Contemporary Labour Law

Vol 14 No 8 March 2005

Incompatibility as a ground for dismissal

Difficult employees, eccentrics and the employer's right to harmonious working relationships

by Carl Mischke

While happy workplaces may be all the same, every unhappy workplace is unhappy in its own way — to paraphrase a famous expression. There are countless reasons for unhappiness in a workplace, ranging from frustration, boredom or perceived lack of recognition, serious breakdowns in interpersonal relationships between employees and managers may have devastating effects not only on the morale of the employees concerned, but on the atmosphere and productivity of the workplace as a whole.

Naturally, not all employees are the same and individual personality traits may range from the idiosyncratic, the eccentric, and the unmanageable. In some instances, an employee may simply be incompatible with other employees, with the reigning corporate culture or managerial styles and approaches, especially when new managers have been appointed or employees have shifted from one position to another and now find themselves working with new colleagues and under the watchful eye of a different manager. This is the essence of incompatibility: that an employee is unable to work harmoniously with fellow workers or managers or that the employee does not 'fit in' with the corporate culture.

A line of decisions, going back to Industrial Court decisions and more recent arbitration awards, have made it clear that incompatibility may, under certain circumstances, be a ground for dismissal. But given the approach of the Labour Relations Act 66 of 1995 (the LRA) in respect of dismissal, most notably its limitation of grounds of dismissal to misconduct, incapacity and operational requirements in section 188, the thorny issue arises as to whether incompatibility constitutes incapacity on the part of the employee or a reason relating to the employer's operational requirements. Is incompatibility something related to the

Published by Gavin Brown & Associates
Box 31380 Tokai 7966
Tel : 021 788-5560 Fax: 021 788-1811

employee and the employee's ability to do the work, or is it the employer's right to relatively peaceful working relationships that justify the dismissal?

Eccentricity

Some employees are downright eccentric in their behaviour. The less-eccentric employees (or those who simply succeed in covering up their own idiosyncrasies more effectively) may complain, gossip or even refuse to work with an employee or even a manager who marches to the beat of a completely different drum. In **Joslin v Olivetti Systems & Networks Africa (Pty) Ltd (1993) 14 ILJ 227 (IC)** management stepped in because the employee had what was described as a 'credibility problem'. The employee carried up to 36 pens in his shirt pocket and sometimes carried a camera around his neck, he sometimes wore a cricket cap at work and he used a photocopier to promote a certain political point of view. Complaints streamed in, ranging from views that the employee (a senior executive) was making himself the object of ridicule, even attracting terms such as 'lunatic'. The issue was, according to the employer, not with the employee's performance of his job but the fact that the employee was creating a negative impression amongst co-workers and was perceived to be acting against the best interests of the employer.

The Industrial Court took the view that odd or eccentric employee (even in a senior manager) cannot in itself constitute a ground for dismissal — mild or harmless eccentricity should be distinguished from extreme forms of unacceptable conduct.

As examples of the latter the Industrial Court mentioned situations where the employee arrives for work in a bathing costume or some other outrageous outfit, if the manager receives clients or co-workers while standing on his head. Turning cartwheels in the passage outside the office, according to the Industrial Court would also justify a conclusion that dismissal was appropriate. The Court held that the employee's odd behaviour amounted to nothing more than a mild form of exhibitionism and the employee was reinstated.

In the Industrial Court's view it appears to be a matter of degree but the line between behaviour that is merely eccentric and destructive incompatibility is at best a blurred one:

> *"Dismissal may be appropriate only where the employee's eccentric behaviour is of such a gross nature that it causes consternation and disruption in the work-place, and then only after he or she has been properly counselled or warned. A manager should not indulge in whimsical conduct which may impair the dignity of his office or cause the employer embarrassment. On the other hand a manager who prefers to wear a black sock on one foot and a white sock on the other may be regarded as being eccentric within the limits of tolerable conduct. In other words eccentricity, like misconduct generally, has to be sufficiently serious to warrant dismissal." (at 213)*

Operational requirements

As old as it may be, the Industrial Court's decision in **Wright v St Mary's Hospital (1992) 13 ILJ 987 (IC)** still sets out a number of important principles, not the least being a focus on underlying causes of conflict. For the Industrial Court, dismissal for incompatibility fell within the ambit of the operational requirements. At that point in time, emphasis fell on the employer's right to insist on reasonably harmonious interpersonal relationships in the organisation, affirming the earlier view expressed by the Court that the employer would be entitled to remove an employee from the workplace if the employee's presence or actions gives rise to disharmony (**Erasmus v BB Bread Ltd** (1987) 8 ILJ 537 (IC)).

Another facet of this case which remains of some importance is the fact that it relates to managerial approaches and interactions. The employer's management and executive committee thought that the employee was impatient and that he could not handle difference of opinion 'diplomatically'. Allegations against the employee included that he encouraged subordinate employees (nurses) to undermine the authority of their superior (the matron) and that he intervened in the work of others. He allegedly manipulated and incited other doctors against the board and his actions were seen as contradicting the policies and wishes of the board. The employee had lost his cool at a board meeting, banging his fist on the table and raising his voice.

Other allegations were that he had criticised the hospital and had written letters to the general public

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Lubke v Protective Packaging (Pty) Ltd (1994) 15 ILJ 422 (IC)

denigrating the hospital and even that his wife had meddled in the nursing department.

No doubt, the Court held, the employee could and should have been more diplomatic and his excessive enthusiasm at times overrode discretion, but in the context of the strained relationships which had developed, every perceived slight resulted in a considerable overreaction. The root cause of the conflict was the employee's vision for the hospital: the employee saw it as his mission in life to serve the hospital and he wanted to create a hospital that would mean all things to the community it served and fulfil the needs of the community. It is also worth noting that confusion of functions and roles aggravated the conflict: the roles of the medical superintendent, the matron and the administrative officer were not clearly demarcated.

Dismissal for incompatibility, the Court held, would only be justified if there is a irremediable breakdown in working relationships. From a procedural perspective, the Industrial Court emphasised the need for remedial action to the perceived incompatibility and, if the employee is found to have been responsible for the strained relationships, that he be given a fair opportunity to remove the cause for disharmony. On the facts of the case the Industrial Court found that reinstatement would a fair remedy.

New management

The introduction of a new management team or even a new senior manager in a specific section of the organisation may lead to increased conflict. **Lubke v Protective Packaging (Pty) Ltd** (1994) 15 ILJ 422 (IC) is a case in point. The employer appointed a new managing director and, as the proverbial new broom, the director made sweeping reforms in an attempt to reinvigorate the company. It was not the changes she made, however, but the manner in which the changes were made and the tempo of change that caused annoyance amongst the subordinates who complained that the new managing director was out to change the corporate culture. As is almost invariably the case in conflict situations such as these, the managing director was told that she lacked interpersonal skills — her performance of her work was not at issue and the employer at no stage claimed that her performance was poor. On the contrary, the employer had, in the proceedings before the Industrial Court, nothing but praise for the work she had done in redefining internal functions and operations. Because of the director's so-called 'dictatorial' style and approach, one employee allegedly resigned and others threatened to do so. The Industrial Court had little sympathy for these disgruntled employees:

> *"In any event, they should have known that it is a fact of life that new brooms do sweep clean. Senior personnel who fall under the supervision of a new executive appointee, such as a new managing director, should learn to live with, and to adapt themselves to changes and new work patterns, instead of crying foul play, simply because the bristles of the new broom happen to be hard and irksome. Where a managing director has been selected for appointment following exhaustive screening, then it is manifestly unfair to terminate the employment contract, after a short period of time, simply because some employees cannot come to terms with the new regime and show signs of rebellion." (at 428)*

From a procedural point of view, the Court stated that the employer must take sensible, practical and genuine efforts to improve workplace relationships or to address the interpersonal conflict when dealing with a senior manager whose work is, apart from the alleged incompatibility, perfectly satisfactory.

Interpersonal conflict may manifest itself in a number of ways that disguise the true nature of the problem.

Managers may see insubordination, lack of respect and even poor work performance instead of incompatibility or conflict in approaches or personalities. In **Nathan v The Reclamation Group (Pty) Ltd** (2002) 23 ILJ 588 (CCMA) the applicant sold his scrap metal business to the respondent company and took over as director of the company — he had been close friends with two of the senior directors of the company. Problems began when an operations director was appointed. The operations director stripped the director of his authority, humiliated him and degraded his status in the company, including appointing his son-in-law to take over some of the applicant's work. Eventually the applicant was dismissed for incapacity and poor work performance.

The arbitrator found the operations director an arrogant, abrasive, patronizing, ignorant and rude person. On the accepted evidence of the applicant, the arbitrating commissioner found that the real reason for the dismissal was the incompatibility between the applicant and the newly appointed operations director. The operations director attempted to make the applicant out as a poor performer, clumsy, unscrupulous and unsuccessful, but the real reason was incompatibility. The arbitrating commissioner held that there was no fair reason for the applicant's dismissal.

Cultures, groups and causes

Managers and management theorists are fond of referring or analysing the concept of a 'corporate culture'. Generally, this constitutes the unwritten rules governing relationships, interactions, work-flow and approaches to work, but also various 'softer' issues such as forms of address, respect, conduct before clients and even codes of dress. It may take a new employee a considerable period of time to discover (sometimes through trial and error) the do's and the don'ts of the corporate culture. In the **Lubke** decision, the Industrial Court was not overly impressed by the employer's reliance on the employer's culture, stating that it was an amorphous concept and that it was inappropriate when used in the context of the working environment and the employment relationship. On the facts of the case the Court found that the only 'culture' the new managing director was bound to promote was to keep the company alive and to secure a maximum profit.

An employer will have to do more than simply rely on the 'corporate culture'. In **Hapwood v Spanjaard Ltd** [1996] 2 BLLR 187 (IC) the employer argued that the employee's style and abrasive manner was totally out of place in the corporate culture. But the employer's witnesses could not articulate and describe this culture except in vague and meaningless terms — nor was the employee given any guidance as to the existence, nature or content of the 'corporate culture'.

One of the pivotal aspects of incompatibility illustrated by these cases is that it often has group or structural implications and effects — subordinates complaining about the conduct of an employee or a manager, conflicts between managers themselves (even leading to situations where a lack of management can paralyse the organisation altogether) or between a senior management and management committees or the board. To a certain extent, this is what sets incompatibility apart from misconduct and poor work performance — conduct and capacity focus on the employee as an individual and evaluates his or her conduct or work against standards or rules that are considerably more objective. In the case of incompatibility, the issue is far more on the employee's interaction with others or with a group of employees. There is a possibility, of course, that subjective and even irrational perceptions and views can lead to interpersonal conflict between an employee and his or her co-workers. Whether this means that the employee concerned is incompatible or whether the subjective perceptions, fears, resistance or concerns of other employees give rise to the conflict remains a difficult factual question. Events, perceived slights, occasional rudeness or even the failure to greet a colleague on a blue Monday morning may be blown out of proportion by sensitive or sensitised employees; the rumour mill is kick-started and the office's e-mail grapevine heads into overdrive, all fanning the flames of interpersonal conflict that may, eventually, lead to a perception of incompatibility.

It is too easy and too convenient to come to the conclusion that relationships have irretrievably broken down and that the dismissal of an employee apparently in the centre of the storm is the only viable option to restore some measure of peace in the workplace (harmony, being an ideal, being considerably harder, if not impossible, to achieve). In **Visagie & andere v**

Prestige Skoonmaakdienste (Edms) Bpk (1995) 16 ILJ 421 (IC) four senior managers refused to accept the employer's refusal to honour a promise of an interest in the partnership. The conflict on this issue increased to the point that disciplinary proceedings were instituted against the managers for causing an irretrievable breakdown of the employment relationship because they had instituted legal proceedings against the employer. The Industrial Court held that the litigation (or the threat of litigation) did not justify the dismissal of the managers because it was not in itself a reasonable and acceptable reason for the breakdown of the employment relationship. The Court also came to the conclusion that even though the employees and the employer agreed that the employment relationship had broken down, this did not justify a dismissal on the grounds of incompatibility. The employer also had to show that the employee(s) had substantially contributed or had been the sole cause of the conflict and that he or she had been given a reasonable opportunity to remove the cause of the conflict.

Cause and effect may be difficult to unravel and, because of their proximity to the conflict, the managers and employees involved may be hard pressed to analyse the conflict and to prove that a specific employee caused or contributed to the breakdown of relationships. It is tempting to lapse into thinking of 'fault' by asking who carries the 'blame' for the breakdown in relationships. This temptation arises particularly in the case of interpersonal conflict between two employees (a manager-subordinate, for example). This approach may, of course, contribute to a worsening of the relationship problems.

The distinction between cause and effect may be made even more complicated in situations where not only the employee played a role, but other persons, be they employees or not, bodies, committees and management structures play a role in aggravating the conflict. Situations such as these are not uncommon — in polarised workplaces it is not unusual to find that employees and managers form alliances and factions, keep secrets and attach suspicion to even the most innocent event or gesture. This is illustrated by **Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit & others** (1999) 20 ILJ 1936 (LC) where a Minister in the Dutch Reformed Church was dismissed after having been transferred from a rural to a large and busy urban parish. Complaints arose as to the amount of time and attention he devoted to some of his tasks, but the Labour Court found that the special commission charged with evaluating his performance had merely drawn attention to his faults and levelled more criticism against him.

One of the interesting aspects of this case is the Labour Court's consideration of whether the minister was at fault. On the evidence the Court found that the parish structure contributed to the tension between the five ministers and that the mistrust, conflict and suspicion amongst the ministers in turn led to secrecy, the forming of alliances and a marked lack of interest in resolving disputes. It appeared as if there was a concerted effort to make the applicant minister the scapegoat for the problems and conflict and the Court concluded that the employer had acted unfairly by singling out the applicant for dismissal.

From a practical perspective, an interesting question arises here: is it the employer or the employee who bears the responsibility for addressing (and, if possible, removing) the causes of the conflict? Is it up to the employer to investigate the matter, to intervene in some way in the strained relationships (for example, by subjecting the conflicting employees to 'team-building' or 'relationship-building' exercises), or is it up to the employee, having perhaps been informed of what the problem is, to seek to reform and change his or her ways? Perhaps a realistic approach to interpersonal conflict entailing the possibility of incompatibility dismissal lies somewhere in between: both

Contemporary Labour Law
is published monthly from August to July of each year. Annual Subscription: R 826.50 including VAT and storage binder. Visit our website at www. workplace.co.za for details.

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"The incompatibility complained of.. is more akin to "incapacity" as used in a loose and non-technical sense. The incapacity does not arise from poor work performance but from an inability to conform to the standards set by the employer to achieve harmony in the workplace."

Subrumuny v Amalgamated Beverage Industries Ltd (2000) 21 ILJ 2780 (ARB)

management and the employee causing the ruckus need to realise that the conflict has reached a point of no return and that steps need to be taken by both to either address the problems or to find some way of amicably parting ways.

Incompatibility and the LRA

Section 188 of the LRA provides for only three grounds of dismissal: the employee's conduct, the employee's capacity or the employer's operational requirements. Incompatibility is not listed as a separate ground. This means that incompatibility must be subsumed under the heading of either incapacity or operational requirements.

This point has been subject to some debate, especially given the fact that the above-mentioned **Wright v St Mary's Hospital** (1992) 13 ILJ 987 (IC) clearly and unambiguously slotted incompatibility in under the heading of operational requirements. But the LRA also introduced a new definition of operational requirements in section 213 as being the employer's technological, economic, structural or "similar" needs. The question arises whether incompatibility falls within the scope of the employer's "similar" needs or whether it should be seen, instead, as a form of incapacity on the part of the employee.

The current view seems be, first, a recognition of the fact that incompatibility hovers in the grey zone between incapacity and operational requirements. Second, it now appears that incompatibility is viewed as relating to the employee's inability to meet one of the employer's performance standards, namely to work, in relative harmony, with other employees in a given workplace. In **Subrumuny v Amalgamated Beverage Industries Ltd** (2000) 21 ILJ 2780 (ARB) the arbitrator affirmed the right of the employer to lay down standards and its right to a peaceful workplace:

> *'An employer is entitled to insist on reasonably harmonious inter personal relationships within his business . . . . Inasmuch as incompatibility is an imponderable and nebulous concept, there must at least be some other evidence besides the ipse dixit or opinion of the employer. Assessing incompatibility of managerial interaction "necessarily involves the exercise of a subjective judgment". The effect of the incompatibility "cannot always be explained and articulated in clear and objective terms". There is much to be said for the formulation that the levels of compatibility must for business and economic reasons be left for the employer to decide. . . . It is not for a court to second-guess these decisions to decide upon the appropriate course of action de novo. Nevertheless, an adjudicator should at least ensure that the employer's standards are attainable.*
>
> *Provided that the employer acts in good faith and has reasonable and supportable grounds for concluding that the employment relationship cannot be continued, interference is unwarranted. It is axiomatic that in determining whether a dismissal is unfair one must be guided by the principle that reasonable people may differ as to what is appropriate under the circumstances. In the final analysis, it is not for me to decide whether the employer's decision was the best decision.' (2789-2790)*

Again, the arbitrator engaged in a fault-finding exercise, coming to the conclusion, on the facts, that the applicant employee was responsible for the conflict and that the blame could be 'directly apportioned' to him. He was not prepared to co-operate with a team and actively sought to create conflict by challenging even constructive criticism. He lacked interpersonal skills and the ability to communicate with co-workers in an environment which sorely depended on co-operation, communication and joint problem solving.

In determining how to accommodate incompatibility as a ground for dismissal into the structure and system of the LRA, the arbitrator reasoned as follows:

> *'In determining the fairness of a dismissal, one is enjoined "to take into account any relevant*

code of good practice issued in terms of this Act" (s 188(2)). The Code of Good Practice does not expressly deal with incompatibility as a ground of dismissal. If one accepts that the incompatibility complained of manifests itself in a failure to maintain the standard of relationship with peers, subordinates and supervisors set by the employer, then such a failing is more akin to "incapacity" as used in a loose and non-technical sense. ***The incapacity does not arise from poor work performance but from an inability to conform to the standards set by the employer to achieve harmony in the workplace.***

*Adapting items 8 and 9 of schedule 8 to the exigencies of a case of incompatibility, important principles can be extrapolated which by and large conform to sound industrial relations practices and norms. Particular relevant factors to be taken into account include that the employee should be counselled; afforded an opportunity to meet the required standard; have alternatives considered short of dismissal; dismissal should be preceded by an opportunity for the employee to state a case in response and to be assisted by a trade union representative or fellow employee' (*at 2790, emphasis added).

In **Jardine v Tongaat Hulett Sugar Ltd** (2002) 23 ILJ 547 (CCMA) the arbitrating commissioner summarised the principles derived from the cases and also dealt with the issue of potential subjectivity:

'*Assessing compatibility of managerial interaction necessarily involves the exercise of a subjective judgment. For this reason there must at least be some other evidence besides the opinion of the employer to establish incompatibility. However the formulation of compatibility must, for business and economic reasons, be left to the employer to decide.' (at 563).*

Given the fact that incompatibility is characterised by strained workplace relationships, reinstatement is thought to be the appropriate remedy only in exceptional cases — usually neither the employer nor the employer can bear the thought of resuming the employment relationship exactly at the point it was broken off. Compensation may, in most cases, be the more appropriate remedy, even in situations where the dismissal is found to be substantively unfair.

Challenges

At the best of times conflict arising in the workplace presents a considerable challenge for both the employer and the employees involved. The employer, of course, needs to provide an expedient solution or some way of addressing the conflict. Left unchecked, conflict in the workplace can be devastating: not only for those directly involved in the conflict, but its impact can spread, infecting entire departments, branches or even the organisation as a whole. Incompatibility amongst senior managers can effectively disable management control, leadership and legitimacy. The employees directly involved in the conflicts may be unable to work or to contribute in any meaningful way to the employer's business or its operations. Interpersonal conflict, incompatibility and other highly emotionally-charged workplace situations are not the exception - unfortunate as that may be.

Fixed term contracts and unfair dismissal

by Carl Mischke

Important new decisions continue to emerge from the courts in relation to breach of contract. The first milestone on this path of development was the well-known **Fedlife Assurance Ltd v Wolfaardt** (2001) 22 *ILJ* 2407 (SCA), in which the Supreme Court of Appeal confirmed that remedies based on the contract of employment have not been supplanted by the statutory remedies provided for in the Labour Relations Act 66 of 1995 (the LRA). It would perhaps be an exaggeration to say that, before this decision of the Supreme Court of Appeal, the law of contract had become dormant, but the focus of attention had almost completely shifted, at that time, to the statutory remedies for an unfair dismissal.

For present purposes, the important principle formulated in the **Fedlife** decision is that the legislature is presumed not to have intended to interfere with the common law or to deprive parties of their common law remedies. The common law rule that an employee must be fully compensated for the damages they can prove as a result of an unlawful premature termination

of a fixed-term employment contract is not, the Supreme Court of Appeal held, in conflict with the spirit, purport and objects of the Bill of Rights. The LRA neither expressly or by implication abrogates an employee's common law rights or the enforcement of those rights.

The latest decision of the Labour Appeal Court in relation to breach of contract, contractual remedies and unfair dismissal has significant implications for both employers and employees as it goes a step or two further by exploring the connection between an unlawful termination of a fixed term contract and substantive unfairness in terms of the LRA. While the **Fedlife** decision affirmed the right of an employee to enforce a contract in terms of common law principles, this new decision indicates that the employer's breach of contract, arising in the context of the termination of the contract, may justify a finding of substantive unfairness in terms of the LRA.

In **Buthelezi v Municipal Demarcation Board** [2005] 2 BLLR 115 (LAC) the Board appointed the employee as a deputy financial manager in terms of a fixed term contract running from 2000 to 2005. Ten months after commencement of the contract the employee received a notice of retrenchment.

The retrenchment arose as a result of organizational restructuring rendering some positions redundant. Detailed reasons for the restructuring were given and the employee was invited to respond to the notice and to suggest alternatives to his possible retrenchment. The employee requested, and was granted, an extension of the period within which he was to make proposals.

The employee was invited to apply for a different vacant post, but he was unsuccessful — a notice of dismissal followed and the employee was requested to vacate his office and return the keys to the employer. During the notice period the employer indicated that it no longer required his services. Conciliation at the CCMA having failed, the employee approached the Labour Court and sought reinstatement and compensation.

In the Labour Court

The employee argued that the termination of his contract was substantively unfair by virtue of the fact that he had concluded a fixed-term contract and that the employer could not terminate this contract for operational reasons during the term of the contract. In an unreported decision the Labour Court found that there was a fixed term contract and that the dismissal was substantively unfair — the Labour Court's reasoning being that the dismissal in the period of the fixed-term contract was substantively unfair.

It was, according to the Labour Court, only this fact that rendered the dismissal unfair. In regard to the argument based on the employer's operational requirements, the Labour Court concluded that, in this respect at least, the dismissal was fair as the employer had a fair reason to restructure its business.

From a procedural point of view, the Labour Court concluded that the dismissal was procedurally unfair: not because of the way the employer conducted the restructuring exercise or selected the employee for retrenchment, but because the manner of his dismissal amounted to an invasion of the employee's dignity. But the employee did not approach the Labour Court with entirely clean hands. Taking into account what it referred to as 'scurrilous accusations' made by the employee and an alleged act of misconduct (which, the Labour Court held, would have entitled the employer to dismiss him) the employee was not awarded compensation.

Because the employee had committed an act of misconduct in the period between the notice of dismissal and the date on which the dismissal became effective, he was not entitled to compensation.

On appeal

In the Labour Appeal Court it was reiterated, on behalf of the employee, that his dismissal was substantively unfair because the employer had no legal right to terminate the fixed-term employment contract before its term expired — even if the employer had valid and fair operational reasons for wanting to do so. The employer's counter-argument was that if valid and fair operational requirements justify a dismissal, the employment contract may be terminated in spite of it being for a fixed term.

The pivotal issue that arises at this point is the connection between a breach of contract, on the one hand, and unfair dismissal on the other hand. A lawful dismissal may still be unfair, but here the Labour Appeal

Court found itself confronted by the question whether a termination amounting to a breach of the employment contract rendered the dismissal substantively unfair. The Court's starting point was a consideration of the applicable common law principles:

> *'There is no doubt that at common law a party to a fixed-term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination. The rationale for this is clear. When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform their respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things. Under the common law there is no right to terminate a fixed-term contract of employment prematurely in the absence of a material breach of such contract by the other party.' (at 118-119)*

"Under the common law there is no right to terminate a fixed-term contract of employment prematurely in the absence of a material breach of such contract by the other party."

Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC)

The employer's arguments included an argument based on fairness. The LRA had extended the scope of protection against dismissal in respect of termination (or non-renewal) of fixed-term contracts — protection that did not exist at common law. Fairness required that employers should have the right to terminate a fixed-term contract during its currency for operational reasons such as restructuring. The Labour Appeal Court dismissed this argument, taking the view that the risk willingly assumed by both the employer and the employee dispel these considerations of fairness:

> *'I have no hesitation in concluding that there is no unfairness in such a situation. This is so simply because the employer is free not to enter into a fixed-term contract but to conclude a contract for an indefinite period if he thinks that there is a risk that he might have to dispense with the employee's services before the expiry of the term. If he chooses to enter into a fixed-term contract, he takes the risk that he might have need to dismiss the employee mid-term but is prepared to take that risk. If he has elected to take such a risk, he cannot be heard to complain when the risk materialises. The employee also takes a risk that during the term of the contract he could be offered a more lucrative job while he has an obligation to complete the contract term. Both parties make a choice and there is no unfairness in the exercise of that choice.' (119-120)*

In line with the decision of the Supreme Court of Appeal in **Fedlife**, the Labour Appeal Court affirmed the principle that the changes made to the common law by labour legislation do not entail that the common law principles no longer exist — the LRA and its protection against unfair dismissal has not amended the general common law principle that the employer may not unilaterally terminate a fixed-term employment contract (unless, of course, the termination is in response to a material breach of the contract by the employee).

Implications

For the Labour Appeal Court, the unlawful termination of the fixed term contract meant that the dismissal was also unfair — unfair in the fullest possible sense. The fact that the employer may have had operational requirements justifying a dismissal did not give the employer the right to terminate the employment contract. In this regard it is necessary not only to consider the Court's reasoning, but also what the judgment is silent on. There was no examination or

consideration of the employer's operational requirements. Whether the employer had a fair and valid reason, arising from the restructuring exercise it had engaged on was, for the Labour Appeal Court, irrelevant. It was the unlawfulness of the dismissal that rendered it unfair.

It is clear that this decision has vitally important implications — at the very least for both employers and employees who have concluded fixed-term employment contracts. Once concluded, neither the employer nor the employee can terminate the contract during its currency. This is the risk incurred by both parties upon concluding a fixed-term contract. The employer may terminate the contract if the employee has breached a fundamental term of the contract, but in the absence of such a breach by the employee, any purported dismissal of the employee will not only be unlawful (entitling the employee to contractual remedies such as specific performance or a claim for damages) but it will also be unfair for the purposes of the LRA.

From this judgment it appears that the employer's reasons, at least if they relate to operational requirements, are not relevant: no matter how sound the employer's operational needs may be, the unlawfulness of the termination renders the dismissal unfair. Seen from a certain angle, it almost appears as if the Labour Appeal Court has developed a new form of automatically unfair dismissal where the reason for the termination is eclipsed by the lawfulness of the termination.

An employer and employer who conclude a fixed term contract remain bound by the period agreed to — this is the risk involved in contracting for a fixed term. From the employer's perspective, and according to the Labour Appeal Court, it would be more practical to conclude an indefinite contract if it foresees the need to dismiss. But it is not always possible to foresee a change in circumstances: three years into a fixed term an employer may experience financial difficulties (unforeseen at the time of concluding the contract) necessitating a reduction in the workforce. Would the operational requirements dismissal of an employee in these circumstances also amount to an unfair dismissal? In terms of the Court's reasoning in this case, it would.

From a practical perspective, this judgment will mean that employers, intending to appoint an employee on a fixed-term contract, may consider providing for termination of that contract under certain circumstances. The parties may, for example, agree that the contract, regardless of its period, may be terminable by the employer in the case of misconduct, incapacity or operational requirements. If a provision such as this is included in the fixed-term contract, a termination on any of these grounds will not constitute a breach of contract. In effect, the parties can agree on methods of termination, during the period of currency of the contract, that enable them to terminate the contract even before the expiry of the fixed term.

This decision of the Labour Appeal cannot, however, be taken to mean that an employee on a fixed-term contract enjoys absolute protection against dismissal during the currency of the contract. Some scope must remain for dismissing an employee on a fixed term on the basis of misconduct or incapacity. The employee may develop severe health problems or suffer a debilitating injury during the currency of the contract; the employee may commit fraud, theft, or infringe workplace rules or standards justifying a dismissal for misconduct.

Taken to the logical conclusion, the common law principles reiterated and relied on by the Labour Appeal Court would entail that the employer may only terminate the fixed-term contract if the employee's incapacity or misconduct constitutes a breach of a material term of the contract. In such a case, the employer could, from a common law perspective, accept the employee's breach of contract and terminate it. This in turn would mean that every enquiry in the context of misconduct or incapacity would have focus on the issue of whether the employee's actions or omissions constitute a breach of a material term. Using this approach means also that a dismissal during the currency of a fixed-term employment contract will be lawful if, and only if, the misconduct or incapacity can be shown to constitute a breach of the contract on the part of the employee. But this is, clearly, not how our law of unfair dismissal is meant to be.