Consistency in discipline
A new trend from the Courts?

by P.A.K. le Roux

The general approach
The idea that an employer must apply discipline in a consistent fashion is explicitly provided for in item 7 of the Code of Good Practice: Dismissal and is deeply imbedded in our conceptions of fairness as applied in the workplace. Its application in practice has generally been uncontroversial.

- The general principle is that an employer must act in a consistent manner (i.e. comply with the ‘parity principle’) when applying discipline.
- A distinction can be drawn between ‘historical inconsistency’ and ‘contemporaneous inconsistency’.
- The former requires that an employer apply discipline consistent with the way in which discipline has been applied to other employees in the past. The latter requires that discipline be applied consistently as between two or more employees who commit the same misconduct at the same time.
- The allegation of inconsistency usually arises in the context of the sanction that has been applied; but it may also arise where the employer has taken disciplinary action against one employee but not against another employee. It may also possibly arise where one employee has been found guilty of a disciplinary offence but another has not been found guilty.
- The most important requirement is that the person with whom the employee is comparing himself must be ‘similarly situated’. If an employee alleges inconsistency the employer may be able to show that a distinction can be drawn between the two employees.
- It is also important that the employer must have known of the
misconduct of the comparator.
The general approach is summarised in the often-quoted decision of *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* (2009) 11 BLLR 1128 (LC)

‘[10] A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element – an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC) at paragraphs [37]–[38]). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant (see *Shoprite Checkers (Pty) Ltd v CCMA & others* [2001] 7 BLLR 840 (LC) at paragraph [3]). Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.’

**The problems**

Despite the general acceptance of the parity principle, it does occasion difficulties for employers. These are some examples -

In the case of historical inconsistency, how far back in the past can an employee go to find an alleged example of inconsistency? If the period is too long ago the employer may no longer have the facts or witnesses at its disposal to justify the differentiation

When one is dealing with an employer with branches throughout South Africa employing a large number of employees, the practical problems associated with ensuring consistency are also evident.

There is also the problem of a disciplinary chairman making a decision, usually with regard to sanction but sometimes also with regard to a finding of guilt, which is totally at odds with employer policies or simply not justified by the facts. A decision not to dismiss an employee taken on dubious grounds and in conflict with the provisions of the employer’s disciplinary code can lead to allegations of inconsistency in later decisions where the chairperson correctly applies employer policies.

Perhaps the most difficult problem arises in the area of the appropriate sanction to be applied. There is a tension between the requirement that discipline must be consistently applied and the requirement that personal circumstances must be taken into account when the issue of sanction is considered. Applying the principle of consistency strictly will lead to the argument that a dismissal was too harsh a sanction because personal circumstances of the employee should have been taken into account. According too much weight to personal circumstances could lead to differing disciplinary sanctions and to allegations of inconsistency.

Finally, there must be unease that an employee who is guilty of a serious disciplinary offence that clearly justifies dismissal should be found to have been unfairly dismissed because of an error made by a chairman of a disciplinary hearing in the past.

There are a number of employer strategies that
can be adopted to minimise the above difficulties. For example, if senior management are made aware of a case where the disciplinary chairperson has come to a decision in conflict with employer policies (e.g. imposed a sanction of a final written warning in circumstances where dismissal would have been the appropriate sanction), and they are concerned that this decision will be used to argue that subsequent dismissals are unfair because of inconsistency, the employer may be able to reconvene a second disciplinary hearing in order to reconsider the matter in accordance with the principle accepted in decisions such as *Branford v Metrorail Services (Durban) & others* (2003) 24 ILJ 2269 (LAC) and *BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC). If the case falls outside the relatively narrow confines of this principle the employer may be able to rectify the situation by informing employees that this case was, in its view, decided in error and that employees should not see it as a ‘precedent’. In the *Southern Suns Hotel Interests* decision the Labour Court accepted the legitimacy of such an approach.

The period of time that has elapsed between the two disciplinary matters may, in itself, be a differentiating factor.

From a practical perspective an employer may derive some assistance from the principle accepted by the Labour Appeal Court (LAC) in *National Union of Mineworkers obo Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 ILJ 2406 (LAC), namely that an employee must, at the commencement of an arbitration, clearly identify the basis for the allegation of inconsistency. It did so in the following terms -

‘[39]… Moreover, as a matter of practice, a party, usually the aggrieved employee, who believes that a case for inconsistency can be argued, ought, at the outset of proceedings, to set out an issue openly and unequivocally so that the employer is put on proper and fair terms to address it. A generalized allegation is never good enough. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently must be set out clearly. Introducing such an issue in an ambush-like fashion, or as an afterthought, does not serve to produce a fair adjudication process’.

(See also, for example, *Comed Health CC v National Bargaining Council for the Chemical Industry & others* (2012) 33 ILJ 623 (LC) and *SA Municipal Workers Union obo Abrahams & others v City of Cape Town & others* (2011) 32 ILJ 715 (LC).)

In the case of an employer with a large, geographically dispersed, workforce the employer can attempt to exercise some form of centralised control by, for example, requiring a disciplinary chairman to discuss the appropriate sanction with the Human Resources Department prior to imposing a sanction. Whilst the chairman would be entitled to seek advice on this issue she would still be required to make her own decision in this regard. Nevertheless, if the disciplinary chairman decides to accept the advice of the Human Resources Department to dismiss the employee this may lead to allegations that the chairman has not acted independently.

The above notwithstanding, the principle of inconsistency remains difficult to apply. This seems to have been recognised in the influential decision of the LAC in *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC) where the following, often quoted, passage appears.

‘[29] It was argued before us by Mr Grobler for the appellants that by not dismissing four employees who had also participated in the demonstration, the respondent applied discipline inconsistently. In my view too great an emphasis is quite frequently sought to be placed on the ‘principle’ of disciplinary consistency, also called the ‘parity principle’ (as to which see eg *Grogan Workplace Law* (4 ed) at 145 and *Le Roux & Van Niekerk The SA Law of Unfair Dismissal* at 110). There is really no separate ‘principle’ involved. Consistency is simply an element of disciplinary fairness (*M S M Brassey The Dismissal of Strikers* (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards (*Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & others* (1991) 12 ILJ 806 (LAC) at 813H-I). Discipline must not be capricious. It is really the
perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy. (As was the case in Henred Fruehauf Trailers v National Union of Metalworkers of SA & others(1992) 13 ILJ 593 (LAC) at 599H-601B; National Union of Mineworkers v Henred Fruehauf Trailers (Pty) Ltd(1994) 15 ILJ 1257 (A) at 1264.) Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself.'

Recent decisions

There are also some recent decisions that indicate that the Courts are taking a more flexible approach to the issue of inconsistency.

In Chemical Energy Paper Printing Wood & Allied Workers Union v National Bargaining Council for the Chemical Industry & others (2010) 31 ILJ 2836 (LAC) the LAC dealt with allegations of inconsistent disciplinary action when considering acts of misconduct committed during the course of a strike. It was argued that the employer had acted unfairly by selectively disciplining employees. The LAC agreed that it is correct, in principle, that all employees who have committed misconduct must be treated similarly unless there is some justification to treat them differently but then went on to state that -

[20] 'An employer cannot, in matters such as this, simply dismiss all of its striking employees because some from amongst them committed serious misconduct. As a consequence, some employees who commit serious misconduct may not be charged or when charged, the employer is unable to satisfy the disciplinary enquiry that each of the employees who is charged is in fact guilty of the misconduct. Hence, where there has been collective misconduct and the employer only charges some of the employees because it only has evidence against them and from amongst those charged some are found to have committed the wrong and are dismissed and a few acquitted, it does not and cannot follow that the dismissal was unfair because of any selective application of discipline. An employer can only be accused of selective application of discipline if, having evidence against a number of individual employees, it arbitrarily selects only few to face disciplinary action.'

The LAC also indicated that an employer is not obliged to investigate the identity of each and every employee who may have participated in a wrongful activity and then proceed to take disciplinary measures against all the wrongdoers. An employer need only proceed against those it has evidence against. It also referred to the excerpt from the Irvin & Johnson decision quoted above.

In Comed Health CC v National Bargaining Council for the Chemical Industry & others (2012) 33 ILJ 623 (LC) the Labour Court dealt with a similar situation. It was asked to review and set aside an arbitration award in which it was held that the dismissals of certain employees who were guilty of acts of misconduct committed during the course of a strike were unfair because of inconsistent treatment; other employees who were also guilty of similar activities had not been charged. The Labour Court set aside
the award. During the course of its judgment the Court endorsed the proposition put forward by the employer’s legal representative that the ‘consistency principle has to be applied with caution’.

In Mphigalale v Safety & Security Sectoral Bargaining Council & others (2012) 33 ILJ 1464 (LC) the employee concerned, an inspector in the South African Police Service, had been dismissed because he had corruptly accepted a bribe to release an illegal immigrant. An arbitrator upheld the fairness of his dismissal despite the fact that, in a previous case, another employee of the South African Police Service who had been found guilty of corruption had not been dismissed. The arbitrator found that the previous decision had been made in error and that there was no evidence that the third respondent had habitually or frequently condoned such misconduct in the past. On review, the Labour Court refused to review and set aside the award. On the issue of inconsistency the Court had the following to say –

‘[25] This court, in numerous previous decisions, has viewed dishonesty in a serious light and has come to the conclusion in most instances that it results in a breakdown of the trust relationship between the parties. I am accordingly satisfied that the decision of the commissioner that the dismissal of the applicant was fair, in spite of the existence of a previous inconsistent sanction imposed on two policemen previously for the same misconduct and mitigating factors, was reasonable. It follows, therefore, given the nature of the misconduct committed by the applicant that the SAPS “cannot be expected to continue repeating a wrong decision in obedience to a principle of consistency”, even in spite of there being no evidence of notice by the employer to its employees that employees who were found guilty of corruption would henceforth face dismissal. This is particularly so given the criminal nature of the misconduct, the fact that it was committed by a person employed in the trusted office of policeman, as a result of the severe impact that corruption has upon society and the importance of an appropriate operational response when imposing an appropriate sanction in the current circumstances. Objectively, there exists little need to remind those officials employed in positions of trust and responsibility in society that fundamentally dishonest practices may result in dismissal. This must logically follow from employment in such responsible a position. Were this court to find that it was incumbent upon the commissioner to have imposed a lesser sanction only due to two previous incorrect decisions (even when other employees may have been dismissed for corruption) and simply because no notice to employees had been given by the employer that in future corruption will lead to dismissal, it would suggest that employees need to be reminded of the very core values of honesty and integrity so fundamental to the performance of their functions. I am satisfied that such a conclusion would be unwarranted and would only serve to minimize the seriousness and effect of the scourge of corruption currently faced by our society.’

A similar approach was taken by the LAC in ABSA Bank Ltd v Naidu & others (Unreported DA 14/2 24/10/2014). In this case, a senior employee was found guilty of, in effect, forging a client’s signature. This took the form of taking the client’s signature on one document and appending this to a new document. The employee was subjected to a disciplinary enquiry in which she had to face this charge and various other charges. She was dismissed and her conduct was reported to the Financial Services Board established in terms of the Financial Advisory and Intermediary Services Act, 37 of 2002. As a result she was barred from acting as a financial advisor. At the subsequent arbitration proceedings challenging the fairness of her dismissal the commissioner found that she was not guilty of various charges but that she was guilty of the charge relating to the client’s signature. The commissioner found that dismissal was too harsh a sanction. He gave various reasons for this finding; the employee had twenty years unblemished service with the employer, had not benefitted from her act of misconduct, had shown remorse and had not concealed her action. Of most importance in this regard was that the commissioner found that the employer had, some time previously, subjected another employee to a disciplinary hearing for a similar offence and had
not dismissed the employee.

The employer was unsuccessful in its application to review and set aside the award in the Labour Court. It then successfully appealed to the LAC. In the course of its judgment the LAC addressed the issue of inconsistency and found that the circumstances in which the other employee had been issued with a final warning and had not been dismissed differed from those in this case. It also went on to state that the parity principle ‘should not just be applied willy-nilly without any measure of caution’. In support of this view it referred to John Grogan’s *Dismissal, Discrimination and Unfair Labour Practices* 2nd ed, (Juta 2007) as well as the *Irvin & Johnson* decision. It also made the following comment –

‘[42] Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer in the belief that they would not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace. As stated earlier, I reiterate, there are varying degrees of dishonesty and, therefore, each case will be treated on the basis of its own facts and circumstances.’

Finally, there is the decision in *Masubelele v Public Health & Social Development Bargaining Council & others* (Unreported JR 1151/2008 17/1/2013) which was referred to by the LAC in the *Botsane* decision. This decision also dealt with the situation where it was common cause that the employee was guilty of a disciplinary offence but where it was argued that the dismissal of the employee was unfair on the grounds of inconsistency.

The Court found that the employee’s argument of inconsistency could not be considered because the employee had failed to provide a ‘prima facie evidentiary platform’ to support the assertion of inconsistency. It then went on to discuss the issue of inconsistency in more general terms. Once again, the Court referred to the *Irvin & Johnson* decision and the excerpt referred to above. It summarised the relevant principles as follows -

‘[34] In my view, the ratio in the judgment in *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* is clear. The following principles apply to the determination of the issue of inconsistency so as to ensure inconsistency is not found to exist in the case of dismissal of employees: (1) Employees must be measured against the same standards (like for like comparison); (2) The chairperson of the disciplinary enquiry must conscientiously and honestly determine the misconduct; (3) The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, or induced by improper motives or by a discriminating management policy (this conduct must be bona fide); (4) A value judgment must always be exercised.’

After referring to various other decisions the Court came to the conclusion that no case had been made out that discipline had not been conscientiously applied, that there were improper
motives or capricious behaviour or that a discriminatory policy had been applied.

Comment

What is interesting is the frequency with which reference is made to the Irvin & Johnson decision when courts deal with the issue of inconsistent treatment, especially where the Court finds that the inconsistent treatment has not affected the fairness of the dismissal. At the heart of this decision is the view that inconsistency is not a separate overriding principle but is simply one element of fairness. This has again now been accepted by the LAC in the Naidu decision.

This is to be welcomed. The mere fact that an employer may have acted inconsistently does not necessarily mean that there was unfair treatment. Inconsistent treatment may be an indication of unfairness, for example, where prior disciplinary decisions have created the impression that certain conduct does not merit disciplinary steps being taken or does not merit the sanction of dismissal being applied. But this is not always the case. One instance of a failure to take disciplinary action or of a failure to dismiss in the past will usually not create such an impression.

Obviously, the most difficult problem remains that of inconsistency in the imposition of sanction. The tension between the requirement of consistency and the need to consider each case on its merits, taking the personal circumstances of each employee (and the circumstances of each case) into account has already been referred to. Here, it is submitted, the approach referred to in the Irvin & Johnson and the Masubelele decisions, is correct. Did the chairperson of the disciplinary enquiry act in a conscientious manner and was the decision motivated by malice, improper motives or a discriminatory policy? If not, there would be no unfairness.

PAK le Roux

The territorial jurisdiction of the CCMA

Where is the workplace? Who is the employer?

By PAK le Roux

Does the Commission for Conciliation, Mediation and Arbitration (CCMA) have jurisdiction to consider an unfair dismissal claim referred to it by an employee whose place of work was outside South Africa? This is the question considered by the Labour Court in two recent decisions.

In MECS Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others (2014) 35 ILJ 745 (LC) the employee concerned initially entered into a contract of employment with MECS South Africa, a temporary employment service. In terms of this contract the employee was required to provide his services as a civil construction manager to a client by the name of Tenke Fungurume Mining (TFM), a company which conducted business in the Democratic Republic of the Congo (DRC). A few days later he signed a contract on substantially the same terms with another company registered in the DRC and referred to in the decision as ‘MECS-DRC’. This company was a subsidiary of MECS South Africa and performed the function of a TES in the DRC. This contract was apparently entered into to enable the employee to obtain a work permit in the DRC. A few months later the employee received an email from the employer in which he was informed that his contract with MECS South Africa ‘...and its subsidiaries’ had been terminated.

The employee then referred an unfair dismissal dispute to the CCMA and cited MECS South Africa as his employer. MECS South Africa argued that the CCMA did not have jurisdiction to consider the dispute. Initially this seems to have been based on an argument that the employee was not employed by MECS South Africa but by the DRC entity. However, this argument was not...
proceeded with and the case proceeded on the basis that MECS South Africa was the employer. MECS South Africa then argued that the CCMA did not have jurisdiction because the employee had worked outside South Africa. The Labour Relations Act, 66 of 1995, which provides the statutory basis for an unfair dismissal claim does not apply outside South Africa. The commissioner decided that the CCMA did have jurisdiction. MECS South Africa then lodged an application to review and set aside this ruling.

The Labour Court came to the conclusion that the employee had been employed by both MECS South Africa and MECS –DRC. It then considered the jurisdictional issue. It referred to the decision of the Labour Appeal Court in Astral Operations Ltd v Parry (2008) 29 ILJ 2668 (LAC) where the test for jurisdiction was formulated as follows –

“[74] … where is the locality of the employer’s undertaking in which the employee works?’

The Court came to the conclusion that the location of the MEC South Africa business was in South Africa and that the CCMA therefore had jurisdiction to consider the unfair dismissal dispute. Its argument was as follows –

‘[75] So where does a TES conduct its labour broking business? The logical answer must be “the place where it recruits and procures labour” and not the place where its clients have operations. By way of example, if a mining company were a client of a TES, it would be wrong to say that the TES conducts a mining business simply because it provides the mining company with externally sourced labour. The TES does not have mining assets and does not share in the profits derived from mining operations.

[76] Therefore, in the present case we must ask the question where does MECS-SA conduct its operations? Where does MECS-SA procure the services of individuals for the benefit of its clients? The answer must be South Africa because MECS-SA, as a distinct legal entity, has no presence in the DRC. Conversely, one could ask, did Pauw go to work at MECS-SA’s operations in the DRC? No, he went to work at MECS -SA’s client’s operations.’

This decision can perhaps be qualified. The question is not so much the locality of the employer but at which locality of the employer the employee is employed. Whilst it is clear that MECS South Africa conducted a business at a locality in South Africa it can be argued that in this case the employee did not work at this locality.

In SA Tourism v Monare & others (2014) 35 ILJ 2280 (LC) the Labour Court adopted a more detailed test for determining jurisdiction. The employee in this case worked for the respondent, a South African company, in the Netherlands. The parties then entered into a five year fixed-term contract in terms of which the employee would take up employment with the respondent in the United Kingdom.

This agreement was entered into in the Netherlands. The employee took up employment in the United Kingdom but, a few months later, was subjected to a disciplinary enquiry which took place in the United Kingdom. He was dismissed in the United Kingdom.

The employee referred a dispute to the CCMA in which he challenged the fairness of his dismissal. The commissioner found that the dismissal was unfair. The employer then sought to review and set aside the award.

At the hearing before the Labour Court van Niekerk J raised the question whether the CCMA had had the jurisdiction to consider the dispute, given the fact that the LRA did not have extra-territorial effect. After considering supplementary arguments from the parties, the Court came to the conclusion that the CCMA did not have jurisdiction to consider the matter. Its arguments were as follows –

- The CCMA only has jurisdiction within the national territory of the Republic of South Africa. It is a statutory body with statutorily defined jurisdiction. It is not open to the parties to a dispute to agree to confer jurisdiction on the CCMA to consider a dispute in the situation where the CCMA is not granted this jurisdiction by statute.

- The Court referred to the award in Serfontein v Balmoral Central Contracts SA (Pty) Ltd (2000) 21 ILJ 1019 (CCMA) where it was stated that the test for determining whether the CCMA had jurisdiction was whether –
The substance of the employment relationship in question is reflected in obligations which are due and enforceable within the country.’ (At 1025D)

• The commissioner indicated that some of the defining characteristics of the substance of an employment relationship which ought normally to be considered are the place where the employee must render his services, the place where payment is made, the location of the parties, the method of calculating remuneration and the currency of remuneration, and where the relationship was entered into.

• The authority binding on the Court was to the effect that the primary but not sole determination for determining the territorial application of the LRA was the location of the undertaking carried on by the employer. But other factors, such as those mentioned in the Serfontein award could also be taken into account. These could include the fact that the employee was paid in the United Kingdom in pounds sterling in terms of a contract concluded outside South Africa. The Court summarised its conclusion as follows – ‘[15] The first respondent may be South African and he may have worked for an entity whose head office is located in South Africa but he was recruited overseas, his employment contract was concluded overseas, he was obliged to work overseas for an agreed fixed term with no right to return to South Africa and continue employment there on conclusion of that fixed term, and he performed services only in the United Kingdom. He committed the acts of misconduct that resulted in his dismissal in the United Kingdom, his disciplinary hearing was held there, and he was given notice of dismissal there. In my view, in these circumstances, the LRA has no territorial application. It follows that the first respondent had no right to refer his dispute to the CCMA, and the CCMA had no right to entertain it.’

PAK le Roux

The provision of safe working conditions

Recent Court decisions confirm extent of the employer’s duty

The fact the employer’s duty to provide a safe working environment extends beyond the context of environments where machinery and other potentially dangerous processes and substances are utilised is evident from two recent decisions.

The first is the decision of the Gauteng Division of the High Court in Sahara Computers (Pty) Ltd v Mokone (2014) 35 ILJ 2750 (GP). In this matter a clerk employed by the employer, Sahara Computers, instituted a claim in the High Court for damages against the employer based on the allegation that the employer had failed to provide a working environment safe from sexual harassment.

The Court found that she had been sexually harassed by a manager employed by the same employer. She had brought the harassment to the attention of her manager but he had failed to take steps to stop it. The reporting of the harassment to the manager constituted notice to the employer of this fact. In not taking steps to prevent future occurrences of the harassment the employer had failed to protect her against harassment and breached its duty to provide a safe working environment. The employee was awarded the sum of R 60 000.00 in damages. The employer appealed against the decision to a full bench of the Gauteng Division of the High Court. It rejected the appeal in the following terms - ‘[29] I find that the appellant delayed overly in taking action to prevent Mthethwa from continuing with his unacceptable behaviour. After the respondent reported Mthethwa’s conduct, it took Steenekamp forever to do anything meaningful. He was too preoccupied with stepping too carefully, knowing that Mthethwa was well connected within the appellant. Even in taking steps, the appellant merely instituted disciplinary proceedings, issued a final written notice, and left the rest to fate as to what then hap-
It is interesting to note that in the abovementioned decision the issue of the applicability of s 35 of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (COIDA) was not raised by the employer. This provides that an employee who is entitled to compensation in terms of this Act is precluded from claiming damages from her employer. In most cases employees who have been injured at work will be more than happy to be able to claim compensation from the Compensation Fund established in terms of COIDA. The employee does not have to institute a civil claim in the courts against the employer and to prove that the employer is delictually liable for loss suffered by the employee. The employee simply lodges a claim with the Compensation Fund. She will be entitled to this compensation if the injury she suffered ‘arose out of and in the course of her employment.’ There is, however, a downside. The compensation payable in terms of COIDA is usually less than that she would have received had she been able to prove a delictual claim against the employer.

If the employee has a viable delictual claim against the employer she may try to argue that the claim did not arise out of, or in the course of, employment and then to pursue this claim in the courts.

This is exactly what happened in the decision of MEC for the Department of Health, Free State Province v Dr E. (Unreported 924/2013 8 October 2014). The employee in this matter was a medical practitioner employed by the Department of Health in the Free State Province at a hospital. She was raped whilst on duty at the hospital. She instituted a delictual claim for damages against the Department based on the allegation that it had failed to provide a safe place of work. Predictably, the employer took the point that she was not entitled to institute a claim because she was entitled to compensation in terms of COIDA.

The Free State Division of the High Court found that the incident did not arise out of and in the course of the doctor’s employment and that she could therefore proceed with the civil claim.

The Department of Health appealed to the Supreme Court of Appeal (SCA). After an in-depth analysis of South African law and the position in other legal systems the SCA upheld the High Court decision. The SCA had the following to say:

‘[32] I am unable to see how a rape perpetrated by an outsider on a doctor – a paediatrician in training – on duty at a hospital arises out of the doctor’s employment. I cannot conceive of the risk of rape being incidental to such employment. There is no more egregious invasion of a woman’s physical integrity and indeed of her mental well-being than rape. As a matter of policy alone an action based on rape should not, except in circumstances in which the risk is inherent, and I have difficulty conceiving of such circumstances, be excluded and compensation then be restricted to a claim for compensation in terms of COIDA.

[33] I can understand that courts have strained to come to the rescue of particularly impecunious individuals and have held them entitled to claim compensation from a fund established for that purpose. I also understand that courts have done this by adopting a position in line with the policy behind the Workers’ Compensation Legislation, namely, that workers should as far as possible be assisted to claim compensation that is their due under the Act and which flow from incidents connected to their employment and which can rightly be said to be a risk attendant upon or inherent to the employment. Dealing with a vulnerable class within our society and contemplating that rape is a scourge of South African society, I have difficulty contemplating that employees would be assisted if their common law rights were to be restricted as proposed on behalf of the MEC. If anything, it might rightly be said to be adverse to the interest of employees injured by rape to restrict them to COIDA. It would be sending an unacceptable message to employees, especially women, namely, that you are precluded from suing your employer for what you assert is a failure to provide reasonable protective measures against rape because rape directed against women is a risk inherent in employment in South Africa. This cannot be what our Constitution will countenance.’

PAK le Roux