An evaluation of the fairness criteria for dismissals due to absenteeism and desertion from the workplace

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ABSTRACT

The dissertation investigates the fairness criteria pertaining to absenteeism and desertion. It should be recognised that desertion is a special case of absenteeism. Desertion is absence from work with the intention of not returning, thus terminating the employment contract. Absenteeism is absence from work with the intention of returning. The intention of the employee determines the employer's cause of action. The dissertation investigates fairness criteria and applicable action by the employer pertaining to such cases in order to avoid unfair dismissal. Procedure should be fair, but can only be judged on the merits of the specific case. Fairness requires the employer to afford the employee an opportunity to state his or her case at the disciplinary hearing. In other words to give a reasonable explanation for his or her absence. Fairness also requires the court to take all surrounding circumstances into account, such as the reasonable period of absence, the employees work record and the employers treatment of similar offences in the past. Absence does not warrant automatic dismissal nor does it justify extended absence. Ultimately, the burden is to be shared by both employer and employee to ensure that the employment contract is constitutionally fair, clearly defined and precisely communicated to parties. The workplace is only an extension of the individual and the collective constitutional birth right; we all have equal right to justice, yet not all cases are the same.

Key words: absenteeism, desertion, dismissals, misconduct, incapacity, South Africa.

SAMEVATTING

Die verhandeling ondersoek die regverdigheidskriteria met betrekking tot afwesigheid en drostery. Drostery is 'n spesiale geval van afwesigheid. Drostery is die afwesigheid van ‘n werknemer van die werkplek met die bedoeling om nie terug te keer nie, daarom kom dit neer op die beëindiging van die dienskontrak. Afwesigheid is die wegbly van die werk met die bedoeling om terug te keer. Die bedoeling van die werknemer bepaal die werkgewer se skuldoorsaak. Die verhandeling ondersoek die regverdigheidskriteria en toepaslike optrede deur die werkgewer met betrekking tot gevalle van afwesigheid en dorstery ten einde onbillike ontslag te vermy. Die prosedure moet regverdig wees, maar kan alleen volgens die meriete van ‘n spesifieke geval beoordeel word. Regverdigheid vereis dat die werkgewer aan die werknemer 'n geleentheid bied om sy of haar saak by ‘n dissiplinêre verhoor te stel met ander woorde om ‘n redelike verduideliking vir sy of haar afwesigheid te gee. Regverdigheid vereis ook dat die hof al die omliggende omstandighede in ag neem, byvoorbeeld ‘n redelike tydperk van afwesigheid, die werknemer se dissiplinêre rekord en hoe die werkgewer soortgelyke afwesighede in die verlede hanteer het. Verlengde afwesigheid regverdig nie outomatiese ontslag nie. Die las word uiteindelik deur beide die werkgewer en die werknemer gedeel om te verseker dat die dienskontrak grondwetlik regverdig is, duidelik omskryf word en presies aan partye gekommunikeer word. Die werkplek is bloot 'n uitbreiding van die individu en die gemeenskap se grondwetlike geboortereg; ons het almal gesamentlike toegang tot gelykheid, maar alle gevalle is nie eners nie.

Sleutelwoorde: afwesigheid, drostery, ontslag, wangedrag, onvermoë Suid-Afrika

LIST OF ABBREVIATIONS

CC	Constitutional Court
CCMA	Commission of Conciliation, Mediation & Arbitration
BCA	Board of Contract Appeals
BCEA	Basic Conditions of Employment Act
EC	Eastern Cape
ECCAWASU	Entertainment, Catering & Commercial Allied Workers' Union of South Africa
IC	Industrial Court
IMSSA	Independent Mediation Service of South Africa
KZN	KwaZulu Natal
LAC	Labour Appeal Court
LC	Labour Court
ILO	International Labour Organisation
LRA	Labour Relations Act
Merc LJ	Mercantile Law Journal
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
POPCRU	Police and Prison Civil Rights Union
SABC	South African Broadcasting Corporation
SAPS	South African Police Services
SCA	Supreme Court of Appeal
SACCAWU	South African Commercial Catering & Allied Workers Union
SACWU	South African Chemical Workers Union

1 Introduction

In terms of section 23 of the *Constitution of the Republic of South Africa*, 1996,[1] everyone has the right to fair labour practices. This includes the right not to be unfairly dismissed as provided for in section 185 of the *Labour Relations Act* 66 of 1995.[2] Fair dismissal entails dismissal on fair grounds, preceded by a fair procedure. Therefore, in terms of section 188 of the LRA when an employment relationship is terminated due to absenteeism and/or desertion, the dismissal and procedure must be fair.[3]

The distinction between desertion and a situation where an employee is absent from work without permission for a long period is not always clear. It can normally not be expected of an employer to keep a position available for an unlimited time if the employer cannot establish the whereabouts of an employee. Thus the fairness criteria for dismissal need to be established when dealing with absenteeism and desertion from the workplace.

Absenteeism can be divided into poor timekeeping, absence from the workstation, and absence from work for short periods.[4] Desertion is when an employee is absent from work for a period of time that justifies the conclusion that the employee does not intend to return to work.[5] In *Seabolo v Belgravia Hotel*[6] the question about what constitutes desertion was answered, as quoted in the arbitration award:

> Desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or, having left his or her post, subsequently formulates the

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1 *Constitution of the Republic of South Africa,* 1996 (hereinafter referred to as the Constitution).
2 *Labour Relations Act* 66 of 1995 (hereinafter referred to as the LRA).
3 The employment relationship refers to the contract of employment as discussed in chapter 2 of the dissertation.
4 Kevin Hollenbach 2010 *Striking at the right time* www.ccbc.co.za [date 16 June 2011] hereinafter referred to as Hollenbach 2010 www.ccbc.co.za.
5 Anonymous 2010 *Desertion* www.labourguide.co.za [date of use 19 February 2010] hereinafter referred to as Anon 2010 www.labourguide.co.za.
6 *Seabelo v Belgravia Hotel* 1997 6 BLLR 829 (CCMA) 831.

> intention not to return. On the other hand, the AWOL employee is absent with the intention of resuming his or her employment.[7]

In *SABC v CCMA*[8] the court found that desertion is a breach of the contract of employment by the employee, and the employer has the right to terminate the contract after notice to the employee to resume duties was issued.[9] All employees accused of desertion have the procedural right to present their cases before their contracts are terminated, provided that the employer is conscious of their location and the employees wish to present their case.[10] Such termination therefore constitutes a dismissal and a disciplinary enquiry should be made by the employer.[11]

Under the common law an employee is required to render services during agreed hours of work. Wilful absence also constitutes a breach of contract by the employee and may justify termination of the employment contract by the employer.[12] Like all transgressions, absenteeism requires fault on the part of the wrongdoer.[13] Whether absence from work can justify dismissal will depend on factors such as the duration of the period of absence, the nature of the employee's job, previous warnings,[14] the reason for absence, whether the employee attempted to contact the employer during absence, and whether insubordination was involved (disciplinary codes have to be followed and agreed upon by employee (or union) and employer in this regard[15]).[16]

From the above it can be said that all dismissals due to absenteeism and/or desertion have to be procedurally fair but each case should be determined

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7 *Seabelo v Belgravia Hotel* 1997 6 BLLR 829 (CCMA) 831.
8 *South African Broadcasting Corporation v CCMA & others* 2001 22 ILJ 487 (LC) 492-493.
9 Joe Mothibi 2006 *Smoke Breaks, Hangovers and Other Employee Absences* www.densysreitz.co.za [date of use May 2010] hereinafter referred to as Mothibi 2006 www.deneysreitz.co.za.
10 Mothibi 2006 www.deneysreitz.co.za.
11 Desertion will be discussed in chapter 3 of the dissertation.
12 Anon 2010 www.labourguide.co.za.
13 Cheadle H, Thompson C, Le Roux PAK & Van Niekerk A *Current Labour Law* (2005) hereinafter referred to as Cheadle *et al Current Labour Law* 19.
14 Hollenbach 2010 www.ccbc.co.za.
15 Cheadle *et al Current Labour Law* 19.
16 Absenteeism will be discussed in chapter 4 of the dissertation.

on its own merits. Section 188(1)(b) of the LRA, read with item 4 of Schedule 8 of the *Code of Good Practice: Dismissal* (The Code),[17] deals with procedural fairness. In *Samancor Ltd v Metal & Engineering Industries Bargaining Council & Others*[18] it was said that a dismissal should be fair and in accordance with a fair procedure depending on reasons for dismissal.[19]

In certain situations it becomes difficult for the employer to afford the employee an opportunity to be granted a fair procedure.[20] There are many reasons why an employer could find himself or herself in such a situation.[21] For instance, the employee who is the subject of a proposed dismissal due to unauthorised absenteeism may be awaiting bail in prison (the date of which is unknown), or the employee may be in such a situation that it would not be possible to follow a proper counselling and/or investigation process to enable the employer to make an informed decision.[22] Regardless of this very important principle to follow a fair process in dealing with employees, item 4(4) of Schedule 8 of the Code states that:

> in exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.[23]

Thus, although there is no intention to desert or abandon work, and despite the fact that there is no fault on the site of the employee for his absence, dismissal may still be possible.[24] It would be unreasonable to expect the employer to keep the position vacant for a prolonged period of time while the employee for instance serves a sentence in jail.[25]

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17 *Code of Good Practice: Dismissal* (Hereinafter referred to as the Code).
18 *Samancor Ltd v Metal & Engineering Industries Bargaining Council & Others* 2009 30 ILJ 389 (LC) 29.
19 Mpho Lesabe 2009 *Procedural Fairness* www.labournet.co.za [date 18 June 2011] herein referred to as Lesabe 2009 www.labournet.co.za.
20 Lesabe 2009 www.labournet.co.za.
21 Lesabe 2009 www.labournet.co.za.
22 Lesabe 2009 www.labournet.co.za.
23 The Code.
24 Mothibi 2006 www.deneysreitz.co.za.
25 Mothibi 2006 www.deneysreitz.co.za.

This dissertation consists out of 7 chapters. Chapter 2 attempts to investigate whether an employment relationship exists between the employee and the employer, and the consequences if one of these parties breached the relationship by virtue of either desertion or absenteeism. This must be determined in context with the employer's business and the nature of work done by the employee, before the employer could be justified for terminating the contract because of aforementioned breach. It is also important to determine what could happen if the termination was not justified, which will be discussed in chapter 3. The distinction between desertion and absenteeism will be made clearer in chapters 4, 5 and 6. In determining the distinction between absenteeism and desertion the fairness criteria is taken into account and it may be asked what period is acceptable before it may be considered unreasonable. This will conclude the evaluation of the fairness criteria for dismissal due to absenteeism and desertion.

2 The employment contract and the breach thereof

As stated above, it is required to establish whether an employment relationship exists between the employee and the employer, and what will happen if one of these parties breaches the relationship by deserting or absconding from the workplace.

The foundation of the relationship between an employee and employer exists in the contract of employment.[26] The existence of an employment relationship can be regarded as the point of departure for the application of all labour law rules. The modern contract of employment reflects its origin in Roman law together with English law, which had a considerable influence on the contracts and contractual principles as we know it today.[27]

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26 Basson AC *et al Essential Labour Law* 4th edition (Labour Law Publications 2005) herein referred to as Basson *et al Essential Labour Law* 19. Kindly note that the employment relationship is not always based on a contract of employment.

27 In Roman times a distinction was made between letting and hiring of some physical object, also known as the *locatio conductio rei*, together with two other forms of letting and hiring which lead to letting and hiring of specific pieces of work. The *locatio conductio operarum* was in the lead with our typical employment

The essential element of an employment contract is a voluntary agreement between two parties in terms of which the employee[28] exchanges labour at the disposal and control of the employer in exchange for remuneration.[29]

All contracts in our law have to comply with certain requirements before the law recognises the contract as legally binding; the contract has to be lawful/legitimate.[30] For a contract to be valid and binding the parties have to reach consensus and there has to be an intention between parties to conclude an employment contract.[31] Both parties to the contract also have to have the necessary capacity to conclude the contract as stated in section 43 of the *Basic Conditions of Employment Act*.[32]

In an employment contract there are contractual duties/obligations imposed on the employer[33] and employee[34] and if a party fails to carry out these duties/obligations in terms of the contract, the party is guilty of a breach of contract.[35] The aforementioned breach may subject the employee to a potential disciplinary offence (keep in mind that the obligations in the contract need to be possible).

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contract because it related to the letting and hiring of someone's personal services in exchange for remuneration. During the industrial revolution and the employment of many numbers of people in factories the modern contract of employment developed from the Roman origins to that which we currently know.

28 Only an employee may claim protection against unfair dismissal, thus the distinction between an employee and an independent contractor should be carefully made. The LRA defines an employee in section 213 as any person who works for another person or for the state, and who receives or is entitled to receive remuneration, and any other person who in any manner assists in carrying on or conducting the business of an employer.

29 Basson *et al Essential Labour Law* 21.

30 An example of an employment contract that contravenes legislation is the employment of illegal foreigners.

31 Basson *et al Essential Labour Law* 36.

32 *Basic Conditions of Employment Act* 75 of 1997 (hereinafter referred to as the BCEA).

33 The contractual duties of the employer are to remunerate the employee, and to provide work and safe working conditions.

34 The contractual duties of the employee include tendering his or her services, to work competently and diligently, to obey lawful and reasonable instruction of the employer, to serve the employer's interest, and to act in good faith.

35 Basson *et al Essential Labour Law* 38.

An employee has to come to the workplace and be on time in order to perform the duty which he or she has been hired to do, and the employee needs to remain at the workstation for the number of hours per day agreed upon.[36] When the employment contract is breached by not complying with its terms, the employer[37] has a choice to accept the breach, terminate[38] the contract and claim damages, repudiate the employment contract, or to enforce the contract.[39] The employer may terminate the employment contract through dismissing the employee[40] for absenteeism or desertion when the employee is in breach of the employment contract after the employee's disciplinary hearing.[41]

In *Jafta v Ezemvelo KZN Wildlife*[42] the court stated that notice has to be given under common law before a contract of employment may be terminated. The BCEA describes the period of time of the notice in section 37.[43] However, the LRA trumps the common law by prescribing that a contract of employment may only be terminated for a valid reason. The LRA only permits an employer to terminate a contract of employment on the grounds of misconduct, incapacity, operational requirements, and to comply with certain applicable laws.

In an employment contract various duties/obligations are imposed on the employer and employee, as stated above. These contractual obligations/duties arise from various sources such as common law, company rules and regulations together with company policies and procedures, and statutes.[44]

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36 Basson *et al Essential Labour Law* 38.
37 The employee may terminate the contract voluntarily, which is called resignation.
38 Different forms of termination are the completion of the contract, termination by agreement, by insolvency, termination as a result of breach of contract termination on notice.
39 *Meyrs v Abramson* 1952 3 SA 121 (C) 123E.
40 *Fedlife Assurance Ltd v Wolfaardt* 2001 22 ILJ 2407 (SCA); 2011 12 BLLR 1301 (A) 308.
41 Basson *et al Essential Labour Law* 53. In order words the employer may terminate the employment contract after fair procedure was followed and there is a fair reason to do so.
42 *Jafta v Ezemvelo KZN Wildlife* 2008 10 BLLR 954 (LC) 124.
43 *Basic Conditions of Employment Act* 75 of 1997.
44 See Absenteeism, chapter 5.

Common law arises primarily from court judgements and practice; which are not laws that have been legislated by Parliament.[45] Common law is recognised as standards and norms enforced by our courts.[46] Under common law an employee should also perform obligations which are not specified in the terms of the contract of employment,[47] such as to provide the employer with labour; not only to come to the workplace, but be on time and work during the hours agreed upon. If the employee does not comply with these requirements, he or she may, according to the common law, be in breach of conditions of the employment contract.[48] The courts normally consider the implied duty of good faith as element of the contract of employment. The former Appellate Division accepted in *Council for Scientific and Industrial Research v Fijen*[49] that:

> the relationship between employer and employee is in essence one of trust and confidence and that in common law, conduct clearly inconsistent therewith entitles the innocent party to cancel the agreement.[50]

It would seem that the duty of good faith does not apply to the circumstances of termination of contracts but to the conduct of parties during the duration of the contract. In *Key Delta v Marriner*[51] it is stated that if there is no presumption in a contract of employment, the employer requires a valid reason for dismissing an employee, or that the *audi alteram partem* rule has to be observed.[52]

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45 Anonymous 2010 Absenteeism www.labourguide.co.za [date of use 17 June 2011] hereinafter referred to as Anon 2010 www.labourguide.co.za.

46 Anon 2010 www.labourguide.co.za.

47 These obligations are to provide the employer with labour, to obey reasonable and lawful instructions, to act in good faith, not to misbehave, and lastly to perform his duties in a satisfactory manner.

48 Anon 2010 www.labourguide.co.za.

49 *Council for Scientific and Industrial Research v Fijen* 1996 17 ILJ 18 (A) 26D-E.

50 *Council for Scientific and Industrial Research v Fijen* 1996 17 ILJ 18 (A) 26D-E.

51 *Key Delta v Marriner* 1998 6 BLLR 647 (E) 652.

52 In *Key Delta v Marriner* 1998 6 BLLR 647 (E) 652 there were referred case law in the United Kingdom in regard to the *audi alteram partem* rule. See *Johnson v Unisys Ltd* 2001 (UKHL) 13 and *McCabe v Cornwal Country Council and Others* 2004 (UKHL) 35.

In *SACWU v Dyasi*[53] the employee was promoted and transferred from Newcastle to Johannesburg. The employee requested to be transferred back to Newcastle because of a number of reasons. After the employee returned from leave and reported for duty at Newcastle she discovered that the vacancy had already been filled because of SACWU's lingering consent to the transfer. The employee was told that, because of her failure to report for duty in Johannesburg, it was regarded as desertion and she was dismissed accordingly. The Labour Court held that the employer could indeed terminate the contract and in fact exercised its common law right to choose:[54]

> If a party to a contract breaches a fundamental term thereof or repudiates it, the other party can elect to hold the first to the contract, or to cancel it. In the case of desertion by the employee the choice is not always in fact real. For instance, when the employee deserts and cannot be traced, the employer has no practical choice other than to accept the repudiation. Where there is no real choice, it can probably be argued that the employer did not terminate the contract. In this case the employer did have a real election. It could have transferred the employee and not have terminated the contract... Therefore it was the employer who terminated the contract. It thus dismissed the respondent and it was obliged to do so both substantively and procedurally fair.[55]

When an employee breaches the employment contract the employer has the choice,[56] or as referred to above, the common law choice to keep the employment contract in place together with alternative contractual remedies.[57] In this case, it is clear that the employer decided to terminate the employment contract by dismissing the employee for desertion.

According to common law an employee can be summarily dismissed when in breach of an employment contract, by virtue of wilful absence.[58] This means that an employer can lawfully terminate a contract of employment

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53 *SACWU v Dyasi* 2001 7 BLLR 731 (LAC) 735C-F.
54 SACWU v Dyasi 2001 7 BLLR 731 (LAC) 735C-F.
55 *SACWU v Dyasi* 2001 7 BLLR 731 (LAC) 735C-F.
56 The employer must take the initiative to end the contract of employment in a manner recognised by law as also seen in *National Union of Leather Workers v Barnard NO & Another* 2001 4 SA 1261 (LAC).
57 Du Toit D *et al Labour Relations Law* 5th edition (LexisNexis Durban 2006) hereinafter referred to as Du Toit *et al Labour Relations Law* 380.
58 Basson et al Essential Labour Law 53.

without notice of termination if there is a lawful cause for doing so.[59] In cases such as this, the breach of contract has to be serious enough to justify the termination, which includes the following examples:[60]

- negligence or incompetence of a serious nature by an employee;
- absence from work in certain circumstances;[61]
- failure to obey a reasonable and lawful instruction of the employer, if that refusal is serious and deliberate;[62]
- misconduct;[63] or
- a breach of duty to act in good faith.

The principle of unjust enrichment comes into play in a scenario where an employee breaches his or her employment contract; the concept means that "nobody may be enriched at the expense of another".[64] In other words, the employee gets paid by the employer for the service the employee renders. It is unreasonable to expect of the employer to pay the employee if the employee does not provide services due to absenteeism or desertion. In layman's terms, "no work, no pay" will be reasonable to apply.[65]

Statutory law was legislated by Parliament or a former law making entity.[66] Common law becomes relevant in situations where no statutory law was legislated; there is thus an interaction between statutory law and common law. The statutory law has a protective effect on an employment contract by prescribing limits and performing a levelling function by specifying minimum standards and contractual terms. A contract with less favourable conditions than contained in the statute is generally unenforceable.[67] In the situation

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59 Basson et al Essential Labour Law 53.
60 Basson et al Essential Labour Law 53.
61 Repeated absence and/or absence without reason by the employee, is to the prejudice of his or her employer, absence for an unreasonably long period.
62 In *SACWU v Dyasi* 2001 7 BLLR 731 (LAC) 735C-F; the court held that the duties to render the service where and when required by the contract and the duty to obey lawful instructions are fundamental terms of the employment contract.
63 Including theft, assault or drunkenness.
64 Anon 2010 www.labourguide.co.za.
65 Anon 2010 www.labourguide.co.za.
66 Anon 2010 www.labourguide.co.za.
67 Anon 2010 www.labourguide.co.za.

where we are dealing with unauthorised absenteeism, statutory law is relevant for the reason that it specifies instances when an employee may lawfully be absent from the workplace, even if the condition contained in the contract of employment or company regulations, policies and procedures states the opposite.[68]

Company regulations, policies and procedures may not deviate from the conditions contained in the statute except when the conditions are more favourable.[69] There are some structures that an employer should try and introduce in his or her company policy, regulations and procedures such as: records must be kept in writing of any interviews with wrongdoers; the employee should justify absenteeism; absenteeism should be justified by giving reasons; and reasons could still be unacceptable even though considered valid.[70]

When an employee breaches his or her employment contract in terms of his/her common law duties/obligations, the employer may terminate such a contract in terms of the common law. However in terms of the LRA, there are certain reasons that need to be given and certain procedures that need to be followed before an employer can terminate the employment contract.

3 Fairness criteria for dismissal

Common law focuses on the lawfulness of the termination of the employment contract on the side of the employer and offers almost no protection against unfair dismissal for an employee.[71] Common law does not take fairness or unfairness of the termination of an employment contract into consideration and the employer is not required to give a reason for the termination to the employee.[72] The common law is still gradually experiencing the effect of the Constitution. The current

68 Anon 2010 www.labourguide.co.za.
69 Anon 2010 www.labourguide.co.za.
70 Anon 2010 www.labourguide.co.za.
71 Basson *et al Essential Labour Law* 75.
72 Constructive dismissal, selective non-re-employment and the non-renewal of fixed term contracts were not considered unfair by the common law.

constitutional right to fair labour practices implies that the employee has a right not to be unfairly dismissed.[73] This right, as protected by section 23(1) of the Constitution, should be read with section 185 of the LRA.

In terms of section 23(1) of the Constitution,[74] it was stated that: "everyone has the right to fair labour practices." This fundamental right includes the right not to be unfairly dismissed. To prevent unfair dismissal, dismissal should take place on fair grounds, preceded by a fair procedure.[75] In other words even with valid and substantive reasons for a dismissal, a fair procedure should be followed before an employer can fairly dismiss an employee.[76]

The International Labour Organisation Conventions (the ILO) played, and still plays a role in the origin of the law in unfair dismissals in the form of international labour standards.[77] The most important international labour standard is found in the *Termination of Employment Convention*, 158 of 1982.[78] The effect of the convention is that the employer must have a fair reason to terminate the employment contract and the reasons have to fall under three broad categories. The categories are the employee's misconduct,[79] incapacity or inability to do the work,[80] and the employer's operational requirements.[81] The ILO Convention does not only lay the

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73 Basson *et al Essential Labour Law* 75.
74 The *Constitution of the Republic of South Africa*, 1996.
75 S188 of the LRA.
76 Derek Jackson 2010 *Workplace Discipline*: *Procedural Fairness* www.labourguide.co.za [date of use 18 June 2011] hereinafter referred to as Jackson 2010 www.labourguide.co.za.
77 Basson *et al Essential Labour Law* 76.
78 *Termination of Employment Convention*, 158 of 1982 (hereinafter referred to as Convention).
79 The result of the conduct of the worker relates to the behaviour or conduct of the worker, and there usually is fault on the part of the worker. Examples of misconduct include insubordination, assault, theft, dishonesty, frequent late-coming for work, and intimidation of co-workers.
80 The capacity of the worker relates to the worker's ability to do the job. The employee is either incapable of doing the job due to incompetence, or is incapable of doing the job for medical reasons.
81 Dismissals due to the operational requirements of the employer are also considered to be no-fault dismissals, because the reasons for dismissals are rooted in the employees' ability or behaviour, but rather the needs of the enterprise. Operational reasons are dismissal based on the economic needs of the business or the employer's need to restructure the organisation.

foundations for the reasons for dismissal, but indicates that pre-dismissal procedures have to be followed. The employee also has to be given the opportunity to defend himself against the allegations made against him.[82] The Labour Court, the Supreme Court of Appeal and others often take ILO Conventions into account in deciding whether dismissals are fair or not.[83]

The principle of fairness is entwined in the LRA.[84] Every employee has the right not to be unfairly dismissed and be subjected to unfair labour practice as stated in section 185 of the LRA.[85] However, the questions that arise are: what constitutes a dismissal, and when is such a dismissal unfair?

These questions are answered in sections 186, 187 and 188 of the LRA. Section 186 defines the meaning of the term dismissal, section 187 defines dismissals that are automatically unfair, which is followed by section 188, which describes dismissal that may be fair if the employer has a substantively fair reason for the dismissal and follows a fair procedure.[86] The remedies for dismissal also seem to play a relevant factor in the dismissal procedure.[87]

The employee has to prove the existence of an employment relationship before he can claim relief for unfair dismissal.[88] If an employee claims for unfair dismissal, the onus of proof that he was in fact dismissed for absenteeism or desertion lies with the employee. Section 192(1) and section 192(2) of the LRA states that the aforementioned onus is transferred to the employer to prove the fairness of a dismissal due to absenteeism and desertion and to prove that a fair procedure was followed against the employee, provided that the employee was indeed dismissed.[89]

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82 *Audi alteram partem*-principle.
83 Basson *et al Essential Labour Law* 76.
84 Lesabe 2009 www.labournet.co.za.
85 Du Toit *et al Labour Relations Law* 379.
86 Basson *et al Essential Labour Law* 78.
87 Du Toit *et al Labour Relations Law* 379.
88 Du Toit *et al Labour Relations Law* 396.
89 Cheadle *et al Current Labour Law* 9.

The aforementioned proof has to be determined on a balance of probabilities.[90]

Dismissal means the termination[91] of the employment contract by the employer on the grounds indicated in section 186(1). Section 186(1)(a) refers to situations where an employer may terminate the contract of employment with or without notice.[92] Parties must have entered into an employment contract or alternatively an employment relationship for dismissal to occur.[93] If an employer terminates the contract of employment before the employee started employment, it still constitutes a dismissal.[94]

Section 188(1) of the LRA contains two requirements for fairness regarding to dismissal, namely that the dismissal has to be substantively fair, and secondly that the dismissal has to be procedurally fair, as stated in the previous chapters and paragraphs.[95]

Substantive fairness[96] entails the motivation behind the decision or the reason behind the decision taken by the employer to dismiss the employee or terminate the employment relationship.[97] The substantive fairness of a dismissal should be determined by the facts of each case, including the

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90 Du Toit *et al Labour Relations Law* 396.

91 Terminate means to bring to an end, put an end to, cause to cease, finish & end.

92 The period of notice required may be expressly stated in the contract itself, in terms of a statute such as the BCEA or even in terms of a collective agreement. One week's notice is required during the first six months of employment, two weeks' notice for more than six months but less than a year, and four weeks' notice if employed for more than a year. Termination without notice, also known as summary termination, may be justified if an employee committed a serious fundamental breach in terms of the employment contract. Termination must however still be procedurally fair.

93 Grogan J *Dismissal, Discrimination & Unfair Labour Practices* 2nd edition (Juta Cape Town 2008) hereinafter referred to as Grogan *Dismissal, Discrimination & Unfair Labour Practices* 182. Thus a contract of service complies with the requirements of the *locatio conductio operis*. Contract of work *lacatio conductio operarum*, if terminated does not constitute dismissal.

94 Du Plessis *et al Labour Relations Law* 383.

95 Basson *et al Essential Labour Law* 114-115.

96 Substantive fairness of a dismissal entails a two-stage enquiry. The first is to find out why the employer dismissed the employee, and the second to find out if the reason is adequate.

97 Lesabe 2009 www.labournet.co.za.

seriousness of the breach and attempts made to comply with the LRA as not every action of misconduct deserve dismissal.[98]

Procedural fairness prescribes the procedure according to which the employer's decision to terminate the relationship was effected. A fair procedure will entail a fair disciplinary enquiry, investigation or pre-dismissal procedure. Procedural fairness may be regarded as the protection of the right of the worker during the process of discipline or dismissal.[99] In *Mondi Timber Products v Tope*[100] procedurally fair dismissals may be summarised as follows:

> At disciplinary hearings presided over by a layman, it cannot be expected that all the finer necessities which a formal court of law would adopt will always be observed... Nor is an employee's right o a fair hearing an inflexible package, whose rules are to be applied mechanically to every situation. A certain amount of flexibility must be allowed. The test is whether the hearings were fair when the proceedings are judged in their broad perspective.[101]

The differentiation between substantive and procedural fairness in the requirement for a fair dismissal essentially means that the employer has to be able to prove that the decision to dismiss had been reasonable, after which a fair procedure was followed. In other words the decision to dismiss should be defensible.[102]

Separate enquiries are normally made by judges and arbitrators when making findings whether a dismissal is substantively or procedurally fair. However, it is sufficient to determine that the dismissal was either procedurally or substantively unfair in order to warrant unfair dismissal.[103] Substantive and procedural requirements are independent of each other,

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98 Lesabe 2009 www.labournet.co.za.
99 *Dolo v Commission for* Conciliation, Mediation and Arbitration and Others (JR 1655/07) [2010] ZALC 148; (2011) 32 ILJ 905 (LC) 19-28.
100 *Mondi Timber Products v Tope* 1997 18 ILJ 149 (LAC) 149 A-H.
101 *Mondi Timber Products v Tope* 1997 18 ILJ 149 (LAC) 149 A-H.
102 Grogan *Dismissal, Discrimination & Unfair Labour Practices* 219.
103 Grogan *Dismissal, Discrimination & Unfair Labour Practices* 221.

and failure to satisfy either one of the requirements will result in unfair dismissal.[104]

The LRA considers three circumstances (also known as reasons for dismissal) under which dismissal may be considered fair. These circumstances are misconduct,[105] incapacity[106] and operational requirements as stated above.[107]

In the majority of cases the employer will seek to justify the fairness of a dismissal on the grounds of conduct such as the misconduct of an employee by being absent or deserting employment.[108] An example of misconduct will be when an employee disappears for a long period without consent and the whereabouts and intentions of the employee are unknown, in other words wilful absence.[109] It is not misconduct when an employee constantly stays away because of illness. This would fall under the category of incapacity.[110] When an employee disappears the employer has to ascertain the reasons for such disappearance. Should the employer not know the reasons for the disappearance he needs to decide what route to

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104 In *Gibb v Nedcor Limited* 1997 12 BLLR1580 (LC) at 1598, it was found that for a dismissal to be fair, s 188(1) requires the employer to prove both a fair reason and fair procedure; Jali AJ said "The provisions of section 188(1) does not mean that the Court ... cannot decide to call evidence on substantive fairness first and later call evidence on procedural fairness or *vice versa*, that is try to separate the issues. If the issues are separated, final judgment should only be given after all the evidence has been heard".

105 Dismissal for misconduct refers to a situation where the employee was dismissed for contravening a rule or wilfully refusing to fulfil an obligation under the employment contract. Behaviour of the employee that damages the employment relationship with the employer or other employees may also fall under this heading.

106 Dismissal for incapacity refers to a situation where the employee is unable to perform his or her duties, and in such situation it is out of the control of the employee.

107 Anon 2010 www.labourguide.co.za.

108 Some of the more important forms of misconduct reflected in the cases reported in the year under review are dealt with here: absence from work without permission or good reason; abusive and derogatory statements; duty to act in good faith; inconsistency of the employer; insubordination and insolence of employee; negligence/failure to comply with policies and procedures; off duty misconduct and misconduct prior to dismissal; racist insults and comments; procedural fairness; incapacity; ill-health or injury, and poor work performance.

109 Also better known as desertion.

110 *National Union of Metalworkers of SA on behalf of Ivase and Whirlpool SA (Pty) Ltd* 2005 26 ILJ 985 (SCA).

follow.[111] The route regarding the dismissal of an employee for misconduct due to desertion or absenteeism is different to the route followed for dismissing the employee for incapacity.[112] In practice, the distinction between different forms of dismissals is useful in order to decide what legal route to follow, although the division is not absolute. In some cases one can distinguish between categories, in other cases the categories will overlap.[113]

Section 188(2) requires the employer to take the relevant Code[114] issued into account to determine whether dismissal will be fair.[115] Every case is unique and different approaches in different circumstances are established by the Code.[116] Both employment justice and efficient operation of business are important in this regard.[117] Dismissal should only be imposed as the last measure in a series of penalties, or if the misconduct is serious.

It may be argued that, when challenging the fairness of dismissal, internal remedies should first be pursued before raising a claim under the LRA. If internal remedies are exhausted the employee may, according to section 191 of the LRA, request the CCMA to conciliate the dispute within 30 days after the dismissal. It is a general rule that proceedings are directed by what an employee believes the dispute to be.[118]

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111 Parsee NL *Absenteeism in the Workplace* Merc LJ South Africa (University of Kwa-Zulu Natal 2008) hereinafter referred to as Parsee 2008 SA *Merc ILJ* 522-529.

112 This will happen where an employee was in jail and did not intend to terminate the employment contract and was not able to notify the employer of his whereabouts. It will be concluded as incapacity.

113 Grogan *Dismissal, Discrimination & Unfair Labour Practices* 218.

114 The Code, does not consist of rules but rather of guidelines, it must be taken into consideration when assessing whether dismissal is fair. There is presumption that the code has to be followed. The code does not supersede disciplinary codes and procedures contained in contracts or agreements. The code will only apply if there are no such procedures.

115 Basson *et al Essential Labour Law* 114-115.

116 Item 1(1) of the Code.

117 Item 1(3) of the Code.

118 *NUMSA v Driveline Technology (Pty) Ltd* 2000 21 ILJ 142 (LAC) 158B-C.

The penalty of dismissal should be applied in the same way as it was applied in the past, i.e. consistently applied to all other employees.[119]

3.1 Dismissal for a reason related to conduct

As stated above, the Code of Good Practice offers guidance to determine whether dismissal was fair and in accordance to fair procedure. Schedule 8 Item 1(3) is considered a key principle in the code and states the following:

> Employers and employees should treat one another with mutual respect; a premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.[120]

In cases of misconduct[121] an employer will be entitled to discipline the employee depending on the nature of the conduct, for example, absence from work.[122]

Before an employee can be dismissed there are disciplinary procedures that should be conducted and/or established.[123] Required standards and conduct of a business need to be made clear and available to the employees in a manner that is easily understood, especially with reference to the concept of discipline.[124]

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119 Item 3(6) of the Code.
120 The Code.
121 There are essential questions in misconduct cases that need to be assessed, such as: was there contravention of a rule relevant to the workplace, is the rule reasonable and valid, was the employee aware of the rule, was dismissal an appropriate sanction for contravention of the rule?
122 Dismissal is justified if the reason for doing so is fair, such as cases of serious misconduct (explained below) or repeated offences.
123 Item 3(1) of the Code.
124 Item 3(1) of the Code. Copies of the disciplinary code can be made available to the employees or employees can be informed by holding introduction programs.

3.1.1 Substantive fairness

Substantive fairness can be guided by looking at whether or not the employee has breached a valid existing rule[125] and if dismissal was appropriate. A rule has to be consistent with the law or public policy in order to be considered valid, in other words it should be lawful[126] and reasonable.[127] The validity of rules is rather tested against the objective criteria of the law and public policy, than the reasonableness of the individual employer.[128]

Thus, when a rule is broken or a standard is not met,[129] the effective way in dealing with it is in an informal way, such as a warning, final warning and then dismissal for repeated misconduct.[130] An employee would normally not be dismissed for a first offence, except when the misconduct is so serious that it makes the continued employment relationship between the employee and employer intolerable.[131] Serious misconduct is subject to each case's own merits. Examples of serious misconduct would be gross insubordination, wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer or fellow employee,[132] client or customer, and gross dishonesty.[133] An employee may also be disciplined by an employer for conduct not covered by the disciplinary code, away from the workplace or outside working hours, that damages the trust relationship between employee and employer

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125 An employer should consider whether or not the employee contravened a rule regulating conduct in *nexus* with the workplace; the rule was reasonable; employee was aware of the rule; and if it was applied consistently.

126 A rule is unlawful when it compels an employee to perform an unlawful act or an act prohibited by statute; in such instance the employee is free to disregard the rule.

127 If a rule is unreasonable because it compels the employee to perform work or action that he/she cannot reasonably be expected to perform, breach of the rule or instruction cannot be treated as conduct.

128 Du Toit *et al Labour Relations Law* 399.

129 This entails a twofold enquiry; first the rule must be interpreted, if rule creates an offence the elements must be identified.

130 Item 3(3) of the Code.

131 Item 3(4) of the Code.

132 Anon 2010 www.labourguide.co.za.

133 Item 3(4) of the Code.

in the sense of productivity, cost-effectiveness and permanency of the employer's business.[134]

When it is established that the employee breached a rule it has to be decided if the breach justifies dismissal.[135] Different factors may be taken into consideration when making decisions according to the Code, such as the gravity of infringement and the consistency in taking disciplinary action.[136] However, the discretion lies primarily with the employer.[137]

To assess the gravity of an employee's infringement, the employee's personal circumstances, nature of the employee's job, and circumstances of infringement should be considered. Aggravating[138] and mitigating[139] factors should also be considered.

Consistency in past practice and treatment of other employees who participated in similar misconduct has to be applied by the employer. For example, if two employees have been absent from work under similar circumstances, an employer cannot dismiss the one and give the other a warning. To promote consistency, proper record should be kept of disciplinary offences, action taken and reasons therefore.[140] The only justified differentiation between employees who committed the same offences and/or misconduct shall pertain to the personal circumstances[141] of the employee or the merits[142] of the situation.

It is currently accepted by courts that the discretion to dismiss lies with the employer, but the discretion has to be executed fairly. Interference by

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134 Du Toit *et al Labour Relations Law* 399.
135 An enquiry at this stage relates to an enquiry conducted by a criminal court.
136 *Early Bird Farms (Pty) Ltd v Mlambo* 1997 5 BLLR 541 (LAC) 545.
137 Du Toit *et al Labour Relations Law* 402.
138 Aggravating factors include: racist insults, wilfulness, lack of remorse, the employee's attention was previously drawn to seriousness of particular infringement, and the record of employee.
139 Mitigating factors include: exemplary service, long service, remorse, personal circumstances of employee, unblemished record, and an employee acting out of fear.
140 Du Toit *et al Labour Relations Law* 400.
141 The length of service and disciplinary record of the employee.
142 The reason for misconduct, the factors that played a role.

commissioners should not be considered lightly. In *Rustenburg Platinum Mines Ltd v CCMA*[143] it was stated that commissioners should exercise their power to intervene with caution and have to afford the sanction of the employer "a measure of deference".[144]

3.1.2 Procedural fairness

Procedural fairness requires natural justice. When suspecting a breach in the employment relationship, an investigation needs to be done and the decision maker has to keep an open mind.[145] Natural justice is the process by which a decision is reached; it focuses on the *maxims audi alterum partem* and *nemo iudex in propria causa* principles.[146] These are concepts of administrative law. There are three basic requirements for applying the principles of natural justice in the context of a disciplinary investigation which are contained in the Code.

Schedule 8, item 4(1) of the Code, conveys these principles applicable to the conduct of an investigation. The most important principle is to give the employee an opportunity to state his case, to rebut the allegations against him, and to put relevant information before the decision maker before the latter makes a final decision. Finally the decision maker should act in good faith.[147] To give effect to fairness, the affected party or the party likely to be affected needs to participate in the proceedings, which is supported by the principle of the *audi alteram partem* rule,[148] as stated above.[149]

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143 *Rustenburg Platinum Mines Ltd v CCMA* 2006 11 BLLR 1021 (LCA) 42.
144 *Rustenburg Platinum Mines Ltd v CCMA* 2006 11 BLLR 1021 (LCA) 42.
145 Du Toit *et al Labour Relations Law* 403.
146 "Hear the other side" and "no one can be a judge in his own case".
147 It is not always necessary for parties to meet in person. Where there is no factual dispute parties may consider written representations. In *Semenya v CCMA* 2006 6 BLLR 521 (LAC) 521H-I it was considered sufficient compliance with the statutory requirements where fair procedure after the decision to dismiss was complied with.
148 In terms of the rule all parties affected by the proposed decision should be granted an opportunity to state their case before the decision is made, as stated above.
149 Lesabe 2009 www.labournet.co.za.

The approach used by the employer to comply with procedural fairness may be adapted to the specific workplace,[150] for example according to the number of employees.[151] According to Item 3(1) of the Code, "the form and content of disciplinary rules vary according to the size and nature of the employers business", and that "in general, a larger business will require a more formal approach to discipline".[152]

Procedure may not be dispensed with because a person is a senior managerial employee, temporary employee or probationer. However, as stated above, the process may be adapted according to circumstances of the case.[153] It should be noted that if a disciplinary procedure is incorporated into the contract of employment, the employer will be bound by it.

Before an employee is charged with misconduct, the charge has to be investigated. The employee is then served with a notice of the hearing, describing the charge which the employee is supposed to reply on, the time and place of the hearing, and the employee's right to be accompanied by a representative.[154] At the hearing the presiding officer has to explain the nature of the proceedings, the right to call witnesses, and the procedure that will be followed.[155]

Item 4(1) of the Code provides the following guidelines in relation to a fair procedure:[156]

i) Notification of factual allegations;

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150 *Moropane v Gilbeys Distillers and Vintners (Pty)* Ltd 1997 10 BLLR 1320 (LC) 1324I.

151 *Mjaji v Creative Signs* 1997 3 BLLR 632 (CCMA) 148-149; a small employer's failure to comply with the procedural requirements of the code was incorrectly condoned on the basis of the no difference-principle.

152 Cohen 2005 *Merc LJ* 34.

153 Du Toit *et al Labour Relations Law* 405.

154 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 332.

155 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 332.

156 Non-compliance with the guidelines will not render procedure unfair, it will be considered unfair on a balance of probabilities.

Employees should sufficiently be informed of the factual allegations against them[157] in a language the employee understands. Investigation should gather information, form a *prima facie* view, and invite a response from the employee.[158] In other words if the employee was absent the employee should be informed that he or she is charged with absenteeism and the employer should have gathered information regarding said absenteeism.

ii) Time to prepare;

The employee needs a reasonable time to prepare a response (notice)[159] which will depend on the circumstances of the case and complexity of the issues. Dismissal will be unfair if the employee is prejudiced.[160]

iii) Opportunity to state a case;

An employee should be entitled to respond to allegations and make representations such as details regarding their personal circumstances. The employee may also adduce evidence, conduct cross examination and address the employer.[161]

iv) Representation;

Trade union representatives or fellow employees are entitled to assist employees, but not legal representatives.[162] However, recent case law indicates that when an employee's legal

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157 In *POPCRU v Minister of Correctional Services and Others* 1999 20 ILJ 2416 (LC) 59, it was stated that "while the standard for a disciplinary charge sheet cannot be the same as for one in a criminal trial the information on the charge sheet must be sufficient to make the accursed right to prepare a real and not an illusory right."

158 Du Toit *et al Labour Relations Law* 407.

159 Notifications were concluded unfair in *Miksch v Edgars Retail Trading (PTY) Ltd* 1995 16 ILJ 1575 (IC) 407.

160 *Shoprite Checkers (Pty) Ltd v CCMA & Others* 1998 5 BLLR 510 (LC) 493.

161 It is not compulsory for the employees to attend disciplinary hearings; the employer may proceed with the hearing unless the employee gives a good reason for his or her absence. In *SACWU v Daysi* 2001 7 BLLR 731 (LAC) 735C-F, the employee has apparently deserted his employment but was in fact busy rendering services at a different workplace; this employer was not excused from holding a hearing.

162 Du Toit *et al Labour Relations Law* 408.

representative is refused at a hearing it can impair an employee's right to fair procedure.[163]

v) The decision maker;

The chairperson must be free of bias against the employees, must keep a clear view of the situation and act in an investigatory capacity.[164]

vi) Giving reasons;

The employees must be informed of the chairperson's decision preferably in writing and given the reasons for such decision related to conduct;[165] the employees must also be informed that they have the right to challenge the decision.[166] In other words the employee needs to be informed that he was dismissed for being absent for an unreasonably long period, and have the right to appeal to the decision of the chairperson.

vii) Keeping records of hearings;

The employers/chairpersons are required to keep record of hearings, in order to avoid future disputes.[167]

viii) Internal appeal;

Employee has a right to dispute to a higher body or person within the organisational structure of his employment about dismissal, although the Code does not require such appeal.[168]

An employer may handle each case separately or collectively when a number of employees have been accused of participating in the same

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163 Grogan J *Workplace Law* 9th edition (Juta 2007) hereinafter referred to as Grogan *Workplace Law* 240.

164 Ideally a chairperson would be someone who is: not involved in or give rise to allegations; is superior to the employee; and has no personal interest in the outcome. A chairperson should put information obtained by absence of the employee to him/her for response; refrain from discussing the matter; establish true facts; allow witnesses; avoid conducting a trial in the criminal sense; and take into account credible evidence.

165 Grogan *Workplace Law* 200. Grogan states that "it is not a requirement for a valid decision that reasons be given to it." Failure to give an employee reasons for his dismissal may be considered procedurally unfair.

166 Schedule 8, item 4(3) of the Code.

167 Appeals are normally led on the record of a disciplinary hearing or a summary of the evidence led according to the arbitrator in *NUMSA v John Thompson (Pty) Ltd* 1997 7 BLLR 932 (CCMA).

168 Du Toit *et al Labour Relations Law* 411. This is referred to as an internal appeal. Collective agreements may provide otherwise.

misconduct, for example collective stay-away actions.[169] If circumstances of the employees are different, a collective process will prejudice proceedings and separate hearings will be preferred.[170]

According to the LRA, in section 188(1)(b) read together with item 4 of Schedule 8 of the Code and related cases, it can be said that, for a dismissal to be fair it has to be in accordance with fair procedure, depending on the reason for dismissal.[171] The employer cannot be reasonably expected to always comply with the above guidelines. There are exceptional circumstances in which the employer could or may dispense with pre-dismissal procedures.[172]

In certain situations it is easier said than done for the employer to afford the employee a chance to be granted a fair procedure. There are many reasons why an employer could find himself or herself in the abovementioned situation.[173] For example, when an employee has been charged with unauthorised absenteeism or desertion, or is awaiting bail in prison (the date of which is unknown). It could also happen in cases where the employee may be in such a situation that it would not be possible to follow a proper counselling and/or investigation process in order to make an informed decision, and as a result becomes subject to proposed dismissal or in circumstances when the employee waives his right to a fair procedure.[174] Under the 1956 LRA the court accepted that employees could be fairly dismissed without hearings; this was confirmed in the Code. Item 4(4) of Schedule 8 of the Code presently stipulates:[175]

> In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.[176]

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169 Grogan *Workplace Law* 229.
170 Du Toit *et al Labour Relations Law* 412.
171 Fairness would require that the employer follow a fair pre-dismissal process in the case of dismissal resulting from misconduct.
172 Item 4(4) of the Code.
173 Lesabe 2009 www.labournet.co.za.
174 Lesabe 2009 www.labournet.co.za.
175 Lesabe 2009 www.labournet.co.za.
176 Lesabe 2009 www.labournet.co.za.

The Code does not expressly state what these exceptional circumstances could be. However, there can be distinguished between two broad categories of exceptional circumstances as identified by the court. The first is crisis zone-situations and the second is when the employee waives his or her right to a hearing.[177] With reference to violent strikes in the mining industry, where employees were killed and injured, the employers argued in the older cases that it was impractical to hold hearings in crisis zones. The Industrial Court agreed in *Lefu & others v Western Areas Gold Mining Co Ltd*,[178] but in *Leboto v Western Areas Gold Mining Co Ltd*[179] the Industrial Court stated that disciplinary inquiries should have been held. It depends on the facts and whether or not a crisis zone existed, and in such circumstances it is an exception rather than a rule.

In *Hayward v Protea Furnishers*[180] an employee, Hayward, was served with a notice to attend a disciplinary hearing after the loss of R71,000 had occurred together with certain irregularities. Hayward was involved in an accident the day before the hearing and was unable to attend the hearing. The hearing was postponed for two months. Hayward attended the hearing with his lawyer, but Protea Furnishers refused to allow the lawyer to represent Hayward, as a result of which the hearing was adjourned. No further hearing was scheduled and Hayward was dismissed. According to the commissioner the dismissal was procedurally unfair because it was neither a crisis zone-situation nor exceptional circumstances as envisaged in item 4(4) of the Code.[181]

A waiver occurs when an employee with knowledge of a legal right abandons such a right, and by doing so, waives the right to a disciplinary enquiry. The employee waives his right if the employee's conduct is of such a nature that the employer cannot be expected to hold an enquiry.[182] In

177 Basson *et al Essential Labour Law* 125-130.
178 *Lefu & others v Western Areas Gold Mining Co Ltd* 1985 6 ILJ 307 (IC) 307.
179 *Leboto v Western Areas Gold Mining Co Ltd* 1985 6 ILJ 299 (IC) 299-302.
180 *Hayward v Protea Furnishers* 1997 3 LLD 106 (CCMA) 124.
181 Basson *et al Essential Labour Law* 125-130.
182 Basson *et al Essential Labour Law* 125-130.

Mfazwe v SA Metal and Machinery Co Ltd[183] the employee, Mfazwe, had been given a series of warnings about the speed of work and his attitude. The final warning contained a threat of dismissal. When Mfazwe's supervisor approached him to tell him what was expected of him the supervisor was treated with contempt, which indicated that Mfazwe was not interested in a working relationship. Mfazwe was dismissed without a disciplinary enquiry. The Industrial Court stated that under the circumstances the dismissal was concluded to be fair.

It may also be assumed that the employee waived the right to a disciplinary enquiry if the employee refuses or fails to attend the enquiry.[184] However the employer has to ensure that the employee's failure to attend is not because the employee was not notified or because the employee was unable to attend due to illness or some other unforeseen circumstance.[185] If an employee still fails to attend the enquiry and the employer is uncertain of the reason, the employer may proceed with the enquiry in the employee's absence.[186]

Another situation that may be concluded as an exceptional circumstance is when an employee cannot be traced, for example if employees have deserted their employment.[187] Initially the view of the courts was that, when an employee deserts or absconds, there was no need for disciplinary hearings, because the employee terminated the employment contract.[188] In *SABC v CCMA & others*[189] and *SUCWU v Dyasi*[190] it was held in the Labour Court and the Labour Appeal Court that the dismissal of employees

183 *Mfazwe v SA Metal and Machinery Co Ltd* 1987 8 ILJ 492 (IC) 492-493.
184 Basson *et al Essential Labour Law* 125-130.
185 Basson *et al Essential Labour Law* 125-130.
186 Basson *et al Essential Labour Law* 125-130.
187 Grogan *Dimissal, Discrimination and Unfair Labour Practices* 363-366.
188 *Maila & others v Hungry Eye Restaurant* 1990 11 ILJ 400 (IC) 400; *Seven Abel CC t/a The Crest Hotel v HRWU & others* 1990 11 ILJ 504 (LAC) 504.
189 *South African Broadcasting Corporation v CCMA & others & others* 2001 22 ILJ 487 (LC) 13.
190 *SUCWU v Dyasi* 2001 7 BLLR 731 (LAC) 735C-F.

who deserted their employment occurs when the employer accepts the employee's repudiation.[191]

In *SABC v CCMA and others*[192] the court pointed out that absence is not conclusive evidence of desertion. Until it is established that the employee has no intention to return to work, the employee is absent without leave. When an intention is established there is no need to hold a disciplinary enquiry.[193] The court made the following suggestions in paragraph 13 of *SABC v CCMA* and others:[194]

> What constitutes desertion is a matter of fact. In some instance an unexplained absence for a reasonable period, that is to say, reasonable in relation to the employer's operational requirements, will establish the fact of desertion.[195]

The court continued in paragraph 18, stating the following:

> In the instance of an employee who remains away from the workplace and whose whereabouts are not known and who is out of reach of the employer, it is plainly impractical to impose upon the employer the obligation to convene a disciplinary inquiry before reaching the conclusion that the fact of desertion has occurred and in consequence of which he is entitled in response thereto to elect to terminate the contract.[196]

Whether or not the employer should conduct a disciplinary enquiry before taking a decision to dismiss will depend on the relevant circumstances. If the employee's whereabouts are known, nothing prevents the employer from taking disciplinary action. Upon failing to attend the hearing the employer can hold an enquiry in the employee's absence and decide

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191 Grogan *Dimissal, Discrimination and Unfair Labour Practices* 363-366. See also Dekker AJ *Gone with the wind and not giving a damn: Problems and solutions in connection with dismissal based on desertion* Merc LJ South African (University of South Africa 2010) hereinafter referred to as Dekker 2010 SA *Merc LJ* 104-113.

192 *South African Broadcasting Corporation v CCMA & others & others* 2001 22 ILJ 487 (LC) 13.

193 Grogan *Dimissal, Discrimination and Unfair Labour Practices* 363-366.

194 *South African Broadcasting Corporation v CCMA & others & others* 2001 22 ILJ 487 (LC) 13.

195 *South African Broadcasting Corporation v CCMA & others & others* 2001 22 ILJ 487 (LC) 13.

196 *South African Broadcasting Corporation v CCMA & others & others* 2001 22 ILJ 487 (LC) 18.

whether the employee is guilty of desertion and if termination is justified.[197] If the employee decides to attend the hearing/enquiry and pleads that he had the intention to return to work, the case has to be treated as absence without leave, unless the employer's disciplinary code makes provision for absence for a period that amounts to desertion.[198] In conclusion, an employer should in principle hold an enquiry before terminating an employment contract of a deserter. In *SABC v CCMA and others*[199] the employer knew where the employee was, and should have requested the employee to give an explanation of his whereabouts.

The Labour Court found a dismissal without a disciplinary enquiry unfair when the enquiry was made in the absence of an employee spending time in jail. The employer dismissed the employee for being absent without leave.[200] On the employee's return to work the employer held a second disciplinary enquiry and the employee was again dismissed for the same reason as well as for his failure to inform the employer where he had been. The Court upheld the arbitrator's decision that the dismissal was unfair, for the reason that the employer knew where the employee had been.[201]

A period of time needs to lapse before an employee's absence can conclude the presumption that the employee does not intend to return to work and that the employer may dispense with an enquiry. It is uncertain how this period is determined. One criterion that could be considered is when the employer could reasonably be expected to endure the absence of the employee without seeking permanent replacements.[202] Many problems go hand in hand with regard to seeking permanent replacement, such as situations where the employee returns from being absent with a very good reason for being absent. Upon the return of an absent employee the

197 Grogan *Dimissal, Discrimination and Unfair Labour Practices* 363-366.
198 Grogan *Dimissal, Discrimination and Unfair Labour Practices* 363-366.
199 *South African Broadcasting Corporation v CCMA & others & others* 2001 22 ILJ 487 (LC) 453E.
200 *Trident Steel (Pty) Ltd v Commissioner for Conciliation, Mediation & Arbitration & Others* 2005 26 ILJ 1519 (LC) 1522.
201 *South African Broadcasting Corporation v CCMA & others & others* 2001 22 ILJ 487 (LC) 453E-H.
202 *South African Broadcasting Corporation v CCMA & others & others* 2001 22 ILJ 487 (LC) 454E-H.

employer can or could reinstate the employee, but what happens to the employee that has been appointed while the other employee was absent? If the employee who was absent is not reinstated, can the dismissal be considered unfair by an arbitrator of the CCMA? No clear answer is to be found in case law; but it is clear that if it is possible for an employer to hold a disciplinary enquiry, the employer should do so.[203]

According to Du Toit[204] not all cases of unauthorised absenteeism or desertion qualify as exceptional circumstances for the purpose of item 4(4). In these cases an employer has to conduct a proper investigation upon the employee's return[205] to establish whether or not same will constitute exceptional circumstances as aforementioned.

The expression in the Code that pre-dismissal procedures may be dispensed with, should be viewed in the context of the need for a hearing as stated in *Librapac CC v Moletsane NO & Others*.[206] The CCMA has condoned situations where exceptional circumstances arose out of the small size businesses and the impracticality of complying with such a requirement, as seen in *ECCAWUSA obo Nkosi & Another v Wimpy Kempton City* and *MWU obo Heydenrych/Turbine Versions (Pty) Ltd t/a Wonder Air*.[207] In *ECCAWUSA obo Nkosi & Another v Wimpy Kempton City* it was held that, because the employees assaulted their employer, it constituted such gross misconduct that it rendered the continuation of the employment relationship intolerable and permitted the employer to depart from the normal requirements of fair procedure.[208] In *MWU obo*

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203 *South African Broadcasting Corporation v CCMA & others & others* 2001 22 ILJ 487 (LC) 454E-H.

204 Du Toit *et al Labour Relations Law* 407.

205 Du Toit *et al Labour Relations Law* 407. Also see *South African Broadcasting Corporation v CCMA & others and Others* 2001 4 BLLR 449 (LC), *SACWU v Daysi* 2001 7 BLLR 731 (LAC) and *Seabelo v Belgravia Hotel* 1997 6 BLLR 829 (CCMA) as already referred to above.

206 *Librapac CC v Moletsane NO & Others* 1998 19 ILJ 1159 (LC) 1163E-F.

207 *ECCAWUSA obo Nkosi & Another v Wimpy Kempton City* 1998 3 BALR 278 (CCMA) 33 and *MWU obo Heydenrych/Turbine Versions (Pty) Ltd t/a Wonder Air* 2001 11 BALR 1187 (CCMA) 1191.

208 Cohen T *Procedurally Fair Dismissal - Losing the Plot?* Merc LJ South Africa (University of Kwa-Zulu Natal 2005) hereinafter referred to as Cohen 2005 *Merc LJ* 37.

Heydenrych/Turbine Versions (Pty) Ltd t/a Wonder Air the CCMA it was held that:

> exceptional circumstances would *inter alia* include the gravity of the offence, the nature and size of the enterprise, the feasibility of adhering to strict procedural principles, the relationship between the parties and other considerations such as monetary and time factors.[209]

The requirements of procedural fairness may seem relaxed in the light of the abovementioned but it must be kept in mind that procedural requirements may not be dispensed with if the requirements would make no difference to the outcome of the decision. The "no difference"-principle has been rejected entirely by our courts.[210]

3.2 Incapacity

When dealing with incapacity the employer has to establish the permanency or temporary state of incapacity according to Item 10, Schedule 8 of the Code. Secondly, the extent of incapacity needs to be investigated by the employer.

The employee has a duty to render services to the employer, and if the employee can not render these services the contract may be terminated or merely suspended.[211] The Code distinguishes between incapacity due to ill

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209 Cohen 2005 *Merc LJ* 37.

210 *Mjaji v Creative Signs* 1997 3 BLLR 321 (CCMA) 1113; it was found that if more formal procedures were followed by the employer, the dismissal would probably have led to a different result .

211 Grogan *Workplace Law* 51-52.

health or injury;[212] poor work performance;[213] incompatibility,[214] and impossibility of contractual performance.[215]

As stated previously, when a contract becomes impossible to perform, the contract automatically terminates due to no fault of the employer or employee.[216] According to Grogan the impossibility to perform has not been raised in South African Courts as a defence against unfair dismissals, for the reason that it has different consequences when raised by employees and/or employers. The following principles apply when an employee finds it impossible to perform:[217]

- if the impossibility of the contract is temporary, for example due to illness or injury, the contract is suspended for the duration of the incapacity. During this time the employer needs not to perform his obligations in terms of the contract, for example paying the employee for this period.
- If the impossibility is permanent or for an extended period, for example due to an extensive jail period or permanent incapacity, the contract automatically terminates once such circumstance is established.

The problem arises when the employee is released from jail or when the employee recovers from illness and claims unfair dismissal. These cases may be treated in two different ways.[218] The court may accept that the contract terminated when the employee's absence became unreasonable,

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212 It has to be considered whether the employee is able to perform the work, the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted and the availability of suitable alternative work.

213 There has to be considered whether the employee failed to meet a performance standard and whether the employee was aware of and given fair opportunity to meet the required standard.

214 Incompatibility may be defined as inability to work in harmony either within the corporate culture of the business or with fellow employees.

215 Cases may be dealt with on the basis of temporary or permanent incapacity, depending on facts.

216 Grogan *Dismissal, Discrimination & Unfair Labour Practice* 204.

217 Grogan *Dismissal, Discrimination & Unfair Labour Practice* 204.

218 Grogan *Dismissal, Discrimination & Unfair Labour Practice* 204.

or it may be accepted that the contract was terminated when the employer accepted the employee's repudiation by appointing someone else. It is however unlikely that the employer would be considered to have acted unfairly.[219]

3.3 Remedies pertaining to unfair dismissal

Disciplinary powers of the employer flow from the contract of employment. Employers may take disciplinary steps against the employee if the employee breaches an express or implied term in the contract of employment.[220] The ultimate sanction to be imposed on an employee by an employer is termination of the employment contract, in other words dismissal. When an employee is dismissed and such dismissal is substantive or procedurally unfair, remedies come into play. To determine the suitable remedy, one needs to determine the extent of the unfairness. There are different routes to follow when one needs to resolve a dismissal dispute.

The dispute may be referred for conciliation to either a council or to the CCMA. When conciliation is unsuccessful, one may refer a dispute for arbitration by the CCMA, council, or for adjudication by the Labour Court. When a dismissal is found to be unfair by one of the aforementioned institutions, the employer may be ordered to reinstate,[221] re-employ,[222] or compensate the employee.[223]

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219 Grogan *Dismissal, Discrimination & Unfair Labour Practice* 204.

220 Grogan *Dismissal, Discrimination & Unfair Labour Practice* 380.

221 To reinstate means to restore the original contract and not to make a new one, according to *SEAWU v Trident Steel* 1986 7 ILJ 418 (IC) 437E-F.

222 To re-employ means to terminate the previously existing employment relationship, and to create a new employment relationship, possibly on different terms.

223 S193(1)(a)-(c). To compensate an employee, there are three formulae provided, depending on the nature of the unfairness, namely remuneration (remuneration is defined as any payment in money or in kind made or owing to any person in return for that person's work), date of dismissal (the equivalent of an employee's remuneration is the rate of the employee's earnings on said date) and just and equitable in all circumstances (compensation has to be fair to the employer as well as the unfairly dismissed employee). There are also limitations to compensation. Compensation for procedural or substantive unfairness may not exceed the equivalent of 12 months, according to s194(1).

At the CCMA the commissioners play an oversight role; their only task is to determine whether the dismissal is substantively and procedurally fair. Commissioners have to hear a matter *de novo*, and then apply the Code while performing abovementioned tasks.[224] In other words, it is the commissioner's task to determine whether the employer used his or her discretion correctly and fairly. The decision of an employer to dismiss has to be tested by taking into account what a reasonable employer would have done. The reasonableness of a dismissal will be evaluated.[225]

4 Desertion

In chapter 1 it has already been established that desertion occurs when an employee is absent from work for a period of time that supports or confirms the conclusion that the employee does not plan to return to work.[226]

The problem for the employer is to decide whether or not the employee has deserted his or her work, which will constitute a breach of contract, and whether the employer has the right to terminate the employment contract after desertion has been established.[227] In other words, the employee did not resign; the employer dismissed the employee by means of termination of the employment contract. This opens the door to unfair dismissal.[228]

In *Seabelo v Belgravia Hotel*,[229] the applicant worked for the respondent as a barman at the Belgravia Hotel. The applicant (the employee) wished to visit his ill mother in Rustenburg and the respondent (the employer) granted him one day of leave. On his return to work six days later, without contacting his employer regarding his intention to stay away for a longer period of time, he found that he had been dismissed without a disciplinary enquiry, and another person was employed in his position. The applicant

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224 *National Union of Mineworkers (NUM) & others v CCMA & others* (LC) Case number JR 2423/06 Judgement 13 March 2009.
225 *National Union of Mineworkers (NUM) & others v CCMA & others* (LC) Case number JR 2423/06 Judgement 13 March 2009.
226 Anon 2010 www.labourguide.co.za.
227 Anon 2010 www.labourguide.co.za.
228 Anon 2010 www.labourguide.co.za.
229 *Seabelo v Belgravia Hotel* 1997 6 BLLR 829 (CCMA) 831.

alleged that he was unfairly dismissed because no disciplinary enquiry was held. No evidence was found that the employee had the intention not to return to work, which is one of the essential elements in concluding that desertion has taken place.[230]

The arbitrator carefully observed the instance and it seemed obvious that the employer did not make an enquiry about the reasons for the employee's absence and was unwilling to discuss the matter when the employee returned. Even though the employer was not contacted by the employee, the arbitrator felt that the employer acted too quickly in employing a new employee based on the faulty conclusion of desertion. The arbitrator awarded reinstatement of the employee.[231]

It is difficult to establish whether or not an employee has the intention to return to work.[232] Whether the employee informs the employer that he or she does not plan or intend to return to work, and whether the employer can conclude that the employee does not want to return to work,[233] each case needs to be judged by its own circumstances.[234] It has been held that if an employer dismisses an employee while he is in prison, the dismissal will be unfair, as the employer knew about the employee's whereabouts. It has also been held that if an employee represented himself for work after being released from prison a few years after his dismissal the claim can be considered prescribed by the CCMA.[235]

Be mindful that the employees accused of desertion have the procedural right to present their cases before their contracts are terminated, provided that the employer is aware of their whereabouts. However,[236]a breach of contract does not automatically bring about its termination.[237] The act of

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230 *Seabelo v Belgravia Hotel* 1997 6 BLLR 829 (CCMA) 831.
231 *Seabelo v Belgravia Hotel* 1997 6 BLLR 829 (CCMA) 831 .
232 Anon 2010 www.labourguide.co.za.
233 For example, total lack of communication and the duration of the period of absence.
234 Anon 2010 www.labourguide.co.za.
235 Grogan *Workplace Law* 227-229.
236 Mothibi 2006 www.deneysreitz.co.za.
237 Mothibi 2006 www.deneysreitz.co.za.

desertion does not terminate the contract of employment, but the act of the employer who exercises his or her right to terminate the contract, after notice to the employee has been given to return to work, does.[238] As stated previously the onus of proof lies with the employee to prove that there was a valid reason for his or her absence.

In *SACCAWU obo Fortuin v Lewis Stores*,[239] an employee was dismissed because he made an application for annual leave, which was refused, after which he still took his annual leave.[240] The employee applied for his annual leave according to procedure, he was then contacted telephonically to be informed that the leave was refused. The employee was informed through a telegram that he was to return to work immediately, which he did not do. His excuse was that he thought his leave had been approved. The employee was dismissed. He referred the case to the CCMA and was represented by his union, which stated that the dismissal was procedurally unfair, because the employee was not informed of a verdict or given the chance to state his case. Furthermore the union stated that the dismissal was substantively unfair, because there was no valid reason for dismissal.[241]

The employer presented the employee with an ultimatum in the form of a telegram which demanded him to return to work or to face dismissal.[242] The telegram was a clear and lawful instruction to the employee to return to work, which he ignored. This aggravated the nature of the misconduct and constituted gross insubordination.[243] The employer was entitled to conclude that the employee had no intention to return to work and to continue with his contract of employment, therefore the employer terminated the contract

238 Mothibi 2006 www.deneysreitz.co.za.
239 *SACCAWU obo Fortuin v Lewis Stores* 1999 (CCMA) 10889.
240 Annual leave has various aspects; ground rules can be found in section 20 of the BCEA which every employer should follow unless a main agreement or collective agreement contains different conditions.
241 *SACCAWU obo Fortuin v Lewis Stores* 1999 (CCMA) 10889.
242 *SACCAWU obo Fortuin v Lewis Stores* 1999 (CCMA) 10889.
243 *SACCAWU obo Fortuin v Lewis Stores* 1999 (CCMA) 10889.

accordingly. The arbitrator found the dismissal was procedurally and substantively fair.[244]

In the above case[245] the employee was not afforded the opportunity to state his case.[246] This proves that periods of unauthorised absenteeism from the workplace need not be limited to conduct.[247] Repudiation of a contract by the employee as well as charges of insubordination by the employer can justify dismissal of an employee on the basis of desertion.[248]

In a situation where an employee deserted or absconded from his employment, the question regarding who terminated the employment contract may arise.[249] The Labour Court distinguished between desertion and absence from work and held that, although desertion amounts to a breach of contract, it does not automatically bring the contract of employment to an end, as stated in *SABC v CCMA and others*.[250]

In *Phenithi v Minister of Education*[251] it was stated that, according to section 14 of the *Employment of Educators Act* 76 of 1998, a 14 day period of absence by the employee concludes automatic termination of the employment contract.[252] When an employee is absent from work for the period of time that warrants the conclusion that the employee does not want to return to work or intend to return to work, it may be deemed as absconding.[253]

A contract of employment terminates when the contract becomes impossible to perform due to no fault on the side of either of the parties. In

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244 Anon 2010 www.labourguide.co.za.
245 *SACCAWU obo Fortuin v Lewis Stores* 1999 (CCMA) 10889.
246 Anon 2010 www.labourguide.co.za.
247 Anon 2010 www.labourguide.co.za.
248 Anon 2010 www.labourguide.co.za.
249 Basson *et al Essential Labour Law* 82.
250 *South African Broadcasting Corporation v CCMA and others* 2001 2 BLLR 449 (LC) 493.
251 *Phenithi v Minister of Education* 2006 9 BLLR 821 (SCA) 17 and 21.
252 Dekker 2010 SA *Merc LJ* 104-113.
253 Grogan *Dismissal, Discrimination & Unfair Labour Practices* 291.

such instance no dismissal has taken place.[254] The impossibility of performance was discussed as part of incapacity.

In *SACWU v Daysi*[255] it was held that, when an employee can not be located, the employer may have no other option but to accept the employee's breach of contract. The Labour Appeal Court held that it could be argued that the employee terminated the contract, but when the employer has an option, and the employer chooses to terminate the contract, it will constitute a dismissal as discussed in chapter two.[256]

One should be cautious in cases where it seems that the employee terminated the contract. When the employee terminates the contract of employment it will be a resignation and not a dismissal; it would imply that the employee can not claim relief.[257]

In *Ouwehand v Hout Bay Fishing Industries*,[258] where an employee needed to prove that he was dismissed, it had to be proved that the proximate cause of the termination of employment was an overt act by the employer. The employer's acceptance of an employee's resignation does not constitute a dismissal, because the contract was terminated by mutual consent.[259]

The employer will have no remedy under the LRA if the employee resigns unlawfully. The employer can seek an order compelling the employee to abide by the contract, or take legal action under BCEA, or require compensation that the employee would have earned, had proper notice been given.

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254 Grogan *Dismissal, Discrimination & Unfair Labour Practices* 204.
255 *SACWU v Daysi* 2001 7 BLLR 731 (LAC) 735C-F.
256 Basson *et al Essential Labour Law* 82.
257 In *Council for Scientific & Industrial Research (CSIR) v Fijen* 1994 15 ILJ 759 (LAC); 1996 17 (ILJ) 18 (A) 772C-D. The Labour Appeal Court noted that Fijen could have only resigned if ”a clear and unambiguous intention not to go on with his contract of employment, by words of conduct which would lead a reasonable person to conclude that he harboured such an intention”.
258 *Ouwehand v Hout Bay Fishing Industries* 2004 25 ILJ 731 (LC) 40.
259 Grogan *Dismissal, Discrimination & Unfair Labour Practices* 183.

Giving notice to an employee does not terminate the employment contract; a contract terminates when the period of notice ends.[260] If the employee abandons the employment during the notice period, the employee voluntarily terminates the employment contract and this will be regarded as desertion; dismissal. According to section 190(1) of the LRA, the date of dismissal is the earlier date of either on which the contract of employment is terminated or on which the employee leaves employment.[261]

It appears that the distinction between desertion and absenteeism requires further scrutiny. Desertion can be regarded as a special case of absenteeism. Based on this, it is required that absenteeism and consequently relevant legal action be defined more clearly.

5 Absenteeism

Absence can be classified under different categories. To be absent can mean a variety of things such as poor timekeeping (which include arriving late, leaving early, extended tea or lunch or toilet breaks, and unduly periods of time for fetching or carrying things), attending to private business during working hours, feigned illness, and other unexplained absences from the workstation or from the premises.[262] As stated in chapter 2, it has to be kept in mind that a duty/obligation rests upon the employee to be at work according to the employment contract; absence is a breach of that contract and potentially a disciplinary offence.[263] Absence should have been unreasonably long or of such a frequency that it can be calculated as constituting a breach of contract.[264]

260 Grogan Dismissal, Discrimination & Unfair Labour Practices 204.
261 Grogan Dismissal, Discrimination & Unfair Labour Practices 204.
262 Anon 2010 www.labourguide.co.za.
263 As discussed in chapter 2 above.
264 Grogan *Workplace law* 227-229.

Absence from work is the most difficult and common type of absenteeism; there can be several reasons[265] for absence.[266] The employee should always be able to give a reasonable explanation for his or her absence.[267]

Lack of punctuality is also a form of absenteeism. The employee is absent from work when he or she is contractually obliged to render services, and is not at the workplace, without reasonable excuse for the absence.[268] Persistent lateness will justify dismissal, in which case the burden to prove justification of any absence rests with the employee.[269]

Similar to lateness is absence from the workstation for smoke-breaks, in which case an employee is physically present at work but mentally absent, or neglecting his duty by sleeping.[270] When an employee is sleeping on duty the employer needs to ensure that the working hours and conditions of the employees are lawful (employees have been reinstated in the past, although guilty of sleeping on duty, because the working hours were too long and accordingly prohibited).[271]

Absence due to personal problems may require the employee to stay at home.[272] Under such circumstances the employee should notify his employer by any means necessary.[273] The failure to notify the employer of the employee's absence is in most disciplinary codes listed as a transgression separate from absence without leave.

If the employee does not notify the employer of his or her absence within reasonable time, the absence renders more serious. If the employee is absent for more than three to five days, depending on the circumstances

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265 This may be failure to report to work after a long weekend or due to the "Monday blues".
266 Mothibi 2006 www.deneysreitz.co.za.
267 Mothibi 2006 www.deneysreitz.co.za.
268 Mothibi 2006 www.deneysreitz.co.za.
269 Mothibi 2006 www.deneysreitz.co.za.
270 Mothibi 2006 www.deneysreitz.co.za.
271 Mothibi 2006 www.deneysreitz.co.za. Also see *Chemical Workers Industrial Union v Boardman Brothers* 1995 16 ILJ 619 (LAC).
272 Anon 2010 www.labourguide.co.za.
273 Anon 2010 www.labourguide.co.za.

the employee could find himself dismissed for desertion.[274] Even if the employee notifies the employer that he or she will be absent, this does not mean that his/her absence is approved. It depends on the employer's willingness to authorise the absence and to pay the employee for the period he or she will be absent, or to treat the absence as unpaid leave.[275] All events have to be recorded and kept on the employee's file, after which counselling with the employer, in accordance with the company's disciplinary code, will follow.[276] If the employer regards the reason for absenteeism unacceptable, the employer may issue a final written warning, or may suspend or dismiss the employee.[277] In *NUMSA and others v Free State Gold Mines*[278] it was stated that the recommended penalty for absenteeism as a first offence should be a verbal warning, for a second offence a final written warning, and finally a dismissal.[279]

Wilful and deliberate absence is when an employee does not go to work because he does not feel like it. This is a very serious offence. The employee wilfully chooses to ignore his or her contractual duty to be present at work and therefore is in breach of his or her contract, which will be followed by a proper disciplinary procedure as stated above.[280] However, to prove the mindset of the employee is difficult and the employer can seldom present evidence in this regard.[281]

In *Namib Wood Industries v Mutiltha and another,*[282] the employee, who was a factory manager, excused himself for the entire afternoon for three consecutive days, even though having been refused permission to do so. The dismissal was upheld in this instance.[283]

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274 Anon 2010 www.labourguide.co.za. Desertion is also a form of absenteeism but already discussed in chapter 3 of this dissertation.
275 Anon 2010 www.labourguide.co.za.
276 Anon 2010 www.labourguide.co.za.
277 Anon 2010 www.labourguide.co.za.
278 *NUMSA and others v Free State Gold Mines* 1996 1 SA 422 (A) 435B.
279 *NUMSA and others v Free State Gold Mines* 1996 1 SA 422 (A) 435B.
280 Anon 2010 www.labourguide.co.za.
281 Anon 2010 www.labourguide.co.za.
282 *Namib Wood Industries v Mutiltha and another* 1992 1 SA 276 (A) 279E.
283 *Namib Wood Industries v Mutiltha and another* 1992 1 SA 276 (A) 279E.

When an employee is absent due to ill health or sickness, it is very difficult to control, because of the employee's right to take sick leave, which is protected by legislation, the BCEA.[284] Sick leave can be described as a form of incapacity. An employee is incapable of carrying out his or her contractual obligations because of being ill.[285] The employee is entitled to a number of days for sick leave during a three year cycle, but the employee may be obliged to produce a valid medical certificate.[286] An employee may be absent for two days without presenting a medical certificate. If the employer recognises a pattern of regular absences, a disciplinary hearing may be called, and may result in dismissal on the ground of incapacity due to ill health.[287]

When an employee has agreed to work overtime, the employee has a contractual responsibility.[288] Disciplinary procedure is similar for absence without permission or unauthorised absenteeism.[289] If the employee does not comply with hours stipulated in the employee's employment contract, the employer is entitled to dismissal. In *Mereholz v Norman*,[290] the conclusion of the case was that, when an employer chooses to appoint certain hours for work and the employee accepts that contract, the employer is entitled to require those hours.[291] It is not necessary for employers to prove that those hours are necessary for running the business.[292]

An uncontrollable event such as heavy rain that floods the employee's house, a tornado, or telephones which are out of order, can conclude as valid and acceptable reasons for an employee's absence and lack of notice to the employer.[293] The employer is not indebted to pay the employee

284 Anon 2010 www.labourguide.co.za.
285 Anon 2010 www.labourguide.co.za.
286 Anon 2010 www.labourguide.co.za.
287 Anon 2010 www.labourguide.co.za.
288 Anon 2010 www.labourguide.co.za.
289 Anon 2010 www.labourguide.co.za.
290 *Mereholz v Norman* 1916 (TPD) 332.
291 *Mereholz v Norman* 1916 (TPD) 332.
292 Anon 2010 www.labourguide.co.za.
293 Anon 2010 www.labourguide.co.za.

under such circumstances.[294] Unrest, violence and political stay-away actions are also occurring more frequently. Unpaid leave is an effective policy to adopt by an employer in case of unrest, violence, and political stay-away actions or national strikes.[295]

In conclusion, it is an employee's general duty to render services, and failure to render these services could potentially conclude to disciplinary action.[296] Like all offences, absenteeism requires fault on the part of the wrongdoer as stated previously, thus the reasons for absence has to be justified.[297] Other factors that may also be considered relevant are the employee's work record and the employer's treatment of similar offences in the past. It was also indicated that a disciplinary enquiry should take place before an employer may dismiss an employee, because the employee has a right to state his case. If the reason for absenteeism is unacceptable to the employer, the employee's conduct would amount to a breach of contract. A disciplinary code provides for a scale of sanctions to be applied in relevant circumstances, unless period of absence is unreasonable;[298] the termination of the employment contract by the employer would then be justified.

6 The fairness criteria for dismissals due to desertion and/or absenteeism in practice

When an employer decides whether or not an employee should be dismissed for unauthorised absenteeism or desertion an evaluation needs to be made of the fairness criteria to follow before and during said termination of the employment contract.

294 Anon 2010 www.labourguide.co.za.
295 Anon 2010 www.labourguide.co.za.
296 Grogan *Workplace Law* 227.
297 Cheadle *et al Current Labour Law* 19, also see footnotes 14 and 15.
298 Grogan *Workplace Law* 227.

6.1 Trident Steel (Pty) Ltd v Commissioner for Conciliation, Mediation & Arbitration & Others

In *Trident Steel (Pty) Ltd v Commissioner for Conciliation, Mediation & Arbitration & Others*[299] the court went to great lengths to justify that the employer should not have dismissed the employee for being absent from work without providing such employee with a fair pre-dismissal procedure. In this case the employee had been absent from work from the 4th of January 2000 to the 7th of March 2000. The employee informed the employer of his whereabouts, but the employer decided to proceed with the disciplinary enquiry while the employee was in prison, and the decision to dismiss was taken in the employee's absence.[300] The court held:

> There were alternatives open to the applicant (the employer). It could have employed a temporary employee. If it had no alternative but to employ a permanent employee, it could have engaged the applicant in consultations in requirements. It does not suffice merely to convey to an employee that he was dismissed for misconduct which was determined in his absence.[301]

The CCMA found the dismissal to be procedurally and substantively unfair, and the employee was reinstated retrospectively from the date of dismissal. The employer took the case on review to the Labour Court, and the court agreed that the hearing was procedurally unfair because the employer dismissed the employee in his absence without a pre-dismissal procedure. The employer did not consider the employee's disciplinary and service record in the hearing, and the real reason for dismissing the employee was not that of absence but because the position had already been filled by another employee.[302]

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299 *Trident Steel (Pty) Ltd v Commissioner for Conciliation, Mediation & Arbitration & Others* 2005 26 ILJ 1519 (LC) 1520A and *Mofokeng and KSB Pumps* 2003 24 ILJ 1756 (BCA) 1762B-D.

300 Lesabe 2009 www.labournet.co.za.

301 *Trident Steel (Pty) Ltd v Commissioner for Conciliation, Mediation & Arbitration & Others* 2005 26 ILJ 1519 (LC) 1520A.

302 There is clear indication that the employment relationship was not destroyed because the employer offered the employee a future job.

6.2 Samancor Ltd v Metal & Engineering Industries Bargaining Council & Others

In *Samancor Ltd v Metal & Engineering Industries Bargaining Council & Others*[303] it was said that a dismissal should be fair and in accordance with a fair procedure depending on the reasons for dismissal. On 27 March 2006 the third respondent, an employee represented by his trade union, was arrested on suspicion of robbery and was released on 10 April 2006. The applicant in this case, the employer, charged him with absenteeism after his release, but a disciplinary enquiry found him not guilty and he returned to work. On 20 May 2006 he was arrested again on suspicion of robbery, and the employee phoned his employer from the police station to notify him of his arrest. He was released 137 days later and found that he was dismissed in his absence on 30 May 2006 on the basis of operational incapacity after a disciplinary enquiry had been conducted. On 2 November 2006 the employee was granted a post-dismissal hearing subsequent to the hearing of 30 May 2006, and there was found that the period of absenteeism had been to long and the employee was dismissed.

The first respondent, a bargaining council for arbitration, found that the procedure that was followed on 30 May 2006 was unfair because the employee had not been allowed the opportunity to be present at the proceedings and it had not been discussed with his union. The employee held no key position in the business of the employer that would have justified dismissal after an absence of 10 days; therefore the dismissal was substantively unfair.

It was stated that absenteeism can not be treated as an operational incapacity because absenteeism is a disciplinary offence. Even if this kind of incapacity was recognised in law or in the LRA, the applicant failed to investigate the extent and duration of the incapacity and did not afford the

303 *Samancor Ltd v Metal & Engineering Industries Bargaining Council & Others* 2009 30 ILJ 389 (LC) 24-27.

employee the opportunity to present his case as prescribed in the Code of Good Practice.[304]

Another reason why the dismissal was substantively unfair is the evidence that the employment relationship between the employee and the applicant had been intolerable, was insufficient. The employee should have been reinstated on 2 November 2006.[305]

The applicant wanted the arbitrator's award to be reviewed by the Labour Court by reason of misconduct, on the basis that he committed gross irregularities and exceeded his powers. The arbitrator exceeded his or her powers in concluding that absenteeism could not be treated as incapacity, because the employee neither had control over the matter and length of his absence, nor obtained a key position that justified termination of his services after ten days. The court found that the dismissal was treated as operational incapacity by the applicant.[306] Section 188(1) of the LRA provides for dismissals related to conduct or incapacity, but the onus rests with the employer to prove that the reasons as well as procedure for dismissal are fair. Section 188(2) also requires that the requirements of the Code of Good Practice should be taken into account in order to be a fair procedure. The reason for this is that, when the employer prefers to clarify dismissal owing to incapacity, he should adhere to item 10 of the Code, which the employer did not do in this case.[307] In terms of the Code the

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304 *Samancor Ltd v Metal & Engineering Industries Bargaining Council & Others* 2009 30 ILJ 389 (LC) 24-27.

305 *Samancor Ltd v Metal & Engineering Industries Bargaining Council & Others* 2009 30 ILJ 389 (LC) 24-27.

306 *Samancor Ltd v Metal & Engineering Industries Bargaining Council & Others* 2009 30 ILJ 389 (LC) 24-27.

307 According to the Code item 10(1) incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work under certain circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include 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. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

employer was under an obligation to investigate the duration of incapacity and the employee should have had the opportunity to state his case.[308] The reason for dismissal, as stated by the applicant was due to absenteeism, which was a breach of contract. The onus rested with the employee to prove that his failure to be present in terms of the contract was the result of action by a superior force, the SAPS, for which he was not to blame. Thus the employee was not guilty of misconduct or incapacity since the employee was not the cause of his own incarceration. It were factors beyond his control, he was not absent without permission and had a valid reason for his absence. The employee was to be reinstated with compensation for the loss of income. In *Trident Steel (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*[309] the said judgement stated which alternatives an employer had in such cases and should use in the above cases. [310]

6.3 National Union of Mineworkers (NUM) & others v CCMA & others

In *National Union of Mineworkers (NUM) & others v CCMA & others*[311] the employee (represented by NUM) was arrested in 2002 for the death of another person. Neither the deceased nor the facts relative to the matter was connected to the employee's work situation. The employee was convicted of culpable homicide and was sentenced to 5 years imprisonment, which was reduced to 10 months after commencing of his sentence.[312] The employee was informed in writing that the employer could

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308 The Code also states in item 10(2) that, in the process of the investigation referred to in subsection (1), the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee. According to item 10(3) the degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counseling and rehabilitation may be appropriate steps for an employer to consider.

309 *Trident Steel (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* 2005 26 ILJ 1519 (LC) 1522.

310 Dekker 2010 SA *Merc LJ* 104-113.

311 *National Union of Mineworkers & others v CCMA & others* (LC) Case number JR 2423/06 Judgement 13 March 2009.

312 Anon 2009 www.worklaw.co.za.

not accept the situation, which amounted to a repudiation of his employment contract because he was unable to render services. The employer could not keep the employer's position vacant for 10 months since the employee was an operator and the work had to continue. The applicant (NUM) appealed to the CCMA that the employee was unfairly dismissed on different grounds, one of which that the employer handled the case different from other cases regarding employees who were imprisoned. In the course of the arbitration the employer persisted that the termination of employment did not amount to dismissal. The CCMA's arbitrator held that:

> ...in terms of contractual principles where a contract has become permanently and objectively impossible to perform due to no fault on either party, the contract automatically terminates...[313]

It implies that no dismissal took place. If employees find it impossible to perform, the above principle would apply. If impossibility is temporary, the contract is suspended for the period of incapacity (the employer would not need to perform his obligations with regard to the contract and no payment would be required for the period of incapacity).[314] The commissioner however found that the contract automatically terminated in this case because of the impossibility of the employee to perform his duties, and no dismissal took place. The matter was taken on review to the Labour Court. The judge referred to *Sidumo & another v Rustenburg Platinum Mines Ltd & another*[315] in deciding whether the award was reviewable. It was said that the applicant needed to establish that the decision fell outside the bounds of a reasonable decision maker. The Labour Court held that the commissioner's finding was not one that the reasonable decision maker could reach and was reviewable because the commissioner did not refer to any decided case law dealing with termination of a contract through impossibility of performance. The case was referred back to the CCMA and

313 *National union of Mineworkers (NUM) & others v CCMA & others* (LC) Case number JR 2423/06 Judgement 13 March 2009.
314 Anon 2009 www.worklaw.co.za.
315 *Sidumo & another v Rustenburg Platinum Mines Ltd & another* 2007 12 BLLR 1097 (CC) 38G.

it was stated that the commissioner should decide whether the period of incarceration was of long duration or permanent.[316]

6.4 The application of the fairness criteria for dismissals due to desertion and/or absenteeism in practice

The above court cases proves clearly that if an employee is unable to fulfil his contractual obligations in terms of the employment contract by being absent, an employer cannot simply dismiss such an employee. A reason must be given for not fulfilling his or her contractual obligation by the employee, in other words the employee must notify the employer of said reason; an investigation must be held by the employer regarding aforementioned reason.

During the investigation the employer must gather information and/or evidence to determine the reason or intention of the employee for being absent or for deserting the employment; the reason or intention will be helpful in deciding what procedure to needs to be followed by the employer during the disciplinary process.[317]

Employees are deemed to be deserted when evidence warrants the conclusion that they have formed an intention to abandon their employment. If the whereabouts of the employee can be established, for example if the employee is or was in prison, dismissal will be considered unfair if the employee was not afforded the opportunity to state his case.[318]

Before the employer terminates the employee's employment notice needs to be given to the employee. Employer should take all reasonable

316 Anonymous 2009 Public Newsletter: Who moved the Cheese? www.worklaw.co.za [date June 2010] hereinafter referred to Anon 2009 www.worklaw.co.za.

317 Dekker 2010 SA *Merc LJ* 104-113.

318 If the employee is absent during the disciplinary hearing after receiving notice thereof, it can be concluded that the employer waived his right to pre-dismissal procedure.

precautions before termination of employment in cases of desertion or unforeseeable circumstances.[319]

When the conduct of an employee amounts to a criminal offence, a comparable process may take place where the same facts give rise to disciplinary and criminal proceedings. Processes are isolated and self-determining. An employee is entitled to request that the disciplinary hearing be postponed pending the result of the criminal trial, but the employer is not required to give permission for such postponement. If the employee is in prison, said imprisonment suspends the employer's obligation to remunerate the employee for the period of the employee's imprisonment. The employer should inform the employee of the right to remain silent pending criminal proceedings, but it bears the risk of an unfortunate result.

On the release of an employee or on his return to his employment, the employee must be given an opportunity to state his or her case, even if the employer already dismissed the employee because of incarceration. The employee does run the risk of the claim having been prescribed when referring it to the CCMA.

At the CCMA the commissioners have an oversight role. Commissioners need to establish whether the employer used his discretion correctly in dismissing an employee; in other words if the employer acted as a reasonable employer. The commissioners should not exceed their authority.

7 Conclusion

It is clear that a contract of employment enforces certain duties upon the employer and employee. Employees have a duty to go to work and be on time, and employers have a duty to set clear policies and rules.[320] These

319 For example appointing temporary employment.
320 See chapter 2.

policies and rules have to include clauses regarding absence with or without adequate reason. Unauthorised absence constitutes a breach of contract which may justify termination of the employment contract. Absence beyond an employee's control such as imprisonment, being seriously ill, or mentally incapacitated, may also constitute termination when the period of absence becomes unreasonable or frequent. However, prejudice on the side of the employer has to be proven.[321] According to Grogan,[322] the longer the period of absence, the more justified the employer will be in terminating the contract. Employees may also be dismissed after a given number of absences, irrespective of the reason.

Modern labour law draws a distinction between absenteeism and desertion, although the distinction may be considered flexible. Absenteeism can be categorised as poor timekeeping, or absence from the workplace or the work station. Desertion is when the employee expressly or by implication appears not to have the intention of resuming contractual duties. When dealing with an employee being absent, there are two scenarios which can be considered as explained below.

The first scenario is when the employer does not know where the employee is, and the second scenario is when the employer receives information about the whereabouts of the employee, and that he or she is unable to come to work for reasons beyond his or her control, for example imprisonment. In case of the first scenario the employer should try and find out where the employee is through contacting the employee's family and by enquiry of his co-workers. In the absence of a positive outcome the employer should send the employee a notice that the employee is breaching his employment contract and should immediately return to work. If he does not return to work his repudiation is accepted. In scenario two, when the employer knows where the employee is, but the absence of the

321 *Schneier & London Ltd v Bennet* 1927 (TPD) 346; *Negro v Continental Spinning & Knitting Mills (Pty)* Ltd 1954 2 SA 203 (W) 204.
322 Grogan Workplace Law 227.

employee is not his fault and beyond his control, the employee should be given an opportunity to state his case.[323]

If the employee is in prison or absent for reasons beyond his control the employer should try and find out for what period the employee will be detained, or for how long the employee will be absent. It may be that, after the employee has been arrested, he will only be detained until his first appearance in court, to be able to return to work after he has obtained bail. If the employee does not obtain bail it may amount to a very long period before he or she might return to work, which creates a problem (or an exceptional circumstance).[324] Thus there should be distinguished between employees in a critical position, and employees in a position not so critical.

When the employee is in a critical position and absent from work, the business may suffer damages because of the employee's absence. The employer should attempt to hire a temporary employee to assist with the work of the absent employee.[325] If possible the temporary employee should be hired on the terms that, if the absent or imprisoned employee returns, the contract would automatically terminate. Another problem arises if the employer is unable to hire a temporary employee. When the contract is rendered impossible and circumstances are beyond the control of both parties, the contract has no value. When an employee is sentenced for a long period, it can come down to repudiation by the employee, and the employer may accept such repudiation.

If the employee is not in a critical position the employer should wait until the situation of the employee is dealt with, by holding a disciplinary enquiry before decision about any precaution. The employer should hire a

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323 A disciplinary enquiry would follow because of the employee's absence and the employee should give a reason for his absence and why it is not-fault based.

324 It would be unreasonable for the employer to hold the position vacant for a prolonged period while the employee served a sentence in jail. So it can be asked how long an unreasonable period of time should be in context of the employer's business and the nature of the work done by the employee.

325 Dekker 2010 SA *Merc LJ* 104-113.

temporary employee, and is, according to the BCEA,[326] not obliged to pay the absent employee any remuneration. If the employee is found guilty in a criminal court, a disciplinary hearing should still follow thereafter. Any disciplinary code of a company should be adapted to deal with situations of imprisonment, absence or desertion of work. If, following detainment, the employee is found guilty, is sentenced and imprisoned, the reason for not obeying the contract is the fault of the employee, and the employer may accept repudiation.

Procedural and substantive fairness is required in all dismissals due to absenteeism and desertion. It will be appropriate to consider counselling in a case where there is only slight prejudice towards the employer and a good reason for the conduct, with the aim to conclude if there is fault on the part of the employee.[327] If there is fault on the part of the employee, corrective disciplinary action should take place in the form of verbal, written and final warnings, and finally dismissal or retrenchment, as recognised by most disciplinary codes. It is important to keep in mind that each case should be treated on its own merits.[328]

Justification for dismissal[329] has to be based on incapacity or misconduct.[330] The employer has a few options, as stated above. One option is to retrench,[331] the other to dismiss an employee. Recent case law[332] suggests that to base the dismissal of an imprisoned employee on

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326 After a reasonable period has elapsed, which is considered to be 3-5 days, the employer is entitled to remove this employee from the payroll.

327 Mothibi 2006 www.deneysreitz.co.za.

328 Mothibi 2006 www.deneysreitz.co.za.

329 Such as misconduct.

330 The employee's inability to carry out his or her duties.

331 Retrenchment can also be considered as a form of dismissal.

332 The Labour Court in the *Trident Steel*-case upheld its arbitrator's award of compensation for unfair dismissal. The following were advisable: to try and establish the employee's whereabouts and circumstances; to stay in touch with the employee's representative if the employee has one, while the employee is absent; no remuneration may be received, in other words no work no pay; the employer should try to replace the employee on a temporary basis until the employee returns; disciplinary rules should apply on the return of the employee; if the employee is absent too long the employer should consider retrenching and replacing the employee for operational reasons; the employer should consult the employee on this either in person, writing or via representative; and lastly if the employee can be easily replaced and cannot be kept in service indefinitely during

incapacity would not necessarily guarantee a fair dismissal either. One will have to determine a reasonable argument that the employee's incapacity is such (given the nature of the job, period of imprisonment) that keeping the position vacant or filling it on a temporary basis will not be sensible in the circumstances.

In terms of the LRA every employee has the right to refer a dispute to the CCMA if he or she feels unfairly dismissed.[333] This may create two problems. Firstly, if an employer accepts the act of desertion, it is not the employee who has resigned, but the employer who has terminated the contract through dismissal.[334] Secondly the CCMA in some instances concluded that, if the employee was held in police custody, it would be a valid reason not to attend work.[335] Although the explanation may be valid, it is not automatically acceptable just because it is valid. It is the employee's duty to make certain that he can get to work on time and in unison with the obligation in his contract as stated above.[336] Thus the employer may be justified in rejecting that excuse.[337]

In conclusion, in order to find the employee guilty on absenteeism or desertion, the employee must have been absent from work when contractually obliged to render a service. Employees can not be implicated if not contractually bound to render a service. The onus rests with the employee to explain his or her reason for being absent. If the employee did not attempt to contact the employer during his or her absence, the employee would find it hard to persuade anybody that he or she had a relevant reason for absence. Absence and/or desertion remain disciplinary offences, and employees retain their procedural right to state their case

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the employee's absence, and the employer is uncertain about the return of the employee, the employer may take disciplinary action. This is equally applicable to the applicant. The arbitrator did what he had been supposed to; that is required from him in terms of section 138(7) of the LRA and gave brief reasons for his award, thus his decision was reasonable.

333 Anonymous 2009 What do you do with deserters? Part 2 www.hrfuture.net [date of use May 2010] hereinafter referred to as Anon 2009 www.hrfuture.net.

334 Anon 2009 www.hrfuture.net.

335 Anon 2009 www.hrfuture.net.

336 Anon 2010 www.labourguide.co.za.

337 Anon 2009 www.hrfuture.net.

before the contract is terminated, provided that the employers were aware of their whereabouts. It is thus clear that each case needs to be evaluated by considering the fairness criteria in dismissing an employee for absenteeism or desertion.

In *National Union of Metalworkers v Vetsak Co-Operative Ltd & others*[338] the following was stated:

> Fairness comprehends that regard must be had not only to the position and interest of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness in court applies a moral or value judgment to established facts and circumstances... and in doing so it must have due and proper regard to the objectives sought to be achieved by the Act.[339]

Ultimately, the burden is to be shared by both employer and employee to ensure that the employment agreement is constitutionally fair, clearly defined and precisely communicated.

To reiterate; everyone has the right to a fair trial, everyone has the right to fair treatment, everyone has the right to natural justice; more specifically, procedural and substantive fairness. The workplace is but an extension of the individual's and the collective constitutional birth right; we all have equal right to justice, yet not all cases are equal. The law aspires to address this disparity by means of an **attempt** to prescribe consistency and flexibility.

This consistency culminates fairness.

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338 *National Union of Metalworkers v Vetsak Co-Operative Ltd & others* 1996 17 ILJ 455 (A) 589B.

339 *National Union of Metalworkers v Vetsak Co-Operative Ltd & others* 1996 17 ILJ 455 (A) 589B.

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