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THE ROLE OF HUMAN DIGNITY IN THE ASSESSMENT OF FAIR COMPENSATION FOR UNFAIR DISMISSALS

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1 Introduction

South African labour law is concerned with the attainment of fairness for both the employer and the employee.¹ In weighing up the interests of the respective parties it is of paramount importance to ensure that a delicate balance is achieved so as to give credence not only to commercial reality but also to a respect for human dignity. Consequently, when a court has to assess the amount of compensation to award for the unfair conduct of the employer, which usually takes the form of an unfair labour practice or an unfair dismissal, it must achieve a balance between the sometimes competing policy considerations of human dignity and equality on the one hand and commercial reality on the other hand. These rights are often the competing rights of the employer on the one hand and the employee on the other.

The environment within which the world of work operates has at its core a free enterprise economy. Ultimately, an employer should generally not be penalised to the extent that it is crippled and unable to continue operating. The essence of the employment relationship is thus explained:

The relationship is a mercantile one to the core. The employer hires the employee because he wants a job done and is prepared to pay accordingly; the employee agrees to the hire because he wants the payment and is prepared to do the job to get it; and the exchange continues until one or other no longer gets the commercial advantage he wants... Financial gain, then, is the mainspring of the employment relationship, just as much as it is the mainspring of a sale or a lease. The legislature sees nothing wrong with this. On the contrary, it encourages it, in the belief that our interests are best served by the free enterprise system it manifests. One is quick to assume, therefore that the unfair labour practice jurisdiction is not meant to restrict the proper pursuit of pecuniary gain.²

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This reality is borne out by the fact, for example, that in terms of the *Labour Relations Act*³ (hereinafter the "LRA") an employer's "operational requirements"⁴ are considered to be an acceptable reason to dismiss employees.⁵

Although the purpose of a contract of employment is mainly commercial, the contract of employment is not perceived as a purely commercial contract. There is an aspect which is strongly linked to an individual's sense of identity, dignity and humanity. A person's sense of self worth is often linked to his or her contributing meaningfully to society. This contribution is very often dependent on a person's job or career. Furthermore, with an employment contract, unlike other commercial contracts such as a contract of sale, there is a continuous relationship between the contracting parties. This relationship often endures for an unspecified time in terms of the contract. As a result of these factors the employment relationship has undergone a transformation in the last few decades. It is now perceived by many to be primarily a relational relationship as opposed to a purely commercial relationship.⁶ As such the employer is obliged to act in a reasonable or fair manner towards its employees, especially in the light of the constitutionally protected right to dignity. The protection of fundamental freedoms such as gender equality, the right to dignity and the prevention of harassment at the workplace form a cornerstone of South African labour legislation.⁷

1 Section 23(1) *Constitution of the Republic of South Africa*, 1996 provides that everyone has the right to fair labour practices.

2 Brasseley *et al* *New Labour Law* 65.

3 *Labour Relations Act* 66 of 1995 (LRA).

4 Section 213 of the LRA defines operational requirements as "economical, technological, structural or similar needs of the employer".

5 Section 189 LRA.

6 Lord Slynn of Hadley in *Spring v Guardian Assurance Plc* 1995 2 AC 296, 335B stated: "the changes which have taken place in the employer - employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee". See *Johnson v Unisys Ltd* 2001 IRLR 279 para 20. After referring to this statement Lord Steyn in *Johnson v Unisys Ltd* 2001 IRLR 279 para 20 concluded: "It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract".

7 Per Nicholson JA in *Chemical Energy Paper Printing Wood & Allied Workers Union v Glass & Aluminium* 2000 CC 2002 23 ILJ 695 (LAC) para 48.

It is argued in this article that in ascertaining what constitutes appropriate or fair compensation⁸ for an unfair dismissal, the underlying reality that labour law operates in a free enterprise system must be given cognisance to, but not at the expense of a person's right to dignity. In short therefore, a court or tribunal should consider any infringement on a person's right to dignity when determining what compensation will be fair in a given set of circumstances.

2 Compensation as a remedy for unfair dismissal

In giving content to the constitutional right to fair labour practices contained in section 23(1) of the *Constitution*,⁹ the LRA *inter alia* provides that every employee has the right not to be unfairly dismissed.¹⁰ In terms of section 193(2) of the LRA the Labour Court or an arbitrator must require the employer to re-instate or re-employ the employee whose dismissal was substantively unfair unless certain exceptions apply. One of the exceptions arises when "it is not reasonably practicable for the employer to re-instate or re-employ the employee".¹¹ Another exception arises when "the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable".¹² Therefore, when it is not appropriate or practical in the circumstances to enforce the primary remedy for an unfair dismissal, namely a re-employment order, the judge or arbitrator must make an award for compensation. The remedy of compensation and the appropriate amount thereof is the focus of this article.

Section 194 of the LRA provides:

1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the

8 Other remedies for unfair dismissal such as re-instatement or re-employment are beyond the scope of this article.

9 It was previously also numbered as if it were an Act of Parliament, Act 108 of 1996.

10 Section 185 LRA.

11 Section 193(2)(c) LRA.

12 Section 193(2)(b) LRA.

equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

(3)The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

Unlike the present LRA, the 1956 *Labour Relations Act*¹³ placed no cap on the amount of compensation an employee who was unfairly dismissed could be awarded. The previous Industrial Court had an unfettered discretion in terms of the said amount.¹⁴ In terms of the present LRA, the legislature placed a cap on the amount that can be awarded and thus the discretion of arbitrators and judges has been limited. Arguments in the interests of business viability and socio-economic policy can be put forward in support of such a cap. In the words of Pillay J:

The need for certainty and limitation of compensation claims in labour disputes is a matter of socio-economic policy. Furthermore, the elevation of labour rights as a socio-economic constitutional right re-enforces the need to balance the various competing interests in labour disputes.¹⁵

It may be possible, albeit in very limited circumstances, to base a claim for unfair dismissal on the common law and thereby circumvent the caps on compensation provided in terms of the LRA. There are substantial differences regarding the onus of proof of both the employer and the employee for a constructive dismissal based on the common law and one based on the LRA.¹⁶ Given these differences it is possible that circumstances may arise where the employee may sue the employer on the basis of the common law constructive dismissal, despite the fact that constructive dismissal is provided for in terms of section 186(1)(e) of the LRA.¹⁷ Constructive dismissal is important in the context of impairment to one's dignity, because it often

13 *Labour Relations Act* 28 of 1956.

14 Grogan *Workplace Law* 177.

15 *Parry v Astral Operations Ltd* 2005 10 BLLR 989 (LC) para 100.

16 For a detailed discussion of this, which is beyond the scope of this article, see Vettori 2011 *Stell LR* 182-185.

17 See *South African Maritime Safety Authority and Fafie Fortune Mckenzie* 2010 31 *ILJ* 529 (SCA) para 16, where the court, quoting *Da Silva v Coutinho* 1971 3 SA 123 (A) 135, stated that where a right is protected by means of statute: "We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded".

happens that an employer's acts or omissions that render a person's work situation intolerable also impair that person's right to dignity.

However, judges and arbitrators still have discretion to award an amount of compensation that is "just and equitable in all the circumstances" within the limited amount. The LRA does not define what is meant by "just and equitable" in this context. This discretion must be exercised in a judicial manner. The court decisions demonstrate inconsistencies regarding the factors that must be considered in determining the *quantum*, and consequently there are also inconsistencies regarding the amounts awarded.¹⁸ Generally the monetary compensation is perceived to be a *solatium*.¹⁹ This is especially the case for procedurally unfair dismissals.²⁰ As such, it may not be necessary to prove any loss or damages since the compensation is a solace for the loss or infringement of a right.²¹ Nevertheless, the courts have still, in unfair dismissal claims in terms of the LRA, considered the damages or loss actually suffered by the dismissed employee as a result of the dismissal in determining the amount of compensation payable,²² as is the case in breach of contract or a delictual claim. For example in *Le Monde Luggage CC t/a Pakwells Petje v Dunn*²³ Jappie AJA concluded that in the case of an unfair dismissal the compensation is:

... payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into

18 See Van Niekerk *Unfair Dismissal* 128.

19 Claassen *Dictionary* defines *solatium* in the words of RD Claassen (Judge of the High Court of South Africa) as follows: "(1) Comfort. Thus by the strict Roman law women could not adopt children, but the emperor allowed them this privilege by way of comfort for the loss of their own children (*ad solatium liberorum amissorum*, Inst 1.11.10). (2) Payment or compensation made either voluntarily or upon judicial decree for loss sustained or injury suffered".

20 In *Alpha Plant and Services (Pty) Ltd v Simmonds* 2001 22 ILJ 359 (LAC) para 41, the court stated: "The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress".

21 See *Johnson & Johnson v CWIU* 1998 12 BLLR 1209 (LAC), where the court held that compensation included payment in solace for the loss of a right. Also in *National Union of Metalworkers of SA v Precious Metal Chains (Pty) Ltd* 1997 18 ILJ 1346 (LC) 1354 H-J, the Labour Court held that since such compensation is not in the form of damages, the employee need not prove his or her losses.

22 In *Chothia v Hall Longmore & Co (Pty) Ltd* (1997) 18 ILJ 1090 (LC) it was held that "compensation" in terms of s 194 of the LRA should be given its ordinary meaning as "the value estimated in money of something lost".

23 *Le Monde Luggage CC t/a Pakwells Petje v Dunn* 2007 28 ILJ 2246 (LAC) para 30.

account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.²⁴

Again, in a recent decision the Supreme Court of Appeal pointed to "a long line of cases" where it was held that that compensation for dismissal is limited to compensation for financial loss and excludes punitive damages.²⁵

Payment for "financial loss which has resulted from a wrongful act" seems akin to a delictual claim as opposed to a claim for breach of contract. This observation was made in *Alert Employment Personnel (Pty) Ltd v Leech*.²⁶ The court then referred to *Trotman v Edwick*²⁷ where Van den Heever distinguished between damages in contract and damages in delict as follows:

A litigant who sues on contract sues to have his bargain or its equivalent in money or in money in kind. The litigant who sues on delict sues to recover the loss which he had sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.

There is, however, also authority for the proposition that compensation should be in line with the damages for a breach of contract in that the aggrieved employee should be placed in the same position had the contract not been breached. In the case of *Nkopane v Independent Electoral Commission*²⁸ the Labour Court found it inappropriate to award more than what the employee would have earned had the fixed term contract not been prematurely terminated by the employer.

24 The Labour Appeal Court in *Alert Employment Personnel (Pty) Ltd v Leech* 1993 14 ILJ 655 (LAC) at 661 held that the intention of the legislature with regard to the *Labour Relations Act 28 of 1956* was to compensate for the loss caused and this was more akin to a delictual claim than to a claim based on breach of contract.

25 *Rawlins C Dr DC Kemp t/a Centralmed* (Unreported Supreme Court of Appeal Case No 483/09, 2010) para 2.

26 *Rawlins C Dr DC Kemp t/a Centralmed* (Unreported Supreme Court of Appeal Case No 483/09, 2010) para 2.

27 *Trotman v Edwick* 1951 1 SA 443 (A) 449B-C.

28 *Nkopane v Independent Electoral Commission* 2007 28 ILJ 670 (LC) para 80.

The Labour Appeal Court in *Ferodo (Pty) Ltd v De Ruiter*,²⁹ under the previous labour law dispensation prior to the enactment of the present LRA, set out the following guidelines for the determination of the *quantum* of damages in the case of an unfair dismissal:

- (a) There must be evidence of actual financial loss suffered by the person claiming compensation;
- (b) There must be proof that the loss was caused by the unfair labour practice;
- (c) The loss must be foreseeable, i.e. not too remote or speculative;
- (d) The award must endeavour to place the applicant in monetary terms in that position in which he would have been had the unfair labour practice not been committed;
- (e) In making the award the court must be guided by what is reasonable and fair in the circumstances;
- (f) There is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment. Even though the Labour Appeal Court was dealing with the issue of compensation for an unfair dismissal under the 1956 Labour Relations Act, these guidelines have been considered apposite even under the current labour regime.

In *Pretoria Society for the Care of the Retarded v Loots*,³⁰ Nicholson JA, following English law, listed basically the same guidelines for consideration in determining the *quantum* of an award for compensation for unfair dismissal.³¹

Other factors the courts have taken into account in determining what is fair and equitable in the context of compensation for unfair dismissal include the length of service of the dismissed employee, the manner in which the dismissal was effected, and the fact that the employer was a small enterprise.³² However, despite *dicta* to the effect that compensation should not be punitive³³ even in the case of an automatically unfair dismissal,³⁴ the courts have also exhibited a willingness to award punitive damages. This is especially but not necessarily the case when the courts are faced with an automatically unfair dismissal.³⁵ For example, in *Chemical Energy*

29 *Ferodo (Pty) Ltd v De Ruiter* 1993 14 ILJ 974 (LAC) 981 C-G.

30 *Pretoria Society for the Care of the Retarded v Loots* 1997 18 ILJ 981 (LAC) 990 A-B.

31 These were the factors referred to by Combrinck J in *Ferodo (Pty) Ltd v De Ruiter* 1993 14 ILJ 974 (LAC) 981 C-G.

32 *Lukie v Rural Alliance CC t/a Rural Development Specialist* 2004 25 ILJ 1445 (LC) para 19.

33 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC).

34 See *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* 2007 28 ILJ 2246 (LAC) para 30.

35 Section 187 of the LRA provides *inter alia* that a dismissal is automatically unfair if the reason for the dismissal is that the "employer unfairly discriminated against an employee, directly or

*Paper Printing Wood & Allied Workers Union v Glass & Aluminium 2000 CC*³⁶
Nicholson JA stated that a dismissal which is automatically unfair ...

...strikes at the essence of the values which form the foundations of our new democratic society as enunciated in the Constitution. It is a dismissal that undermines the fundamental values that the labour relations community in our country depends on to regulate its very existence. Accordingly such a dismissal deserves to be dealt with in a manner that gives due weight to the seriousness of the unfairness to which the employee so dismissed has been subjected...Accordingly there must be a punitive element in the consideration of compensation.

In similar vein in *Parry v Astral Operations Ltd*³⁷ Pillay J stated:

So reprehensible has the respondent's conduct been, so gross the violation of the applicant's dignity that, despite the applicant being awarded contractual damages under section 195 of the LRA, he should also be awarded the maximum compensation allowed under section 194 of the LRA.³⁸

The cap on compensation for automatically unfair dismissals is double that of "ordinary dismissals", namely 24 months' salary as opposed to 12 months salary.³⁹ Perhaps this could be construed as an intention on the part of the legislature to introduce a punitive element in the amount of compensation awarded for automatically unfair dismissals since these reasons for dismissal seem to be morally reprehensible and repulsive to our sense of justice.

In *Minister for Justice & Constitutional Development v Tshishonga*⁴⁰ the Labour Appeal Court referred to case law relating to an award for *solatium* in terms of the *actio injuriarum* for guidance in what would constitute just and equitable

indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility".

36 *Chemical Energy Paper Printing Wood & Allied Workers Union v Glass & Aluminium 2000 CC* 2002 23 ILJ 695 (LAC) para 48-50.

37 *Parry v Astral Operations Ltd* 2005]10 BLLR 989 (LC) para 137.

38 See also *Lukie v Rural Alliance CC t/a Rural Development Specialist* 2004 25 ILJ 1445 (LC) para 19, where the Labour Court found it unacceptable that some employers dismiss employees on the basis of pregnancy despite the advancement of women's rights and the protection of fundamental rights in terms of the Constitution.

39 Section 194(3) LRA.

40 *Minister for Justice & Constitutional Development v Tshishonga* 2009 9 BLLR 862 (LAC).

compensation for non-patrimonial loss in the context of an unfair labour practice.⁴¹ The award in these cases serves to rectify an attack on one's dignity. The court concluded that relevant factors in determining the quantum of damages in these cases included but were not limited to:

...the nature and seriousness of the *iniuria*, the circumstances in which the infringement took place, the behavior of the defendant (especially whether the motive was honorable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the *iniuria* had taken place...

The above discussion of the case law illustrates that the determination of the *quantum* of compensation and the determination of what is "just and equitable" compensation in terms of the LRA in the case of an unfair dismissal are not exact sciences. There are conflicting decisions regarding whether or not there should be a punitive element and also whether the compensation should be akin to compensation for a breach of contract or for a delictual claim. The weight of authority seems to lie with the conclusion that the compensation awarded is akin to a delictual claim and that there should not be a punitive element, except perhaps in the case of automatically unfair dismissals. In terms of section 193(2) of the LRA the Labour Court or an arbitrator must require the employer to re-instate or re-employ the employee whose dismissal was substantively unfair unless certain exceptions apply. The primary remedy, namely a re-employment order, obviously does not include any compensation for non-pecuniary loss, or punitive damages. It could be argued that it follows therefore that the secondary remedy, namely compensation, also excludes non-pecuniary losses such as injury to feelings, and punitive damages.

3 Dismissals and a breach of the right to dignity

3.1 *The Constitution and the right to dignity*

Section 9(3) of the *Constitution* provides that no person may unfairly discriminate against anyone on one or more grounds including race, sex, ethnic or social origin *et*

⁴¹ *Minister for Justice & Constitutional Development v Tshishonga* 2009 9 BLLR 862 (LAC) para 18.

cetera. Section 10 provides that "everyone has the right to have their dignity respected and protected". These fundamental rights must be given cognisance to in interpreting provisions not only in national legislation but also in developing and interpreting the common law. This is so, as section 39(1)(a) enjoins courts to promote the "values that underlie an open and democratic society based on human dignity, equality and freedom" and section 39(2) enjoins the courts to develop the common law in line with and giving effect to the spirit, purport and object of the Bill of Rights. Furthermore section 173 of the *Constitution* provides the High Courts, the Supreme Court of Appeal and the Constitutional Court with inherent jurisdiction to develop the common law, "taking into account the interests of justice".

Since a dismissal can also entail a breach of a person's right to dignity or unfair discrimination, the amount of compensation awarded in these instances must reflect these constitutional imperatives so that a person's fundamental rights to dignity and equality can be upheld and protected. The relevance of these constitutional imperatives with regard to determining what amount of compensation to award for an unfair dismissal is that an emphasis on the importance of preserving human dignity when interpreting both the common law and legislation is achieved. In essence, when a dismissal also impairs a person's right to dignity, both labour rights and constitutional rights are impaired by the same conduct.

3.2 *More than one claim based on the same set of facts*

There may be instances where a person's right to dignity was severely impaired as a result of his or her dismissal. If such a person bases his/her claim on the LRA unfair dismissal provisions he/she may not be adequately compensated for injury to dignity since the LRA places a cap on the amount of compensation that can be awarded in cases of an unfair dismissal. In these circumstances it is possible that an employee can claim compensation for an unfair dismissal in terms of the LRA and in addition claim compensation for injury to feelings or discrimination either in terms of the common law or the *Employment Equity Act*⁴² (hereinafter the EEA) as a result of the

42 *Employment Equity Act* 55 of 1998 (EEA).

dismissal. In other words, there can be more than one cause of action based on the same set of facts.

Very often, in the course of a dismissal an employee also suffers injury to feelings or an infringement of the right to dignity. This is usually the case where there has been a constructive dismissal⁴³ or a breach of the implied term of trust and confidence.⁴⁴ Section 195 of the LRA provides that "an order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment". In *Gcaba v Minister of Safety & Security*⁴⁵ the Constitutional Court held that section 157(2) of the LRA allows the High Court to adjudicate issues arising from employment if the Labour Court does not have exclusive jurisdiction in respect of such issues. In *Ntsabo v Real Security CC*⁴⁶ the Labour Court awarded the employee the maximum compensation for constructive dismissal in terms of the LRA, namely 12 months' salary, in addition to damages arising from the sexual harassment of the employee which resulted in the constructive dismissal, in terms of the provisions of the *Employment Equity Act*⁴⁷ (the EEA).⁴⁸ In the light of this, the possibility of claiming compensation in terms of the EEA, or in terms of the common law in addition to a claim for unfair dismissal in terms of the LRA based on the same

43 Section 186(1)(e) LRA.

44 The notion of "constructive dismissal" is derived from English law. Cameron JA in *Murray v Minister of Defence* 2009 3 SA 130 (SCA) para 8 explains: "The term used in English law 'constructive dismissal' (where 'constructive' signifies something the law deems to exist for reasons of fairness and justice, such as notice, knowledge, trust, desertion), has become well established in our law. In employment law, constructive dismissal represents a victory for substance over form. Its essence is that although the employee resigns, the causal responsibility for the termination of service is recognised as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences". For a detailed discussion of the implied term of trust and confidence see Vettori 2011 *Stell LR* 179-181.

45 *Gcaba v Minister of Safety & Security* (Unreported Constitutional Court Case No T64/08, 7 October 2009) para 73.

46 *Ntsabo v Real Security CC* 2003 4 *ILJ* 2341 (LC).

47 *Employment Equity Act* 55 of 1998.

48 See also *Dial Tech CC v Hudson* 2007 28 *ILJ* 1237 (LC) para 63 where the court stated: "Whilst the cause of action in both the constructive dismissal and the harassment cases may arise from the same set of facts and circumstances, the remedies are located in different statutes. The remedies for constructive dismissal and unfair discrimination are found in the LRA and EEA respectively". The court therefore concluded that the employee was entitled to pursue a claim based on constructive dismissal in terms of the LRA in addition to one based on unfair discrimination in terms of the EEA even though both causes of action were given rise to by the same set of facts. This approach was followed in *Ditsamai v Gauteng Shared Services Centre* 2009 5 *BLLR* 456 (LC).

set of facts will be discussed. The discussion will be limited to instances where the employee's dignity was impaired as a result of discrimination or harassment. In such instances the employee could claim that he/she was constructively dismissed.

3.2.1 *The common law duty of care*

Every employer has the common law duty to take reasonable care of an employee's safety. The breach of the duty of care can also take the form of an omission.⁴⁹

Brassey states:

Since employers can be held liable for omissions, employers can be liable for failing to prevent people, such as suppliers, customers or employees, from causing their employees harm. They are likely to be held liable if they provided the opportunity or conditions for the injurious act or had the power to prevent it.⁵⁰

Breach of this duty occurs if the employer fails to guard against injury or harm in circumstances where a reasonable person would have foreseen the likelihood of injury or harm.⁵¹

In *Media 24 Ltd v Grobler*⁵² the Supreme Court of Appeal held that it is "well settled" that employers owe their employees a duty to take reasonable care of their safety.⁵³ The court expressed the opinion that this duty is not confined to protecting employees from physical harm, but includes a duty to protect employees from psychological harm.⁵⁴ The court found that the legal convictions of the community required an employer to take reasonable steps to protect its employees against acts

49 See Brassey *Employment and Labour Law* vol 1 E4:29.

50 Brassey *Employment and Labour Law* vol 1 E4:30.

51 Brassey *Employment and Labour Law* vol 1 E4:30-31.

52 *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 (SCA).

53 See Brassey *Employment and Labour Law* vol 1 E4:19-49.

54 *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 (SCA) para 65.

55 Difficulty arises in the application of what constitutes "the course and scope of employment". See in this regard *Feldman (Pty) Ltd v Mall* 1945 AD 733 774; *Viljoen v Smith* 1997 1 SA 309 (A) 315D-317A; *Minister of Safety and Security Services v Jordaan t/a Andre Jordaan Transport* 2000 4 SA 21 (SCA) para 5; *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 5 SA 649 (SCA) paras 11-16 and *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 5 SA 475 (SCA) paras 8-18. See also *K v Minister of Safety and Security* 2005 3 All SA 519 (SCA) and *K v Minister of Safety and Security* 2005 8 BLLR 749 (CC).

of sexual harassment of other employees. Failure to do so would result in employers having to pay compensation to the victim of such sexual harassment.

The constitutional imperatives discussed above may have the effect of increasing the ambit of the common law duty of employers to take reasonable care of and to protect employees from physical and psychological harm arising from harassment, stigmatisation and discrimination at the workplace. This in turn may result in higher awards of compensation where a person's dignity is impaired in the course of an unfair constructive dismissal.

3.2.2 *The vicarious liability of the employer*

In terms of common law vicarious liability of the employer, an employer will be held vicariously liable for a delict committed by an employee if it is committed by the employee in the course and scope of his or her employment.⁵⁵ This delictual act could result in the impairment of the dignity of another person. If such an impairment is so severe as to render a person's work situation intolerable, it could amount to a constructive dismissal. As discussed above, this would violate the right not to be unfairly dismissed and the right not to be unfairly discriminated against and to have one's dignity impaired.

Although a detailed discussion of the interpretation of the concept "in the course and scope of employment" in the context of an employer's liability for the wrongful acts of its employees is beyond the scope of this article, it is nevertheless noteworthy that the Constitutional Court in *K v Minister of Safety and Security*⁵⁶ felt it appropriate, in the light of constitutional imperatives, to expand and develop the common law of vicarious liability so that it "is sufficiently flexible to incorporate not only constitutional norms, but other norms as well".⁵⁷ In this context the Constitutional Court emphasised the "pervasive normative effect of our *Constitution*" and the consequent obligation of courts to develop the common law so that it promotes the spirit, purport

56 *K v Minister of Safety and Security* 2005 8 BLLR 749 (CC).

57 See *F v Minister of Safety and Security* 2012 1 SA 536 (CC).

and objects of the *Constitution* in terms of section 39(2) of the *Constitution*.⁵⁸ A person's right to dignity is important in this context. In this case three policemen in turn raped a young woman who had gone to them for protection. The Court held that although the police officers' actions were obviously a clear deviation from their duty, there was a sufficiently close relationship between their employment and the wrongful conduct to hold the Minister of Safety and Security liable.

In *Grobler v Naspers Bpk*⁵⁹ the court found the employer vicariously liable for the acts of sexual harassment committed by a manager. The victim was his secretary. After considering the development of the doctrine of vicarious liability in other common law jurisdictions, the court concluded that policy considerations justified its finding.⁶⁰ The court held that in order to establish the vicarious liability of the employer, there must be a "significant relationship" between the unlawful conduct and the creation or increase of the risk which was caused by the employer. Factors that were taken into account to establish this relationship included the harasser's ability to abuse his position of authority at the workplace as a result of the ambit of authority given to him by the employer, and the vulnerability of the harassed employee as a result of the harasser's position of authority. In this context the court considered the working relationship between a manager and his secretary to be one that increases the risk of the sexual harassment of the secretary. The court also took into account the fact that the manager had a close relationship with and considerable influence on the managing director. As a result of this he was in a position to influence his subordinate's careers by ensuring failure if they did not abide by his sexual demands and success if they did.

It is significant that the court stated that if it was incorrect in finding the employer vicariously liable, then the existing rule of vicarious liability was not sufficiently flexible to deal with the problems of sexual harassment in the workplace. In this case, the court thought, courts would be obliged in terms of the *Constitution* to

58 *F v Minister of Safety and Security* 2012 1 SA 536 (CC) para 15.

59 *Grobler v Naspers Bpk* 2004 25 ILJ 439 (C). See also *Farhana v Open Learning Systems Education Trust* (Unreported Labour Court Case No JS347/10, 20 April 2011) and *Gauteng Shared Services Centre v Samai* (Unreported Labour Appeal Court Case No JA44/09, 7 December 2011).

60 A thorough discussion of the reasoning of the court is beyond the scope of this article.

develop or adapt the common law of vicarious liability in order to protect and develop the fundamental rights to personal dignity, to the freedom and security of person, and to the bodily and psychological integrity of women in the workplace.⁶¹ As seen above, the Constitutional Court later adopted this same stance in *K v Minister of Safety and Security*.

The court also held that an employer can escape liability by proving that reasonable care was taken to prevent harassment and to correct any such harassment immediately, and that the plaintiff employee unreasonably failed to avail herself of any preventative, or unreasonably failed to prevent harm.⁶² This is significant because the statutory provision providing for the vicarious liability of an employer provides a similar escape route for the employer. Section 60 of the EEA provides *inter alia* that if an employer directly encourages or even by its inaction allows or condones conduct which is in breach of the EEA,⁶³ it will be vicariously liable for the damages flowing from such a breach. It reads as follows:

- (1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
- (3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

61 *Gauteng Shared Services Centre v Samai* (Unreported Labour Appeal Court Case No JA44/09, 7 December 2011) 514 C-H.

62 *Gauteng Shared Services Centre v Samai* (Unreported Labour Appeal Court Case No JA44/09, 7 December 2011) 495 G-H.

63 Section 6(1) of the EEA prohibits discrimination in the following terms: "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth". S 6(3) prohibits harassment in the following terms: "Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)".

This section was invoked in *Ntsabo v Real Security CC*.⁶⁴ Ntsabo, a security guard, resigned after being sexually harassed by her supervisor. The employer, despite having been informed of the incidents of sexual harassment, consistently ignored the situation and in a complacent manner did nothing about it. The victim of the sexual harassment consequently resigned. The Labour Court found that the employer's inaction and complacency with regard to the situation had rendered it intolerable for Ntsabo to continue working and consequently Ntsabo was found to have been constructively dismissed in terms of the LRA.⁶⁵ The basis of the constructive dismissal was sexual harassment. Sexual harassment is not one of the prohibited grounds of discrimination listed in section 187(f) of the LRA, and it qualifies as a ground for discrimination in terms of section 6(3) of the EEA only. In consequence the court per Pillay J was unable to find that the dismissal was an automatically unfair dismissal in terms of section 187(f) of the LRA, which attracts compensation of up to 24 months salary. Nevertheless the inaction of the employer was still found to constitute an unfair dismissal in terms of section 186(1)(e) of the LRA. The court made the maximum allowable award compensation for an unfair dismissal which is not an automatically unfair dismissal. This amounts to twelve month's salary,⁶⁶ which in this case amounted to R12 000.

The same inaction of the employer resulted in a further two awards for compensation. Section 50(1)(d) and (e) of the EEA provide that the Labour Court may make any appropriate order including awarding compensation and damages "in circumstances contemplated in this Act". Section 50(2) of the EEA further provides that if the Labour Court finds that an employee has been unfairly discriminated against, it may make "any order that is just and equitable in the circumstances, including-

- (a) payment of compensation by the employer to the employee;
- (b) payment of damages by the employer to the employee".⁶⁷

64 *Ntsabo v Real Security CC* 2003 4 ILJ 2341 (LC).

65 Section 186(1)(e) LRA.

66 Section 194(1) LRA

67 In *Coetzer v Minister of Safety & Security* 2003 24 ILJ 163 (LC) 306 the primary remedy for unfair discrimination was held to be what the court deems just and equitable.

The employer was ordered in terms of the EEA to pay a further amount of R20 000 for future medical costs for psychiatric treatment and an amount of R50 000 for general damages including *contumelia*.⁶⁸ In addition, the employer was ordered to pay for the costs of the application. Liability for future medical costs and general damages including *contumelia* was based on the statutory vicarious liability of the employer for the conduct of its employees created in terms of section 60 of the EEA.

In *Marsland v New Way Motor & Diesel Engineering*⁶⁹ the employee suffered a nervous breakdown as a result of his wife's leaving him during the December holidays. After hospitalisation for his breakdown, on his return to work, the employer, principally through the conduct of the managing director, placed the employee in a situation that rendered him incapable of doing his work. The employee was also so severely verbally abused, mainly by the managing director, that the court found the abuse to amount to a form of harassment. The court found that there had been a constructive dismissal and that the reason for the dismissal was unfair discrimination based on mental illness. The court found the dismissal to be automatically unfair on the basis of section 187(1)(f) of the LRA, which provides that a dismissal is automatically unfair if:

... the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

Mental illness is not one of the factors listed in section 187(1)(f) of the LRA. Despite this, Stein AJ found that since discrimination on the ground that a person suffers from a mental illness has the potential to infringe that person's dignity as a human being, such discrimination must be treated as discrimination on a prohibited ground.⁷⁰ Section 6(1) of the EEA does not list mental illness as a prohibited ground for discrimination. Unlike section 187(1)(f) of the LRA, the words "on any arbitrary ground, including" do not precede the list of prohibited grounds. The listed prohibited grounds in the EEA, however, are preceded by the word "including". This indicates

68 This refers to non patrimonial damages suffered as a result of an injury to dignity, for example.

69 *Marsland v New Way Motor & Diesel Engineering* 2009 30 ILJ 169 (LC).

70 *Marsland v New Way Motor & Diesel Engineering* 2009 30 ILJ 169 (LC) 193E.

that the legislature did not intend to limit the grounds of discrimination to those listed in section 6(1). The decisive factor for a finding of discrimination in the *Marsland* case was that the basis for discrimination had the potential to impair the person's dignity as a human being. Since one of the purposes of the EEA "is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination",⁷¹ it could be argued that all forms of discrimination that have the potential to impair a person's dignity, even if not on the basis of a listed ground, are prohibited by section 6(1) of the EEA.

Therefore, conceivably Mr Marsland could claim that he was unfairly discriminated against by the managing director on the basis of mental illness and that this amounts to unfair discrimination in terms of section 6(1) of the EEA. In terms of section 60 of the EEA the employer could be held vicariously liable for this discrimination. As was the case in *Ntsabo*, Marsland would then be able to institute an action in terms of the EEA in addition to his claim for constructive dismissal in terms of the LRA. The difference between *Ntsabo* and *Marsland* is that the constructive dismissal in *Ntsabo* was not found to be automatically unfair. This could possibly result in a deduction of the compensation awarded as a result of the dismissal being automatically unfair from any compensation the Labour Court may award on the basis of section 60 of the EEA.

In cases of unfair discrimination in terms of the EEA, the Labour Court can make an award that it deems to be just and equitable.⁷² There is no statutory limitation on the amount that can be awarded. Therefore, whether one's claim is based on unfair discrimination in terms of the EEA or on the common law (on the vicarious liability of the employer or on the duty to take reasonable care of the safety of employees), the ultimate outcome concerning the amount of compensation will be determined by the judge's sense of what is right and fair. Even though a judge will have the benefit of the opinions of expert witnesses concerning the extent of the injury, be it physical or psychological, as well as the results of calculations of actuaries, the fact remains that determining the amount of damages can never be an exact science. Inevitably there

71 Section 2(a) EEA.

72 Section 50(2) EEA.

will always be an element of subjectivity in the final determination. Given the fact that unfair discrimination "undermines fundamental values that the labour relations community in our country depends on to regulate its very existence"⁷³ it may be that the courts will impose punitive damages in severe cases of unfair discrimination that extend beyond pure financial loss.

4 Conclusion

The fact that an employment relationship is based at least partly on commercial considerations is evidenced by the fact that an employer is not only entitled to but even encouraged to make profits. A possible justification for legislative caps on the amount of compensation allowed for unfair dismissal may be the preservation of the interests of business efficiency and certainty. However, commercial viability can never be at the expense of a person's dignity;⁷⁴ hence the notion that the employment relationship is relational. The interpretation of legislative and common law provisions must be undertaken against the backdrop of the fundamental constitutional guarantees *inter alia* of the right to fair labour practices and the rights to dignity and equality.

This proposition is reflected in the law because in circumstances where an unfair dismissal also involves an impairment of one's dignity or discrimination, a disgruntled employee can avail himself/herself of the common law and/or certain provisions of the EEA where there are no limits imposed regarding the amount of compensation a court can award. If there has been unfair discrimination, the courts may even award punitive and non-pecuniary damages.

73 Per Nicholson JA in *Chemical Energy Paper Printing Wood & Allied Workers Union v Glass & Aluminium 2000 CC 2002 23 ILJ 695 (LAC)* para 48.

74 In *Whitehead v Woolworths (Pty) Ltd* 1999 8 BLLR 862 (LC) para 32, the Labour Court held that in the light of the fundamental rights protected in terms of the Constitution, "the fairness or unfairness of the discrimination cannot be measured against the profitability or for that matter efficiency of a business enterprise".

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List of abbreviations

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