Incompatibility as a ground for dismissal in South African labour law

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Mini-dissertation accepted in partial fulfilment of the requirements for the degree *Master of Laws in Labour Law* at the North-West University

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Graduation ceremony: July 2022

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“It always seems impossible until it is done”

Nelson Mandela

DEDICATION

To the strongest man I know, my father, **Jackn Anothony Umegbu,** without you I would not have made it this far. This is for you Papa Ble. I know you are proud of me wherever you are.

ABSTRACT

Incompatibility has been broadly defined as the inability of an employee to conform to an employer's corporate culture. The employer's corporate culture governs the interpersonal relationship in the organisation. It directs the manner in which an employee must conduct his or herself in the organisation. Where the employee is unable to conform to the employer's corporate culture, or act in a way that causes disharmony in the organisation, the employer may have a justifiable reason to dismiss the employee.

The concept of incompatibility has existed in South African labour law for centuries. It was first accepted as a ground for dismissal in the 1987 case of *Erasmus v BB Ltd* (1987) 8 ILJ 537, where the Industrial Court held that it is justifiable for an employer to dismiss an employee who causes disharmony in the organisation. Following the decision of the above judgment, the courts and eminent scholars on this topic accepted the position that incompatibility is a valid ground for dismissal. However, the problem with incompatibility as a ground for dismissal is that, firstly, the above judgment does not set out when, how or what procedure to follow when dismissing the employee on grounds of incompatibility. Secondly, the former *Labour Relations Act* 28 of 1956 and the current *Labour Relations Act* 66 of 1995 does not recognise incompatibility as a ground for dismissal. The lack of legislative guidance has created a number of problems over the years, as the employer who is faced with incompatibility in an organisation is forced to tolerate the employee who is causing the disharmony in the organisation, or worse, the employer may exercise discretion and dismiss the employee for whatever reason it deems fit, and following whatever procedure it deems fit. The effect is that the employee who is dismissed on grounds of incompatibility may refer an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA may reinstate the employee because the employer could not prove that the dismissal of the employee was justifiable and in accordance with fair procedures. In an attempt to bridge the gap created by a lack of legislative recognition and guidance on when, how and what procedure to follow when opting to dismiss the employee on

grounds of incompatibility, the courts over the years have established characteristic features of justifiable reasons to dismiss the employee on grounds of incompatibility. The courts have also characterised incompatibility as a form of incapacity. It is submitted that incompatibility is subjective and therefore it is best categorised as a form of incapacity. Although the courts have accepted that incompatibility is best categorised as a form of incapacity, they have also accepted the employer's categorisation of incompatibility as a form of misconduct or the employer's operational requirements provided that the employer can prove that the dismissal on grounds of incompatibility falls with the chosen category and a fair procedure has been followed. It is submitted that by accepting the employer's categorisation of incompatibility as a form of misconduct or the employer's operational requirements, the courts have created more uncertainties as the employer may continue to exercise discretion and deal with the incompatibility in a form and manner it deems fit.

The courts have further provided guidance that the employer may follow when opting to dismiss the employee on grounds of incompatibility. The guidance provided by the courts ensures that the dismissal of the employee on grounds of incompatibility is substantively and procedurally fair. Although the courts have categorised incompatibility as a form of incapacity and have provided guidance thereto, this study argues that there is a need for the *Labour Relations Act* 66 of 1996 and the Code of Good Practice: Dismissal to recognise incompatibility as a ground for dismissal, and to provide guidance for employers in this regard. This study argues that the recognition of incompatibility as a ground for dismissal in the *Labour Relations Act* 66 of 1995 is essential to dealing with incompatibility disputes in the future. It could also go a long way in ensuring certainty and uniformity in the processes that should be followed in dealing with incompatibility as a ground for dismissal.

Keywords: Incompatibility, disruptive behaviour, dismissal, employment relationship, Labour Relations Act.

ACKNOWLEDGMENT

GIFT OZIOMA UNEGBU: My younger twin. You are the gift that keeps on giving. Without you, I would not have made it this far.

DR ESTIE GRESSE: I am grateful for your guidance. All this is because of you.

PROFESSOR AVITUS AGBOR: Thank you for motivating and encouraging me to further my studies.

OUR CREATOR: Without you Lord, I am nothing.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

CCMA	Commission for Conciliation, Mediation and Arbitration
IC	Industrial Labour Law
ILJ	Industrial Law Journal
LC	Labour Court
LAC	Labour Appeal Court
LRA	Labour Relations Act
CC	Constitutional Court

Chapter 1

1 Introduction

1.1 Statement of the problem

The main parties to the employment relationship are the employer and the employee.[1] The employer, on one hand, has the prerogative to set reasonable standards pertaining to the harmonious interpersonal relationship in the organisation. This includes, amongst others, cultivating a corporate culture[2] where employees can fit in, and adhering to the standards and practices of the organisation. Employees, on the other hand, are expected to be loyal and act in the best interests of the employer. This includes amongst others, conducting themselves in a way that does not conflict with the employer's corporate culture of the organisation, or cause disharmony in the organisation.[3] In the event that the employee is unable to conform to the employer's corporate culture, or causes disharmony that disrupts the normal functioning or operations in the organisation, the employee may be labelled an 'incompatible employee'[4] and the employer may be justified in dismissing such an employee.[5]

The term 'incompatibility' is used to describe an 'incompatible employee' in the organisation. Griessel[6] defines incompatibility as a behaviour pattern.[7] It relates to the subjective individual behaviour that is acceptable to one employer but unacceptable to another.[8] It relates to the inability of an employee to fit in with an employer's corporate culture, or the inability of an employee to maintain a cordial harmonious relationship with fellow employees.[9] Incompatibility in the organisation

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1 Eiselen *et al The Law of Contract in South Africa* 4.
2 Mischke *Contemporary Law* 74: Corporate culture is defined as the unwritten rules governing the relationships, interactions, and workflow in an organisation.
3 Van Jaarsveld 2007 *SA Merc LJ* 205.
4 Grants *Defining Incompatible behaviour in an employer/employee relationship* 10.
5 Van Jaarsveld 2007 *SA Merc LJ* 214: this principle was developed in the 1987 *Erasmus v BB Ltd* (1987) 8 ILJ 537, where the court held that the employer is justified in dismissing the employee who disrupts the harmony in the organisation.
6 Griessel date unknown http://www.labourguide.co.za.
7 Griessel date unknown http://www.labourguide.co.za.
8 Griessel date unknown http://www.labourguide.co.za.
9 Grogan *Workplace Law* 253.

may take many forms, amongst others, personality clashes[10] or interpersonal conflicts,[11] and may be preserved in other relationships.[12] There is no particular conduct of an employee that constitutes incompatibility. Regardless of the form of incompatibility or the manner in which incompatibility may present itself, the employee may be considered incompatible if his or her conduct causes disharmony in the organisation, or conflicts with the employer's corporate culture. This principle was set out by the Industrial Court[13] in the early case of *Erasmus v BB Ltd*[14] where the IC held that it is justifiable to dismiss an employee whose conduct causes disharmony in the organisation. However, the employer must follow a fair procedure.[15] The *Erasmus case* therefore paved way for the dismissal of an employee on grounds of incompatibility. However, dealing with incompatibility as ground for dismissal has not been an easy process for many employers over the past years. Case law, as discussed later on in this study, has shown the dilemma employers are faced with when dealing with incompatibility as a ground for dismissal.[16] Grants[17] submit that the problem with incompatibility as a ground for dismissal lies in its insufficient definition. The courts[18] as well as eminent scholars[19] on this topic have criticised the definition of incompatibility. It has been submitted that the definition of incompatibility is vague and does not set out the conduct(s) of the employee that constitutes incompatibility for the purposes of a dismissal. It has further been submitted that the definition of incompatibility does not specify when it is justifiable to dismiss an employee on

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10 Cambridge University Press *Cambridge Advanced Learner Dictionary* 831: personality clashes occur when two or more people of different characteristics are unable to have a good relationship with each other.

11 Communication in the Real World 2016 http://www.open.umn.edu : Interpersonal conflict occurs where there are perceived incompatible goals, scarce resources or opposing viewpoints. It can be expressed verbally or nonverbally which could range from a cold shoulder to a very obvious blowout.

12 Mischke *Contemporary Law* 74.

13 Hereafter the IC.

14 *Erasmus v BB Ltd* (1987) 8 ILJ 537 (Hereafter the *Erasmus case*).

15 *Erasmus case* para 542.

16 *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC); *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ 422; *Joslin v Olivetti Systems Africa (Pty) Ltd* (1993) 14 ILJ 227 (LC); *Hapwood Spanjaard Ltd* (1996) 2 BLLR (IC); *Subrumuny and Amalgamated Beverage Industries Ltd* (2000) 21 ILJ 2780 (ARB).

17 Grants *Defining incompatible behaviour in an employer/employee relationship* 12.

18 *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC).

19 Griesssel date unknown http://www.labourguide.co.za.

grounds of incompatibility.[20] It has been submitted further that the definition of incompatibility gives employers the leeway to dismiss an employee for whatever behaviour or action the employer considers incompatible.[21] For instance, in a society like South Africa with diverse beliefs, races, cultures, gender and age, the difference in integration into corporate culture(s) may sometimes lead to personality clashes or interpersonal conflicts that may occur from time to time in the organisation. Because the definition of incompatibility is unclear on the conduct(s) constituting incompatibility in the organisation, and when it is justifiable to dismiss an employee on grounds of incompatibility, the employer may exercise its discretion and may dismiss the employee for whatever behaviour or action it considers incompatible.[22]

In the absence of a clear definition of conduct constitutes incompatibility in an organisation, and when it is justifiable to dismiss an employee on grounds of incompatibility, the IC intervened in the *Wright v St Mary's Hospital*[23] by developing the golden rule. The IC held that a dismissal on grounds of incompatibility is fair if the employment relationship has broken down irremediably.[24] If the employment relationship can be mended by sensible and genuine effort to improve the interpersonal relationship, the dismissal of an employee without a conscious effort to redeem the employment relationship is considered an unfair dismissal.[25] Another problem with incompatibility as a ground for dismissal lies in the *Labour Relations Act*.[26] The *LRA* recognises three grounds of dismissal, namely, misconduct, incapacity, and the employer's operational requirements.[27] Section 188 of the *LRA* states that a dismissal is fair if the reason for the dismissal falls within one of the above–mentioned grounds for dismissal

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20 Grant *Defining Incompatible behaviour in an employer/employee relationship* 12.
21 Grant *Defining Incompatible behavior in an employer/employee relationship* 12.
22 *Joslin v Olivetti Systems Africa (Pty) Ltd* (1993) 14 ILJ 227 (LC).
23 *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC) (Hereafter the *Wright case*).
24 *Wright case* para 1004; *Gorflin v Distressed* (1973) IRLR 290.
25 *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ 422; *Jardine and Tongaat-Hulett Sugar Ltd* (2002) 23 ILJ 547 (CCMA).
26 *Labour Relations Act* 66 of 1995 (as amended) (hereafter the *LRA*).
27 Section 188 of the *LRA*.

(also known as substantive fairness),[28] and if a fair procedure was followed (also known as procedural fairness).[29] The *LRA* also provides guidelines that may be followed when dismissing an employee on any of the grounds mentioned above. Schedule 8 of the Code of Good Practice: Dismissal[30] and the Code of Good Practice: Operational Requirements[31] were established in line with the *LRA*.[32] The Code of Good Practice: Dismissal and the Code of Good Practice: Dismissal for Operational Requirements serve as legislative guidelines, *inter alia*, on what a fair procedure entails for a dismissal for misconduct, incapacity or the employer's operational requirements.[33] However, in terms of the incompatibility as a ground for dismissal, the *LRA* is silent. The *LRA* does not recognise incompatibility as a ground for dismissal, neither does the *LRA* provide guidelines that the employer could follow when dismissing an employee on grounds of incompatibility.[34] This leaves a grey area for the employer because, oftentimes, the employer who wants to dismiss the incompatible employee does not know when it is appropriate to dismiss such an employee on grounds of incompatibility, and how to dismiss the employee on grounds of incompatibility.[35] The effect is that, oftentimes, the employer is forced to tolerate an employee who causes disharmony or worse, may dismiss an employee using a wrong ground for dismissal,[36] and following a wrong procedure.[37] The employee who has been dismissed may, however, be reinstated

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28 Fouche *A Practical Guide to Labour Law* 288.

29 Fouche *A Practical Guide to Labour Law* 288.

30 Schedule 8 of the *LRA*: The Code of Good Practice: Dismissal (Hereafter the Code of Good Practice: Dismissal).

31 The Code of Good Practice: Operational Requirements (published in GG 20254) (Hereafter the Code of Good Practice: Operational Requirements).

32 Fouche *A Practical Guide to Labour Law* 288.

33 The Code of Good Practice: Dismissal provides guidelines for dismissal in terms of misconduct and incapacity. While the Code of Good Practice: Operational Requirements provides guidelines for dismissal in terms of the employer's operational requirements.

34 Grant *Defining Incompatible behaviour in an employer/employee relationship* 12; Griessel date unknown http://www.labourguide.co.za; Israelstam 2012 http:www.labourguide.co.za.

35 Grant *Defining incompatible behaviour in an employer/employee relationship* 12.

36 *Zililo v Maletswai Municipality & Others* [2009] JOL 23238 (LC).

37 *Zililo v Maletswai Municipality & Others* [2009] JOL 23238 (LC).

or compensated by a relevant forum[38] because the employer could not prove that the reason for dismissal is a fair one and that a fair procedure was followed.[39]

It has been recognised by case law[40] and eminent scholars[41] on this topic that incompatibility is a species or variant of incapacity. For instance, Rycroft[42] submits that incompatibility may take other forms of dismissal, i.e. misconduct[43] or the employer's operational requirement,[44] but it is best categorised as a species of incapacity. This view was accepted by Van Nierkerk and Smit.[45] Grogan[46] and Basson[47] also accepted this position. This view was further accepted by the Labour Appeal Court[48] in the recent case of *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk*[49] where the LAC held that incompatibility is best categorised as a form of incapacity. The LAC further recognised the difficulties faced by the employer in dealing with incompatibility as a ground for dismissal. To this effect, the LAC referred to the guidance provided by the courts in early judgments. The LAC held that in the absence of legislative recognition and guidance on incompatibility as a

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38 The Commissioner for Conciliation, Mediation and Arbitration (Hereafter the CCMA) and Bargaining Council are dispute resolution bodies established in terms of the *LRA.* The Labour Court (Hereafter the LC) is a superior court that has authority, inherent powers, and standing in relation to matters under the *LRA*.

39 Section 188 of the *LRA.*

40 *Zililo v Maletswai Municipality &Others* [2009] JOL 23238 (LC); *Watson v South African Rugby Union (SARU) &others* (2019) 40 ILJ 1052 (LAC); *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v VanDyk* [2020] 6 BLLR 549 (LAC).

41 Rycroft 2009 *SA Merc LJ* 426. Van Nierkerk and Smit 2018 *Law@Work* 329: they are of the view that incompatibility is probable best categorised as form of incapacity, as it related to the inability of an employee to work within the particular circumstances in which the employee is engaged. Basson *et al The New Essential Labour Law Handbook* 158-159: states that incompatibility may take other forms, but it is best dealt with as a species of incapacity. Grogan *Workplace Law* 253 states that incompatibility is best deal with as incapacity, under the ambit if poor work performance.

42 Rycroft 2009 *SA Merc LJ* 426.

43 *Zililo v Maletswai Municipality & Others* [2009] JOL 23238.

44 *Wright v St Mary's Hospital* (1992) 13 ILJ 987.

45 Van Niekerk and Smit 2018 *Law@Work* 329: it was submitted that incompatibility is probably best categorised as a form of incapacity, as it relates to the inability of an employee to work within the particular circumstances in which the employee is engaged.

46 Grogan *Workplace Law* 253 states that incompatibility is best dealt with as incapacity, under the ambit of poor work performance.

47 Basson *et al The New Essential Labour Law Handbook* 158-159 states that incompatibility may take other forms, but it is best dealt with as a species of incapacity.

48 Hereafter the LAC.

49 *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk* [2020] 6 BLLR 549 (LAC) (Hereafter the *Zeda Car Leasing* case).

ground for dismissal, the guidance provided by the courts in earlier judgments could be used as guidance in dealing with incompatibility disputes.[50]

Regardless of the development in South African labour law in relation to incompatibility, this study demonstrates that there is still a loophole in this labour law system. In this day and age where interpersonal relationships are becoming more and more important in the organisation, it is necessary that the employer know how to deal with incompatibility in the organisation. However, it is noteworthy that, to date, a majority of employers are not aware of the existence of incompatibility as a ground for dismissal in South African labour law. Majority employers are also not aware of the development of incompatibility as a ground for dismissal in South African labour law. This is a problem because the employers in a more general sense rely on the *LRA* and the relevant Code of Good Practice to deal with dismissals in an organisation. When the *LRA* and the relevant Code of Good Practice does not cater for a particular ground of dismissal, i.e. incompatibility, it creates uncertainty for the employer as shown above. It would also be unreasonable and unfair to expect ordinary employers who have no legal knowledge to keep up with the developments in labour law in this regard. This study therefore demonstrates that there is a need for incompatibility to be recognised as a ground for dismissal in the *LRA*. This study further illustrates that there is a need for specific guidelines to be developed in assisting employers in dealing with incompatibility as a ground for dismissal, and creating certainty and uniformity in the procedures followed in incompatibility dismissals.

1.2 Scope and limitations of the study

The scope of this study is focused on incompatibility as a ground for dismissal in South African labour law. The principal legislation in this research is the *LRA*. Case law and other sources of law are carefully considered throughout this study to identify and demonstrate the development of incompatibility as a ground for

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[50] This guidance will be discussed further in Chapter 4 of this study. The aim is to investigate whether the guidance provided by the court in the *Zeda Car Leasing case* is sufficient to employers in dealing with incompatibility in the organisation.

dismissal in South Africa. This research is limited to South African labour law and does not take into purview any international convention or case law dealing with incompatibility as ground for dismissal.

1.3 Rationale and justification

The rationale for this study is to investigate incompatibility as ground for dismissal in South Africa. Incompatibility as ground for dismissal has existed in South African labour law system for a long time. However, the *LRA* does not recognise incompatibility as ground for dismissal, neither does the *LRA* or the relevant Code provide guidance that an employer may follow when dealing with incompatibility in an organisation. The lack of legislative recognition has therefore created loopholes in the labour law system. The courts have therefore intervened, and developed principles to assist the employers in dealing with incompatibility in the organisation. This study therefore focuses on incompatibility as a ground for dismissal, taking into account the developments in South African labour law system, and making recommendations on how the recognition of incompatibility as a ground for dismissal in the *LRA* could assist employers in the near future.

1.4 Aims and objectives

The study aims to investigate incompatibility as a ground for dismissal in South African Labour Law. The following are set as secondary objectives:

- The definition of incompatibility, and the characteristic features of incompatibility in an organisation for the purposes of a dismissal;
- The other grounds of dismissal as they relate to incompatibility, taking into account the guidelines provided by the *LRA* and the Code;
- Investigate incompatibility as a species of incapacity, taking into account case law, eminent scholars writing on this topic, and considering the guidance provided by the courts in the recent case *Zeda Leasing Car* case;

- Further, make recommendations on the need for incompatibility to be recognised by the *LRA*, and for guidelines to be provided by the *LRA* or the relevant Code in this regard.

1.5 Research question

To what extent does the recognition of incompatibility as a ground for dismissal in the *LRA* assist the employer in dealing with incompatibility in the organisation?

Sub-question: Is there a need for the *LRA* or the relevant Code to provide specific guidelines dealing with incompatibility in the organisation?

1.6 Research method (s)

This research is primarily based on a literature review of appropriate books, case law, law journals, legislation, and internet sources dealing with incompatibility.

1.7 Structure of the study

Chapter one: Introduction

This chapter offers an overview of the research. It discusses the background to the study briefly; the problem addressed the aims and objectives, as well as the limitations of the study. This chapter clarifies and justifies the research methods, data collection and establishes the different techniques used to collect the data for the study.

Chapter two: Defining incompatibility as a ground for dismissal

This chapter focuses entirely on incompatibility as a ground for dismissal. This chapter commences with a brief discussion of an employer's right to a cordial harmonious relationship, the definition of incompatibility in an organisation, characteristic features of incompatible behaviour as developed by the courts, and then terminates with a conclusion.

Chapter three: Grounds for dismissal in terms of the *LRA*

This chapter dwells on the three grounds for dismissal as established by the *LRA*, and the guidelines provided by relevant Code of Good Practice: Dismissal in this regard. The chapter teases out how employers and the courts have used the different grounds for dismissal to deal with incompatibility in the organisation.

Chapter four: Guidance provided by the courts in dealing incompatibility as a ground for dismissal

This chapter zooms on guidance provided by the courts that could be used by the relevant forum and employers in dealing with incompatibility as ground for dismissal. This chapter also investigates whether there is a need for legislative recognition of incompatibility as ground for dismissal, or whether the guidance provided by the courts is sufficient to assist the relevant forum and employers in incompatibility disputes.

Chapter five: Conclusion and Recommendations

The final chapter addresses the research question, and demonstrates that there is a need for recognition of incompatibility as ground for dismissal in the *LRA.* Further, that there is a need for specific guidelines dealing with incompatibility that ought to be set out in the *LRA* or the Code.

1.8 Relevance for the Research Unit

The proposed study falls within the broad focus of the research unit Law, Justice and Sustainability in the Faculty of Law, and falls under the sub-project of Finance, Trade, and Investment. This study directly relates to the concept of incompatibility and contributes to the legal development in the field of labour law in South Africa.

1.9 Statement regarding ethics

This research has no ethical and it is a no-risk study. This research will guard against plagiarism and all sources used in the course of this study will be relatively acknowledged. Please find attached herewith the completed ethics checklist.

1.10 Conclusion

The next chapter will therefore focus on the definition of incompatibility as a ground for dismissal in South Africa. The courts have developed characteristic features of justifiable reasons to dismiss an 'incompatible employee'. This aspect is assessed and critically discussed in the next chapter.

Chapter 2

2 Defining incompatibility as a ground for dismissal

2.1 Introduction

The purpose of this chapter is to define incompatibility as a ground for dismissal in the South African labour law. As prefaced in Chapter 1 of this study, the definition of incompatibility is vague and does not strictly set out the conduct(s) of an employee that may constitute incompatibility for the purpose of a dismissal. In the absence of a clear definition of incompatibility, the courts intervened by identifying characteristic features of justifiable reasons to dismiss an employee on grounds of incompatibility. The aim of these characteristic features is to narrow down the justifiable reasons to dismiss an employee on grounds of incompatibility. In order to achieve the above purpose, this chapter commences with a brief discussion of the employer's corporate culture as it relates to incompatibility, followed by a general definition of incompatibility as a ground for dismissal, and then discusses the characteristic features of justifiable reasons to dismiss an employee on grounds of incompatibility.

2.2 The employer's corporate culture

The employer's corporate culture comprises the unwritten rules that govern the interpersonal relationship in an organisation.[51] It relates to the beliefs, values, norms and practices that are established by the employer and communicated to the employees. It specifies the employee's perceptions, behaviours and understanding of the organisation, and sets the framework on how the organisation should run.[52] Because employers may vary and circumstances may differ, there is no one-size-fit-all approach to corporate culture. Each employer is

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51 Mischke *Contemporary Law* 74.

52 Evan 2021 http://www.investopedia.com.

expected to establish, develop and adapt their own corporate culture according to specific organisational needs, provided it is not unreasonable and unjustifiable.[53]

The employer's corporate culture is an essential construct in the context of incompatibility. As stated in Chapter 1 of this study, incompatibility relates to the inability of an employee to conform to the employer's corporate culture.[54] There are many reasons why an employee may be considered incompatible with the employer's corporate culture. Amongst others, incompatibility occurs if:

- His/her conduct(s) conflicts with the beliefs, norms, values and practices of the organisation;[55]
- His/her conduct(s) causes disruption that affects the cordial harmonious interpersonal relationship in the organisation;[56]
- The presence of the employee in the organisation causes hostility and animosity amongst other employees and between the employer and the employee;[57]
- The conduct(s) of the employee affects fellow employees' morale, team spirit, unity, and as a result the employer loses productivity and income.[58]

2.3 Defining incompatibility as a ground for dismissal

The definition of incompatibility as the inability of an employee to conform to the employer's corporate culture has been criticised by the courts[59] and eminent scholars[60] as too vague. It is submitted in this study that the definition of incompatibility is insufficient to deal with instances of dismissal. It is submitted

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53 Evan 2021 http://www.investopedia.com.
54 Mischke *Contemporary Law* 74.
55 Griessel date unknown http://www.labourguide.co.za.
56 *Wright case* para 990H.
57 *Erasmus case* para 542 - the court held that where the presence of the employee causes disharmony in the organization, the employer is justified in dismissing the employee.
58 Mischke *Contemporary Law* 74 submits that the organisation functions at its best when there is cooperation and a harmonious relationship in the organisation.
59 Mischke *Contemporary Law* 74.
60 Mischke *Contemporary Law* 74.

further that the definition does not specify what conduct(s) of the employee cause/s disharmony, when to dismiss the employee on grounds of incompatibility and how to dismiss the employee on grounds of incompatibility.[61] In an attempt to assist employers in the regard, the courts have developed characteristic features of justifiable reasons to dismiss an employee on grounds of incompatibility. These characteristic features are discussed hereunder.

2.4 Characteristics features of justifiable reasons to dismiss the employee on grounds of incompatibility

2.4.1 Racism as the cause of disharmony in the organisation

It is common knowledge that racism in an organisation thrives where there is disharmony.[62] This is evident in the *Erasmus case.*[63] In this case, a white employee (a distributing manager) uttered derogatory words to a fellow employee (that the subordinate black employee stinks). The white employee had stated on numerous occasions that the black employee stank and should consider taking a shower before coming to work.[64] The black employee, upset by the remark, reported the matter to the employer, and requested the employer's intervention. Other allegations against the white employee included, amongst others, that the white distributing manager was racist, uncompromising, difficult to work with, and lacked leadership skills. The employer alleged further that fellow employees (especially subordinates) had requested that the white employee be dismissed or that the white employee be removed as manager. The employer further alleged that although the white employee was a hardworking and a loyal manager, he was "too much of an industrial risk" to continue working for the organisation.[65]The employer alleged that due to the conduct of the white employee, there was disharmony in the organisation and it was necessary to dismiss him. The IC held that it is justifiable to dismiss an employee whose conduct causes disharmony in

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61 Grants *Defining incompatible behaviour in an employer/employee relationship* 12.
62 Raligilia and Nkoweni 2020 *Obiter* 431.
63 *Erasmus case*
64 *Erasmus case* 542.
65 *Erasmus case* 542.

the organisation; however, the employer must follow a fair procedure.[66]The IC held that before dismissing the employee, the employer must evaluate the nature and seriousness of the problem and endeavour to assist the employer to overcome their personality difficulties. If it cannot be achieved within a reasonable time, the employer may endeavour to place the employee in a position suitable to their temperament. After considering the evidence provided to it, the IC held that the employer had a good reason to dismiss the employee and it was evident that the employer had taken reasonable steps to provide an alternative position suitable to the white employee's temperament. In spite of all steps taken by the employer in this case, there was, however, no alternative available position. Therefore the IC held that the employer had a good reason to dismiss and had followed a fair procedure.[67]

In *Cronje v Toyota Manufacturing*[68] the employee (a senior manager) was dismissed after been charged and found guilty of the distribution of racist and/or inflammatory material that was in violation of the internal policy of the organisation. The employer alleged that the employee's behaviour was unbecoming of a manager and the employee's conduct had the capacity to cause disharmony and unrest in the organisation. The employer alleged that the employee had circulated to certain employees (black employees via email and hardcopy) a graphic material (a cartoon depicting an adult and a young gorilla, both with the head of Zimbabwe former President Robert Mugabe).[69] The caption stated "we want the farms to grow more bananas." The employee alleged that he had received the cartoon as an attachment to a petition to former President Thabo Mbeki, requesting that he intervene in the Zimbabwe crisis, and did not consider it racist, rather it described Zimbabwe as a "Banana Republic." The employer however alleged that it is a rule in the organisation that no one should use the organisation system to promote racism, sexism or any other offensive material, i.e. including religious or political images. The employer alleged that the

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66 *Erasmus case* 544.
67 *Erasmus case* para 544.
68 *Cronje v Toyota Manufacturing* (2001) 22 ILJ 735 (CCMA) (hereafter the *Cronje case*).
69 *Cronje case* para 738

organisation had a majority of black employees and a minority of white employees, and any race-related issue was sensitive in the organisation.[70] The employer alleged that the black employees were upset by the caption and the conduct of the employee caused disharmony in the organisation. The employer alleged that due to the conduct of the employee, the trust relationship had broken down and there was no prospect of a reasonable working relationship with the employee and fellow employees.[71] The CCMA held that although the employer did not follow a fair procedure in dismissing the employee, the employer had a justifiable reason to dismiss the employee. The CCMA referred to the history of South Africa and held that the conduct(s) of the employee negatively impacted on the employer's efforts to build a non-racial relationship in the organisation.[72]

Similarly, in *Lebowa Platinum Mines Ltd v Hill*[73] a white employee was dismissed on the insistence of a trade union after he referred to a fellow employee (black) as 'bobbejaan' (translated as 'baboon') in a staff meeting. The black employee lodged a complaint and the white employee was given a final written warning. However, the trade union to which the black employee was affiliated argued that the final written warning was too lenient, and could not convey the seriousness and gravity of the white's employee's conduct. The trade union therefore threatened to strike if the white employee was not dismissed.[74] The employer consulted with the white employee and negotiated a possible transfer to another mine. However, when the white employee refused the option of the transfer, the employee had no choice but to dismiss the employee. The question before the court was whether the dismissal of the employee in response to a demand by the trade union was a justifiable reason to dismiss the white employee. The LAC summarised the test for fairness based on incompatibility on demand of a third party as follows:

> (a) the mere fact that a third party demands the dismissal of an employee does not render such dismissal fair; (b) the demand for the employee's dismissal must

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70 *Cronje case* para 739
71 *Cronje case* para 749
72 *Cronje case* para 749.
73 *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 112 (LAC) (*Lebowa case*).
74 *Lebowa case* para 16.

have a good and sufficient foundation; (c) the threat by the third party to impose some sanction against the employer must be real; (d) the harm that would be caused if the third party were to carry out its threat must be significant; mere inconvenience to the employer is not enough to justify the dismissal; (e) the employer must make reasonable efforts to persuade the party making the demand to abandon the demand; (f) if the third party cannot be persuaded to abandon the demand, the employer must investigate and consider alternatives to dismissal; (g) in the process of considering alternatives, the employer must consult the employee and make it clear to him or her that rejection of any possible alternative will result in dismissal.[75]

Turning to the facts of the case, LAC held that the employer had attempted to dissuade the trade union from insisting on the white employee's dismissal. The employer had also offered the employee a transfer instead of a dismissal, an offer that the white employee refused.[76] Further, the LAC held that the employee was aware that refusing the alternative position in another mine would result in his dismissal.[77] Therefore, the LAC held that the dismissal of the employee was fair because the reason for the white employee's dismissal is one that could generate disharmony in the organisation. The LAC further held that no injustice was done to the white employee as he was the cause of his own dismissal.[78]

In the recent case of *Rustenburg Platinum Mine v SAEWA obo Meyer Bester,*[79] the Constitutional Court intervened on the pervasiveness and impact of racism in the organisation. In this case, the employee had called a fellow employee "swart man" (black man). The employee was subsequently dismissed for his conduct as it was alleged that the conduct of the employee caused unrest and disharmony amongst fellow employees. The matter went before the CCMA and it was found that the dismissal of the employee was substantively and procedurally unfair.[80] The LC held

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75 *Lebowa case* para 22: This test was also applied by the court in *SACTWU obo Chanchane v Matwebeng Christian Academy* [2012]2 BALR 193 (CCMA).
76 *Lebowa case* para 68.
77 *Lebowa case* para 70.
78 *Lebowa case* para 75.
79 *Rustenburg Platinum Mine v SAEWA obo Meyer Bester* 2018 (5) SA 78 (CC) (Hereafter the *SAEWA* case).
80 *SAEWA case* para 11.

that the conduct of the employee was serious enough to warrant a dismissal. The decision of the CCMA was therefore set aside.[81] The LAC confirmed the decision of the CCMA.[82] The LAC held that the dismissal of the employee was substantively and procedurally unfair. However, in the Constitutional Court,[83] the CC had to decide whether referring to a fellow employee as a "swart man" (black man) was racist and derogatory, and whether the CCMA was unreasonable to arrive at the conclusion that the dismissal of the employee was substantively and procedurally unfair.[84] The CC held that the conduct had the potential of causing disharmony in the organisation. The CC further held that the conduct of the employee had the potential of deepening tensions among employees in the organisation. Further, the CC held that the dismissal of the employee was fair as the employment relationships had broken down irremediably. The CC held that the dismissal of the employee was the only reasonable option to address the issue of racism in the organisation.[85]

2.4.2 Irremediable breakdown of the employment relationship

In the *Wright case*[86] the employee was dismissed by the employer on grounds of incompatibility. The employee, after becoming the medical superintendent of a hospital, reached a decision that the hospital would be upgraded so as to expand its medical services to the community. The employer alleged that the manner in which the employee presented his ideas and decisions to the management and executive committees caused friction in the organisation. The employer alleged, amongst others, that the employee was: 'impatient', acted impulsively', could not handle difference 'diplomatically',[87]encouraged his subordinates (nurses) to undermine their superiors (matron), intervened in the work of fellow employees, incited other doctors against the management and the executive committee, had lost his temper at a Board meeting by banging his fist on the table and raising his

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81 *SAEWA case* para 17.
82 *SAEWA case* para 23.
83 Hereafter the CC.
84 *SAEWA case* para 36.
85 *SAEWA case* para 58.
86 *Wright case.*
87 *Wright case* para 990H.

voice; criticised the hospital and had written letters to the public belittling the hospital. Other allegations against the employee were that the employee lacked interpersonal relationships, undermined and disrespected the authority of the management and executive committee. The employer alleged that the employee's conduct was against the policy of the hospital and the wishes of the management and executive committee.[88] The employer alleged further that due to the conduct of employee, the relationship between the employer and employee had deteriorated and it was necessary for the management and executive committee to dismiss the employee. The employer emphasised that although the employee had done nothing wrong for disciplinary reasons, the employee's opinions and manner of conducting himself in the hospital was in conflict with the corporate culture of the organisation, and had caused disharmony that disrupted the normal functioning of the organisation.[89] First, the IC reaffirmed the general rule as set out in the *Erasmus case*. The IC held that the employer is entitled to insist on a cordial harmonious relationship in the organisation.[90] Second, the IC held that the dispute between the parties was not related to personality clashes, but related to differences in opinion on how the hospital should run. Third, the IC held that, although the employee had good intentions for the organisation, the manner in which he communicated his opinions to the management and executive committee was wrong and unacceptable. The IC accepted the fact that the conduct of the employee was unacceptable to the organisation, but there was no evidence presented by the employee to show that that the employee was unwilling to improve his interpersonal skills with fellow employees. There was also no evidence to show that the employee was duly informed of his incompatibility. Further, the IC held that there was no evidence to show that the employer had made attempts to assist the employee with his incompatibility to the organisation and there was no evidence to show that the employee was given a fair opportunity to remedy this incompatibility.[91] In essence, the IC laid down the procedure that the

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88 *Wright case* para 990H.
89 *Wright case* para 990H.
90 *Erasmus case* para 542.
91 *Wright case* para 1005H.

employer may adopt when dealing with incompatibility in the organisation. The IC held as follows:

> …what is required where there is incompatibility is that the employee must be advised what conduct allegedly causes the disharmony; who was being upset by the conduct; what remedial action is suggested to remove the incompatibility; the employee should be given a fair opportunity to consider the allegations and prepare his reply thereto; that he be given a proper opportunity of putting his version; and where it is found that he is responsible for the disharmony he must be given a fair opportunity to remove the cause of disharmony.[92]

Furthermore, the IC set out the golden rule in dismissal on grounds of incompatibility. The court held as follows:

> ...before any dismissal arising from personality differences will be considered fair, the employer must show that not only is there a breakdown in the working relationship but that it is irremediable. So every step short of dismissal should first be investigated in order to seek to effect an improvement in the relationship.[93]

The IC held that although the relationship between the employer and employee had deteriorated, there was no evidence to prove that the relationship had broken down irremediably.[94] The CCMA and the courts have therefore relied on the above principle in dealing with employees dismissed on grounds of incompatibility.[95] In the recent case of *South African Rugby Union v Watson and Others*[96]the LAC reaffirmed the above principle. In this case, the employer alleged that complaints

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92 *Wright case* para1004H; see also *King v Beacon Island Hotel* (1987) 8 ILJ 485 (IC).

93 *Wright case* para 1004H; See also *Gorflin v Distressed* (1973) IRLR 290.

94 *Wright case* para 1004H.

95 *Joslin v Olivetti Systems Africa (Pty) Ltd* (1993) 14 ILJ 227 (LC); *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ 422; *SA Quilt Manufacturers (Pty) Ltd v Radebe* (1994) 15 ILJ 115 (LAC); *Visagie & Andere v Prestige Skoonmaakdientse (Edms) BPK*(1995) 16 ILJ 421 (IC); *Hapwood v Spanjaard Ltd* (1996) 2 BLLR (IC); *MCDuling v MIF* [1998] 3 BALR 287 (CCMA)*Subrumny and Amalgamated Beverage Industries Ltd* (2000) 21 ILJ 2780 (ARB); *Jardine and Tongaat-Hulett Sugar Ltd* (2002) 23 ILJ 547 (CCMA); *Jabari v Telkom SA (Pty) Ltd* (2006) 27 ILJ 1854 (lC); *Myeni v Chillibush Communications (Pty) Ltd* (2010) 19 CCMA; *Edcon Limited v Padayachee and Others* (J331/16) [2018] ZALCJHB 307 (20 September 2018);

96 *South African Rugby Union v Watson and Others* (CA17/2017) [2018] ZALAC 57; (2019) 40 ILJ 1052 (LAC); [2019] 7 BLLR 638 (LAC) (11 October 2018).

against the employees included gross inappropriate and unprofessional use of abusive words against fellow employees, dictatorial style of management, intimidation of subordinates (fellow employees), lack of professional input and communication, and a lack of interest in the growth and development of the organisation amongst others. The employer alleged that due to the conduct of employee, there was a lack of trust and confidence in the employment as a result the employment relationship had broken down irremediably.[97] The LAC accepted the employer's contention. The LAC held that if the trust relationship between the employer and employee had been destroyed due to the conduct of the employee, it is safe to say that the employment relationship had broken down irremediably.[98] The LC in *Werely v Productivity SA & another*[99]accepted this position. The LC held that a breakdown of a trust relationship is sufficient reason to dismiss the employee.[100]

2.4.3 Odd or eccentric behaviour

In *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd*[101] the employee (manager) of the organisation was dismissed for incompatibility after complaints had been received from fellow employees relating to the employee's conduct. The employer alleged that the employee displayed eccentric behaviour in the form of carrying about 36 pens in his pockets, wearing a floppy cricket hat, and behaving in an odd manner.[102] The employer alleged further that the complaints against the employee included, amongst others, that the employee had a 'credibility problem', the employee was a 'lunatic', the employee sometimes carried a camera around his neck, the employee wore a cricket cap at work, and the employee had used the organisation photocopy to promote certain political views.[103]The employer alleged that there was no problem with the employee's work performance, but his

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97 *Watson case* para 2.
98 *Watson case* para 31.
99 *Werely v Productivity SA & Another* (2020) 41 ILJ 997 (Hereafter the *Wereley case*).
100 *Werely case* para 30.
101 *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (LC) (Hereafter the *Joslin* case).
102 *Joslin case* para 229.
103 *Joslin case* para 229.

personality or way of conducting himself in the organisation created a negative impression for fellow employees in the organisation.[104] The employer alleged that the conduct(s) of the employee in the organisation conflicted with the corporate culture of the organisation, and it was necessary for the employee to be dismissed. However, the LC held that odd and eccentric behaviour cannot in itself constitute ground for dismissal even if the employee happened to be the manger or a senior executive in the organisation. The LC held that, mild or harmless eccentricity should be distinguished from extreme unacceptable behaviour.[105]A dismissal may be appropriate if the employee's eccentric behaviour is of such gross nature that it disrupts the normal functioning of the organisation, or if the employee's eccentric behaviour had caused a breakdown in the employment relationship.[106] The LC held that eccentric behaviour that may constitute ground for dismissal is, if for instance, the employee arrived at work in a bathing costume or some outrageous outfit, or if the employee received clients or fellow employees while standing on his head or turning on a cartwheels in the passage outside the office.[107] The LC concluded that the conduct of the employee was not severe enough to warrant dismissal on grounds of incompatibility.[108]

2.4.4 The employer must take some sensible, practical and genuine effort to effect an improvement in the employment relationship

In *Lubke v Protective Packaging (Pty) Ltd*[109] the employee (Managing Director) of the organisation was dismissed 56 working days after her appointment in the organisation. The employer alleged that the reason for her dismissal was because fellow employees of the organisation were unhappy with her 'dictatorial style' and

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104 *Joslin case* para 228.

105 *Joslin case* para 229: the court held that eccentric behaviour may constitute a ground for dismissal if for instance the employee arrives at work in a bathing costume or some other outrageous outfit, or if the manager of the organisation receives clients or co-workers while standing on his head, or turning cartwheels in the passage outside the office.

106 *Joslin case* para 229; see also *Edcon Limited v Padayachee and Others* (J331/16) [2018] ZALCJHB 307 (20 September 2018).

107 *Joslin case* para 229.

108 *Joslin case* para 230;

109 *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ 422 (Hereafter the *Lubke case*).

approach, and had shown signs of rebellion.[110] The employer alleged that the employee had made some structural and administrative changes to the organisation without consulting or communicating with fellow employees. The employer alleged further that although the employee was very good at her job, the problem related to her inability to interact with fellow employees.[111] The employer alleged that the conduct of the employee conflicted with the corporate culture of the organisation and as such the employment relationship had broken down irremediably. The employer alleged that it was therefore necessary to dismiss the employee. Firstly, the IC expressed its discontent with the employer's reliance on the corporate culture of the organisation.[112]The IC held that corporate culture is an amorphous concept, and it is inappropriate when used in the context of the work environment and the employment relationship.[113] The IC held that the only corporate culture that the employee was bound to promote was to keep the business of the employer afloat and to achieve maximum profit. The IC further held that it is absurd for the employer to suggest that the employee is threatening the survival of the company when in fact the opposite is true.[114] The court expressed little sympathy for the disgruntled employees. The court held as follows:

> ....in any event, they should have known that it is a fact 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

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110 *Lubke case* para425.
111 *Lubke case* para 425.
112 *Lubke case* para425.
113 *Lubke case* para 427: the court held that the employer cannot rely solely on corporate culture as a defence to justify a dismissal on grounds of incompatibility.
114 *Lubke case* para 427.

> contract, after a short period of time, simply because some employees cannot come to terms with the new regime and show signs of rebellion.[115]

In reaching a decision, the IC referred to the procedure set out in the *Wright case*.[116] The court held that the employer had failed to inform the employee of her incompatible behaviour, had failed to counsel the employee on her conduct, had failed to assist the employee with her interpersonal skills, and further had failed to give the employee a reasonable opportunity to remedy her incompatible behaviour. The IC therefore set out a golden rule. The IC held that prior to reaching a decision to dismiss the employee on grounds of incompatibility the employer must take "some reasonable, sensible, practical and genuine efforts to effect improvement in the interpersonal relationship".[117] This means that the employer must, as far as reasonably possible, assist the employee to conform to the corporate culture of the organisation. If after the employer's assistance, the employee fails to improve his or her interpersonal relationship, the employer may insist that the relationship has broken down irremediably and may be justified in dismissing the employee on grounds of incompatibility. This principle was accepted and reaffirmed by the court in *Hapwood v Spanjaard Ltd*[118]where the IC held that the employer must consider alternatives short of dismissal and a dismissal must be considered only as a matter of last resort.[119] In *Jabari case*[120] the LC ruled as follows:

> (3) An employer is entitled, where the conduct of an employee creates disharmony to: (a) evaluate the nature and seriousness of the problem, address same, and assist the employee to overcome his personal difficulties, and (b) effect remedial action, and if unsuccessful, place the employee in a position suitable to his qualifications and experience.[121]

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115 *Lubke case* para 428.
116 See 2.4.1 above on the discussion of the *Wright case*.
117 *Lubke case* para 429.
118 *Hapwood v Spanjaard Ltd* (1996) 2 BLLR 187 (IC).
119 *Hapwood v Spanjaard Ltd* (1996) 2 BLLR 187 (IC) para 198.
120 *Jabari case.*
121 Jabari case para 3.

In *Myeni v Chillibush Communications (Pty) Ltd*[122] the CCMA held that the dismissal of the employee was fair because the employer, as far as reasonable possible, took effort to assist the employee with his incompatibility. The CCMA took into account the fact that the employee was duly informed of his incompatibility, the employee was given adequate notice of the meeting to discuss the allegations of his incompatibility, the fact that the employee chose not to attend the meeting. The CCMA held that although the employee failed to attend the meeting, the employer had taken reasonable, practical and genuine effort to assist the employee with his incompatibility.[123] In *Mgijima v Member of the Executive Council Gauteng of Education and Others*[124] the LC held as follows:

> ...the fairness of the dismissal in incompatibility cases, generally turns around the question of: (a) the nature and the seriousness of the conduct of the employee in causing disharmony with the others; the assistance given to the employee to address his or her problem. This may include counselling and facilitating a relationship building by objective exercise; (c) placing the employee in another alternative position if the remedial action has failed.[125]

The LC held further that where the employer makes a decision to assist the employee, i.e. through the appointment of a psychologist, a dismissal without the

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122 *Myeni v Chillibush Communications (Pty) Ltd* (2010) 19 CCMA (Hereafter the *Myeni case*): the employer alleged amongst others that: the employee was unable to supervise and motivate his subordinate; the employee lacked interpersonal skills and fellow employees were demoralise by his presence in the organisation; due to the employee's conduct the productivity level has depreciated and the employer had lost profit and some employees had resigned as they could not continue to work with the employee. The employer further alleged that due to the conduct of the employee the employment relationship had broken down irremediably.

123 *Myeni case* para 151.

124 *Mgijima v Member of the Executive Council Gauteng of Education and Others* (JR 1897/2011) [2014] ZALCHB 414 (27 October 2014) (Hereafter the *Mgijima case*): the employee (a senior manager) was dismissed a year after her appointment. The employer alleged that the reason for her dismissal was incompatibility. The employer further alleged amongst others that, the employee had a confrontational style of management, poor and negative management style, and fellow employees were uncomfortable working with her. It was alleged that the employee failed to take responsibilities for her action, created conflict and lack interpersonal skills. The employer alleged that due to the conduct of the employee, the relationship had broken down irremediably.

125 *Mgijima case* para 75.

appointment of a psychologist to assist the employee with his/her behaviour would be considered unjustifiable.[126]

2.4.5 The employee must be the cause of the disharmony in the organisation and incompatibility must be the reason for the employee's dismissal

In *SA Quilt Manufacturers (Pty) Ltd v Radebe*[127] the employee (supervisor) was dismissed after complaints were brought against her by fellow employees. The employer alleged that the employee was unpopular with the organisation as she intimidated and harassed her subordinates (fellow employees). The employer alleged that counselling was held, and the employee promised to improve her behaviour. However, there was no improvement in her behaviour, and this resulted in work stoppage in the organisation, and later on 80% of the employees signed a petition demanding that the employee should be dismissed.[128] The employer alleged that the organisation faced disruption and financial loss, and some of the employees were angry and threatened industrial action.[129] The employer alleged that two disciplinary enquiries were held and it was recommended that the employee should be dismissed. The employer further alleged that the employee was offered an alternative position, but the employee refused the position, and as such the employer resolved to dismiss the employee.[130] The LAC held that there was no doubt that the employee was partly to be blamed for the state of affairs in the organisation. The LAC held further that it was totally improbable that the employee did not contribute to her unpopularity as the supervisor and it could not be believed that fellow employees would have allowed themselves to mobilise against the employee if the employee was competent, impartial and performed her work properly as a supervisor. Based on

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126 *Mgijima case* para 45.

127 *SA Quilt Manufacturers (Pty) Ltd v Radebe* (1994) 15 ILJ 115 (LAC) (Hereafter the *Radebe case*).

128 *Radebe case* para 118: fellow employees had indicated in the petition that they were not prepared to work with the employee because she was victimising the employees, threatening to dismiss them for minor reasons, threatening them with court actions, insulting and swearing at them, unfair and unequal treatment in the organisation, inciting some workers to take illegal action against management without their will and failing to cooperate with anyone when asked to do so.

129 *Radebe case* para 123.

130 *Radebe case* para 123.

the circumstances, the LAC held that the employer had a good reason for dismissing the employee. However, the employer did not follow fair procedure.[131] The LAC held that when the employee behaves in a way that is incompatible with fellow employees, the employee may be dismissed but still the employer must conduct a proper inquiry to establish whether the employee is solely to be blamed for the disharmony.[132] The LAC further held that the fact that the employee is incompatible with fellow employees does not justify the unfair treatment of the employer. The LAC held as follows:

> We are of the view that the court below was correct in finding that the procedure adopted by the appellant in dismissing the respondent was inadequate and unfair. However, the facts would seem to indicate that the appellant may well have had grounds to terminate the employment of the respondent on account of the unrest that developed in its workforce as a result of the animosity towards the respondent. However, it adopted the wrong procedure and thereby treated the respondent unfairly.[133]

It is evident from the above that although the employer did not follow a fair procedure in dismissing the employee, the LAC found that the employee was the cause of the disharmony in the organisation and the reason for the employee's dismissal was incompatibility. In *Visagie & Andere v Prestige Skoonmaakdientse (Edms) BPK*[134] the IC held that a dismissal on grounds of incompatibility is justified if the employee contributed materially to the disharmony in the organisation, and only after the employee is afforded a fair opportunity to remove the cause of the disharmony.[135] In *MCDuling v MIF*[136] the CCMA accepted this position. The CCMA held that the dismissal of the employee was fair because the disharmony in the organisation was substantially the fault of the employee. However, the CCMA found that the employer did not give the employee the opportunity to remove the

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131 *Radebe case* para 116.
132 *Radebe case* para 124.
133 *Radebe case* para 125.
134 *Visagie & Andere v Prestige Skoonmaakdientse (Edms) BPK* (1995) 16 ILJ 421 (IC).
135 *Visagie & Andere v Prestige Skoonmaakdientse (Edms) BPK* (1995) 16 ILJ 421 (IC) para 101.
136 *MCDuling v MIF [*1998] 3 BALR 287 (CCMA).

disharmony.[137] In *Subrumuny and Amalgamated Beverage Industries Ltd*[138] the LC held that there must be independent corroborative evidence supporting the employer's view that the employee's conduct is the primary cause of the disharmony in the organisation. This means that fellow employees or an independent third party must be able to see that the cause of the disharmony in the organisation is the fault of the employee. The LC further held that the courts or the CCMA should be reluctant to interfere with the decision of the employer that the employee is incompatible provided that the employee acted in good faith and have supportive evidence to prove that the employment relationship has broken down irremediably. The LC further reaffirmed the position that employers vary and circumstances vary. The LC held that when dealing with incompatibility disputes the CCMA or the courts should be guided by the principle that reasonable people may differ as to what is appropriate behaviour under the circumstances.[139] In *Jardine and Tongaat Hulett Sugar Ltd*[140] the CCMA held that although the employee contributed materially to the disharmony in the organisation, it is evident that after counselling and warnings, the employee's behaviour had improved significantly. Therefore, the employer cannot rely on outdated information to conclude that the employee is incompatible. The CCMA held that relying on outdated information in dismissing employee was a form of victimisation. The court therefore held that the employee was not the cause of the disharmony in the organisation.[141] In *Glass v Liberty Group Ltd*[142] the CCMA held that employer had a justifiable reason to dismiss the employee as the employee was the cause of the disharmony in the organisation.[143] In *Edcon Limited v Padayachee and Others*[144] the LC had to decide whether the decision of the CCMA that the employee was the primary cause of the disharmony in the organisation is one that a reasonable decision maker could have arrived at. The employee was

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137 *MCDuling v MIF [*1998] 3 BALR 287 (CCMA) para 294.
138 *Subrumuny and Amalgamated Beverage Industries Ltd* (2000) 21 ILJ 2780 (ARB).
139 *Subrumuny and Amalgamated Beverage Industries Ltd* (2000) 21 ILJ 2780 (ARB) para 2786.
140 *Jardine and Tongaat Hulett Sugar Ltd*(2002) 23 ILJ 547 (CCMA).
141 *Jardine and Tongaat Hulett Sugar Ltd* (2002) 23 ILJ 547 (CCMA) para 560.
142 *Glass v Liberty Group Ltd* [2007] 12 BALR 1172 (Hereafter the *Glass case*).
143 *Glass case* para 6.
144 *Edcon Limited v Padayachee and Others* (J331/16) [2018] ZALCJHB 307 (20 September 2018) (Hereafter the *Padayachee case*).

dismissed by the employer after receiving several complaints relating to an employee's work ethic and inability to collaboratively work in a team. The employer alleged that an attempt was made at a mutual termination of employment relationship but the attempt failed to yield good fruit. An investigation was therefore held on grounds of the employee's incompatibility. After the investigation, the employee was dismissed. The question before the LC was therefore whether the employee was the cause of the disharmony and whether the dismissal of the employee was for a fair reason.[145] The LC confirmed the principle of incompatibility. The LC held that the employee is considered incompatible if due to the employee the employment relationship had broken down irremediably.[146] The LC further referred to the golden rule set out in the *Lubke case*.[147] The LC held that prior to reaching a decision to dismiss the employer must take some sensible, practical and genuine effort to improve the interpersonal relationship especially if the employee is a manager whose work is otherwise perfectly satisfactory.[148] The LC, relying on the decision in *Jabari*[149] and *Radebe case*[150] held as follows:

> ...there are many instances where lethargic employees may label a results-driven manager as being incompatible. The cause of disharmony in such instances would be the insistence on results and lack of shoddiness. The conduct of insistence on diligence cannot be intolerable conduct. The conduct must be one departing from a recognised, conventional, or established norm or pattern. There must be a clear causal link between the disharmony and the departing conduct. Where there is no evidence that the conduct is the cause of the disharmony, then an employer must fail.[151]

The LC therefore concluded that the dismissal of the employee was unfair and the decision of the CCMA was not one that a reasonable decision-maker may have

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145 *Padayachee case* para 10
146 *Wright case*.
147 *Lubkhe case*.
148 *Lubkhe case* para 12.
149 *Jabari case* para 4.
150 *Radebe case*.
151 *Padayachee case* para 15.

arrived at. The LC in the *Watson case*[152] held that if the employee is the cause of the conduct that renders him/her incompatible then the employer has a fair reason to dismiss the employee. The LAC in the *Zeda Car Leasing case*[153] also supports the view. The LAC held that if the conduct of the employee causes disharmony in the organisation, the employer has a good reason to dismiss the employee.[154]

2.5 Conclusion

Based on the above, it is evident that incompatibility as a ground for dismissal relates to the inability of the employee to conform to the employer's corporate culture. There is no particular conduct(s) of the employee that constitutes incompatibility. The employer is justified to dismiss an employee on grounds of incompatibility if the employer can prove that: the conduct(s) of employee causes disharmony in the organisation, i.e. in the instance of racism, poor leadership or intimidation of subordinates or fellow employees; incompatibility is the main reason for dismissing the employee; the employee is substantially the cause of the disharmony in the organisation; the employer has taken some sensible, practical and genuine effort to assist the employee with his or her interpersonal relationship; there is corroborative evidence to show that the employee is the cause of the disharmony in the organisation; the employer has attempted to provide alternative position for the employee; dismissal is considered as last resort; and due to the conduct(s) of the employee the employment relationship has broken down irremediably. The employer may, however, not dismiss the employee for odd or eccentric behaviour unless the eccentric behaviour is of extreme nature that it indeed causes disharmony in the organisation. The employer may not use incompatibility to mask the main reason for dismissing an employee. This means that the employer who wants to dismiss the employee on grounds of incompatibility must ask in good faith and must be able to show that incompatibility is the reason for the employee's dismissal and the conduct(s) of

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152 *Watson case*.
153 *Zeda Car Leasing case*.
154 *Zeda Car Leasing case* para 240.

the employee is the cause of the disharmony. The next chapter deals with the recognised grounds for dismissal in South African Labour Law.

Chapter 3

3 Grounds for dismissal in South African labour law

3.1 Introduction

The previous chapter assessed the characteristic features of justifiable reasons to dismissing an employee on grounds of incompatibility. This chapter examines the recognised grounds for dismissal in South African labour law. It should be noted that the *LRA* is one of the governing labour law legislation in South Africa, regulating, amongst others, the right not to be unfairly dismissed;[155] when a dismissal is considered automatically unfair;[156] and valid reasons for a fair dismissal.[157] A dismissal is substantively fair if the employer has a fair reason to dismiss the employee, and a dismissal is procedurally fair if the employer has followed a fair procedure in dealing with the employee.[158] A dismissal is substantively fair if the reason for the dismissal falls under misconduct, incapacity or the employer's operational requirements. A dismissal is procedurally fair if the employer has followed the procedures or guidelines set out in Schedule 8 of the Code of Good Practice: Dismissal[159] and the Code of Good Practice: Operational Requirements.[160]

In terms of incompatibility as a ground for dismissal, the *LRA* is silent. Incompatibility is not recognised by the *LRA* as one of the valid grounds for dismissal and the *LRA* does not provide any procedure or guidelines that the employer may follow when dismissing the employee. As demonstrated later on in this chapter, employers have faced a number of challenges in properly categorising incompatibility as a ground for dismissal. This is evident from case law which is discussed subsequently in this chapter.

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155 Section 185 of the *LRA*.
156 Section 187 of the *LRA*.
157 Section 188 of the *LRA.*
158 Manamela 2019 *Obiter* 98.
159 Section 213 of the *LRA* defines the Code of Good Practice as a code of practice issued by NEDLAC.
160 GeN 1517 GG Notice 20256 (16 July 1999).

According to Grogan,[161] it is important for a dismissal to be properly categorised as this determines the procedures/guidance as provided by the *LRA* that ought to be followed. Grogan[162] submits further that if the reason for a dismissal cannot fit into one of the recognised grounds for dismissal, it is arbitrary and unjustifiable. Manamela[163] supports this viewpoint. He submits that, the employee will be properly dealt with if his or her conduct is correctly categorised. Rycroft[164] submits that the employer who intends to dismiss an employee on grounds of incompatibility must fit the dismissal into either misconduct or incapacity, or the employer's operational requirements. He submits that, at first glance, it seems easy to apply, but in fact, it is not always easy to decide whether incompatibility should fall under misconduct or incapacity, or the employer's operational requirements. The LC in First *National Bank, A Division of First Rand Bank Ltd v Commission for Conciliation, Mediation and Arbitration*[165] held that a failure to properly categorise the dismissal should not, however, distract the courts from properly assessing whether there was a fair reason for dismissing the employee and whether the appropriate procedure/guidelines was followed by the employer in dismissing.

This purpose of this chapter is to investigate the recognised grounds for dismissal as they relate to incompatibility as a ground for dismissal. In order to achieve this purpose, the chapter commences by discussing the grounds for dismissals recognised by the *LRA*, followed by the debates of the courts as well as eminent scholars on the topics on the most appropriate ground for dismissal to categorise incompatibility. Then, this chapter discusses the challenges employers encounter in categorising incompatibility as a ground for dismissal, and then reflects on the gaps in the categorisation of incompatibility as a ground for dismissal. This chapter subsequently draws a conclusion from the discussion.

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161 Grogan *Workplace Law* 189; Manamela 2019 *Obiter* 100.
162 Grogan *Workplace Law* 189.
163 Manamela 2019 *Obiter* 100.
164 Rycroft 2009 *SA Merc LJ* 426
165 *First National Bank, A Division of First Rand Bank Ltd v Commission for Conciliation, Mediation and Arbitration*[2017] 11 BLLR 1117 (LC).

3.2 Misconduct as a form of dismissal

Misconduct relates to willingly or negligently breaching the workplace rules set by the employer and imposed on all employees.[166] Manamela[167] states that the conduct of the employee could qualify as misconduct if it relates to the breaking of a workplace rule, either intentionally or negligently, or a breach of a material term of the employment contract, or it may relate to breakdown in the employment relationship.[168] Employers are expected to adopt a disciplinary code that set outs what is considered acceptable and what is considered unacceptable by the employer.[169] The employer's own disciplinary code must be in line with the Code of Good Practice: Dismissal. In other words, the employer's own Disciplinary Code and Procedure must be measured against the provisions of the Code of Good Practice: Dismissal. If the employer does not have a Disciplinary Code and Procedure, the Code of Good Practice constitutes the minimum guidelines.[170]

Item 7 of the Code of Good Practice: Dismissal states that any person who has to determine whether a dismissal on grounds of misconduct is for a fair reason must consider whether or not the employee contravened the employer's Disciplinary Code. If the employee contravened the employer's Disciplinary Code and Procedure, it must be established whether or not the employer's Disciplinary Code and Procedure is valid and reasonable, and whether the employee was aware or reasonably expected to be aware of the employer's Disciplinary Code and Procedure. It has to be further established whether the Disciplinary Code and Procedure has been consistently applied by the employer and based on the

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166 Basson *et al The New Essential Labour Law Handbook* 239; Fourie *A Practical Guide to Labour Law* 290: because misconduct is prevalent in every organisation, it is essential that the employer adopt measures to curb misconduct in the organisation, i.e. set out disciplinary rules in the form of a disciplinary code of conduct. Item 2 (1) of the Code of Good Practice: Dismissal states that, all employers should adopt disciplinary rules that establish the standard of conduct required for all employees in the organisation.

167 Manamela 2019 *Obiter* 100.

168 Manamela 2019 *Obiter* 100.

169 Item 3 (1) – (3) of the Code of Good Practice: Dismissal.

170 Basson *et al The New Essential Labour Law Handbook* 179.

employer's Disciplinary Code and Procedure the dismissal of the employee is the most appropriate sanction for the conduct of the employee.[171]

Item 4 of the Code of Good Practice: Dismissal provides procedural guidelines that must be followed by the employer to ensure that a fair procedure was followed. Item 4 (1) states that before the employer can dismiss the employee on grounds of misconduct, the employer must conduct an investigation to determine whether there are grounds for dismissal. It does not need to be a formal enquiry, but the employee must be notified of the allegations against him or her in a form and language that can be reasonably understood by the employee.[172] The employee should be given an opportunity to state his or her case in response to the allegations against him or her, and the employee should be given reasonable time to prepare his/her response.[173] The employee may be assisted by a trade union representative or a fellow employee.[174] The sanction that may be handed to the employee will depend on the extent and seriousness of the misconduct.[175] The employer may also receive guidance on the most appropriate sanction for the conduct of the employee from its own disciplinary code.

3.3 The employer's operational requirements as a form of dismissal

The term 'operational requirements" is defined in section 213 of the *LRA* as the "requirements based on the economic, technological, structural or similar needs of the employer".[176] It is regarded as 'no fault' dismissal.[177] This means that, it is not

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171 Item 7 of the Code of Good Practice: Dismissal; Manamela 2019 *Obiter* 100;
172 Item 4 (1) of the Code of Good Practice: Dismissal.
173 Item 4 (1) of the Code of Good Practice: Dismissal.
174 Item 4 (1) of the Code of Good Practice: Dismissal; Manamela 2019 *Obiter* 101.
175 Item 4 (1) of the Code of Good Practice: Dismissal: For instance, where the employee has committed gross dishonesty (theft or fraud), or wilful damage to the employer's property, or wilful endangers the safety of other employees, or has physical assault the employer, fellow employees or clients, and has committed a form of gross insubordination.
176 Item 1 of the Code of Good Practice: Operational requirements: states that it is difficult to define all the circumstances that might lead to legitimate reasons for dismissals for operational requirement. However, it is a general rule that, 'economic reasons' relates to the financial management of the organisation. 'Technological reasons' relates to the introduction of new technology which affects the work relationships, wither by making existing jobs redundant or by requiring employees to adapt to the new technology or consequential restructuring of the organisation. 'Structural reasons' related to the redundancy of post and consequently a restructuring of the organisation. However, with regards to 'similar needs', the

the employee who is responsible for the termination of the employment relationship.[178] It is the circumstances brought about by economic factors, the introduction of new technology, the restructuring of the business or other needs that has led to the employee's position being redundant.[179] Van Nierkerk and Smit[180] support this definition. It is submitted that the definition is broad enough to include the introduction of new technology or work programmes, the reorganisation of work and the restructuring of the organisation. It is submitted further that, other categorises not mentioned in the Code of Good Practice: Operational Requirements, would also qualify as operational requirements.[181]For instance, incompatibility, or the refusal of the employee to accept the changes in the organisation, or pressure from a third party can also be grounds for dismissal for operational requirements.[182]

The question of whether or not the employee's dismissal on grounds of the employer's operational requirements is substantively fair is a factual one. The employer has to prove a number of things. For instance, the employer has to prove that the dismissal of the employee was aimed at giving effect to the employer's operational requirements, i.e. economical, technological, structural needs of the employer. The employer's operational requirements actually existed and it is the cause of the employee's dismissal. This means that the employer's operational requirements must be the true reason for the employee's dismissal, and that the employer is not using operational requirements as a mask to dismiss the employee for other reasons. The employee was dismissed to increase the profitability of the organisation,[183] and the employer's reason for the dismissal is

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Code of Good Practice: Operational Requirements does not provide any description or examples; Manamela 2019 *Obiter* 103: states that the absence of any description or examples has created challenges for employers, relevant forums and the courts.

177 Basson *et al The New Essential Labour Law Handbook* 239.

178 Item 2 of the Code of Good Practice: Operational Requirements.

179 Manamela 2019 *Obiter* 103.

180 Van Nierkerk and Smit*Law@Work* 338; Manamela 2019 *Obiter* 103.

181 Manamela 2019 Obiter 103.

182 Manamela 2019 *Obiter* 103.

183 *National Union of Metal Workers of South Africa & Another v Aveng Trident Steel (A Division of Aveng Africa Proprietary Limited) & Others* (unreported Labour Appeal Court JA25/18 13 June 2019): the LAC held that the employer has the right to dismiss employees in the case of the organization wanting to make more profit.

bona fide, rationally justified, and informed by a proper and valid commercial or business rationale.[184]

Section 189 (3) of the *LRA* states that once the employer has contemplated dismissing the employee for the employer's operational requirements, it must issue a written notice to the other consulting party or parties inviting it/them to consult on the contemplated retrenchments. Item 3 of the Code of Good Practice: Dismissal on operational requirements states that the purpose of the consultation is to allow parties involved to enter into a meaningful joint problem-solving exercise and strive for consensus, if possible. Section 189 (2) of the *LRA* states the meaningful joint consensus-seeking process is aimed at reaching a consensus on appropriate measures to avoid dismissals, to minimise the number of dismissals, to change the timing of the dismissals, and to mitigate the adverse effects of the dismissals. It is further aimed at reaching consensus on the method of selecting the employees to be dismissed, and the severance pay for the dismissed employees.

3.4 Incapacity as a form of dismissal

Section 188 of the *LRA* recognises incapacity as a potentially fair reason to dismiss the employee. Incapacity is described as a no-fault dismissal.[185] It relates to the inability of an employee to meet the required performance standards.[186] The Code of Good Practice: Dismissal recognises two forms of incapacity, namely poor work performance and ill health or injury.[187] Poor work performance may result from the inability of the employee to meet the required performance standards due to a

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184 *Havemann v Secequip (Pty) Ltd* (unreported Labour Appeal Court JA91/2014 22 November 2014).
185 Basson *et al The New Essential Labour Law* 239.
186 Basson *et al The New Essential Labour Law* 239.
187 Item 1 of the Code of Good Practice: Dismissal.

lack of necessary skills or qualification.[188] Ill healthy or injury may be caused by an injury or physical, mental or spiritual illness.[189]

3.4.1 Dismissal for poor work performance

Item 9 of the Code of Good Practice: Dismissal gives clear guidelines as to the substantive fairness for a dismissal for poor work performance. It states that any person determining whether a dismissal for poor work performance is unfair should consider whether or not the employee failed to meet a performance standard, and if the employee did not meet the required standard or performance, whether or not the employee was made aware or is reasonably expected to have been aware, of the required standard. Further, it has to be determined whether the employee was given a fair opportunity to meet the required performance standard and whether the dismissal of the employee was the most appropriate sanction for not meeting the required performance standard.[190] Item 8 (2) to (4) of the Code of Good Practice: Dismissal provide guidelines that the employer must follow to dismiss the employee for poor work performance. It states as follows: after probation, the employee should not be dismissed for unsatisfactory performance unless the employer has given the employee the appropriate evaluation, instruction, training, guidance or counselling. The employer has further given the employee a reasonable period of time to improvement his/her poor work performance and the employee had continued to perform unsatisfactory. The procedure leading to dismissal should include an incapacity inquiry to establish the reasons for the employee's poor work performance and the employer should consider other measures short of dismissal. That is, dismissal should be considered as a last resort. The employee should also be granted the right to fair representation.

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188 Manamela 2019 *Obiter* 102; Basson*et al The New Essential Labour Law Handbook* 242: a dismissal for poor work performance implies that the employer must set a reasonable standard for performance against which the employee is expected to meet.

189 Basson *et al The New Essential Labour LawHandbook*255.

190 Item 9 of the Code of Good Practice: Dismissal.

3.4.2 Dismissal for ill health or injury

Incapacity on the grounds of ill health or injury may be temporary[191] or permanent.[192] The employer must determine whether or not the employee is able to perform his or her normal duties.[193] If the employee is not able to perform his or her normal duties as expected, the employer must determine the extent[194] and the duration of the employee's incapacity or the injury.[195] The employer must consider options available to accommodate the employee's incapacity or injury. If the employer cannot adapt the duties of the employee, the employer must establish if there is alternative work that could be given to the employee,[196] even if it is at a lower salary grade.[197] A dismissal on grounds of incapacity for ill health or injury is fair if the above requirements are satisfied.[198]

3.5 Debates on the categorisation of incompatibility as a ground for dismissal

It is noteworthy to mention that in early decided cases[199] dismissal on grounds of incompatibility were categorised as a form of the employer's operational requirements. At that point in time, the focus was on the employer's right to insist on a cordial harmonious relationship in the organisation. The employer who intended to dismiss the employee or who had dismissed the employee had to prove that the characteristics features of justifiable reasons for dismissal on

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191 Item 10 (1) of the Code of Good Practice: Dismissal states that: if the employee's incapacity is temporary, the employee should investigate the extent of the incapacity or injury. If the employee is likely to be absent from work, for a period of time, the employee should investigate alternative short of dismissal. When considering alternatives, the employer must consider the nature of the job, the period of absence, the seriousness of the illness or injury, and the possibility of securing a temporary replacement for the ill or injured employee.

192 Item 10 (1) of the Code of Good Practice: Dismissal states that: if the employee is permanently incapacitated, the employer should consider the possibility of securing alternative employment, or adapting the duties or work circumstances of the employer to accommodate his or her incapacity.

193 Item 11 (a) of the Code of Good Practice: Dismissal.

194 Item 10 (2) of the Code of Good Practice: Dismissal states that: the degree of incapacity is relevant to the fairness of the dismissal.

195 Item 11 (b) of the Code of Good Practice: Dismissal.

196 Item 11 (b) of the Code of Good Practice: Dismissal.

197 Manamela 2019 *Obiter* 102.

198 Item 11 of the Code of Good Practice: Dismissal.

199 *Wright case*; *Lebowa case*; *Hapwood Spanjaard Ltd* (1996) 2 BLLR (IC); *Lubkhe case*.

grounds of incompatibility were present.[200] Mischke[201] submits that incompatibility as a ground for dismissal was at the time categorised as a form of the employer's operational requirements because incompatibility causes disharmony in the organisation, and disharmony affects the productivity of the organisation and the employer's operations. Le Roux and Van Nierkerk[202] support this view in line with the IC decision in the *Wright case* and other case law.[203] Grogan[204] also supports this view, submitting that all dismissals are operational provided the employer can prove that due to the conduct of the employee, the employer had suffered financial loss or depreciation in its productivity level. However, after the *LRA* introduced the employer's operational requirements in terms of section 213 as the "economic, technological, structural or similar needs" of the employer, the question became: what is the appropriate ground for dismissal to categorise incompatibility?[205] Is incompatibility suitably categorised as a form of the employer's operational requirements, or should it rather be categorised as a form of misconduct or the incapacity?

In the *Subrumuny case*,[206] the LC held that although the *LRA* as well as the Code of Good Practice: Dismissal does not cater for incompatibility as a ground for dismissal, if incompatibility relates to the inability of the employee to maintain a standard relationship with his fellow-employees, i.e. subordinates and superiors, then such a failing is more akin to incapacity as used in a loose and non-technical sense. The LC held that the incapacity does not stem from poor work performance of the employee but from the employee's inability to conform to the standards set by the employer to achieve harmony in the organisation.[207] The CCMA in the *Jardine case*[208] however held that the categorisation of incompatibility as a form of incapacity may not necessarily be a neat fit. The CCMA held that incapacity in

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200 See chapter 2 of this study.
201 Mischke 2005 *Obiter* 72.
202 Le Roux and Van Nierkerk *The South African Law of Unfair Dismissal*285.
203 *Wright case*; *Lebowa case*; *Hapwood Spanjaard Ltd* (1996) 2 BLLR (IC); *Lubkhe case*.
204 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 120.
205 Mischke 2005 *Obiter* 72.
206 *Subrunumy case.*
207 *Subrunumy case* para 2790
208 *Jardine case*.

terms of the Code of Good Practice: Dismissal concerns poor work performance and, despite knowledge of the performance standard, the employee is counselled and given appropriate time to improve despite the inability or unwillingness to comply with the performance standard. The CCMA further held that it may be inappropriate to regard incompatibility which is essentially an attitudinal problem, as poor work performance, particularly where the employee's technical performance is highly competent. The CCMA held that although compatibility may arguably be considered a performance standard, the wilfulness suggests that, on occasions, incompatibility is more appropriately categorised as a form of misconduct.[209] The LC in the *Jabari case* however supports the view point that incompatibility is a species of incapacity as it relates to the subjective relationship between the employer and the employee.[210] The CCMA in the *Glass case*[211] supports the *Jabari case* that incompatibility is a species of incapacity. The CCMA held that the incompatibility should be treated as a form of incapacity and the guidelines for incapacity should be followed.[212] Grogan[213] submits that the definition of the employer's operational requirements as contained in section 213 of the *LRA* is too narrow to embrace incompatibility as a ground for dismissal. He submits that the "economic, structural and similar needs" of the employer do not include incompatibility. He submits further that incompatibility is more properly categorised as a form of dismissal for incapacity if the employee is not to be blamed for the conduct that renders him incompatible and as a form of misconduct if the employee is to be blamed for the conduct that renders him incompatible.[214] Van Nierkerk and Smit[215] are of the view that incompatibility is best categorised as a form of incapacity as it relates to the inability of the employee to work within the particular circumstances in which the employee is engaged. Basson[216] supports this view, submitting that although incompatibility as

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209 *Jardine case* para 28
210 *Jabari case* para 1868.
211 *Glass case*.
212 *Glass case* para 6.
213 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 511.
214 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 511.
215 Van Nierkerk and Smit*Law@Work* 338.
216 Basson *et al The New Essential Labour Law Handbook*158-159.

a ground for dismissal may take other forms, it is best categorised as a form of incapacity. Rycroft[217] submits that incompatibility may be categorised as a form of misconduct or the employer's operational requirements but it is best categorised as a form of misconduct.

The debate concerning what ground of dismissal is best suitable for was settled by the Supreme Court of Appeal in *National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & another*[218] where the SCA held that incapacity may extend beyond the forms provided in the *LRA*. The SCA held that incapacity may be extended to include the employee's physical inability to render his services due to incarceration (operational incapacity). The LC in *Armament Corporations of SA (SOC) Ltd v Commissioner for Conciliation, Mediation and Arbitration & Others*[219] reaffirmed the SCA decision in the *Samancor case*. The LC held that incapacity is not restricted to poor work performance and ill health or injury but may be extended to other forms of incapacity. The LC held as follows:

> Incapacity may be permanent or temporary and may have either a partial or a complete impact on the employee's ability to perform the job. The Code of Good Practice: Dismissal conceives of incapacity as ill-health or injury but it can take other forms. Imprisonment and military call-up, for instance, incapacitates the employee from performing his obligation under the contract. The dismissal of an employee in pursuance of a closed shop is for incapacity; so is one that results from a legal prohibition on employment.[220]

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217 Rycroft 2009 *SA Merc LJ* 426.

218 *Nation Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) &another* (2011) 32 ILJ 1618 (SCA) (Hereafter the *Samancor case*).

219 *Armament Corporations of SA (SOC) Ltd v Commissioner for Conciliation, Mediation and Arbitration & Others* (2016) 37 ILJ 1127 (LC) (Hereafter the Armaments Corporation case).

220 *Armaments Corporation case* Para 29; The above decision was reaffirmed by the LAC in the recent case of *Solidarity & Another v Armaments Corporation of SA (SOC) Ltd & Others* (2019) 40 ILJ 535 (LAC).

The LC in the *First National Bank – A Division of First Rand Bank Ltd v Commission for Conciliation, Mediation and Arbitration & Others*[221] also accepted this position. The LC held that in the case of incapacity, the focus is on the qualities of the employee, as opposed to operational requirements where the focus is on the employer and its decisions relating to its business.[222] In line with the approach adopted by the LC decision in the *First National Bank case, the LAC in Watson case*[223] held that incompatibility is best categorised as a form of incapacity. The LAC in the *Zeda Car Leasing case* accepted this position. The LAC held that incompatibility is best categorised as a form of incapacity as it exerts an impact on the employee's work performance.[224]

3.6 Effect of a lack of legislative recognition of incompatibility as a ground for dismissal

Although incompatibility has been recognised and best categorised by the courts and eminent scholars on this topic as form of incapacity, many employers are not privy to this information or knowledge. The employers' lack of knowledge is caused by the lack of legislative recognition or guidance in this area of law, as compared to the other grounds of dismissal that are recognised and catered for by the *LRA.* A majority of employers rely on the *LRA* as well as the Code of Good Practice: Dismissal for guidance in dealing with dismissals in their organisations. When the *LRA* and the Code of Good Practice: Dismissal is silent on a particular area of dismissal, this creates uncertainty for the employers.[225]

In the absence of the legislative guidance in this regard, employers have exercised their discretion and have opted to categorise incompatibility as a form of misconduct, the employer's operational requirements, or incapacity. In some instances, as discussed below, the employer has been successful in dismissing an

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221 *First National Bank – A Division of First Rand Bank Ltd v Commission for Conciliation, Mediation and Arbitration & Others* (2017) 38 ILJ 2545 (Hereafter the *First National Bank case)*

222 *First National Bank case* para 88.

223 *Watson case* para 30.

224 *Zeda Car Leasing case* para 39.

225 This aspect will be discussed later on in this chapter.

employee for incompatibility in the form of misconduct, or the employer's operational requirements, or incapacity, and in others, the employers have been unsuccessful in dismissing the employee for incompatibility in the form of misconduct, or the employer's operational requirements, or incapacity.[226]

3.6.1 Incompatibility as a form of misconduct

In *Jardine and Tongaat Hulett Sugar Ltd*[227] the employee was dismissed on grounds of misconduct. The employee referred an unfair dismissal dispute to the CCMA. The question before the CCMA was whether the dismissal of the employee was substantively and procedurally fair. The charge against the employee was as follows:

> It is management's assessment that you continue to be incompatible with middle management colleagues and senior management, despite changes in the personalities involved, to the extent that the trust relationship is detrimentally affected. Your objectivity in supporting the management team of which you are an integral part, has become questionable. This has a dysfunctional impact on Felixton operations.[228]

The employer alleged that Management took a resolution to conduct a disciplinary inquiry against the employee after an incident occurred between the employee and a fellow employee (Senior Manager). The employer alleged that the employee had lodged a grievance against a fellow employee (Senior Manager) and in the process of exercising his right to grieve he had overstepped the line that seriously jeopardised an on-going employment relationship.[229] The employer alleged that Management had applied the characteristic features of justifiable reasons to dismiss the employee on grounds of incompatibility in the present dispute.[230] The employer alleged that the conduct of the employee related to gross insubordination which is a form of misconduct. The employer alleged that the

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226 Grant *Defining incompatible behavior in an employer/employee relationship* 12.
227 *Jardine case.*
228 *Jardine case* para 429.
229 *Jardine case* para 429.
230 Chapter 2 of this study.

review meetings were evidence of a consistent attempt of the employer to warn and counsel the employee on his conduct. The warning letter and verbal warnings signalled that the gross insubordination of the employee constituted misconduct. The employer alleged that the employee was given a fair chance to remove the cause of the disharmony before dismissal was considered as an option. The employer further alleged that Management had for a long period exercised extreme patience with the behaviour of the employee and had time and again counselled the employee on the conduct(s) that was expected of the employee (Senior Manager) in his position and the consequences of his action as well as the impact of his dysfunctional behaviour upon the organisation. The employer alleged that Management had demonstrated good faith by trying to resuscitate the employee's relationship with fellow employees (Senior Managers) by placing the employee in an alternative position or resolving the conflicts between the employee and fellow employee (Senior Managers) but it was evident that the resuscitation of any amicable relationship was impossible. The employer alleged that the employee was the architect of his own downfall as opportunities were given to the employee to improve his inter-relationship.[231] From a procedural point of view, the employer alleged that Management acted fairly and consistently in a gradual and progressive manner in disciplining the employee. The employer alleged that the employee was given sufficient opportunity to state his case and in fact, virtually conceded to all of the misdemeanours of his past conduct(s).[232] Taking into account the factual dispute as well as the evidence provided, the CCMA held that although the employer did not categorise the employee's incompatibility as misconduct, incapacity or the employer's operational requirements, it was evident from the employer's conduct that the employee's incompatibility was categorised as a form of misconduct.[233] However, the CCMA held that the charges against the employee related to past and present conducts of the employee. The evidence provided showed that the employee had a history of gross insubordination and incompatibility. The review meetings, verbal warnings

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231 *Jardine case* para 442.
232 *Jardine case* para 442.
233 *Jardine case* para 442.

as well as written warnings related to past issues of gross insubordination and incompatibility. There was no evidence that the employee was warned or counselled for current gross insubordination or incompatibility. In the absence of any warnings and counselling relating to the current gross insubordination or incompatibility of the employee, the CCMA held that dismissal was an inappropriate sanction.[234] However, the CCMA held that reinstatement was inappropriate as the employment relationship had broken down irremediably.

It is evident from the above case that the CCMA accepted the employer's contention that incompatibility may be categorised as a form of misconduct. This implies that if the employer decides to categorise incompatibility as a form of misconduct, the procedure set out for misconduct must be followed, i.e. progressive discipline. The LC in the *Watson case*[235] also accepted this position. In the *Watson case*, the employer had categorised the conduct of the employee as incompatibility in the form of misconduct. The charges against the employee related to gross inappropriate and/or unprofessional and/or unbecoming and/or abusive conduct. The employer alleged that the conduct of the employee and, in general, the manner in which the employee dealt with fellow employees (Majority referees) had caused a breakdown in the relationships as fellow employees (Majority referees) were unwilling to work with the employee and this was negatively affecting the organisation. The question was whether the dismissal of the employee was the most appropriate sanction for the employee's conduct.[236] In the CCMA the question was whether due to the conduct of the employee the trust relationship between the employer and the employee had broken down irremediably and whether incompatible circumstances had arisen. The CCMA took into account the employer's disciplinary code and practice, in particular, the provision for progressive disciplinary measures in relation to individual misconduct.[237] After considering the definition of incompatibility which was defined as "the inability on the part of the employee to work in harmony or culture with

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234 *Jardine case* para 444.
235 *Watson case*.
236 *Watson case* para 2
237 *Watson case* para 18

fellow employees", the CCMA found that the conduct of the employee was of sufficiently serious a nature to justify the employee's dismissal.[238] However, in the LC, the LC held that incompatibility may be categorised as a form of incapacity if the employee is not to be blamed for the conduct that rendered him/her incompatible. However, if the employee is to be blamed for the conduct that rendered him/her incompatible, then incompatibility should be categorised as a form of misconduct. It was held that the employee's managerial style was "vulgar, autocratic, demeaning, unprofessional an, to some extent, abusive". The LC held further that "without reservation Watson's general demeanour in dealing with referees was unprofessional, uncouth and borders on the despicable." The LC held that since the employer had chosen to categorise incompatibility as a form of the misconduct, the employer ought to have followed its disciplinary code and procedure. The LC held that a process of progressive discipline should have been implemented in an attempt to correct the employee's behaviour, particularly to determine whether the employee was capable of responding positively to such measures.[239] The LC held that given the evidence provided, it was unreasonable for the CCMA to conclude that the employee was incapable of changing when he had not been afforded an opportunity to do so. It was therefore held that the dismissal of the employee was inappropriate.[240] The LC altered the sanction of the employee to a final written warning and the employee was reinstated. However, in the LAC, the LAC upheld the CCMA award. The LAC held that the decision of the CCMA was one that a reasonable decision-maker could have made as it was evident that several employees (Majority Referees) had complained of the employee's conduct.[241]

Similarly in the *Wereley case*[242] the employee was dismissed on grounds of incompatibility in the form of misconduct. The employee brought an urgent application to the LC to rectify an alleged fundamental breach of employment

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238 *Watson case* para 20.
239 *Watson case* para 23.
240 *Watson case* para 23.
241 *Watson case* para 33.
242 *Wereley case*.

contract. The employee alleged that she was dismissed without being given a fair opportunity to state her case. The employee further alleged that she had received notice of a disciplinary hearing. Amongst others, she was charged with misconduct relating to disrespecting, undermining, and failing to follow lawful instructions. The employee was further charged with creating a toxic and hostile working environment. It was further stated in the charge sheet that, regardless of the outcome of the disciplinary enquiry, her alleged persistent fostering and aggravation of a disharmonious working environment warranted the termination of her employment.[243] The employee alleged that during her disciplinary enquiry the employer abruptly terminated her employment without giving her opportunity to respond to the charges against her. The employer, on the other hand, alleged that it was entitled to dismiss employee in terms of the termination clause in the employment contract that states that the employer may terminate the employee's contract of employment if the employee's conduct destroys the trust relationship in the organisation. The employer further alleged that the destruction of the trust relationship was sufficient to dismiss the employee without holding a disciplinary enquiry.[244] The LC upheld the decision of LAC in the *Watson case*. The LC held that "it is obviously misconduct for the employee to foster and aggravate a disharmonious working environment".[245] The LC referred to the decision of the Supreme Court of Appeal[246] in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation & Arbitration & others*[247] where the SCA held that the Code of Good Conduct: Dismissal is located as the first line of responsibility for the organisational discipline and sanction with the employer *inter alia* because the Code of Good Practice states as follows:

> ….Generally it is not appropriate to dismiss for a first offence unless the misconduct is serious and of such gravity that it makes a continued employment relationship "intolerable." "Intolerable means unable to be endured" (Concise

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243 *Wereley case* para 6.
244 *Wereley case* para 17.
245 *Wereley case* para 38.
246 Hereafter the SCA.
247 *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation & Arbitration & others* 2007 (1) SA 576 (SCA); (2006) 27 *ILJ* 2076 (SCA).

> Oxford Dictionary). This necessarily imports a measure of subjective perception and assessment, since the capacity to ensure a continued employment relationship must exist on the part of the employer. It follows that the primary assessment of intolerable unavoidably belongs to the employer. This is not to confer a subjective say, so allowing some leeway to the employer's primacy of response does not permit caprice or arbitrariness. A mere assertion on implausible grounds that a continued relationship is intolerable will not be sufficient. The criterion remains whether the dismissal was fair.[248]

Accordingly, the LC held that on the basis of the cause of the incompatibility raised by the employer and the fact that the employee had been accused of unacceptable conduct giving rise to the alleged breakdown of the employment relationship, determining whether the employees had committed such conduct and whether it had led to an irremediable breakdown of the employment relationship to warrant her dismissal on grounds of misconduct, requires that the employee be subjected to disciplinary hearing.[249] The LC held that the fact that the employee deemed it fit to have an elaborate Disciplinary Code and Procedure in line with the *LRA* and the Code of Good Practice: Dismissal means that the employer wanted to ensure that dismissals are dealt with fairly and in accordance with its Disciplinary Code And Procedure.[250] The LC concluded that dismissing the employee without due regard to the disciplinary code and procedure which entitled the employee to a formal hearing was, indeed, a breach of the employee's contract of employment.[251]

3.6.2 Incompatibility as a form of the employer's operational requirements

In *Sondlo v University of Fort Hare*[252] the CCMA had to decide whether the dismissal of the employee on grounds of incompatibility relating to the employer's operational requirements was fair. The employer alleged that the reason for the employee's dismissal related to complaints that had been brought against the

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248 *Wereley case* para 39.
249 *Wereley case* para 40.
250 *Wereley case* para 36.
251 *Wereley case* para 44.
252 *Sondlo v University of Fort Hare* [2011] 5 BALR 551 (CCMA) (Hereafter the *Sondlo case*).

employee relating to her conduct(s) in the organisation. The employer alleged, amongst others, that on numerous occasions, the employee had initiated fights between employees in the organisation, that the employee had circulated derogatory emails about her superior (fellow employee), and that students had raised complaints about the employee's conduct. The employer alleged that the conduct of the employee had caused disharmony in the organisation, and in fact, the employee's superior (fellow employee) had requested that the employee should be transferred to another organisation as a cordial working relationship could no longer exist between them. The employer alleged further that the employee's superior (fellow employee) had indicated that she had lost all trust and confidence in the employee and had no interest in a continued working relationship with the employee. The employer alleged that a discussion was held with the employee regarding a transfer to another organisation. However, the employee could not meet the criteria for the position in the other organisation. The employer further alleged that a decision was made to transfer the employee to another department but still the employee was unfit for the department as she had to deal with students, and the students of the organisation had complained of her conducts. The employer alleged that they had a fair reason to dismiss the employee as the conducts of the employee had caused an irremediable breakdown of the employment relationship, and also the employee had made efforts to find an alternative position suitable to the employee's character. The employer alleged that a retrenchment procedure was conducted and eventually the employee was dismissed. In the CCMA, the CCMA acknowledged the dismissal of the employee as incompatibility in the form of the employer's operational requirements. However, the CCMA disputed the employer's contention that incompatibility is a form of the employer's operational requirements. The CCMA referred to the defined retrenchment as the employer's operational requirements as defined in section 213 of the *LRA*.[253] The CCMA relied on eminent scholars[254] on this topic for authority. It held that the definition of retrenchment does not include

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253 *Sondlo case* para 19.

254 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 511.

incompatibility.[255] It held further that dismissal on grounds of incompatibility is more properly classified as a form of a dismissal for incapacity, if the employee concerned is to be blamed for the conduct that renders him or her incompatible. On the other hand, if the employee concerned is to be blame for the conduct that renders him or her incompatible, then dismissal of the employee may be classified as a form of misconduct.[256] Taking into account the substantive fairness of a dismissal on grounds of the employer's requirements[257] the CCMA found that the dismissal of the employee was not substantively fair as the reason for the employee's retrenchment did not fit into characteristics features of a retrenchment. In terms of whether the employee's dismissal was justified on grounds of incompatibility, the CCMA held that the evidence provided shows that the employer had re-hashed past transgressions for which the employee had been disciplined. The CCMA further held other issues against the employee, i.e. the falsification of information were serious misconduct for which the employee ought to have been charged.[258] The CCMA further held that there was no evidence provided that showed that the employee was incompatible with the organisation or the employment relationship had broken down irremediably.[259] With regards the procedural fairness on the employee dismissal on grounds of the employer's operational requirements, the CCMA held that the employee was invited to consultation in terms of section 189 of the *LRA,* the consultation meetings were held and the employee was dismissed on operational reasons. The CCMA held that by using the retrenchment procedure, the employer had implied that the employee was not at fault. However, the evidence provided contradicted the no fault contention as it implied that the employee was the cause of the incompatibility. Therefore, the CCMA held that the dismissal of the employee was substantively and procedurally unfair.[260]

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255 *Sondlo case* para 20
256 *Sondlo case* para 20.
257 See 3.3.1 above.
258 *Sondlo case* para 31.
259 *Sondlo case* para 31.
260 *Sondlo case* para 27.

It is evident from the above case that the CCMA did not accept the employer's contention that the dismissal of the employee related to the employer's operational requirements. It is also evident that the CCMA held that incompatibility as a ground for dismissal does not fit into the category of the employer's operational requirements. In *Sactwu obo Chanchane v Matwabeng Christian Academy*[261] the CCMA also considered the dismissal of the employee on grounds of incompatibility in the form of the employer's operational requirements. The question before the CCMA was whether the dismissal of the employee was substantively and procedurally fair. The employer alleged that there were an accumulated number of charges against the employee leading to her dismissal. Amongst others, was the fact that: the employee was the cause of the disharmony in the organisation; and also the employee had assaulted a student which signalled that the employee was unfit to work with children. The employer further alleged that the employee's dismissal was triggered by the request by fellow employees that the employee should be dismissed. The CCMA held that the underlying cause of the employee's dismissal is clouded.[262] The CCMA held that the reason for the employee's dismissal contain an element of misconduct as well as the employer's operational requirements on incompatibility. The CCMA held that it was evident that the dismissal of the employee was triggered by the following conducts: her initial request for a salary increase which had caused disharmony in the organisation; her bad attitude towards fellow employees as well as students and that she was a poor performer; and finally the fact that she had assaulted a student. In dealing with the substantive fairness of the dismissal, the CCMA held that there was no evidence to show that the reason for the employee dismissal was due to the employer's operational requirements. The CCMA further referred to the characteristic features of justifiable reasons to dismiss the employee on grounds of incompatibility.[263] The CCMA held that taking into account the reasons for the employee's dismissal, there was no evidence to show that the employee was incompatible. The CCMA held that the employee had other options available

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261 *SACTWU obo Chanchane v Matwebeng Christian Academy* [2012]2 BALR 193 (CCMA) (Hereafter the *SACTWU case*).

262 *SACTWU case* para 200.

263 See Chapter 2 above.

and that included suspending the employee and charging her for serious misconduct. As such the CCMA held that the dismissal of the employee was substantively unfair. With regards to the procedural fairness of the employee's dismissal, the CCMA also confirmed the position that incompatibility may take the form of misconduct or the incapacity.[264] The CCMA held that the employer had failed to follow the procedures as set out in section 189 of the *LRA*. The CCMA held that where the employee chose a particular ground for dismissal, the employer must ensure that the procedure set out for the particular ground is followed, to guarantee that the dismissal is procedurally fair.[265]

In *Zeda Car Leasing case*[266] the employee was dismissed on grounds of the employer's operational requirements. The employer in this case had a different approach to dealing with incompatibility in the organisation. The employee referred an unfair dismissal dispute to the LC, alleging that the reason for her dismissal was unfair discrimination or alternatively that the dismissal was unfair in terms of section 189 of the *LRA* as there was no bona fide reason for her dismissal on grounds of the employer's operational requirements and the employer had not followed a fair procedure.[267] The factual dispute related to conflicts between Senior Managers (two Senior Managers) of the organisation. The employer alleged that the dispute between the employees (Senior Manager) had caused a loss of trust, animosity, and poor communication between the employees. The employer further alleged that the dispute between the employees had caused disharmony in the organisation, a lack of team spirit and affected the productivity level as well as income of the organisation. The employer alleged that the management of the organisation had intervened and tried to resolve the dispute between the employees (Senior Managers). During the process of the mediation, the employer decided to make structural changes to the organisation and the changes included the consolidation of the positions of the two Senior Managers. The Senior Managers were informed of the structural changes as well as the consolidation of

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264 *SACTWU case* para 200.
265 *SACTWU case* para 204.
266 *Zeda Car Leasing case*.
267 *Zeda Car Leasing case* para 20.

their positions. The Senior Managers were encouraged to apply for the new position by the employer. When one of the Senior Managers did not apply for the new position, the employer took the opportunity to dismiss the employee for operational requirements. The employer alleged that due to the structural changes, the one Senior Manager's position was no longer in existence and it was fair to dismiss the employee.[268] The LC held as follows:

> ...the manner in which the hunting and caring teams were constituted was the source of the conflictual relationship between the general managers and that the structural solution of combining the positions and declaring one of the posts redundant was the only solution and a rational commercial or operational decision....On this basis the dismissal was substantively fair.[269]

With regards the procedural fairness of the employee's dismissal, the LC held that the dismissal was procedurally unfair as the employer had failed to follow the procedure set out in section 189 of the *LRA*.[270] In the LAC, the LAC had to deal with the procedural fairness of the employee's dismissal. The LAC confirmed the decision of the LC that the dismissal of the employee was procedurally unfair. The LC held that the dispute faced by the employer related to incompatibility and the employer decided to frame the dispute as the employer's operational requirements. The LAC referred to the characteristic features of justifiable reasons to dismiss the employee on grounds of incompatibility.[271] The LAC held that there had been differences in opinion in the past as to whether incompatibility is a form of the employer's operational requirements or a form of incapacity. The LAC held that the prevailing view is that incompatibility is a form of incapacity as it relates to the work performance of the employee.[272] The LAC held that the evidence provided to it shows that the employer had initially approached the dispute between the two Senior Manager as an incompatibility dispute, as it attempted to facilitate and meditate on the cause of disharmony and identify possible solutions.

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268 *Zeda Car Leasing case* para 17.
269 *Zeda Car Leasing case* para 33.
270 *Zeda Car Leasing case* para 34.
271 *Zeda Car Leasing case* para 39.
272 *Zeda Car Leasing case* para 39

However, after receiving response from the two Senior Managers it opted for the restructuring of the organisation and to declare one of the two positions redundant. The LAC held that the employer did not complete the facilitation and mediation process but instead decided to deal with the incompatibility by declaring one of the two positions redundant.[273] The LAC held that the moment the employer decided to make one of the two positions redundant the employer ought to have engaged in a meaningful joint consensus-seeking process to avoid dismissals as contemplated in section 189 of the *LRA*. The LAC accepted that the employee's dismissal was substantively fair even if the employer did not prove that it had suffered financial loss or profit as a requirement for retrenchment. The LAC held that the failure of the employee to adhere to the procedure set out in section 189 of the *LRA* meant that the employer had decided that the dismissal of one of the Senior Managers was inevitable and there was no need to engage in a joint consensus-seeking process to negotiate possible options short of dismissal.[274]

3.6.3 Incompatibility as a form of incapacity

In the *Glass case*,[275] the employee was dismissed on grounds of incompatibility in the form of incapacity. The employee had referred an unfair dismissal dispute to the CCMA. The question before the CCMA was whether the dismissal of the employee was substantively and procedurally fair.[276] In this case, the employee was dismissed after the head of her division had complained that the employee was undermining her authority and team work in the department. The employee alleged that she was not aware of the reason for her dismissal, and as such her dismissal was substantively and procedurally unfair.[277] The CCMA noted that the crux of incompatibility was established in the early case law. In dealing with the substantive fairness of the employee's dismissal, the CCMA found that the employee was the main cause of the breakdown of the working relationship with fellow employees in the organisation. The CCMA found that the employee was a

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273 *Zeda Car Leasing case* para 40.
274 *Zeda Car Leasing case* para 43.
275 *Glass case*.
276 *Glass case* para 6.21.
277 *Glass case* para 3.2.

forceful person and that the working relationship had broken down irremediably. The CCMA found that in order to avoid dismissal, the employer had suggested a transfer to another department, which the employee had initially agreed to, but later rejected to the suggestion before the employer could implement the transfer. With regards the procedural fairness, the CCMA held that incompatibility should be treated as a form of incapacity. The CCMA held that to determine the procedural fairness of dismissal on grounds of incompatibility, the Code of Good Practice should be considered. Items 8 and 9 of the Code of Good Practice should be adapted, the employer must counsel the employee, afford the employee an opportunity to meet the required standard, consider alternatives to dismissal, and afford the employee an opportunity to state her case before reaching a decision to dismiss the employee.[278] The CCMA held that several meetings were convened between the employer and the employee and it was agreed that the working relationship was stalled. The employee was given adequate time to address the issues and to correct her behaviour. The employee was given an opportunity to convey her reasons for her incompatibility and to respond to her supervisor's allegations. The employee, however, waived her rights. The employee was well aware of who was aggrieved by her conduct. The employee further failed to improve her behaviour. Therefore, the employer had no other option but to dismiss the employee. The CCMA held that the dismissal of the employee was substantively and procedurally fair as the employer had a good reason to dismiss the employee and had followed a fair procedure.[279] It is worth mentioning that the above case is one of the few cases where the employer has successfully proven that the dismissal on grounds of incompatibility is substantively and procedurally fair.

3.7 Reflections on the categorisation of incompatibility as a ground for dismissal

Over the years, the CCMA as well as the courts have gravitated towards dealing with incompatibility as a form of incapacity, and have suggested that the

[278] Glass case para 6.19
[279] *Glass case* para 6.25.

employers should approach incompatibility from a "no-fault" perspective, especially if the employee is not to be blamed for the conduct that renders him or her incompatible.[280] If the employee is to be blamed for the conduct that renders him or her incompatible, the CCMA and the courts have accepted the categorisation as a form of misconduct.[281] This is a problem as it is evident from the case law discussed above that despite the development in South African law on this topic there is still no clear categorisation of incompatibility as a legal ground for dismissal. The *Glass case*[282] is currently the only case where the employer has successfully proven that the dismissal on grounds of incompatibility in the form of incapacity was substantively and procedurally fair. Regardless of the decision in the *Glass case*, employers still exercise their discretion to dismiss an employee for whatever reason it considers incompatible. The courts are also swayed by the employer's ability to prove that incompatibility is either a form of misconduct or the employer's operational requirements. That is, the courts are satisfied with the employer's categorisation of incompatibility as either a form of misconduct or the employer's operational requirements provided that the employer can prove that the dismissal is substantively and procedurally fair. This is evident from the case law discussed above. In the *Watson case,* for instance, the employer categorised incompatibility as a form of misconduct. Although LAC held that incompatibility is a form of incapacity, the LAC still accepted the employer's categorisation of incompatibility as a form of misconduct. The LAC further held that if the employer opts to categorise incompatibility as a form of misconduct, it must follow its disciplinary code and procedure which allows for progressive discipline.[283] Similarly, in the *Wereley case*, the LC reaffirmed the position that incompatibility is a form of incapacity, but accepted the employer's categorisation of incompatibility as a form of misconduct.[284]

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280 Botes 2017 *Without Prejudice* 2.
281 *Watson case* para 33; *Wereley case* para 38.
282 *Glass case.*
283 *Watson case*; and *Wereley case*.
284 *Wereley case*.

With regards incompatibility as a form of the employer's operational requirements, it is evident from the above case law[285] that the employer has been unsuccessful in some instances in proving that incompatibility is a form of the employer's operational requirements. This is evident from the fact that the courts have accepted the position that the definition of the employer's operational requirements is too narrow to include incompatibility.[286] However, the *Zeda Car Leasing case* became a turning point taken from the view that although the LAC accepted that incompatibility is a form of incapacity, the LAC accepted the employer's categorisation of incompatibility as a form of the employer's operational requirements.[287] The LAC held that the dismissal of the employee was substantively fair as the employer was able to prove that "…structural solution of combining the positions and declaring one of the posts redundant was the only solution and a rational commercial or operational decision".[288] The LAC further went on to state that the employee's dismissal would have been procedurally fair, if the employer had followed the procedure set out in section 189 of the LRA dealing with retrenchments. The LAC decision in the above case comes as relief for employers, as it has paved the way for the employer to dismiss the employee for incompatibility in the form of the employer's operational requirements. Employers may now refer to the *Zeda Car Leasing* case as authority to dismiss the employee on grounds of incompatibility. Mulligan and Horn submit[289] that utilising the retrenchment procedure, as contained in section 189 of the *LRA,* may create problems in the future. The scholars submit that LC in the *First National Bank case* correctly differentiated between the employer's operational requirements and incapacity where it held that "…in the event of incapacity, the focus is on the qualities of the employee. In the event of operational requirements, the focus is on the employer and its decisions relating to its business".[290] Therefore,

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285 *Sondlo case*; *SACTWU case.*
286 Grogan *Dismissal, Discrimination & Unfair Labour Practice* 511.
287 *Zeda Car Leasing case* para 39.
288 *Zeda Car Leasing case* para 33.
289 Mulligan and Horn 2021 http://www.chmlegal.co.za.
290 *First National Bank case* para 88.

incompatibility mainly relates to the qualities of the employee and not the employer's business decision.

From the plethora of case law dealing with incompatibility as a ground for dismissal, it appears as though the courts are not entirely satisfied with the categorisation of incompatibility as a form of incapacity. Apparently, even though the prevailing view that is mostly accepted by courts is that incompatibility may be dealt with as either a form of misconduct or the employer's operational requirements.[291] It is evident that the courts have emphasised that incompatibility is a form of incapacity in almost all cases, however, there is no practicality to it as employers are still allowed to categorise and dismiss the employee on grounds of misconduct, or the employer's operational requirements, and the employer may be successful if the employer can prove that the dismissal is substantively and procedurally fair. The writer submits that allowing the employer to exercise discretion defeats the purpose of categorising incompatibility under one of the recognised grounds for dismissal, and further may cause inconsistency in the application of procedures that ought to be followed in dealing with incompatibility disputes.

3.8 Conclusion

As shown above, the *LRA* recognises three grounds for dismissal which are misconduct, incapacity and the employer's operational requirements. The *LRA* provides procedures or guidelines that the employer may follow when dismissing an employee on any of the above grounds of dismissals.[292] However, in terms of incompatibility as ground for dismissal, the *LRA* is silent. This therefore has created a number of uncertainties for employers in categorising incompatibility as a ground for dismissal. The courts have however intervened by categorising incompatibility as a form of incapacity, but have not exercised a stringent approach to its categorisation as a form of incapacity. This is evident from recent case law as discussed above showing that the courts have also accepted the

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291 Mulligan and Horn 2021 http://www.chmlegal.co.za.
292 Section 188 of the *LRA.*

employers' categorisation of incompatibility as a form of either misconduct or the employer's operational requirements.[293] It is further evident from the above that in some instances, the employer has been successful in categorisation incompatibility as a form of misconduct,[294] and in other instances, the employer has been successful in categorising incompatibility as a form of the employer's operational requirements.[295] The courts are swayed by the employer's ability to prove that the dismissal of an employee on grounds of incompatibility is substantively and procedurally fair on whatever ground of dismissal the employer chooses to categorise incompatibility. If the employer is unable to prove that incompatibility falls within its chosen category, the employee's dismissal may be considered unfair. This is a problem as there is no consistency in the application of the procedures that the employer may follow when dismissing the employee on grounds of incompatibility.

The lack of consistency may be caused by a deficit of legislative guidance. For instance, with regards the other grounds of dismissal, there may be consistency in its application by the employers because the employer is guided by the *LRA* and the relevant Code of Good Practice: Dismissal. This means that the employer must follow the procedure that is set out in the *LRA* and the Code of Good Practice: Dismissal. Therefore, the lack of legislative guidance in this regard leaves room for the employer to dismiss the employee at will for whatever reason that the employer deems incompatible. The lack of legislative guidance also creates inconsistency as well as uncertainty for employers in the appropriate categorisation of incompatibility and the procedure that needs to be followed when dealing with incompatibility. Although there are uncertainties in this area of law, the courts have provided guidance that the employer may follow when dismissing an employee on grounds of incompatibility. The purpose of this guidance is to assist the employer in properly dismissing the employee on grounds of incompatibility. The purpose of the guidance is also aimed to ensure certainty

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293 *Watson case; Wereley case; and Zeda Car Leasing case*.
294 *Watson case.*
295 *Zeda Car Leasing* case.

and uniformity in dismissal of the employee on grounds of incompatibility. This guidance provided by the court is discussed in the next chapter.

Chapter 4

4 Guidance provided by the courts in dealing with incompatibility as a ground for dismissal

4.1 Introduction

The previous chapter dealt with the grounds for dismissal as recognised by the *LRA*, and as they relate to incompatibility as a ground for dismissal. It is clear from the previous chapter that incompatibility is a ground for dismissal, and the courts and eminent scholars on this topic have submitted that incompatibility is best categorised as a form of incapacity. However, it is also evident from the previous chapter that the courts have accepted the dismissal of an employee on grounds of incompatibility in the form of misconduct,[296] and incompatibility in the form of the employer's operational requirements.[297] The courts have held that if the employer can prove that the dismissal of the employee falls within the chosen category then the dismissal of the employee on grounds of incompatibility is fair,[298] i.e. the employer satisfies the substantive and procedural requirement. It only becomes a problem where the employer cannot prove both the substantive and procedural fairness of a dismissal on grounds of incompatibility. For instance, where the employer dismisses the employee on grounds of incompatibility in the form of misconduct, the employer must prove that the employee has breached a workplace rule, and the procedure set out in its Disciplinary Code and Procedure was followed. Where the employer is unable to satisfy the two requirements, or has satisfied the substantive but not procedural fairness requirements, then the dismissal is unfair. It is for this reason that employers in most incompatibility disputes have been unsuccessful in dismissing an employee on grounds of incompatibility, because employers in most cases cannot satisfy the substantive and procedural requirements in its chosen category. For instance, in the *Werely case*, the employer dismissed the employee on grounds of incompatibility in the

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296 *Werely case* para 6; *Watson case* para 2.
297 *Zeda Car Leasing* case para 20.
298 Glass case para 6.21.

form of misconduct. The LC found that the dismissal of the employee was substantively fair, but procedurally unfair.[299] Similarly, in the *Watson case*, the LAC upheld the decision of the CCMA, by finding that the dismissal of the employee on grounds of incompatibility in the form of misconduct was substantively fair, but procedurally unfair as the employer did not follow the procedure set out in its Disciplinary Code and Procedure in dismissing the employee.[300] Also, in the *Zeda Car Leasing case*, the LAC found that the dismissal of the employee on grounds of incompatibility in the form of the employer's operational requirements was substantively fair, but held that the dismissal of the employee was procedurally unfair as the employer did not follow the procedure as set out in section 189 of the *LRA* dealing with the retrenchment.[301] However, in the *Glass case*, the employer categorised incompatibility as a form of incapacity and was successful in proving the substantive procedural farness requirements.[302] The fact that the employer was successful in categorising incompatibility as a form of incapacity, and satisfying the substantive and procedural fairness requirements thereto[303] reaffirms the courts and eminent scholars on this topic position that incompatibility is best categorised as a form of incapacity. In the *Zeda Car Leasing case*, the LAC held that the categorisation of incompatibility is not important; what is important is that the dismissal of the employee is substantively and procedurally fair.[304] The question therefore is, what criteria must the employer satisfy before a dismissal on grounds of incompatibility is substantively and procedural fair, and is there a need for the categorisation of incompatibility as a ground for dismissal? This aspect is discussed later on in this chapter.[305]

In the absence of legislative recognition and guidance on the appropriate categorisation and procedure to follow when dealing with incompatibility as a ground for dismissal, the writer submits that the guidance provided by the courts

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299 *Werely case* para 44.
300 *Zeda Car Leasing* case para 33.
301 *Zeda Car Leasing* case par 43.
302 See 3.6.3 above.
303 See 3.6.3 above.
304 *Zeda Car Leasing* case para 39.
305 See 4.4 below.

in the different judgments may be used as guidance. The guidance is properly set out in the *Zeda Car Leasing case*. Basson[306] submits that the courts have adapted Item 8 and 9 of the Code of Good Practice: Dismissal in the context of incompatibility as a ground for dismissal. The guidance aims to assist the CCMA, courts, and the employer with a uniform procedure that must be followed when dealing with incompatibility as ground for dismissal. This chapter investigates the guidance provided by the courts in different judgments in this regard. This chapter further assesses whether there is a need for the categorisation of incompatibility as a ground for dismissal. In addition, the chapter interrogates whether the guidance provided by the courts in different judgments is sufficient to assist the CCMA, courts, and employers in dealing with incompatibility as a ground for dismissal, and/or whether there is still a need for legislative recognition and guidance in this regard.

4.2 Substantive fairness requirement for a dismissal on grounds of incompatibility

As stated in the Chapter 2 of this study, the employer's corporate culture is the unwritten rule that governs the interpersonal relationships in the organisation. Therefore, any person who wants to determine whether the dismissal of the employee on grounds of incompatibility is fair must consider whether:

4.2.1 The nature and seriousness of the conduct of the employee causes disharmony in the organisation

Before the employer considers dismissing the employee on grounds of incompatibility, the employer must consider the nature and extent of the employee's conduct causing disharmony in the organisation. That is, the employer must assess the conduct of the employee who is affected by the employee's conduct, how the conduct of the employee affects fellow employees and the organisation as a whole. The employee may be regarded as the cause of the disharmony in the organisation if fault can be attributed substantially or wholly to

306 Basson *et al The New Essential Labour Law Handbook* 270.

the employee's conduct, and if the conduct of the employee substantively affects the smooth running of the organisation.[307] For instance, in the early case of *Erasmus*, the IC found that the dismissal of the employee was substantively fair, as the employee was substantially the cause of the disharmony in the organisation. This is evident from the fact that fellow employees (black employees) were upset by his racist remarks, and his conduct in the organisation had the potential to incite violence or disharmony in the organisation.[308] Similarly, in the *Cronje*,[309] *Lebowa*[310] *and SAEWA cases,*[311] the courts held that the use of racist comments in the organisation did not conform to the employer's corporate culture, and it had caused unrest and disharmony amongst fellow employees in the organisation. In the *Watson case*, the LC held that the dismissal of the employee was substantively fair as the employee was substantially the cause of the conduct that rendered him incompatible. The LC in the *Watson case* held that the onus is on the employer alleging incompatibility to demonstrate that the employee in question was responsible substantially for the disharmony in the organisation.[312]

4.2.2 The employee was aware or could reasonably be expected to be aware that his or her conduct may cause disharmony in the organisation

Whether the employee was aware or could reasonably be expected to be aware that his or her conduct causes disharmony in the organisation is a question of fact.[313] For instance, all employees of an organisation are reasonably expected to be aware of the employer's corporate culture. That is, all employees are reasonably expected to be aware of what is right and wrong in the organisation. However, the level reasonableness differs, depending on the position held by the employee in the organisation. For instance, in the *Cronje case*, it was the employer's contention that the employee as a senior manager was reasonably

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307 *Radebe case* para 125.
308 *Erasmus case* para 544.
309 *Cronje case* para 746.
310 *Lebowa case* para 75.
311 *SAEWA case* para 58.
312 *Watson case* para 38.
313 Basson *et al The New Essential Labour Law Handbook* 242.

expected to have been aware that the use of the organisation system to promote racist, sexist or other offensive material was prohibited in the organisation. The CCMA accepted the employer's contention. The CCMA held that a senior manager ought to have known that such conduct could cause disharmony in the organisation.[314]However, in the *Lubkhe case,* the IC considered the length of service of the senior manager before her dismissal. The IC held that a newly appointed senior manager should be given a reasonable and fair opportunity to conform to the employer's corporate culture. The IC held that, given the employee's short period of service in the organisation, it was unfair for the employee to have been reasonably expected to have been aware of the employer's corporate culture.[315] Therefore, the IC held that the dismissal of the employee was substantively unfair.

4.2.3 The employee was informed and given an opportunity to remove the cause of the disharmony in the organisation

When the employer becomes aware that the conduct of the employee causes disharmony in the organisation, the employer should inform the employee of conduct that causes disharmony, and the persons (employer or employee) affected by the employee's conduct.[316] The employer should also give the employee a fair opportunity to improve the cause of incompatibility.[317] In the *MCDuling case*, the CCMA held that the employer had a good reason to dismiss the employee; however, the dismissal was substantively unfair as the employee was not informed of his incompatibility, and was not given an opportunity to remove the cause of the incompatibility.[318] In the *Lubke case* the IC held that the employer must assist the employee as far as reasonably possible to conform to the corporate culture of the employer. Similarly, the LC in the *Jabari case* held that the employer must assist the employee to overcome his or her personal

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314 *Cronje case* para 439.
315 *Lubkhe case* para 429.
316 *Sondlo case* para 20; see also 3.6.2 of Chapter 3 of this study.
317 *Visagie & Andere v Prestige Skoonmaakdientse (Edms) BPK* (1995) 16 ILJ 421 (1C) para 101.
318 *MCDuling case* para 294.

difficulties.[319] In the *Myeni case*, the CCMA held that the dismissal of the employee was substantively fair, as the employer had made effort to assist the employee with his interpersonal relationship.[320] The LC in *Mgijima case* held that where the employer decides to assist the employee by appointing a psychologist, a decision to dismiss the employee without appointing a psychologist would be considered an unfair dismissal.[321] In *Watson case*, the LAC held that the dismissal of the employee was substantively unfair as the employee was not given an opportunity to remove the cause of the incompatibility before he was dismissed.[322]

4.2.4 Dismissal is the most appropriate sanction

Dismissal must always be considered as a last resort.[323] Even though the employee is the cause of disharmony in organisation, where steps have been taken by the employee to improve his or her behaviour through counselling and warnings, the employer cannot rely on previous conduct of the employee in dismissing the employee. This is evident in the *Jardine case* where the CCMA held that the employer cannot rely on outdated information to dismiss the employee on grounds of incompatibility. The reason for the employee's dismissal must be linked to the employee's current conduct. The employer is required to consider other options, i.e. placing the employee in an alternative position.[324] In the *Watson case*, the LAC held that the dismissal of the employee was unfair as the employee was not afforded the opportunity to improve his or her behaviour. The LAC held that it is unfair to state that the employee is incapable of changing when the employee has not been afforded an opportunity to change.[325]However, the LAC held that dismissal was justifiable in the circumstances and as the conduct of the employee was too severe and progressive discipline, i.e. written warning, could not justify the employee's conduct.[326] Similarly, in the *Zeda Car Leasing case*, the LC held

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319 *Jabari case* para 3.
320 Myeni case para 151.
321 *Mgijima case* para 75.
322 *Watson case* para 23.
323 Basson *et al The New Essential Labour Law* 245.
324 *Jardine case* para 444.
325 *Watson case* para 23.
326 *Watson case* para 23.

that the dismissal of the employee was justified as it was evident that the employee's position had become redundant.[327]

4.3 Procedural fairness requirement of a dismissal on grounds of incompatibility

The procedure which the employer must follow to justify a dismissal on grounds of incompatibility is as follows:

4.3.1 An investigation to establish the reason for the disharmony in the organisation

Once the employee has been identified as displaying characteristic features of incompatibility in the organisation, the employer must conduct a thorough investigation to determine whether the employee is indeed the cause of the disharmony in the organisation. Basson[328] submits that an investigation is not an equivalent to a disciplinary hearing. It is a process which could consist of a number of meetings between the employer and the employee. The purpose of the meetings is to discuss the employee's incompatibility and to prove to the employee that he or she is the cause of the disharmony in the organisation.[329] The employee may be represented by a fellow employee or a trade union representative in the meetings. The investigation may be initiated by the employer informing the employee of the conduct causing disharmony in the organisation, the extent of his or her incompatibility, and its impact on the organisation.

Once the employer has established incompatibility, the employer must inform the employee, and this includes informing the employee that his or her conduct causes disharmony that affects the cordial harmonious relationship in the organisation.[330] The employee should be given an opportunity to state his or her case, i.e. the employee may argue that his or her incompatibility is not caused by

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327 *Zeda Car Leasing case* para 34.
328 Basson *et al The New Essential Labour LawHandbook*247.
329 Basson *et al The New Essential Labour LawHandbook*247.
330 *Zeda Car Leasing case* para 39.

his or her own doings, but rather due to other factors beyond his or her control[331] The employee should be given an opportunity to give reasons for his or her behaviour,[332] and the reasons provided by the employee must be assessed by the employer.[333] The employer may, during the investigation, warn the employee that a failure to improve his or her behaviour may result in a dismissal.

4.3.2 The employee must be given a fair opportunity to improve his or her behaviour

The employee must not be dismissed for incompatibility unless the employer has given the employee appropriate assistance, guidance or counselling in improving his or her incompatibility.[334] This means that the employer must take sensible, genuine and practical effort to assist the employee with his or her incompatibility.[335] During this period, the employee should be monitored and informed of his or her improvement. In the event that there is no improvement in the employee's behaviour, the employee should be informed that there is no improvement in his or her behaviour. The employer may also consider placing the employee in a position suitable to his or her temperament.[336] When reasonable efforts have failed, the employer may conclude that the employment relationship has broken down irremediably.[337] However, where the employee's behaviour has improved significantly after counselling and warnings, the employer cannot rely on previous incompatible behaviour to dismiss the employee.[338] This means that the reasons for the employee's dismissal must be in line with the employee's current incompatibility. The employer cannot use incompatibility as a smokescreen to hide the main reason for dismissing the employee.

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331 *Zeda Car Leasing case* para 39.
332 *Zeda Car Leasing case* para 39.
333 Basson *et al The New Essential Labour Law Handbook* 249.
334 *Myeni case* para 151.
335 *Lubkhe case* para 429.
336 *Lubkhe case* para 429.
337 Amongst others, *see Wright case* para 1004H; *Watson case* para 101; *Wereley case* para 30.
338 *Jardine case* para 560.

4.3.3 Conduct an incompatibility enquiry to assess the employee's conduct and continued employment relationship

In the event that there is no improvement in the employee's conduct in the organisation despite reasonable assistance and warnings from the employer, and the employer considers dismissing the employee, the employer must convene an incompatibility enquiry to consider the employee's conduct and the possibility of continued employment. Basson[339] submits that an enquiry is an essential requirement for a fair dismissal. He submits as follows:

> Firstly, the employee should be given a chance to explain why he or she has not been able to reach or maintain the required standard of performance. Training may have been deficient; the previous warnings may not have been properly interpreted or understood; or surrounding people may have withheld their due co-operation. Secondly, the employee should be given an opportunity to suggest other work that may be more suited to his or her qualifications or temperament (This possibly will obviously depend on the nature and size of the employer's enterprise or the work in which the employee was engaged.) Finally, the employee should be given a chance to plead in mitigation, by making whatever can be made of work record, length of service or loyalty to the employer's business.[340]

Should such an incompatibility enquiry be convened, the employer must notify the employee of the incompatibility enquiry and should be given a reasonable time to respond. The employee must also be informed that he or she has a right to assistance from a fellow employee or a trade union representative. The employee must be given an opportunity to make a representation and to state his or her other case, and to possibly give reasons why he or she should not be dismissed. The employee should further be given the opportunity to suggest alternatives short of dismissal.[341] In the *Glass case*, the CCMA held that the employer had followed a fair procedure in dismissing the employee as the employee was duly

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339 Basson *et al The New Essential Labour Law Handbook* para 250.
340 Basson *et al The New Essential Labour Law Handbook* para 250.
341 *Erasmus case para* 544.

informed of incompatibility, counselled, given an opportunity to state her case, and also provided alternative position.[342] The CCMA held that the employer had tried to accommodate the employee as far as reasonable possible and the dismissal of the employee was considered as last resort as the employee had failed to improve her behaviour.

4.4 To what extent can the guidance provided by the courts assist the CCMA, the courts, and employers in dealing with incompatibility as a ground for dismissal, and/or is there a need for legislative recognition of incompatibility as a ground for dismissal?

It is evident from the discussions that employers have followed different procedures in dismissing employees on grounds of incompatibility over the years. In some instances as shown above, the employer can prove that the reason for the dismissal is fair, and in accordance with a fair procedure,[343] and in other instances the employer can prove that the reason for dismissal is fair, but a fair procedure has not been followed.[344] The inability of the employer to prove both the substantive and procedural fair requirements in its chosen categorisation has caused the employer to fail in most incompatibility dismissals. That is, the CCMA or the courts have reinstated or compensated because the employer cannot prove that the dismissal of the employee is substantively and procedurally fair. Therefore, the writer submits that the guidance provided by the courts is sufficient to assist the CCMA, the courts and the employer in dealing with incompatibility as a ground for dismissal in the future as it contains all the necessary criteria that the employer must satisfy to prove that the dismissal on grounds of incompatibility is substantively and procedurally fair.[345] The guidance may also ensure that there is certainty and uniformity in the procedure that must be followed by employers

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342 *Glass case* para 6.25.

343 *Glass case:* where the employer was successful able to prove that the dismissal of the employee on grounds of incompatibility in the form of incapacity is substantively and procedurally fair.

344 *Zeda Car Leasing case* amongst others, where the employer was able to shown that incompatibility was a form of the employer's operational requirements, but the employer could prove that the procedure followed was fair.

345 Basson *et al The New Essential Labour Law Handbook* para 250.

when dealing with incompatibility as a ground for dismissal. The writer, however, submits that although the guidance provided by the courts may be sufficient in dealing with incompatibility as a ground for dismissal, there is still a need for the legislative recognition of incompatibility as a ground for dismissal. The writer submits that the legislative recognition would ensure as follows:

- That employers and employees are aware of incompatibility as a ground for dismissal.
- That incompatibility is properly defined as a ground for dismissal, and is properly categorised as either a form of misconduct, incapacity, or the employer's operational requirements;
- That there is a uniform procedure that the employer must follow when dealing with incompatibility in the organisation; and
- That there is certainty, that is, the CCMA and the courts are aware of the procedures that needs to be followed when dealing with a dismissal of the employee on grounds of incompatibility;
- That there is an adoption a Code of Good Practice: Dismissal designed specifically for incompatibility as a ground for dismissal.

The writer submits that at the moment the categorisation of incompatibility as a form of incapacity, and the guidance provided by the courts is more akin to assist the CCMA and the courts in dealing with incompatibility as a ground for dismissal.[346] This is based on the fact that the information or discussion on incompatibility as a ground for dismissal is contained in case law and academic literature. There is currently no legal document containing information on incompatibility as a ground for dismissal. The majority of employers only become aware of incompatibility as a ground for dismissal, and/or the procedure to follow when dealing with incompatibility as a ground for dismissal after an unfair

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[346] This is evident from the different case law discussed above that shows that the CCMA and the courts have applied this guidance, in reaching a decision.

dismissal dispute has been brought to the CCMA or the courts. The writer submits further that it would be unfair to expect ordinary employer without legal knowledge to keep abreast with the developments in South Africa labour law with regards incompatibility as a ground for dismissal. The writer submits further that would be unfair to expect ordinary employer to refer to case law or academic literature when dealing with incompatibility dispute in the organisation. Therefore, the writer submits that there is indeed a need for legislative recognition of incompatibility as a ground for dismissal. The writer submits that legislating incompatibility as a ground for dismissal could go a long way in creating awareness, certainty and uniformity in dealing with incompatibility as a ground for dismissal. It could also exist in bridging the gap created by lack of legislative recognition.

4.5 Conclusion

It is evident from the above discussion that the guidance provided by the courts in previous judgements, and reaffirmed by the LAC in the *Zeda Car Leasing case* may assist the CCMA, the courts, and the employer in dealing with incompatibility as a ground for dismissal. However, the writer submits that there is still a need for incompatibility to be recognised as a ground for dismissal, and a Code of Good Practice: Dismissal should be adopted specifically for incompatibility disputes. The writer submits that without legislative recognition of incompatibility as a ground for dismissal, the courts guidance is more akin to assist the CCMA and the courts in dealing with future incompatibility disputes. The writer submits that it would be unfair to require ordinary employers to refer to case law or academic literature when dealing with incompatibility in the organisation. Therefore, the writer submits that legislating incompatibility as a ground for dismissal could go a long way in the assisting employers. Further, legislating incompatibility as a ground for dismissal will also assist the CCMA and the courts on procedures that must be followed when dealing with a dismissal on grounds of incompatibility. Furthermore, the writer submits that legislating incompatibility as a ground for dismissal will ensure that all employers are aware of incompatibility as a ground for dismissal and the procedure that needs to be followed when dealing with

incompatibility in the organisation. It will ensure that incompatibility is properly categorised as a ground for dismissal. It will also ensure there is certainty and uniformity on the procedure that needs to be followed to ensure that a dismissal on grounds of incompatibility is substantively and procedurally fair. The next chapter which is the last chapter deals with the conclusion and recommendation. The purpose of this chapter is to provide some conclusion on incompatibility as a ground for dismissal, and also provide recommendations that may be considered in the future.

Chapter 5

5 Conclusion and Recommendations

5.1 Introduction

This chapter provides recommendations that may be assist the CCMA, courts and employers in dealing with incompatibility as a ground for dismissal in the absence of legislative recognition and guidance. This chapter concludes by highlighting important issues that have been argued in the rest of the chapters. Finally, an evaluation is made as on incompatibility as a ground for dismissal, and whether the guidance provided by the courts in different judgments may be of assistance to CCMA, courts and employers in the future when dealing incompatibility disputes.

5.2 Conclusion

This study, as indicated in chapter one, analysed incompatibility as a ground for dismissal in South African labour law. Chapter one highlighted the problem areas. It identified incompatibility as the inability of an employee to conform to the employer's corporate culture. It identified further that the *LRA*[347] and the Code of Good Practice: Dismissal[348] does not recognise incompatibility as a ground for dismissal, and there is no guideline that has been provided to assist employers in dealing incompatibility in the organisation.

Chapter two discussed the characteristic features of justifiable reasons to dismiss the employee on grounds of incompatibility. Chapter two established that there is no particular conduct(s) of the employee that constitutes incompatibility.[349] Each case must be decided on this own merits. However, the courts have over the years identified characteristic features of justifiable reasons to dismiss an employee on grounds of incompatibility. This includes if the employee displays

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347 See the *LRA*.

348 See Code of Good Practice: Dismissal; see also the Code of Good Practice: Operational Requirements published under GG 20254 dated 16 July 1999.

349 Grant *Defining incompatible behaviour in an employer/employee relationship* 12.

racist behaviour in the organisation that causes disharmony in the organisation;[350] the employment relationship has broken down irremediable breakdown;[351] the employer has taken some sensible, practical and genuine effort to effect improvement in the employment relationship;[352] the employee is substantially the cause of the disharmony in the organisation. [353] The courts have also held that an employer may not dismiss an employee for odd or eccentric behaviour unless such eccentric behaviour is of such extreme nature that it indeed causes disharmony in the organisation.[354]

Chapter three discussed the grounds for dismissal recognised in the *LRA*.[355] The chapter identified the grounds for dismissal recognised in the *LRA* as constituting misconduct,[356] incapacity[357] and the employer's operational requirements.[358] It further identified the guidelines that the employer may follow when considering dismissing an employee on any of the above recognised ground for dismissal.[359] It further interrogated the debates on the categorisation of incompatibility as a ground for dismissal.[360] It was submitted that in early cases, incompatibility was categorised as a form of the employer's operational requirements, because at that point in time, the focus was on the employer's right to insist on a cordial harmonious relation in the organisation. The employer at that time had to prove that the employee's incompatibility caused disharmony in the organisation, and the disharmony affected the productivity level of the organisation.[361] This view was

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350 See *Erasmus case; Cronje case; Lebowa case; SAEWA case*.
351 See *Wright case; Watson case; Werely case*.
352 See *Lubkhe case; Wright case; Hapwood case; Jabari case; Myeni case; Mgijima case.*
353 See Radebe case; *Visagie&andere v Prestige Skoonmaakdientse (Edms) BPK; MCDuling v MIF; Subrumuny case; Jardine case; Edcon case; Zeda Car Leasing case.*
354 *See Joslin case*.
355 Section 188 of the LRA.
356 See 3.2 of Chapter 3 of this study.
357 See 3.4 of Chapter 3 of this study.
358 See 3.3 of Chapter 3 of this study.
359 See 3.2, 3.3 and 3.4 of Chapter 3 of this study for a discussion on the guidelines contained in the Code of Good Practice: Dismissal.
360 See 3.5 of Chapter 3 of this study.
361 Mischke 2005 *Obiter* 2.

initially accepted by academic writers in this topic.[362] However, the amendment of the employer's operational requirements in terms of section 213 of the *LRA* to be "…economic, technological, structural or similar needs…" of the employer, it was submitted that incompatibility as a ground for dismissal does not fit under the category of the employer's operational requirements.[363] It was submitted that the definition of the employer's operational requirements contained in section 213 of the *LRA* was too narrow to embrace incompatibility as a ground for dismissal.[364] It was therefore held that incompatibility should be categorised as a form of misconduct, if the employee is to be blamed for the conduct that renders him or her incompatible or as a form of incapacity if the employee cannot be blamed for the conduct that renders him incompatible.[365] The debate on the categorisation of incompatibility as a ground for dismissal was settled by the SCA in the *Samancor case* where the SCA held that incapacity may extend beyond the forms contained in the *LRA*.[366] In *First National Bank Case*, the LC held that incapacity ought to focus on the quality of the employee as opposed to the employer's operational requirements which focuses on the employer and its decisions relating to its business.[367] In line with the approach adopted by the LC in the *First National Bank case* the LAC in the *Watson case* held that incompatibility is best categorised as a form of incapacity.[368] This position was accepted by the LC in the *Wereley case*[369] as well as the LAC in the *Zeda Car Leasing case*.[370]The chapter further discussed the effect of a lack of legislative recognition of incompatibility as a ground for dismissal. It was found that employers have exercised their discretion and have categorised incompatibility as either a form of misconduct,[371] incapacity[372] or the

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362 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 120; Le Roux and Van Nierkerk *The South African Law of Unfair Dismissal* 285; see also 3.5 of Chapter 3 of this study on the debates.

363 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 511.

364 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 511.

365 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 511; Van Nierkerk and Smit *Law@Work* 338; Basson *et al The New Essential Labour Law Handbook* 158 – 159.

366 See 3.5 of Chapter 3 of this study on the discussion of the *Samancor case.*

367 See 3.5 of Chapter 3 of this study on the discussion of the *First National Bank case*.

368 See 3.6.1 of Chapter 3 of this study on the discussion of the *Watson case*.

369 See 3.6.1 of Chapter 3 of this study on the discussion of the *Wereley case*.

370 See 3.6.2 of Chapter 3 of this study on the discussion of the *Zeda Car Leasing case*.

371 See 3.6.1 of Chapter 3 of this study.

372 See 3.6.2 of Chapter 3 of this study.

employer's operational requirements.[373] This chapter further reflected on the categorisation of incompatibility as a ground for dismissal. It was found that although the courts have accepted incompatibility as a form of incapacity, it is not enforceable. The courts still accept the dismissal of an employee on grounds of incompatibility in the form of misconduct or the employer's operational requirements, if the employer can prove that the incompatibility falls within the chosen category, i.e. if the substantive and procedural requirements are fulfilled.[374] However, the employer has not always been successful in proving both the substantive and procedural fairness requirements in incompatibility dismissals. For instance, in the *Wereley case*, the employer categorised incompatibility as a form of misconduct. The LC held that the dismissal was substantively but procedurally unfair. Similarly in the *Watson case*, the employer categorised incompatibility as a form of misconduct.[375] The LAC held the dismissal was substantively but procedurally unfair. In the *Zeda Car Leasing case*, the employer categorised incompatibility as a form of the employer's operational requirements. The LAC held that the dismissal was substantively fair but procedurally unfair.[376] In the *Glass case*, the employer categorised incompatibility as a form of incapacity and was successful in proving both the substantive and procedural fairness requirements.[377]

Chapter four discussed the guidance provided by the courts in different judgments that could be used assist the CCMA, courts, and employers in dealing with incompatibility as a ground for dismissal. The guidance identified the substantive and procedural fairness requirements. The chapter also discussed the extent to which the guidance the provided may assist, and whether there is still a need for

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373 See 3.6.3 of Chapter 3 of this study.

374 See 3.6.3 of Chapter 3 of this study; See also the *Glass case* para 6.25 where the CCMA held that the dismissal of the employee on grounds of incompatibility in the form of incapacity is substantively and procedural fair.

375 See 3.6.1 of Chapter 3 of this study; See also the *Watson case* para 244 where the LAC held that a reasonable commissioner would have made a similar decision as the employee was the cause of the disharmony in the organisation.

376 See 3.6.2 of Chapter 3 of this study; See also the *Zeda Car Leasing case para* 277 where the LAC held that the dismissal of the employee on grounds of the employer's operational requirements is substantively but procedurally unfair.

377 *Glass case* para 6.25.

legislative recognition of incompatibility as a ground for dismissal. It was concluded that the guidance provided by the courts is sufficient to assist the CCMA, courts and employers in dealing with incompatibility as a ground for dismissal.[378] However, there is still a need for legislative recognition. Legislative recognition could ensure all that employers are aware of incompatibility as a ground for dismissal. It would ensure that there is a clear definition and categorisation of incompatibility as a ground for dismissal. It will ensure certainty and uniformity on the procedures that needs to be followed when dealing with incompatibility as a ground for dismissal. It will also ensure that a Code of Good Practice: Dismissal is specifically designed for incompatibility as a ground for dismissal. Therefore, legislating incompatibility as a ground for dismissal will go a long way in assisting the CCMA, courts and employers in dealing with incompatibility, and will breach the gap caused by a lack of legislative recognition.

In conclusion, it is evident from the above discussion that incompatibility is a recognised ground for dismissal in South African labour law but there is still a need for legislative recognition. It is argued that legislating incompatibility as a ground for dismissal will go a long way in assisting CCMA, courts and employers in dealing with incompatibility in the organisation. It will also ensure that there is a certainty and consistency in this area of the South African labour law.

5.3 Recommendations

5.3.1 Incompatibility should be recognised as a ground for dismissal in the LRA

It is recommended that the *LRA* should be amended to include incompatibility as a ground for dismissal in South African labour law. It is evident from the discussion above that incompatibility as a ground for dismissal has existed in South African labour law for centuries.[379] However, the previous *LRA*[380] and the current *LRA*[381] does not recognise it as a ground for dismissal in labour law, and this has caused

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378 See 4.4 of Chapter 4 of this study.
379 Since the 1980s.
380 *LRA* 28 of 1956.
381 LRA 66 of 1995.

a number of uncertainties with the definition, characteristics features of incompatibility and the procedures to follow when dealing with incompatibility as a ground for dismissal. It is recommended that including incompatibility as a ground for dismissal in the *LRA* will ensure that all grounds of dismissal in South African labour law are governed by a piece of legislation.

5.3.2 The definition of "incompatibility" should be included in the definition section in the LRA

As shown above, there is no clear definition of incompatibility as a ground of dismissal. Incompatibility is currently defined as the inability of the employee to conform to the corporate culture of the organisation. It is submitted that the current definition of incompatibility is too vague and does not set out what conduct of the employee constitutes incompatibility for the purpose of a dismissal.[382] Even though the courts have identified the characteristic features of justifiable reasons to dismiss an employee on grounds of incompatibility, it is submitted that the list is exhaustive, as incompatibility may take other forms besides those identified by the courts.[383] It is recommended that including incompatibility as a ground for dismissal in the definition section of the *LRA* will ensure that there is a clear definition of incompatibility as a ground for dismissal. It will also ensure that everyone is aware of the characteristic features of justifiable reasons to dismiss the employee on grounds of incompatibility. It will ensure further that employers do not unnecessary rely on incompatibility to dismiss the employee, without providing justifiable reasons.

5.3.3 Code of Good Practice: Dismissal for incompatibility should be adopted

As shown above, the *LRA* recognises three grounds for dismissal, and also provides individual guidelines that the employer may follow to ensure that a dismissal on any of the above grounds is substantively and procedurally fair.[384] It is recommended that a Code of Good Practice: Dismissal designed specifically for

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382 Grant *Defining Incompatible behaviour in an employer/employee relationship* 12.
383 Grant *Defining Incompatible behaviour in an employer/employee relationship* 12.
384 See section 188 of the *LRA*.

incompatibility should be adopted.[385] Alternatively, it is recommended that the current Code of Good Practice: Dismissal should be amended to include a section for incompatibility as a ground for dismissal. The section or the Code of Good Practice: Dismissal for incompatibility should be called "Incapacity: incompatibility: Guidelines in cases of dismissal arising from incompatibility". It is recommended that the section or Code of Good Practice: Dismissal for incompatibility should be drafted along the same lines as the guidance provided by the courts. Taking into account the content of the current Code of Good Practice: Dismissal, it is recommended that the section or the Code of Good Practice should be drafted as follows:

Incapacity: incompatibility

1. Where an employer contemplates dismissing the employee on grounds of incompatibility, the employer must investigate to establish the reason for the disharmony in the organisation. The investigation should consider the nature and extent of the conduct of the employee causing disharmony in the organisation. The employer must consider other alternatives short of dismissal. When the employer considers alternatives, relevant factors might include the nature of the job, the duration of service in the organisation, the temperament of the employee, the ability of the employee to work in a team, and the possibility of adapting the employee's position to suit his or her temperament.

2. In the process of the investigation referred to above, the employee should be allowed the opportunity to state a case in response and be assisted by a fellow employee or a trade union representative.

3. The degree of the employee incompatibility is relevant to the fairness of the employee's dismissal. In the case of mere eccentric behaviour, a dismissal

[385] As in the case of Code of Good Practice: Dismissal for the Employer's Operational Requirements. Although the courts adapted Items 8 and 9 of the current Code of Good Practice: Dismissal. It is submitted that a Code of Good Practice: Dismissal for incompatibility or a section for incompatibility will ensure that there is no confusion and there is a clear procedure designed specifically for incompatibility as a ground for dismissal.

may be considered unfair. In the case of racism, a dismissal may be considered fair. In the case of insolence or undermining authority, counselling may be an appropriate action for an employer to consider.

4. Particular consideration should be given to the employee whose conduct has improved after warnings and counselling.

Guidelines in cases of dismissal arising from incompatibility

Any person determining whether a dismissal arising from incompatibility is unfair should consider:

a) whether or not the employee is the cause of the disharmony in the organisation;

b) If the employee is the cause of the disharmony, whether the employee was aware or could reasonably be expected to be aware that his or her conduct causes disharmony in the organisation;

c) whether the employee was informed and given an opportunity to remove the cause of the disharmony in the organisation;

d) the extent to which the employee's work circumstance could be adapted to accommodate the employee's incompatibility;

e) the availability of an alternative position suitable for the employee's temperament;

f) whether the dismissal of the employee is the most appropriate sanction.

5.3.4 The courts should adopt a stringent approach to the procedure followed in dealing with incompatibility disputes.

Until such time as incompatibility is recognised by legislation or the *LRA*, it is recommended that the CCMA and courts should adopt a stringent approach to the procedure followed in dealing with incompatibility as a ground for dismissal, irrespective of the categorisation or the procedure that is followed by the

employer. This will ensure certainty and uniformity in the procedure followed by the CCMA and courts in incompatibility disputes.

5.4 Conclusion

The writer therefore concludes this study by stating that incompatibility is indeed a ground for dismissal in the South African labour law, and there is a need for legislative recognition of incompatibility as a ground for dismissal in South African labour law. However, until such time as incompatibility is legislatively recognised as a ground for dismissal, the CCMA and courts should exercise caution when dealing with incompatibility disputes to ensure that employers do not misuse incompatibility as a ground for dismissal.

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