubordination directed at the employer, would not be constructively handled if a 'hearing'

⁷² (1992) 13 ILJ 573 (LAC).

⁷³ At 587B-D.

was given. In these cases it can not reasonably be expected of an employer to conduct an enquiry.

In the domestic labour sector where the parties to the contract more often than not belong to different language groups, both the employer and employee should be entitled to the presence of an interpreter, when needed.

8.3 Dismissal during probation

In order to dismiss a probationer the same general equitable principles will apply.⁷⁴ With regard to domestic work the majority of workers are engaged in a very informal manner, with no specialized personality tests as to personal suitability, yet the personal relationship between the employer and employee is of paramount importance to the success of the employment relationship. During the probation period both parties can ascertain whether a long term employment relationship will be feasible. It can therefore be argued that the employer should have the liberty to end the employment relationship before or on expiration of the probation period by giving notice and that the Act should specify that such termination of services by notice

⁷⁴ J Grogan 'Dismissal of Probationary Employees - A Postscript' (1990) 11 ILJ 266 at 273.

shall not be deemed to be an unfair labour practice.⁷⁵

However, the question remains whether it could not be possible to apply the same principles as to other workers while at the same time bearing the unique personal nature of the employment and the employers' interest in mind.

To genuinely apply fairness to the situation several factors (inter alia the personal nature of the employment and the employer's interest) should be kept in mind. In UAMAWU v Fodens⁷⁶ the court observed:

'In so far as fairness is applicable all relevant matters surrounding the specific case in the framework that reasonably belongs to the actual supposition are to be taken into account.'⁷⁷

The personal nature of the employment and the employer's interests are matters surrounding the issue and are factors to be taken into consideration in determining the fairness of the dismissal. Mere incompatibility should be sufficient to dismiss during probation without the need to go through a process of counselling. Counselling would imply that the employee should

⁷⁵ A recommendation of the National Manpower Commission is that a domestic worker and his employer should be able to agree on a probationary period that does not exceed three months, during which time no procedures need to be followed or reasons given prior to termination of employment. GN 850 of GG 13511 13 September 1991 at 42.

⁷⁶ (1983) 4 ILJ 212 (IC).

⁷⁷ At 225.

be given time for improvement, by which time the period of probation most probably might have expired.

This is what De Villiers A M might have had in mind in Black Allied Workers Union v One Rander Steakhouse⁷⁸ when he suggested that probationary employees may be dismissed for reasons less substantial than would be required in the case of those not on probation. I therefore agree with a three month probation period, during which dismissal can be effected without giving reasons or following any procedures.

8.4 Appropriate relief

Section 46(9)(6) obliges the industrial court to determine the dispute on such terms as it may deem reasonable, including, but not limited to, the ordering of reinstatement or compensation. The court has a discretion to order the appropriate relief in order to eradicate the unfair labour practice. The domestic sector will in all probability be an area where the court will exercise its discretion against physical reinstatement. It has been held that if an unfair dismissal occurs, the inference is that fairness demands reinstatement and it is for an employer to raise the factors which displace such inference.⁷⁹ Employers

⁷⁸ (1988) 9 ILJ 326 (IC) at 330G-I.

⁷⁹ Sentraal-Wes (Koöp) Bpk v Food & Allied Workers Union (1990) 11 ILJ 977 (LAC) at 944E.

of domestic workers should be relieved of this onus, as appropriate compensation can provide an adequate alternative. Where the relationship between parties 'has irretrievably broken down' the court has been loath to order reinstatement.⁸⁰ Where the nature of a business required the employees to work closely together,⁸¹ the court has been similarly reluctant to order reinstatement.

Compensation ordered in terms of section 46(9)(6) differs from the common-law relief of damages, as it need not be mitigated.⁸² Jordaan contends that where compensation is ordered instead of reinstatement, the worker should be compensated adequately for the loss, financial and otherwise, that results from dismissal.⁸³ For most employees their ability to earn a living may be the most meaningful form of wealth that they may ever have, and this should be kept in mind when the court exercises its discretion.

⁸⁰ Commerical Catering & Allied Workers Unions of SA & Others v Wooltru (Ltd) t/a Woolworths (Randburg) (1989) 10 ILJ 311 (IC) at 319F.

⁸¹ Kompecha v Bite My Sausage CC (1988) 9 ILJ 1077 (IC) at 1083E.

⁸² See M S M Brassey 'Specific Performance - a New Stage for Labour's Lost Love' (1981) 2 ILJ 57 at 66; contra Clarke v Ninian and Lester (Pty) Ltd (1988) 9 ILJ 651 (IC) where the court reduced the amount of compensation, because the employee failed to accept alternative employment that was available.

⁸³ B Jordaan 'Herindiensstelling as Remedie vir Onbillike Ontslag' 1990 SA Merc LJ 207 at 215.

The unfair labour practice determination is final and binding.⁸⁴

Failure to comply with the final order is a criminal offence.⁸⁵

8.5 Conclusion

Fairness is, as indicated above, a notion that is difficult to capture. Dworkin in his essays on Taking Rights Seriously⁸⁶ makes an important distinction between a *concept* and a *conception* and uses the following example as illustration:

'Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my 'meaning' was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair; or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conceptions* of fairness I might have in mind.'⁸⁷

He therefore identifies a *concept* as a general idea or ideal and a *conception* as a specific representation of the generalised concept. While I agree that the *concept* 'fairness' should be

⁸⁴ Section 49(1).

⁸⁵ Section 52(1).

⁸⁶ Dworkin Taking Rights Seriously (1977).

⁸⁷ Ibid at 134.

retained in the Act as such and no attempt should be made to codify the standards which it requires, lest the flexibility needed to come to equitable results is lost, there is a need for *conceptions* of 'fairness' as a guideline for employment behaviour.

While the *concept* of 'fairness' should be entrenched in legislation in order to retain flexibility to produce equitable results when applied to any given situation, the *conceptions* of fairness in a code of practice could direct the behaviour of employers and employees. Unger⁸⁸ explains the reasoning behind this argument as follows:

'When attempts are made to codify standards, to reduce them to rules, their character is distorted. Either a large area of uncontrolled discretion and individualization subsists under the trappings of general norms, or the flexibility needed to make managerial decisions or to produce equitable results is lost...'⁸⁹

If domestic workers were to be given recourse to the Labour Relations Act the 'unfair labour practice' notion as such may be difficult and too abstract for both employers and employees to understand. If employers knew the kinds of actions that could constitute an unfair labour practice, they could prevent them from occurring. Likewise, if domestic workers could be guided as to the actions for which they could have recourse to the Act,

⁸⁸ R M Unger Law in Modern Society (1976).

⁸⁹ Ibid 197.

their inclusion under the Act would be meaningful. I suggest that a code of practice be drawn up as recommended and that this code should include a list of duties the infringement of which would constitute an unfair labour practice.

CHAPTER NINE

CONSIDERATIONS AND RECOMMENDATIONS FOR LAW REFORM:
DISPUTE RESOLUTION PROCEDURES9.1 Introduction

Conflict between employers and workers can be said to be an inescapable ingredient of life in the work-place.¹ Bercovitch² identifies the following sources of conflict: a) general differences (educational, cultural, political differences); b) role and goal differences (workers and management have different expectations and goals) and c) functional differences (workers and management have different demands, constraints and responsibilities). Labour disputes are the visible products of conflict and dispute resolution procedures must reach the sources of that conflict.

In practice, one can distinguish between different types of labour disputes for the purpose of applying different procedures of settlement. Two main distinctions have been developed: the first is based on the number of persons involved in the dispute, which determines its individual or collective character. The second is based on differences in the nature of the issues involved. This entails the difference between issues regarding the application or interpretation of existing rights (a dispute

¹ C Summers 'Patterns of Dispute Resolution: Lessons from four Countries' in A Rycroft (ed) The Private Regulation of Industrial Conflict (1990) 6 and 16.

² J Bercovitch Social Conflicts and Third Parties (1984) 61.

of right) and those regarding the establishment of new rights (a dispute of interest).

Under the second distinction, for the purpose of the settlement procedures, conflicts of rights are those arising from the application or interpretation of an existing law, a collective agreement or a contract of employment.³ Disputes of right are normally referred to as 'grievances' and the International Labour Organisation Recommendation 130 on the Examination of Grievances states:

'The grounds for a grievance may be any measure or situation which concerns the relations between employer and worker or which affects or may affect the conditions of employment of one or several workers in the undertaking when that measure or situation appears contrary to provisions of an applicable collective agreement or of an individual contract of employment, to works rules, to laws or regulations or to the custom or usage of the occupation, branch of economic activity or country, regard being had to the principles of good faith.'

Interest disputes, by contrast, are those in which a party seeks to establish a new right,⁴ for example, whether the worker should be paid a better wage than the existing one. Disputes of interest are conventionally referred to as 'disputes'. Disputes of interest concern the determination of new terms and conditions of employment. The problems inherent in collective bargaining in the domestic labour are discussed in Chapter 5. Disputes arising from domestic employment will by and large be individual

³ Anon 'Recognition - Dispute and Grievance Procedures' 1985 (2) Employment Law 4.

⁴ Ibid at 4.

in nature and concern rights.

The most appropriate dispute resolution system for employers and employees in domestic employment relations would be one that could be understood by all, one which is cheap, easily accessible and which ensures expeditious settlement of disputes. The involved and complex machinery of the Labour Relations Act cannot adequately serve this purpose.

A simplified system, in the spirit of the Labour Relations Act, might however be a workable solution. The Manpower Commission recommended⁵ that there should be an obligation on the party initiating the dispute to endeavour to set up a meeting with the other party with a view to settlement. If the other party is not willing to attend, or if no settlement is reached, the aggrieved party may then refer the dispute to court. It is not clear from this recommendation whether this meeting only involves the two disputants, because if there is no third party intervention in the form of mediation or arbitration, the unequal bargaining power of the parties could jeopardize a settlement. It would be the wrong way to go about resolving conflict if the dispute were to be referred to a court immediately if the two parties involved cannot reach a settlement in the first instance.

⁵ GN 850 GG No 13511 13 September 1991 at 43.

Karl Llewellyn⁶ wrote that:

'Disputes are the eternal heart and core of law. They do not mark its circumference, but they will always mark its centre. It is when two parties are in dispute, it is especially when they are in a dispute not otherwise settled that law shows its first societal value.'⁷

In this formulation, Llewellyn not only recognises the centrality of conflict resolution to the task of law, but also the truth, that resorting to law is not the only way of resolving disputes. It is, he says, because:

'so many disputes are settled in one way or another, by wrangling or simply self-assertion on the one side and submission on the other; or by bargaining or compromise or mediation. The primary business of law is not with this. Law on its dispute side is the machinery of last resort, when these others have failed.'⁸

With regard to this exposition by Llewellyn it should be possible for the disputants at the first level of dispute resolution to choose between mediation or arbitration and to resort to court adjudication only if mediation or arbitration fails.

9.2 Mediation

Mediation is the dispute resolving process in which a third party facilitates and coordinates the negotiations of the disputing

⁶ K N Llewellyn Jurisprudence: Realism in Theory and Practice (1962).

⁷ Karl N Llewellyn Jurisprudence: Realism in Theory and Practice (1962) 79.

⁸ Idem.

parties, whereas arbitration or court adjudication is a dispute resolving process in which parties present their dispute to a third party who has the power to make a decision that will be binding on the disputants.

Douwes Dekker⁹ contends that mediation is most appropriate for situations where the parties are involved in reconciling conflicts of interests, for instance, where there is a power struggle on economic issues.¹⁰ He concedes that it can also be considered as a first step when an impasse is reached in a conflict of rights. This means that mediation could be reverted to the interpretation of established rights, clauses in agreements or where common law norms are in dispute. Mediation is a method of conflict resolution that is conclusive to resume good working relations, contrary to the adversarial nature of arbitration and court adjudication.

A mediator should be neutral and impartial and should act as a channel for communication between the parties. The mediator can help parties to clarify their problems, guide them through the issues that need to be resolved and can indicate alternative solutions to the problem, but does not make the final decision. In mediation the parties to the dispute should come to a solution. Mediation makes it possible for the disputants to feel that they do not only have a hand in their own destiny, but the

⁹ L C G Douwes Dekker 'Guidelines for Reconciling Industrial Conflicts' (1985) IR Journal 32.

¹⁰ Ibid at 34.

ability to solve their own problems.

If mediation fails, the parties should have the choice of either arbitration or court adjudication.

9.3 Arbitration

The word 'arbitration' is derived from the Latin arbitrii, meaning 'to give judgment' or 'to make a decision'. Although the method by which the dispute is settled is similar to judicial settlement, arbitration emphasises private regulation of conflict. Whereas in the latter method the presiding officer is a state-appointed public official, in the original conception of arbitration the arbitrator was selected by the parties to the dispute.

If the decision concerns a legal dispute and involves deciding the rights and obligations of the parties, it is similar to adjudication. If it concerns an interest dispute, it involves replacing negotiations by an award considered by the third party to be appropriate.¹¹

Private labour arbitration has grown dramatically since 1984 when the Independent Mediation Services of South Africa (IMSSA) was

¹¹ Conciliation and Arbitration Procedures in Labour Disputes (1980) 15.

formed.¹² The growing reliance on arbitration was caused by the extended delays in obtaining relief, excessive formalism in the preparation of cases, over-reliance on the use of lawyers and consequent expense that characterize the operation of the industrial court.¹³

9.4 Court adjudication

The National Manpower Commission¹⁴ recommends that a party to a dispute should have the right to elect to proceed in either the small labour court or the industrial court.¹⁵

In terms of the draft Consolidated Labour Relations Act¹⁶ small labour courts will deal with certain unfair suspensions, alterations of terms and conditions of employment and individual alleged unfair terminations of service where individuals are involved. If these draft recommendations were implemented, it would mean that most disputes regarding domestic workers will be heard in the small labour courts. There should be only one court of the first instance viz. the small labour court. Final appeal to the industrial court should be possible. The functions of the

¹² C O'Regan 'The Development of Private Labour Arbitration in South Africa - A Review of the Arbitration Awards' (1989) 10 ILJ 557.

¹³ E Cameron 'Overview of the Industrial Court' in Benjamin (ed) Strikes, Lock-outs and Arbitration in SA Labour Law: Proceedings of the Labour Law Conference 1988 (1989) 145.

¹⁴ GG 13511 13 September 1991.

¹⁵ Ibid at 43.

¹⁶ GG 13925 16 April 1992 at 31.

small labour court should be the same as the industrial court:

'[i]n determining the dispute the court must obviously decide whether the practice concerned is unfair or not, and if it decides that it is unfair it must resolve the matter by making a determination akin to an arbitration award.'¹⁷

The necessity for a dispute to be referred to an industrial council or conciliation board, before the court has jurisdiction in respect of a dispute, should not apply to domestic workers seeking relief. An attempt to settle the dispute through mediation should be the only prerequisite for the small labour court to have jurisdiction.

I do not agree with the dual approach to court adjudication recommended by the National Manpower Commission. The bar on legal representation and the right to appeal in the small labour courts, while allowing both in the industrial court, might subvert the intention to make the dispute resolution for domestic workers as simple and accessible as possible. This could lead to cases brought before the industrial court, which could be attended to by a much cheaper procedure.

Final and expeditious resolution of disputes is important for the following reasons: Individual employers of domestic workers might not be able to afford a dispute-resolution procedure whereby different appeals are possible. A trade union with a massive financial power base, could come to the assistance of its

¹⁷ SEAWUSA v Trident Steel (Pty) Ltd (1986) 7 ILJ (IC) at 437C-D.

members in order to contest decisions. The individual employer (as opposed to corporate employers) might be caught up in protracted and prohibitively expensive court proceedings. The situation could be further complicated by the fact that many domestic workers are accommodated at their place of work.

As it is recommended that mediation and expeditious adjudication of the dispute are the preferred methods for the settlement of disputes in the domestic sector, the small labour courts need no jurisdiction akin to an urgent interim relief¹⁸ order or status quo order¹⁹ of the industrial court.

The disintegration of the employment relationship in a work situation where a personal relationship more than often is at the basis of the employment relationship, could have far-reaching implications for the security and/or privacy of the family. Where accommodation is at stake, the grant of interim accommodation is an issue that can be negotiated between the two parties through a competent mediator. The following members of society could be asked to function as mediators: a school teacher, a minister of religion, or a lay-preacher in a church.

¹⁸ Section 17(11)(a).

¹⁹ Section 43.

9.5 Methods of conflict prevention

9.5.1 Education

Employers and employees in the domestic labour sector are not necessarily experienced in the field of labour relations and if the inclusion, as recommended, were to be meaningful, the introduction of extensive education programmes for both employers and employees would be essential.

9.5.2 The contract of employment

The common-law contract²⁰ of employment could play an important role in clarifying what is to be expected from each party. The greater the clarity as to what is expected from each contractual party, the less chance there would be for misunderstandings and conflict. At the root of almost every individual dispute in the employment relationship lies a disagreement about the contract. There is no general requirement that contracts of service should be committed to writing. In Britain the Employment Protection (Consolidation) Act 1978 requires that within thirteen weeks every employee must be given a statement in writing that sets out *inter alia*:

- a) the rate of pay and the method of calculation;²¹

²⁰ Anon 'An Act of Contract' 1986 (5) Industrial Relations Data 2.

²¹ Section 1(3)(a) & (b).

- b) the hours of work;²²
- c) the length of notice required to terminate;²³
- d) terms and conditions with regard to holidays and holiday pay, and sick leave and sick pay;²⁴
- d) any disciplinary code applicable to the employee;²⁵
- e) the title of the job and the tasks which are required to be performed.²⁶

If these arrangements are in writing, many of the disagreements that arise are referrable to a written document and thereby to a clearer ruling as to exactly what the requirements are. Where the employee is illiterate and does not understand the language of the employer, a problem still exists. So although the contract could be an instrument to prevent conflict, it must be remembered that it is not the contract per se that brings stability to the relationship, but the certainty and clarity of communication between the two sides.

9.5.3 A code of practice

A code of practice deals in clear and simple terms with the mutual dealing of employers and employees in their day-to-day actions.

²² Section 1(3)(c).

²³ Section 1(3)(e).

²⁴ Section 1(3)(d)(i) & (ii).

²⁵ Section 2(1).

²⁶ Section 1(3)(f).

A code of practice, which is discussed in Chapter 10 circumscribe standards of behaviour for both employers and employees. In this way day-to-day actions could be guided and misunderstandings and/or offensive actions be avoided.

CHAPTER TEN

A CODE OF PRACTICE

At the outset of this thesis it is argued that the legal position of the domestic worker in South Africa is indeed in need of reform. The thesis examines ways in which domestic workers could be included within the scope of existing industrial legislation and recommendations are made to accommodate the nature of domestic employment. One of the instruments that could facilitate the implementation of industrial legislation in the domestic sector, is a code of practice. A typical code of practice deals in clear and simple terms with the mutual dealings of employers and employees in their day-to-day actions.¹ It gives guidelines on how to carry out their responsibilities to one another and how to translate them into rules of good behaviour. Baldwin remarks that '[r]ules do not work when those willing to comply do not know what compliance involves and when those less willing or able to comply are not informed or stimulated in the appropriate manner'.² The term quasi-legislation is often used to describe codes of practice.³

In Britain the Advisory Conciliation and Arbitration Service (ACAS) may issue Codes of Practice containing such practical guidance as it thinks fit for the purpose of promoting the

¹ B A Hepple Hepple and O'Higgings: Employment Law 4ed (1981) 54.

² R Baldwin 'Why Rules Don't Work' 1990 MLR 336-337.

³ G Ganz Quasi-Legislation: Recent Developments in Secondary Legislation (1987) 316.

improvement of industrial relations.⁴ One such example is the Code of Practice on Disciplinary Practice and Procedures in Employment.⁵ Section 4 provides that:

'A failure on the part of any person to observe any provision of a code of practice which is for the time being in force...shall not of itself render him liable to any proceedings; but in any proceedings before the Industrial Court or an industrial tribunal under this Act - (a) any such code of practice shall be admissible in evidence, and any provision...relevant to any question...shall be taken into account by the Court or tribunal.'

A comparable Code of longer standing is the Highway Code now issued under section 37 of the British Road Traffic Act 1972. In the case of Froom v Butcher⁶ decided prior to an introduction of a legal requirement that front seat passengers should wear seat belts, the provision in the Highway Code to 'Fit seat belts in your car and make sure they are always used', was relied upon by the Court of Appeal as 'tending to establish' contributory negligence on the part of plaintiffs who did not heed it.

A simply-worded code of practice has an advantage over legislation, as statutes are often expressed in a style most people find difficult to understand. The proposal to use a code of practice in the domestic employment sector, does not aim to substitute legislation, but to complement it and to make the legal rules more accessible to an area where the participants are

⁴ Section 6(1) of the Employment Protection Act 1975.

⁵ Employment Protection Code of Practice Order 1977 SI 1977/867.

⁶ [1975] 3 WLR 379.

largely uneducated in the field of labour law and labour relations.

As in the case of the British codes of practice, this code should not give rise to legal rights or duties, but the guidelines of the code should be admissible as evidence in proceedings before an industrial tribunal, if any provision of the Code appears to be relevant to any question arising in the proceedings.

'A code may seek to address one or more of at least three different audiences. One group may be the external public, to whom the code is addressed for reasons of guidance, education or fairness...The Code may be used to indicate to its officials or members how the body itself, or the courts, have been deciding certain issues in the past and, for the sake of consistency, sets down this practice so that its own officials can follow it more easily in the future. Equally it may seek to guide officials or members...in the context of any adjudicatory proceedings...'

The code that I propose, will therefore, in the first instance, be addressed to employees and employers, regarding practical steps that embody the principles of the industrial legislation that cover them. To prevent confusion by actually declaring certain actions unfair labour practices, the code should rather prescribe the conduct that parties should follow to prevent their actions from being unfair.

⁷ C McCrudden 'Codes in a Cold Climate: Administrative Rule-making by the Commission for Racial Equality' 1988 MLR 409 at 432.

In the attached example of a possible code of practice, I have endeavoured to codify basic principles, inter alia those of the common law, those proposed by the International Labour Organisation and those enunciated by the industrial court, in simple terms to relate to all who participate in the domestic labour sector. The final draft of an envisaged code of practice should, however, be negotiated at a forum that is representative of the major actors in the domestic labour arena. The restructured⁸ National Manpower Commission could be an appropriate forum. The final code of practice should only come into operation before it has been published, in order for representations to be made by all interested parties.⁹

A CODE OF PRACTICE FOR DOMESTIC EMPLOYEES AND THEIR EMPLOYERS

THE FORMATION OF A CONTRACT OF SERVICE

- 1) Where one person agrees to work for another for certain payment, a contract of employment comes about.
- 2) A contract need not be in writing to be valid, but there should at least be clear agreement on the tasks to be done, the hours of work and the rate and period of payment.

⁸ 'Restructuring' shall mean that the NMC will also be representative of the major trade union federations. See para 8 of the agreement signed by SACCOLA, COSATU, NACTU and the Minister of Manpower on 14 September 1990 ('Laboria Minute').

⁹ This way of implementation is also in accordance with the agreement with para 9 of the 'Laboria Minute'.

- 3) The contract, whether written or not, shall have certain terms that the employer and employee will have agreed upon and these are called 'express' terms. An 'express term' is therefore anything which the parties discussed and agreed upon. Such a term should not be illegal or immoral.

RIGHTS AND DUTIES OF CONTRACTING PARTIES

- 4) There are also other terms that the employer and employee are bound to although they are not mentioned in the contract. These terms are implied by law.
- 5) The duties of the employee are:
- to attend work punctually
 - to obey the reasonable instructions of the employer
 - to work diligently and to the best of his/her ability
 - to be honest
 - not to be disrespectful to the employer nor to indulge in unbecoming or unruly conduct in the work-place
 - not to be absent from work or late for work without good reason and without notifying the employer at the earliest possible opportunity
 - not to be careless or to do anything to endanger the lives and safety of persons
 - not to end employment without giving notice.
- 6) The duties of the employer are:
- to pay the worker's wages promptly and not make

unauthorized deductions

- to provide a safe working environment
- not to make derogatory remarks about an employee, nor to insult or humiliate him/her in the work-place.

- 7) The terms of the contract of employment shall not be less favourable than the conditions laid down in the Basic Conditions of Employment Act or wage determination in terms of the Wage Act. The employer shall refrain from any actions in contravention of these Acts.

TERMINATION OF SERVICE

A. Justification for termination

- 8) The employment of an employee shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or economic resources of the household.
- 9) The following, inter alia, shall not constitute valid reasons for termination or other activities prejudicial to the employee:
- union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
 - the filing of a complaint or the participation in proceedings against an employer, involving alleged

- violation of laws or regulations, or recourse to competent administrative authorities;
- the lodging of a complaint with the employer concerning the provisions of the contract of employment or of this code;
 - race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
 - absence from work during maternity leave;
 - refusal by the employee to work overtime in excess of 3 hours per day or 10 hours per week;
 - temporary absence from work because of illness or injury.
- 10) The employer should be deemed to have waived his/her right to terminate the employment of a employee for misconduct if he/she has failed to do so or to warn the employee within a reasonable period of time after he has obtained knowledge of misconduct.
- B. Procedure prior to or at the time of termination**
- 11) - Dismissal is an extreme penalty and should be reserved only for the most serious misconduct or when the employee has already been given previous warnings for similar misconduct.
- The schedule of offences and possible penalties should be used as a guide.

- 12) The employment of an employee should not be terminated for unsatisfactory performance, unless the employer has given the employee appropriate instructions and written warning and the employee continues to perform his/her duties unsatisfactorily after a reasonable period of time has elapsed.

Practical steps to take:

- Discuss the employee's poor performance with him/her.
- Give the employee a chance to put across his/her side of the story.
- Discuss steps that can be taken to improve poor performance e.g. instruction/training.
- Give the employee an opportunity to improve his/her performance.

- 13) The employment of a employee should not be terminated for incapacity due to illness, unless the employee's legal entitlement to sick leave is used up and a month's notice is given.

Points to remember:

The following factors can have bearing on the fairness:

- the nature of the illness
- the duration of the illness
- the prospects of recovery
- the needs of the household
- the length of service.

- 14) The employment of an employee shall not be terminated for reasons related to the employee's conduct or performance before he/she is provided an opportunity to defend himself/herself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

Points to remember:

- The enquiry need not be formal.
- The facts complained of must be established.
- The employee must have the opportunity of stating his/her version.
- Use the schedule of offences as a guideline.
- Inform the employee of the decision and the reasons for it.
- If he/she is guilty, inform him/her what the maximum penalty can be.
- Ask the employee whether he/she wants to say anything with regard to the possible penalty.
- When deciding on the penalty use the following as a guideline:
 - The seriousness of the offence
 - The maximum possible penalty
 - Points raised in mitigation
 - Nature and number of previous offences during past 6-12 months
 - The employee's age
 - The employee's position
 - The employee's job performance
 - The interests of the household.

C. Period of notice

- 15) An employee whose employment is to be terminated shall be entitled to a month's notice or compensation in lieu thereof, unless he/she is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his/her employment during the notice period.

Points to remember:

- Notice may not run at the same time as paid sick leave
- Notice may not run at the same time as annual paid leave.

SCHEDULE OF INSTANCES OF MISCONDUCT OR INCAPACITY, PROPOSED ACTION AND POLICY GUIDELINES

PROPOSED ACTION: The proposed action should not automatically be imposed. The nature and circumstances of each individual case should be taken into consideration prior to making a decision. This serves only as a guideline.

Nature of conduct	Comments and/or policy guidelines	First Occurrence	Second Occurrence	Third Occurrence	Fourth Occurrence
1. Very serious					
Being under the influence of liquor where in charge of children, the frail or the sick		Dismissal			
Grossly offensive behaviour	e.g. Excessive indecent or insulting behaviour	Dismissal			
Forsaking duty where in charge of children, the frail or the sick	e.g. Leaving duty where the neglect causes/or could cause serious detriment to the household	Dismissal			
Theft/Fraud/Dishonesty		Dismissal			
Gross negligence		Dismissal			
Assault		Dismissal			
Being in possession of dangerous weapons	e.g. guns in the work place. Ascertain purpose of weapon	Dismissal			

Nature of conduct	Comments and/or policy guidelines	First Occurrence	Second Occurrence	Third Occurrence	Fourth Occurrence
-------------------	-----------------------------------	------------------	-------------------	------------------	-------------------

2. Serious

Refusal to carry out reasonable instructions in respect of normal work, which does not involve physical risk

Final written warning

Dismissal

Unauthorized absence for longer than 2 days without a reasonable excuse or certificate from doctor or clinic health worker

Factors to consider: the effect of absence on household, period of absence, reason for absence, length of service of employee

Final written warning

Dismissal

Stayaways

Factors to consider in addition to the above: notice of action or discussion beforehand, intimidation, absence of transport, warning by employer with regard to employer's attitude towards stayaway, absence despite warnings to work

Final written warning

Dismissal

Being under the influence of liquor

Final written warning

Dismissal

Being in possession of liquor

Final written warning

Dismissal

Nature of conduct	Comments and/or policy guidelines	First Occurrence	Second Occurrence	Third Occurrence	Fourth Occurrence
-------------------	-----------------------------------	------------------	-------------------	------------------	-------------------

3. Other

Incompetence	Failure to maintain work standards. Discuss with employee ways of improving performance	Written warning	Final written warning	Dismissal	
Swearing		Written warning	Final written warning	Dismissal	
Habitual absence of 1 to 2 days without a reasonable excuse or health certificate, more than twice in any 8-week period		Written warning	Final written warning	Dismissal	
Unsatisfactory work performance		Verbal warning	Written warning	Final written warning	Dismissal
Habitual late-coming		Verbal warning	Written warning	Final written warning	Dismissal