The question is deceptively simple: does the dismissal of an employee in the public sector constitute administrative action under s1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)? There are numerous ways of formulating and re-formulating this question. For instance: if an employee of an organ of state is dismissed, does that employee have additional remedies in terms of PAJA, read together with s 33 of the Constitution of 1996? Or should the employee refer his or her dismissal to the labour dispute resolution institutions established by the Labour Relations Act of 1995 (the LRA) instead? Naturally, the question can also be cast as a jurisdictional question: may the High Court hear and decide dismissal disputes, not in terms of the LRA, but in terms of s 33 of the Constitution and PAJA?

On the one hand, the question seems to entail nothing more than an exercise in statutory interpretation (of s 1 of PAJA); on the other hand, fundamental questions of legal principles arise. The questions relate to some of the principles of our legal system as it is now, but it also involves decisions of our not-so-recent past and their continued applicability in the new constitutional order.

The Labour Court and employment disputes

The Labour Court seemed determined to draw (and maintain) a distinction between administrative action and employment issues. Administrative law and labour law are not the same thing, said the Labour Court in Public Servants Association on behalf of Haschke v MEC for Agriculture & others (2004) 25 ILJ 1750 (LC) even though they share many common characteristics. In this case the Labour Court was alert to a historical context, namely that administrative law principles have been relied on where labour laws were inadequate: until the 1990s, public servants were excluded from the general protections against unfair
dismissal offered by labour legislation.

Other decisions followed: in SA Police Union & another v National Commissioner of the SA Police Service & another (2005) 26 ILJ 2403 (LC) the Labour Court focused on the difference between the contractual and labour practices of the public sector employer on the one hand and the administrative acts or conduct of such an employer on the other. The Labour Court was well aware of the historical issues involved:

"Prior to the extension of the protection in the Labour Relations Act to state employees in 1995, our courts began to develop the common law to grant protection to state employees against unfair employer conduct. In order to do so, it became necessary to regard the state's conduct as an employer as being administrative action. In Administrator, Transvaal & others v Zenzile & others 1991 (1) SA 21 (A); (1991) 12 ILJ 259 (A) the then Appellate Division held that the existence of a contractual relationship does not make the relationship between the state and its employees a purely contractual one. The court held that the power to dismiss was disciplinary or punitive in nature, had been exercised by a public authority in terms of a statute, adversely affected the rights of employees and thus attracted the rules of natural justice, irrespective of the contractual nature of the relationship. Having accepted such employer conduct to be administrative action the courts soon extended the scope of protection to decisions to retrench, suspend, transfer, promote and deprive of benefits - Administrator, Natal & another v Sibiya & another 1992 (4) SA 532 (A); Bula v Minister of Education 1992 (4) SA 716 (TKA); Hlongwa v Minister of Justice, KwaZulu 1993 (2) SA 269 (A); (1992) 13 ILJ 338 (A) and Foster v Chairman, Commissioner for Administration & another 1991 (4) SA 403 (C).

All these decisions were handed down before the adoption of a fundamental constitution in 1994 and the subsequent codification of our administrative law and labour law respectively in PAJA and the LRA consciously to give effect and content to the constitutional rights to just administrative action and fair labour practices." (at 2422-3)

Does the introduction of a new constitutional order, with fundamental rights to administrative justice and the "codification" of administrative law principles in PAJA render these old decisions obsolete? The Court concluded that they had:

"It follows from this line of thought that the progressive decisions of our courts, extending labour rights to public sector employees by categorizing employer conduct as administrative action, have lost their force following the codification of our administrative law and labour law, and the extension of full labour rights to public sector employees by the LRA. Courts might therefore justifiably be expected to reconsider previous doctrine in the light of the new constitutional and statutory framework. This much was clearly stated by the Constitutional Court in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others when it directed that the groundnorm of administrative law is not to be found in erstwhile common-law doctrine but in the principles of our Constitution, requiring the relevance of previous doctrine to be re-evaluated on a case by case basis." (at 2423)

In Hlope & others v Minister of Safety & Security & others (2006) 27 ILJ 1003 (LC) the Labour Court maintained the labour/administrative law distinction and confirmed that there had been a fundamental change in legal principles since the early 1990s:

“To the extent that the courts previously extended the reach of administrative law to ensure fairness in the exercise of employment discipline in the public sector, the extension of the Labour Relations Act to that sector now guarantees labour rights to public sector workers.” (at 1011)
Whether things have changed?

It is into this sodden quagmire of principles, constitutional rights, jurisdictional issues and a few baleful ghosts from our past that the Supreme Court of Appeal had to wade. The facts of *Transnet (Ltd) v Chirwa* [2006] SCA 131 (RSA) are not exceptional. The employee, a Human Resources manager of Transnet’s Pension Fund Business unit, was dismissed for poor work performance. An incapacity hearing was scheduled to consider allegations of poor performance, incompetence and poor employee relations. The hearing was to be chaired by the employee’s supervisor and the employee refused to participate in the proceedings because of this fact — that her supervisor could not act as complainant, witness and presiding officer at the same time. The employee concerned had also lodged a grievance against her supervisor.

While the supervisor may have believed that he could be objective and dealing with this matter, there were real grounds for the employee believing that he would be biased against her. Regardless, the performance enquiry proceeded and she was dismissed. The counter-argument raised by the chairperson was that he was entitled, and that he was the most suitable person, to consider the matter because no-one else would really be in a position to assess the employee’s work performance. The High Court set the dismissal aside and ordered the employee to be reinstated. The employee’s ground for challenging her dismissal was that it violated her right to administrative action that is lawful, reasonable and fair — a fundamental right in terms of s 33 of the Constitution of 1996. Was she forum shopping?

No doubt: she had first referred the dismissal dispute to the CCMA for conciliation and the CCMA had issued a certificate to the effect that conciliation had failed. Then she went shopping for another forum, the High Court, and promptly changed her cause of action from an unfair dismissal (as defined in the LRA) to a claim of unfair administrative action under PAJA (in the alternative, a violation of her constitutional right to procedurally fair administrative action).

At stake were the principles of natural justice and this is also the basis on which the High Court reached its decision. And it is at this point that two decisions dating from 1991 and 1992 make their appearance: *Administrator, Transvaal & Others v Zenzile & Others* 1991(1) SA 21 (A) and *Administrator, Natal & Another v Sibiya and Another* 1992(4) SA 532 (A). The effect of these two decisions, as summarised by the Supreme Court of Appeal in *Transnet & others v Chirwa* (at [4]) is that the termination of the employment contract of a public sector employee constituted an exercise of public power — the dismissal is therefore subject to the principles of natural justice and administrative law. The employer, Transnet, being an organ of state, meant that the employee concerned enjoyed the protection of the rules of natural justice.

The Supreme Court of Appeal had to answer two questions: the first, a jurisdictional one, was whether the dismissal fell within the exclusive jurisdiction of the Labour Court (in terms of s 157(1) of the LRA). The second question was whether the employee’s dismissal constituted administrative action as defined in s 1 of PAJA. These were uncommonly difficult questions, as it is put in one of the judgments. So difficult indeed that three separate judgments were rendered: one by Mthiyane JA (Jafta JA concurring), one by Conradie JA and one by Cameron JA (with Mpati DP concurring). A majority of three judges upheld Transnet’s appeal against the decision of the High Court to reinstate the employee; two judges held that, to some extent at least, the appeal should succeed.

**The new order (part 1)**

The first judgment (by Mthiyane JA) answers the first question by saying that if an employment dispute raises an alleged violation of constitutional rights, the employee is not confined to the remedies provided by the LRA and the High Court retains its jurisdiction to hear the matter. The Labour Court would never enjoy exclusive constitutional jurisdiction — even if the case relates to an alleged violation of the right to fair labour practices. But it is when focusing on the second question (whether the dismissal constituted administrative action) that this judgment is of some importance.

There was no dispute that Transnet is an organ of state, but the judge concluded that when conducting the hearing leading to the employee’s dismissal, the employer was not performing administrative action. This judgment aligns itself with the basic approach
taken by the Labour Court and its point of departure was that the employer was not exercising a public power or performing a public function in terms of any legislation. Deciding whether an act constitutes administrative action for the purposes of PAJA depends not on who is exercising the function (the functionary) but on the nature of the power that is being exercised instead. Not every act performed by an organ of state constitutes administrative action — the fact that the employer, as organ of state, derives the power to enter into contracts from legislation does not mean that its right to terminate that contract is also derived from public power.

The nature of the contract of employment does not change because of the fact that the employer is an organ of state: the contract does not obtain a public law character. The employer’s decision to dismiss is based on the contract of employment and it does not involve the exercise of any public power or performance of a public function in terms of legislation.

One of the motifs appearing in all of the three judgments is the interrogation of the continued validity of the Zenzile and Sibiya decisions of the early 1990s. In his judgment, Mthiyane JA unequivocally finds that things have indeed changed, that these decisions could be distinguished because they were made before the new definition of administrative action in PAJA, and that the “factual matrix” in which these cases were decided has changed.

The new order (part 2)

Conradie JA’s approach differs in that it does not focus, at the outset, on drawing the distinction between administrative law and labour law or the application of PAJA:

“[26] In my view the interpretational difficulties to which the provisions of the LRA and PAJA have given rise can only be addressed by a holistic approach. The real enquiry in this case is not whether the decision to dismiss the respondent amounted to administrative action. I am prepared to accept that it did. After all, any proper dismissal enquiry in the public domain necessarily has the procedural attributes of administrative action. PAJA governs all administrative action falling within its scope. But not all administrative action falls within its scope. The definition of ‘administrative action’ in s 1 of PAJA excludes certain administrative acts from its ambit. It does not exclude a decision by a public sector employer to dismiss an employee. This omission has been interpreted as an indication that such a decision might, provided all the other requirements of the definition are met, be considered administrative action. In the light of the considerations that I mention later the failure to exclude a dismissal from the definition is not decisive.”

The question is not whether the dismissal constitutes an administrative act but how the dismissal should be dealt with — it is not about the nature of the decision to dismiss but about the remedies and the procedures. The LRA represents a comprehensive scheme of labour legislation and its evident intent is to subject a dispute about the unfair dismissal of any employee falling within its scope to the dispute resolution mechanisms contained in the LRA. In effect, the LRA removed dismissals in the public sector from the rules and processes of administrative law. The case of unfair dismissal disputes, in this case a procedurally unfair dismissal for poor work performance, is “a quintessential LRA matter” and the legislature did not intend relief under PAJA to be available.

Not all employer issues are governed by the LRA and the jurisdiction of the Labour Court is limited to what the judge calls the “four corners of the LRA”. Causes of action falling outside the scope of the LRA are not taken away by the LRA itself — employees’ common law claims for damages for the breach of a fixed term contract fall outside the scope of the LRA (Fedlife Assurance Ltd v Wolfaardt (2001) 22 ILJ 2407 (SCA)).

Given that this judgment focuses on the interaction between the LRA and PAJA (and not whether the dismissal itself constituted an administrative act as defined in s 1 of PAJA), the following passage on the interplay between rights to fair labour practices and administrative action is instructive:

“[31] The Bill of Rights creates two distinct sources of power: Natural justice
is a philosophical cornerstone of both but they are nevertheless distinct. The one, in s 23 of the Constitution, feeds the procedure of the labour law, the other, in s 33, those of the administrative law. Administrative power over the subject has one source, an employer’s power over its employees another. The statutes enacted to give effect to each of the constitutional provisions, PAJA and the LRA, differ fundamentally in the substantive remedies they provide. If an application for the review of administrative action succeeds, the applicant is usually entitled to no more than a setting aside of the impugned decision and its remittal to the decision-maker to apply his mind afresh. Except where unreasonableness is an issue the reviewing court does not concern itself with the substance of the applicant’s case and only in rare cases substitutes its decision for that of the decision-maker. The guiding principle is that the subject is entitled to a procedurally fair and lawful decision, not to a correct one. Under the LRA the procedure to have a dismissal overturned or adjusted involves a rehearing with evidence by the parties and the substitution of a correct decision for an incorrect one. The scope for relief consequent upon such an order is extensive. It is quite unlike that afforded by an administrative law review.”

This approach taken by Conradie JA also has profound implications for the jurisdictional question. He begins by referring to s 158(1)(h) of the LRA which provides that the Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law. Because special provision is made to review state decisions in the context of employment at the very least suggests an extension of the Labour Court’s jurisdiction to bring the kind of employment-related decision that would normally be considered to fall outside the scope of the LRA (administrative decisions under PAJA or in terms of the common law) under the exclusive jurisdiction of the Labour Court. In turn, this means that the Labour Court has exclusive jurisdiction to review the employee’s dismissal — even though she has a cause of action in terms of PAJA, only the Labour Court can hear the matter (and not the High Court).

For the purposes of the present case, Conradie JA concluded that the employee’s reliance on PAJA was misplaced. If she had a claim in terms of PAJA, she nevertheless chose the wrong forum in which to enforce that claim. Similarly misplaced was her attempt to base her cause of action directly on s 33 of the Constitution.

A different approach

The third judgment (by Cameron JA, Mpati DP concurring) takes the opposite view, namely that the Constitution permits an employee of a public body to seek relief in the ordinary courts for dismissal-related procedural injustices that constitute administrative action. There are too many conceptual, doctrinal and interpretative difficulties in the approaches taken in the other two judgments — these difficulties not only obstruct the path to the conclusion reached in the other two judgments, but also compel a different conclusion altogether.

Cameron JA concludes that any power exercised by the employer which is a public body, constitutes administrative action: everything the public body does (including dismissal) attracts the protection of the rules of natural justice because the public body’s employment-related decisions involve the exercise of
public power. After all, the public body would not exist without statute; everything it does derives from its public and statutory character. In essence, this view is that there is something different about the relationship between public bodies and their employees and here the decision of the Supreme Court of Appeal (or the Appellate Division, as it then was) in Administrator, Transvaal & Others v Zenzile & Others 1991(1) SA 21 (A) casts its decade-and-a-half old shadow:

“One is here concerned not with mere employment under a contract of service between two private individuals, but with a form of employment which invests the employee with a particular status which the law will protect. Here the employer and decisionmaker is a public authority whose decision to dismiss involved the exercise of a public power. The element of public service injected by statute necessarily entails, so I consider, that the respondents were entitled to the benefit of the application of the principles of natural justice before they could be summarily dismissed for misconduct. Where an employee has this protection legal remedies are available to him to quash a dismissal not carried out in accordance with the principles of natural justice. It appears to me that in the present case it is the specific protection accorded to a member of the public service which must prevail.” (at 34B-D)

The reasoning in the Zenzile decision remains compelling and neither the Constitution nor PAJA supersedes it — they in effect confirm the continued validity of the principle. The principle remains that the decision to dismiss the employee was made by exercising public power (conferred by legislation) in the ordinary course of administering the employer’s business.

The public dimension of the employment relationship between a public body and its employees makes it subject to administrative law control. The decision to dismiss had immediate and direct legal consequences and it therefore constituted administrative action for the purposes of PAJA. The general principle in this regard being that if a public body is empowered by statute to contract, the principles of administrative justice frame the contractual relationship between the parties — more specifically, these principles govern the exercise of the rights the public body has in terms of the contract. This applies to any contract entered into by a public body, not only employment contracts.

Turning to the question of jurisdiction, Cameron JA writes that the fact that the employee has remedies in terms of the LRA does not mean that she cannot approach the ordinary courts to enforce her rights in terms of PAJA. The LRA does not confer exclusive jurisdiction on the Labour Court in matters arising from the employment relationship and the ordinary courts retain their power to hear disputes relating to the alleged infringement of constitutional rights.

In an earlier decision (United National Public Servants Association of SA v Digomo NO (2005) 26 ILJ 1957 (SCA)) the Court had found that an employer’s conduct could constitute both an unfair labour practice as defined in the LRA and it may, at the same time, give rise to other rights of action. In the Digomo case, the employees argued not that the employer’s conduct constituted an unfair labour practice as contemplated in the LRA, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair.

The present judgment continues that the LRA does not deprive employees of their administrative justice rights of action; the LRA does not “occlude” other rights, such as an employee’s rights under PAJA. If the legislature wanted to deprive dismissed public servants of their administrative justice rights, it could have said so, and it could have included dismissal in the extensive list of exclusions from the definition of administrative action in s 1 of PAJA.

From a constitutional point of view, there is no suggestion that if someone has more than one right, that that person should be confined to any single scheme of rights. There is no constitutional basis for saying that a public service employee should only have rights in terms of the LRA; there is no intention to prefer one “legislative embodiment of a protected right over another” (at [65]).
Difficult answers to difficult questions

Because the questions are so easy to formulate (and re-formulate) one expects easy answers. In these judgments the judges of the Supreme Court of Appeal often refer to the considerable difficulties in finding any answers and, as this highly divided decision shows, clear and unambiguous answers have yet to come.

The various judgments and the division of the Supreme Court of Appeal seem to amount to this: Mthiyane and Jafta JJ hold that the employee’s dismissal does not constitute administrative action because it is based on the employment contract and that the employer (a public body) did not exercise a public power or perform a public function in terms of legislation when dismissing her. Conradie JA holds the view that the employee’s dismissal did indeed constitute administrative action, but that the employee’s administrative law remedies have been removed by the LRA: the LRA effectively took dismissals out of the realm of administrative law and in the context of poor work performance (a quintessential LRA matter) relief under PAJA is not intended to be available.

These judgments say that things have changed since the early 1990s when public service employees did not enjoy the protection of labour legislation. The fact that the general protections offered by labour legislation have now been extended to these employees is of considerable significance in these judgments, as is the “codification” of administrative law in PAJA in line with s 33 of the Constitution.

For Cameron JA and Mpati DP the new legislation in the context of the new constitutional order in effect confirms the principles formulated in the Zenzile and Sibiya decisions of the Supreme Court of Appeal in the 1990s and that these cases retain their force and effect.

The core element of this approach is that the relationship between an employee and a public body as employer is different: that it retains a public law element and that the public body’s employment-related decisions inevitably involve the exercise of public power. The public dimension of employment with a public body means that the employment relationship is also subject to administrative law oversight and that it remains within the definitional reach of PAJA.

This means that there are three difficult answers to seemingly easy questions from the Supreme Court of Appeal. Clearly, the answers to the easy-looking questions are considerably harder than anyone would have thought. Some would no doubt argue that the decision of the Supreme Court of Appeal in Transnet v Chirwa represents no real answers to any questions, difficult or otherwise. But it may be more correct to think of this important decision as an in-depth analysis of possibilities, an examination of a range of approaches that can be taken in respect of the questions asked.

From a practical perspective, however, this split decision of the Supreme Court of Appeal may entail a persistence of some of the considerable difficulties that the courts have experienced. Public service employees can and will continue to shop for a forum under the impression that they could do better than the LRA’s compensation or reinstatement by heading for the High Court. They will continue to formulate their causes of action either on the basis of common law or on the basis of administrative law principles as embodied in PAJA. No doubt, employees will continue to formulate their applications with reference to s 33 of the Constitution and PAJA. And, equally without doubt, the jurisdictional to-and-fro between the High Court and the Labour Court will continue.

It is conceivable that the Labour Court will continue to draw a distinction between administrative law and labour law and to take the view that dismissals and other typically employment-related matters (such as suspensions, demotions or changing terms and conditions of employment) fall within the ambit of the LRA and within the ambit of the Labour Court’s jurisdiction.

It is just as conceivable that the High Court will continue to see the dismissal of public service employees as constituting administrative action and provide employees with some form of relief.

This decision of the Supreme Court of Appeal has not settled the matter: anyone seeking support for a particular view could probably find a passage in support of that view in the spectrum of viewpoints expressed by the judges of the Supreme Court of Appeal. Those who argue that dismissal of a public service employee
does not constitute administrative action would refer to the judgment of Mthiyane JA; those holding the opposite view would find support in the judgment of Cameron JA — and those analysing the interaction between PAJA and the LRA would no doubt refer approvingly to the judgment by Conradie JA.

The split in the Supreme Court of Appeal is, perhaps, unfortunate, but it is, perhaps, also inevitable. That some coherent answer to the difficult questions will have to be found (relatively soon) is obvious. The only difficult question remaining until then will be whether the answer itself is going to be difficult or easy.

**Judicial precedent reviewed**

by Wayne Hutchinson

The thinking behind the concept of precedent is an inclination to regard the decisions of the past as a guide to the decisions of the future. This furthers certainty and predictability in the law – an important element of justice. (The South African Legal System and its Background: Hahlo and Kahn at 214).

In the far reaching decision in **CWIU & Others v Latex Surgical Products (Proprietary) Limited** (2006) 27 ILJ 292 (LAC), a full bench of the Labour Appeal Court (“LAC”) held that it was not competent for a Judge of the Labour Court or an arbitrator to order retrospective reinstatement in excess of 12 months in the case of an ordinary dismissal and a maximum of 24 months in the case of an automatically unfair dismissal. The judgment of the Court was delivered by Zondo JP with Mogoeng JA and Jafta AJA concurring therein.

The same issue was raised in **Kroukam v SA Airlink (Pty) Ltd** (2005) 26 ILJ 2153 (LAC), delivered shortly before the judgment of **Latex**. The constitution of the Court in that matter was Zondo JP, Willis JA and Davis AJA. Davis AJA (with whom Willis JA agreed), maintained that an order of reinstatement operates with retrospective effect up to the date of dismissal even if it exceeds a 12 month period for ordinary dismissals and a 24 month period for automatically unfair dismissals. The judgment of the Court was delivered by Zondo JP with Mogoeng JA and Jafta AJA concurring therein.

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In **Limiting Retrospective Reinstatement – CWIU & Others v Latex Surgical Products (Pty) Ltd** (2006) 26 ILJ 2018 (LAC) (2006) 26 ILJ 2018, Tamara Cohen expresses some doubt as to whether Zondo JP’s view that the issue decided in **Kroukam** was of an obiter nature was correct. She points out as follows:-

“Arguments were presented on this point by opposing Counsel and both the majority and minority judgments addressed these arguments fully and conclusively. It is thus questionable...”

The ratio decidendi means the reason for the decision. An obiter dictum is “a statement not necessary for the decision of the case”. (Hahlo and Kahn 260 and 270). The ratio decidendi of a judgment of a superior court is of binding force on an inferior court whilst any obiter dictum is only of persuasive value and need not be followed.

The split in the Supreme Court of Appeal is, perhaps, unfortunate, but it is, perhaps, also inevitable. That some coherent answer to the difficult questions will have to be found (relatively soon) is obvious. The only difficult question remaining until then will be whether the answer itself is going to be difficult or easy.

**Carl Mischke**
whether these dicta can be trivialised as being entirely unnecessary and incidental to the ultimate decision reached.” (At 2025)

Whatever the merits or demerits of the debate may be, it is clear that a full bench of the LAC in Latex held that the discussion in Kroukam surrounding the retrospectivity of reinstatement was of an obiter and non-binding nature. Such a pronouncement is clearly definitive and binding on all inferior courts and tribunals. Whether a judge of the Labour Court may entertain a different standpoint is not in doubt - the Judge is bound by the views of the LAC.

In a remarkable twist, Francis J., in the case of SA Commercial Catering and Allied Workers Union and Others v Primserv ABC Recruitment (Pty) Ltd t/a Primserv Out Sourcing Incorporated (2006) ILJ 2162 (LC), reasoned that, despite Latex, he was entitled to grant reinstatement retrospective beyond a 12 month period. The Court held as follows:-

“[18] There are conflicting judgments about whether an order for reinstatement can go beyond 12 months for ordinarily unfair dismissals and 24 months for automatically unfair dismissals. In the matter of Kroukam v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC) the majority court found that there was nothing preventing a court to make an award for more than 24 months’ compensation in an automatically unfair dismissal case. Since the [period between] dismissal and the date of judgment was less than 24 months the court took into account that the appellant had been employed for five months after his dismissal and made an order for reinstatement effective from five months after his dismissal. The minority court found that an order for reinstatement could not go beyond 24 months.

[19] In the matter of Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd (2006) 27 ILJ 202 (LAC) the Labour Appeal Court had to consider whether there is any limitation on how far retrospective the court may order the operation of reinstatement order. The court found that the same issue was considered in Kroukam but that the decision by the majority court was obiter. The court concluded that it was not competent to order retrospective operation of a reinstatement order (even if limited) which is in excess of 12 months in an ordinarily unfair dismissal case.

[20] ...

[21] I have already pointed out that there are conflicting judgments of the Labour Appeal Court on this issue. Since there is no limitation on reinstatement or a capping of reinstatement in the Act, it is competent for a court to award reinstatement that goes beyond the 12 month period.”

The reference in Primserv to “conflicting judgments” of the LAC is not entirely correct. Two judgments can only be conflicting in the true sense of the meaning if their respective ratio decidendi are diametrically opposed. In light of the Latex finding that the discussion in Kroukam was merely obiter, there was no room for any finding by Francis J to the contrary. He was absolutely bound by that conclusion. Since the Court in Latex declared that the observations in Kroukam were obiter, it was free to depart therefrom without having to be convinced that Kroukam was wrongly decided. It was entitled to prefer its own reasoning to that of Kroukam. If on the other hand, Kroukam had set a binding precedent then the court would only be able to overturn it on the stringent ground of being satisfied that it was clearly wrongly decided. For instance, in the case of Denel (Pty) Ltd v Gerber (2005) 26 ILJ 1256 (LAC) the Court was seized with the issue as to whether a person who provided services through a company was an employee or an independent contractor. In coming to the conclusion that Gerber was an employee, the Court overruled one of its earlier decisions, CMS Support Services (Pty) Ltd v Briggs (1998) 19 ILJ 271 (LAC). The court was satisfied that the ratio decidendi of CMS was clearly wrong and should not be followed.

If a Labour Court judgment departs from a principle enunciated by the Labour Appeal Court on the erroneous assumption that it was of an obiter nature,
the decision is liable to be set aside on appeal if the LAC finds that the principle constituted a ratio decidendi.

Even if the views expressed by the majority in the Kroukam judgment were not of an obiter nature, the effect of Latex would be to either expressly or by necessary implication overrule Kroukam. Once this occurs, the Labour Court is not entitled to follow a decision that has been overruled. Conflicting decisions of a superior court may arise where a later decision overlooks an earlier one that arrived at a different conclusion. Under these circumstances it would seem that an inferior court is entitled to follow the decision that it deems to be the correct one. Clearly, the court in Latex did not overlook its earlier Kroukam decision. In the final analysis, arbitrators should have no hesitation in taking cognisance of the fact that the Labour Court cannot overrule decisions of the LAC and accordingly, an arbitrator is still bound to follow the precedent set by the LAC in Latex notwithstanding any Labour Court judgment to the contrary.

Wayne Hutchinson

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**Remedies for discrimination based on age**

In recent years there have been several decisions dealing with complaints by ex employees who argued that they had been unfairly discriminated against on the basis of age when they were forced to retire. Most of the decisions turn on the application and interpretation of s 187(1)(f) and s 187(2) of the Labour Relations Act, 66 of 1995 (LRA). The former states that a dismissal is automatically unfair if the reason for the dismissal one of a range of prohibited grounds, including the employee’s age. The latter qualifies section 187(1)(f) by providing that a dismissal based on the age of an employee will be fair if that employee has reached the normal or agreed retirement age that applies to persons in the position of the employee. Most of the decisions deal with the question whether the employer concerned had an agreed or normal retirement age in place within the workplace and/or what that age was.

There is, however, another statute which provides a potential remedy for such an employee, namely the Employment Equity Act, 55 of 1998 (EEA). Section 6 of the EEA states that an employer may not unfairly discriminate against an employee “in any employment policy or practice” on the basis of a wide range of grounds, including age. This section clearly encompasses a claim based on age discrimination where the employee is required to retire by an employer. This was accepted in the case of HOSPERSA oboVenter v SA Nursing Council [2006] 6 BLLR 558 (LC) in which it was held that an employee who had been forced to retire at the age of 60 (despite her contract providing for a retirement age of 70) had been unfairly discriminated against on the basis of age as envisaged in s 6 of the EEA.

In Evans v Japanese School of Johannesburg [2006] 12 BLLR 1146 (LC) the dismissed employee took the matter further and relied on both the LRA and the EEA. She argued that her dismissal was automatically unfair as envisaged in s 187(1)(f) in that she had been required to retire at the age of 61. The Labour Court found that the evidence established that there was no normal retirement age applicable to persons in her position at the school and that she had in fact agreed to a retirement age of 65. It therefore found that the dismissal was automatically unfair and awarded her compensation equal to 24 months’ remuneration – the maximum compensation that she was entitled to in terms of the LRA, an amount of some R 177 144.00.

The Court also accepted that her dismissal constituted unfair discrimination as envisaged in s 6 of the EEA. In terms of this Act the Court was entitled to order the payment of compensation that was just and equitable. This was set at R 200 000.00 this roughly compensating her for the loss of income she had suffered as a result of not being permitted to retire at 65.

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