An investigation of incompatibility as a valid ground for dismissal in South African labour law: A critical appraisal of global best practices

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"When the time is right, I, the Lord, will make it happen." – Isaiah 60:22.

After I completed my Masters degree, I dedicated some time to pray for my future. I remember praying for all the things that my peers had – a stable job, a partner and marriage. I prayed for months, but I did not receive the answer I was hoping for. The answer was that I should go back to school. It was a very difficult decision to make because I never imagined myself studying towards my doctorate shortly after I graduated. However, I decided to take a leap of faith, even when it did not make sense to many people. Here I am, five years later! I have learnt that we are all fated to take different paths in this life. My journey has not been an easy one, but it has taught me endurance and patience. First and foremost, I thank the Almighty God and my ancestors for placing this dream in my heart and for giving me strength throughout this journey. It has not been an easy one. It has also been coupled with health and financial challenges, but eventually I made it.

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ABSTRACT

Section 188 of the *Labour Relations Act* 66 of 1995 gives cognisance to misconduct and incapacity due to poor performance or ill health and/or injury and the employer's operational requirements as valid grounds for dismissal in the South African labour law. The *LRA*, however, does not provide any statutory recognition or guidance on incompatibility as an acceptable ground for dismissal, though it has been recognised as such by various South African courts and other dispute resolution tribunals in a number of cases. It has been established that incompatibility refers to an employee's inability to work harmoniously with fellow employees and/or the employer due to personality clashes, differences and/or failure to fit in with the "corporate culture" in the workplace. This thesis recognises the significance of interpersonal relationships and harmonious relations in the workplace as these are amongst the crucial components that contribute to a healthy and well-functioning business and labour market. Against this backdrop, this thesis contends that employers must be allowed to dismiss employees, whose attitude, behaviour or character can potentially harm the business or cause undue hardship for the employer or other employees, due to their disruptive nature. This thesis seeks to investigate the suitability of incompatibility as a separate and legitimate ground for dismissal in terms of the *LRA*. In the absence of statutory guidelines and processes that regulate dismissals based on incompatibility, legal uncertainty as to how to properly and fairly deal with these matters exists. It is unclear how employers and the courts should deal with the dismissal of employees who are considered incompatible for being "different", quirky or for their unique conduct arising from their cultural practices and/or beliefs. It is further submitted that there is no clarity as to what constitutes a "corporate culture" in the workplace in this regard, and no consensus whether incompatibility falls under misconduct, incapacity or operational requirements, or whether it should be regulated as an entirely separate ground for dismissal. This thesis advances the proposition that there is a need for statutory and regulatory reform on the matter to provide legal recourse for employers when dealing with disruptive and/or intolerable employees. By the same token, it is submitted that statutory and regulatory reform on the topic will provide

a level of protection to employees from arbitrary dismissal by the employer. As a member and signatory of the International Labour Organisation (ILO), South Africa has an obligation to ensure that its domestic legislation falls within the core ILO labour standards. This thesis submits that the ILO conventions and recommendations regarding termination of employment and discrimination in the workplace can provide direction when developing guidelines and procedures which regulate incompatibility dismissals in South African labour law. In this thesis, an analysis of best practices in New Zealand and Australia was undertaken. The New Zealand and Australian courts have dealt with incompatibility disputes and developed substantive and procedural principles in this regard. This thesis recommends South Africa to draw lessons from these established principles, and along with its common law principles identified by the courts, develop a clear set of guidelines, regulating incompatibility as a legitimate, statutory ground for dismissal in South African labour law. In the process, the rights and interests of both the employer and employee can properly be served.

Keywords: dismissal, incompatibility, corporate culture, Labour Relations Act, harmonious relations, interpersonal relationships

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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
CCMA	Commission for Conciliation, Mediation And Arbitration
EEA	Employment Equity Act 55 of 1998
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LRA	Labour Relations Act 66 of 1995
PER/PELJ	Potchefstroom Electronic Journal
SA Merc LJ	South African Mercantile Journal
SAJHR/PL	South African Journal on Human Rights
SALJ	South African Law Journal
SAPR	Sa Public Law
SCA	Supreme Court of Appeal
STELL LR	Stellenbosch Law Review

Chapter 1 Introduction

1.1 Introduction

This research investigates incompatibility as a ground for dismissal in South African labour law. This chapter briefly outlines the background to and purpose of this thesis. It includes an introduction of the subject matter, a brief synopsis of incompatibility in South African labour law and the problem areas addressed in this study. This enables one to have a better understanding of the research embarked upon and an exposition of the specific areas that this study focuses on in subsequent chapters.

1.2 Background and problem statement

Section 188 of the *Labour Relations Act* 66 of 1995 gives cognisance to misconduct, incapacity due to poor performance or ill health and/or injury and the employer's operational requirements as valid grounds for dismissal in the South African labour law.[1] While fixed grounds for fair dismissal have been identified by law, the question should be asked whether or not the *incompatibility* of an employee within his or her workplace could not similarly be recognised as a ground for dismissal, based on the effect it might have on the various relationships in the said workplace. It is contended that the significance of interpersonal relationships and harmonious relations in the workplace cannot be disregarded as these are amongst the crucial components that factor into a healthy and well-functioning business and labour market.

It could be argued that, like in matters of misconduct or the incapacity of the employee, an employer's business may suffer detriment in situations where an employee's attitude, behaviour or character is incompatible with certain values or personalities of the other employees or the employer and subsequently hinders the functions of the business. This is not to say that an employer is allowed to unfairly discriminate against an employee simply because he or she is different, but he should be able to deal with those disruptive and/or intolerable employees that can potentially harm the business or cause undue hardship for the employer or other fellow

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1 Hereafter the *LRA*.

employees. For this reason, it should be justifiable to include incompatibility as a separate and legitimate ground for dismissal in South African legislation. It is therefore argued that it may be imperative that both employers and employees are fully aware and have knowledge of the requirements, procedures and reasons that govern incompatibility as a valid ground for dismissal.

1.3 Literature review

The *Constitution of the Republic of South Africa,* 1996[2] plays a fundamental role in determining whether incompatibility can and should be regarded as a legitimate ground for dismissal in South African legislation. As the supreme law of the Republic, the *Constitution* determines the invalidity or inconsistency of any law or conduct that does not safeguard the values embedded in the *Constitution*.[3] As such, the *Constitution* serves as a yardstick and starting point in interpreting any labour laws. Central to the rights in the workplace, section 23 of the *Constitution* bestows upon everyone in an employment relationship or something akin to it, the right to fair labour practices.[4]

Both employers and employees can rely on section 23 for protection under the *Constitution*.[5] In *NEHAWU v University of Cape Town and others*[6], Ngcobo J highlighted that the interests of both employees and employers should be considered in the exercise of labour rights. The rationale is that the interests of both parties are a vital component of labour relations[7]. In other words, a balance between the interests of the two parties needs to be maintained to promote healthy employment relationships and labour peace. The *LRA* was promulgated to give effect to the overarching constitutional right to fair labour practices provided in section 23 in the *Constitution*.[8] Hence, the *LRA* should be interpreted in a manner that accommodates the interests of both the employers and employees as envisaged by the *Constitution*.

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2 *Constitution of the Republic of South Africa,* 1996 (hereafter the *Constitution)*.
3 Section 2 of the *Constitution*.
4 Section 23 of the *Constitution*.
5 *Nehawu v University of Cape Town & Others* (2003) 24 ILJ 95 (CC), (hereinafter, referred to as the *Nehawu v UCT* case) para 39.
6 *Nehawu v UCT* case para 40.
7 *Nehawu v UCT* case para 40.
8 See s 1(c) of the *LRA*.

For instance, the *LRA* prohibits *unfair* dismissal of an employee in terms of section 185 to protect the interests of the employee as the vulnerable party to the employment relationship. However, the *LRA* also allows for the fair dismissal of the employee under circumstances where the employer's business interests are at stake. By providing for the situations of *fair* dismissal, the *LRA* serves the interests of both parties to the employment relationship.

In addition, the *Employment Equity Act* 55 of 1998 (hereafter the EEA) is the principal statute that was promulgated to give effect to the right to equality in terms of section 9 of the *Constitution* by prohibiting unfair discrimination in the workplace.[9] In terms of the EEA, the employer has a duty to eradicate all forms of discrimination against his employees on various listed and unlisted grounds.[10] Similar to the *LRA*, the EEA also provides for the interests of both the employer and the employee. Although the EEA prohibits unfair discrimination against an employee in terms of section 6(1), it provides for circumstances in section 6(2) where the employer may differentiate between employees on a prohibited ground. An example would be where it is an *inherent requirement of the job* that a person should either have a particular characteristic, or should not have such in order to be able to perform the work effectively.[11]

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9 Van Niekerk *et al Law @ Wo*rk 119; *Employment Equity Act* 55 of 1998 (as amended) (hereafter the *EEA*).

10 Chapter II of the *EEA*.

11 McGregor 2013 *JLSS* 82; Henrico 2012 *Obiter* 506- 507; Bernard 2012 *PELJ* 2880; *SA Airways (Pty) Ltd v Jansen van Vuuren & another* (2014) 35 *ILJ* 2774 (LAC) para 58. In this case, the court held that there was no evidence to the effect that age was an inherent requirement of the job of a pilot; *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA) (Hereinafter, referred to as the *POPCRU* case) para 25. The court held that shaving dreadlocks was not an inherent requirement owing to the fact that the department failed to establish whether its short-hair policy had any impact on or detracted the performance of the employee's duties. It was held that it did not jeopardise the safety of the public or other employees, neither did it cause undue hardship to the employer in a practical sense; Rycroft 2011 *SA Merc LJ* 110-111; *Dlamini & others v Green Four Security* [2006] JOL 17853 (LC) (Hereinafter, referred to as the Dlamini case) para 67. In this case, the court held that the company's 'clean-shaven rule' was accordingly a justified inherent requirement for a job to ensure discipline and uniformity amongst its employees; Rycroft 2011 *SA Merc LJ* 109-110.

Consequently, labour legislation strongly advocates that a balance should be struck between the interests of the employer and the employee. This is to safeguard the employee from being unfairly dismissed or subjected to unfair labour practices and unfair discrimination by the employer. For instance, misconduct has a bearing on the employment relationship between an employer and an employee, and could cause irreparable damage to the said relationship; as such it may constitute a ground for dismissal.[12] However, in cases of misconduct, on one hand, the *LRA* requires that an employer should prove that there is a fair reason/s for any dismissal on alleged misconduct in that a disciplinary rule was contravened and that the contravention was of sufficiently serious gravity.[13] On the other hand, the employer should be able to protect his business in a like manner against an employee whose conduct may have the potential to cause damage to the employer, although not in contravention of the employer's disciplinary code or some well-established rule of conduct and therefore not misconduct *per se*.

Although incompatibility is not listed as a ground for dismissal in the *LRA*, it has been recognised as such by various South African courts and other dispute resolution tribunals in a number of cases.[14] Due to the increased practice of employers to dismiss employees for this reason, the South African courts have attempted for the past few decades to develop and elaborate on the awareness and knowledge of the concept of incompatibility as a plausible ground for dismissal. It is noteworthy that the Labour Court developed the principle of incompatibility in the case of *Erasmus v BB Bread*.[15] In this case, the Industrial Court concluded that reasons for dismissal based on

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12 Grogan *Workplace Law* 207.

13 S188 of the *LRA*.

14 *Erasmus v BB Bread* 1987 8 ILJ 537 (IC) (hereinafter, referred to as *Erasmus v BB Bread*); *Wright v St Mary's Hospital* 1992 13 ILJ 987 (IC); *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC) ; *Hapwood v Spanjaard Ltd* 1996 2 BLLR 187 (IC); *Lebowa Platinum Mines Ltd v Hill* 1998 19 ILJ 1112 (LAC); *Brereton v Bateman Industrial Corporation Ltd and Others* 2000 5 LLD 119 (IC); *Subrumuny v Amalgamated Beverages* 2000 21 ILJ 2780 (ARB); *Nathan v Reclamation Group (Pty) Ltd* 2002 23 ILJ 588 (CCMA*); Cutts v Izinga Access (Pty) Ltd* 2004 25 ILJ 1973 (LC); *Jabari v Telkom SA (Pty) Ltd* 2006 27 ILJ 1854 (LC); *Lotter and SA Red Cross Society* 2006 27 ILJ 2486 (CCMA); *Jardine v Tongaat Hulet Sugar Ltd* 2002 23 ILJ 547 (CCMA); *Miyeni v Chillibush Communications (Pty) Ltd* 2010 31 ILJ 3054 (CCMA); *Goussard v Impala Platinum Limited* 2012 33 ILJ 2898 (LC); *PSA obo Mbiza v Office of the Presidency and Others* 2014 35 ILJ 1628 (LC); *Mgijima v Member of the Executive Council Gauteng Department of Education and Others* (JR1894/2011) 2014 ZALCJHB 414.

15 *Erasmus v BB Bread* 542.

incompatibility are justifiable since the employer is entitled to harmonious interpersonal relationships amongst his employees.[16] Consequently, an employee who is a threat to workplace harmony and smooth operations could be removed by the employer as a means to deal with such a disruption in the workplace.[17] Suffice to say, this case established the precedent for employers to take measures against employees whose behaviour is incompatible with workplace harmony.[18] However, the employer has to prove that the employee is substantially responsible for causing disharmony in the workplace and that it has or could have an adverse effect on the business.[19] Moreover, the court found that the employer must prove why the incompatibility should constitute a fair reason for the dismissal.[20] In other words, the incompatibility of the employee as a reason for dismissal ought to be justified, for instance, by proving the negative impact of the employee's conduct on the business.

However, the court argued that the concept of incompatibility is not readily ascertainable because of its subjective nature. In *Subrumuny v Amalgamated Beverages*,[21] it was held that incompatibility is a tenuous concept and its effect cannot often be explained or articulated in clear objective terms. The reason is that what would be regarded as behaviour incompatible with one business or its employees, will not necessarily be regarded as such in another workplace. Therefore, it can be argued that incompatibility is based on subjective judgments.[22] According to Israelstam,[23] this presents a challenge when applying the concept of incompatibility as a ground for dismissal. It may prove difficult to establish an objective criterion or reach a judgement that may be deemed "fair" when trying to determine whether an employee is incompatible with the workplace or not as the merits of each case are subjective for every individual. The concept is based on feelings rather than the actual facts of the

16 *Erasmus v BB Bread* 544.
17 Van Jaarsveld 2007 *SA Merc LJ* 213-214; Rycroft 2012 *ILJ* 2276.
18 Erasmus v BB Bread 544.
19 *Mgijima v Member of the Executive Council Gauteng Department of Education and Others* (JR1894/2011) 2014 ZALCJHB 414 (27 October 2014) (hereinafter referred to as the *Mgijima* case) para 71.
20 *Mgijima* case para 71.
21 *Subrumuny v Amalgamated Beverages Ltd* 2000 21 ILJ 2780 (ARB) (hereinafter referred to as *Subrumuny v Amalgamated Beverages*) 2789.
22 *Subrumuny v Amalgamated Beverages* 2789.
23 Israelstam 2018 http://www.labourguide.co.za

case. For example, one of the underlying reasons that an employer might dismiss an employee could be that they simply dislike him or her as opposed to the actual fact that the employee is incompatible with the organisation.

Nonetheless, in the recent cases of *Mgijima v Member of the Executive Council, Gauteng Department of Education and others* and *Jabari v Telkom SA (Pty) Ltd*,[24] the courts attempted to elaborate on the concept of incompatibility. In both cases, it was held that incompatibility is generally treated as an aspect or species of incapacity and involves the inability or failure by an employee to maintain harmonious relationships with his or her colleagues.[25] The question that arises is whether incompatibility should be considered as a species of incapacity?

Incapacity suggests the employee's inability to perform his or her duties, manifesting in poor work performance or due to ill health or an injury suffered.[26] It should be investigated whether there is indeed enough of a connection between the employee's behaviour and the effective performance of his tasks to justify considering incompatibility as a species of incapacity. Such an investigation is pertinent in ascertaining whether incompatibility can actually be regarded as a separate and legitimate ground for dismissal in terms of the *LRA*. This will also clarify the position regarding the guidelines to be followed when dealing with dismissals emanating from incompatibility; whether guidelines which are unique to incompatibility should be developed or those which regulate incapacity dismissals should be applied. In *Jabari v Telkom SA (Pty) Ltd*[27] specifically, it was highlighted that the factors that cause incompatibility relate to personality conflicts, management style and inability to integrate into the culture and the environment of the workplace. The simple lack of confidence in the ability or willingness of the manager to do the job in the way the owner or senior colleagues desire, could justify dismissal.[28] It is therefore submitted that an employee can be considered as being incompatible when he or she portrays an attitude, behaviour and character that is deemed to be in contrast to the employer's

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24 *Jabari v Telkom SA (Pty) Ltd* (2006) 27 ILJ 1854 (LC) (hereinafter referred to as *Jabari case*).
25 *Mgijima case* para 70; *Jabari* case 1868.
26 Grogan *Workplace Law* 276.
27 *Jabari* case 1868.
28 *Jabari* case 1868.

"corporate culture".[29] In this regard, the employer has the prerogative to set reasonable standards pertaining to the harmonious interpersonal relationships in the workplace.[30] In the case of *Wright v St Mary's Hospital*,[31] it was further held that incompatibility that will ultimately result in a dismissal would have caused disintegration in a workplace relationship which is irremediable and the working relationship between the parties would have irretrievably broken down before the dismissal.

However, a number of obstacles come into existence when establishing incompatibility as a ground for dismissal, especially without the aid of statutory guidance in South African labour law. First, it is unclear as to how the courts deem it justified to dismiss an employee for being perhaps a little quirky or just "different" from other employees on the grounds of incompatibility.[32] One has to investigate when the behaviour of the employee can be considered of such a nature or serious enough to allow for a fair dismissal, and when will it amount to discrimination on a listed or unlisted ground. The *LRA* and the *Code of Good Practice: Dismissal Schedule 8 of the LRA* provides guidance in this regard pertaining to misconduct and incapacity, but clarity is needed in the context of incompatibility if it continues to be used as a ground for dismissal.[33] Moreover, there is need for clarity as to how the courts should deal with issues of incompatibility in the workplace when it is caused by the unique conduct of the employee due to his or her cultural practices or beliefs. The question thus arises as to when the employer would be able to dismiss an employee fairly in such circumstances, considering that the employer's interests should also be served in these matters as established above. Although it can be argued that section 187 of the *LRA* regarding automatically unfair dismissals would naturally play a role, it is unclear as to what the balancing of interests of both the employer and employee would entail when considering the business interests of the employer and the right of the employee to practice his or her cultural or religious activities as provided by the *Constitution* in

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29 Mgudlwa 2013 *Employment Law: Without Prejudice* 50.
30 *Jabari* case 1868.
31 *Wright v St Mary's Hospital* 1992 13 ILJ 987 (IC), (Hereinafter, referred to as the *Wright case*) 987.
32 *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC) para 233.
33 *The Code of Good Practice: Dismissal (Schedule 8 of the LRA*).

sections 30 and 31.[34] It is submitted that there is also need for clarity as to whether the employer can raise the defence of inherent requirements of the job as provided for in section 187(2) of the *LRA* (and section 6(2) of the *EEA*) in matters regarding incompatibility.[35]

In addition, it is submitted that there is a need for clarity as to what constitutes a "corporate culture"[36] and what constitutes reasonable standards pertaining to the culture set by the employer in the workplace. Currently, the meaning of these concepts are not readily ascertainable since the courts have not fully elaborated on them. The lack of clarity and guidelines creates the possibility of innocent employees being victimised by unscrupulous employers who can dismiss them on unreasonable grounds and for arbitrary reasons, without the ability to test whether the employer's motives for the dismissal has merit. Further, the absence of a test or criteria for incompatibility makes it difficult for courts or tribunals to uniformly establish fairness and justifiability in this regard. In the absence of such, it is unclear as to how and when the court's intervention is necessary to afford protection to employees in situations where the employer dismisses an employee whom he or she deem incompatible merely based on personal differences. The implication of this is that it leaves employees vulnerable, as they are at risk of being dismissed based on the subjective feelings of the employer. Therefore, one would need a criterion for a set of events to take place before an employer has a basis to claim that the employee is incompatible with the other employees or his corporate culture. In this regard, the legislature will have to clearly

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34 In terms of s 187(f) of the *LRA*, a dismissal is automatically unfair if the employer, in dismissing the employee, that the employer unfairly discriminated against an employee, directly or indirectly, on an arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility; s30 of the *Constitution*, everyone has the right to use the language and participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights; s31(1)(a) of the Constitution, persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language; Lambrechts 2012 http://ir.cut.ac.za.

35 See s187 (2) of the *LRA*. Despite subsection (1)(f)-(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job.

36 *Jabari case* 1868; Van Vuuren 2016 www.hrfuture.net.

establish whether incompatibility should be determined by means of an objective or subjective test, or even a combination thereof.

Another obstacle is that until now, the courts have adopted various substantive and procedural factors, or rather a "flexible approach",[37] when establishing whether dismissal based on the ground of incompatibility is fair or not.[38] This is problematic in the sense that the substantive and procedural requirements are not applied uniformly as each case is dependent on the unique circumstances. Further, there is no consensus whether incompatibility falls under misconduct, incapacity or operational requirements or whether it should be regarded as a separate ground entirely for purposes of determining the applicable substantive and procedural requirements. This would enable employers to adopt the appropriate pre-dismissal procedures. For instance, incompatibility was regarded as falling under operational requirements in the case of *Wright v St Mary's Hospital*[39] and under misconduct in the case of *Jardine v Tongaat Hulett Sugar*.[40] However, in the recent case of *Mgijima* and *Jabari* it was regarded as falling under incapacity.[41] It should be noted that the courts arrived at these conclusions based on the facts involved in each case. On one hand, it may be argued that the unique circumstances of each case could justify a different approach in that incompatibility can be closely linked with misconduct or the employer's operational requirements. On the other hand, this creates a problem in that there will be no uniformity in application by the courts or tribunals when dealing with incompatibility cases and it will be difficult to distinguish incompatibility from other grounds of dismissal, if it is always viewed in light of the others. It may be argued that for purposes of clarity, a definite and legit distinction between incompatibility and other grounds of dismissal is necessitated. For instance, incompatible behaviour is not misconduct if the employee does not contravene a rule of conduct in the workplace. Similarly, an employee (himself or herself) might be very good at his or her job and

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37 *Brereton v Bateman Industrial Corporation Ltd and Others* (2000) 5 LLD 119 (IC).

38 *Miyeni v Chillibush Communications*; *Wright v St Mary's Hospital* 987; *Jabari case* 1868; *Jardine v Tongaat Hullet Sugar Ltd* 2002 23 ILJ 547 (CCMA), (Hereinafter, referred to as the *Jardine* case) 547; *Mgijima v MEC* case para 70.

39 *Wright v St Mary's Hospital* 987.

40 *Jardine* case 547.

41 Jordaan and Stander *Effective Workplace Solutions: Employment Law from a Business Perspective* 73.

efficient (thus not incapacitated), while other employees simply feel that due to his or her demeanour or quirks, they do not find him or her compatible with the corporate culture and thus collegial relationships and productivity suffer.

Lastly, there are no guidelines as to the various effective remedial actions apart from counselling that can be used in respect of those employees who conduct themselves in a manner that creates disharmony in the workplace. Due to a lack of statutory guidelines and protection of employees in certain instances as can be seen above, there is a need for policy reform and legislative intervention when considering incompatibility as a valid independent ground for dismissal.

Given that guidelines regarding incompatibility as a freestanding ground for dismissal in the South African labour law are negligible, it is pertinent to investigate best practices of other jurisdictions in an attempt to learn lessons and potentially fill the gaps highlighted above.[42] As chosen jurisdictions in this regard, the regulation and/or application of incompatibility as a legitimate ground for dismissal in New Zealand and Australia are analysed.[43] The purpose of this investigation is to make possible suggestions for the potential problem areas in the South African legislative framework regarding incompatibility and where policy reform might be needed. New Zealand and Australia have no express provisions or statutory guidelines that specifically recognise incompatibility as a valid ground for dismissal, but like South Africa, the courts have addressed such disputes and have provided a few guidelines in their case law.[44] It

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42 S39(c); s233 of the *Constitution*; *S v Makwanyane* 1995 (3) SA 391 (CC) para 37. The Constitutional Court affirmed that guidance can be drawn from comparative law and can provide assistance if there is no developed jurisprudence in that particular body of law. Rautenbach C "The South African Constitutional Court's Use of Foreign precedent in Matters of Religion: Without Fear or Favour?" 2015 *PER/PELJ* 1548- 1549.

43 The basis of this investigation is that New Zealand and Australia have addressed such disputes and have provided a few guidelines in their case law.

44 *Terris v The Parliamentary Service* 2012 NZ ERA 29/03/12; *Walker Procure Health Ltd* 2012 NZ EmpC 90 ARC 72/ 90; *Snowdon v Radio New Zealand* NZCA 108 CA149/2013; *Mabry v West Auckland and Living Skills Home Trust Board* (Inc) unreported 2001 AC 86/01; *Reid v New Zealand Fire Service Commission* (7/5/08, HRRT Decision No 8/2008; HRRT58/07); *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66*; Bennett v NZ Mushrooms Ltd Auckland* 2008 NZERA 754*; Birss v Aiku New Zealand Ltd* (AT/195/96) *Auckland* 1996 NZEmpT 244; *Burns v Chief Executive Legal Services Agency* (WA/22/04) Wellington 2004 NZERA 182; *Buxton v Five Star Beef Ltd (CT/37/96) Christchurch* 1996 NZEmpT 486; *Cheol Hong v Auckland Transport (Auckland)* [2017] NZERA 255; *Crooks v Pratt & Whitney Air New Zealand Services Christchurch*

should be noted that New Zealand and Australia do not address all the problems faced in South Africa. However, since these jurisdictions have dealt with the issue of incompatibility in their labour law, it is hoped that the measures that they have in place can, to some extent, assist in improving the *lacunae* posed by a lack of statutory guidance in South African labour law. In the Australian judgement of *Marbry v West Auckland Living Skills Home Trust Board*,[45] the Employment Court held that when the employment relationship between the employer and the employee terminates due to incompatibility, the employer must justify the dismissal by corroborating substantial facts. This entails an objective approach to prove there was an irreconcilable breakdown in the employment relationship that justifies the dismissal. Once the burden has been discharged, substantive and procedural elements of dismissal must be considered.[46] Similarly, in the New Zealand cases of *Reid v New Zealand*,[47] *Snowdon v Radio New Zealand*[48] and *Walker v ProCare*,[49] the courts held that when dealing with issues regarding incompatibility, the onus rests on the employer to prove that there is an irreconcilable breakdown of trust and confidence of the employment relationship between the employer and the employee.

Although New Zealand does not have an express provision that recognises and regulates incompatibility as a ground of dismissal, section 103A of the *Employment Relations Act* of 2000 provides a test to determine whether a dismissal is justified.[50] It

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2007 NZERA 278; *De Kater v Streamline Freight (Auckland)* [2016] NZERA Auckland 102; *Gomes v Ministry of Social Development Wellington* 2007 NZERA 473; *Hayward v Tairawhiti Polytechnic (AA/72/04) Auckland* 2004 NZERA 490; *Harris v Chief Executive, Department of Corrections* [2000] 1 ERNZ; *Comberv v Odyssey House Trust Inc* [1992] 3 ERNZ 210; *Wellington Hotel etc IUOW v Hawthorne* [1988] NZILR; *Heriot v Asteron Life Limited Wellington* 2007 NZERA 407; *Hoyte v AIA International Limited (Auckland)* [2018] NZERA 72; *Huntley v Maataa Waka Waka Ki Te Tau Ihu Trust Christchurch* 2008 NZERA 341; *Kee v Bartercard New Zealand Ltd (AA/296/04) Auckland* 2004 NZERA 432; *Marshall v Conway Shipping Ltd ta Seatrade NZ (AA/311/03) Auckland* 2003 NZERA 407; *O Neill v Te Puke High School Board of Trustees (HT/69/01) Hamilton* 2001 NZEmpT 454; *Watt v Canterbury District Health Board (CA/22/06) Christchurch* 2006 NZERA 132.

45 *Mabry v West Auckland and Living Skills Home Trust Board* (Inc) unreported 2001 AC 86/01, (Hereinafter, referred to as the *Mabry* case)

46 *Mabry* case.

47 *Reid v New Zealand Fire Service Commission* (7/5/08, HRRT Decision No 8/2008; HRRT58/07).

48 *Snowdon v Radio New Zealand* NZCA 108 CA149/2013 (Hereinafter, referred to as, *Snowdon v* Radio New Zealand).

49 *Walker v Procure Health Ltd* 2012 NZ EmpC 90 ARC 72/ 90 (Hereinafter, referred to as, *Walker case*).

50 *Employment Relations Act* of 2000, (Hereinafter, referred to as the *Employment Relations Act*).

may be argued that in terms of section 103A of the *Employment Relations Act*, one can also determine whether a dismissal based on incompatibility is justifiable based on the employer's actions. In addition, considerations should focus on whether or not the manner in which the employer acted would be what a fair and reasonable employer could have done in the circumstances that were prevailing at that time. Although statutory regulation of incompatibility in New Zealand is absent, it can still make a valuable contribution to this thesis since the New Zealand courts have set out procedural and substantive guidelines when dealing with incompatibility in the workplace. Particularly, in the case of *Walker v ProCare*[51] the court laid down comprehensive substantive and procedural guidelines as a means to assist employers when dealing with matters of incompatibility and provide legal certainty in such disputes. South Africa may potentially learn lessons from these procedural and substantive guidelines where its legislation falls short.

Moreover, in terms of the New Zealand *Health and Safety in Employment Act* of 1992, a hazard also includes a situation where a person's behaviour may be an actual or potential cause or source of harm to the person or another.[52] It can be argued that this provision is similarly applicable to cases of incompatibility in that by "behaviour" one does not refer to a certified illness as that would naturally fall under incapacity. Rather, it refers to behaviour that would negate the organisational objective or output of the work environment such as stress or disruption in the rhythm line which has a negative impact on the employer's business. Notably, the *Health and Safety in Employment Act* also recognises stress as a potential workplace harm and as such employers are required to take the necessary steps to identify, eliminate, isolate or minimise such harm against their employees and work environment.[53] In the context of the regulation of incompatibility as a ground for dismissal in the South African labour law, the above could potentially be considered.

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51 *Walker* case.

52 Section 2 of the *Health and Safety in Employment Act* of 1992 (hereinafter referred to as the HSEA).

53 Section 2 and s 10 of the *HSEA*.

When interpreting any legislation, the *Constitution* dictates in section 233 that courts must prefer any reasonable interpretation of the legislation that is consistent with international law.[54] Moreover, South Africa is bound by international agreements which were binding on the Republic as of when the Constitution took effect.[55] It should be noted that South Africa, New Zealand and Australia are member states of the International Labour Organisation (ILO).[56] As member states of the ILO, these countries have an obligation to ensure that their domestic legislation complies with the ILO labour standards.[57] The ILO provides guidelines when dealing with termination of employment and discrimination in the workplace to which South Africa, New Zealand and Australia are signatories.[58] Consequently, these countries are obliged to comply with the particular ILO standards. These instruments include the *Discrimination (Employment and Occupation) Convention* 111 of 1958 which deals with discrimination in the workplace and the *Termination of Employment Convention* 158 of 1982 provides guidelines regarding termination of employment.[59] For purposes of this study, the general ILO guidelines for fair dismissal are used for the appropriate development of guidelines for incompatibility in South African labour law. These international standards may assist in conceptualising incompatibility as a ground of dismissal and applying the correct procedural and substantive guidelines when dealing with issues of this matter.

1.4 Framework

This research has seven chapters:

Chapter 1 contains a brief overview of the scope and purpose of this thesis. This includes an introduction on incompatibility in South Africa and the specific problem areas that are addressed in this research.

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54 Section 233 of the *Constitution*.
55 Section 231 of the *Constitution*.
56 International Labour Organisation 2019 Member States www.ilo.org accessed 13 June 2019.
57 Van Niekerk *et al Law @ Work* 21.
58 International Labour Organisation 2018 www.ilo.org.
59 *Discrimination (Employment and Occupation) Convention* 111 of 1958; *Termination of Employment Convention* 158 of 1982.

Chapter 2 critically analyses the concept of incompatibility in the workplace. This chapter unpacks the definition of incompatibility in the workplace and highlights instances when an employee is deemed to be incompatible. A critical analysis of the crucial elements that constitute incompatibility such as the corporate culture of the workplace, standards in the workplace, irreconcilable breakdown in the working relationship and disharmony in the workplace is carried out in this chapter.

Chapter 3 discusses the challenges surrounding incompatibility as a ground for dismissal in South African labour law especially in the absence of proper regulation and established guidelines. An overview of incompatibility under the influence of the *Constitution* and the *EEA* is provided. This includes a critical analysis on the balancing of the interests of the employer's business against those of the employee. Furthermore, an investigation is undertaken to illuminate the conflict between the corporate culture in the workplace and incompatibility that is caused by the unique conduct of the employee due to cultural practices or beliefs. In addition, instances where incompatibility is as a result of the employee just being eccentric, talks to themselves or where a manager is harsh with his subordinates are analysed. Lastly, a critical analysis on the conflict between incompatibility, the inherent requirements of a job and the principle of reasonable accommodation is carried out. As part of this chapter, an assessment of how the South African courts have dealt with issues of incompatibility of this nature in the workplace to date, is conducted.

Chapter 4 provides a critical comparison between incompatibility and other grounds of dismissal which include misconduct, incapacity and operational requirements. This chapter assists in determining why the other grounds of dismissal are included as fair grounds of dismissal and why incompatibility cannot necessarily be considered as a species of either. In doing so, this determination provides justification as to if and why incompatibility should be considered as a separate and fair ground of dismissal in terms of the *Labour Relations Act*.

Chapter 5 entails an investigation into the international law instruments of the ILO regulating termination of employment and discrimination in the workplace as well as best practice guidelines in other jurisdictions, namely New Zealand and Australia.

South Africa, New Zealand and Australia have an obligation to ensure that their domestic legislation comply with the ILO labour standards. This chapter provides the background to the prescribed international guidelines on termination of employment and discrimination in the workplace from which it can later be deduced which of the ILO standards in particular, are to be complied with in South Africa regarding incompatibility in the workplace. In addition, a critical analysis and an evaluation of the application of incompatibility as a ground of dismissal in New Zealand and Australia are carried out in this chapter. The ultimate purpose of this chapter is to determine which guidance can be drawn from the ILO standards and which lessons could potentially be learnt from New Zealand and Australia in the development of guidelines in the South African labour law on incompatibility as a ground for dismissal.

Chapter 6 consists of a set of proposed guidelines and procedures for regulating incompatibility as a legitimate and separate ground of dismissal, which culminate in a proposed *Code of Good Practice* in this regard. This chapter specifically establishes substantive and procedural fairness guidelines applicable to cases of incompatibility as developed by the South African labour courts, as well as the New Zealand and Australian employment courts. The ultimate purpose of the proposed *Code of Good Practice* is to provide the minimum guidelines to be followed when determining substantive and procedural fairness of dismissals arising from incompatibility.[60]

Chapter 7 concludes the thesis by presenting the findings of the research conducted, and the recommendations based on the observations made throughout the research. Recommendations are made as to what measures can be taken to include incompatibility as a separate and fair ground for dismissal in South African labour law legislation.

1.5 Aims and objectives

An investigation and a critical analysis on how suitable incompatibility is in the workplace as a separate and legitimate ground for dismissal in terms of the *LRA* are

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60 Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* (Juta Cape town 2014) 156.

carried out in this research. This research further aims to critically evaluate and examine how the courts have attempted to provide guidelines and procedures when dealing with dismissals arising from incompatibility. Moreover, this study also considers how other jurisdictions – New Zealand and Australia in particular – have attempted to address incompatibility and what lessons South Africa can adopt in developing its labour laws where they fall short. This study is based on the premise that there are no statutory guidelines in this regard, as the *LRA* and other governmental documents do not provide express provisions on dismissals arising from compatibility.

The research seeks to:

1 Provide a conceptualisation of incompatibility from other sources, different countries and authors and consequently provide a critical understanding of this topic.

2 Establish what constitutes a corporate culture in the workplace and when it is a valid basis for determining compatibility.

3 Determine whether incompatibility is a species of misconduct, incapacity or if it falls under operational requirements since neither the courts nor legislation provide clarity to this effect.

4 Critically analyse how the courts deal with incompatibility when caused by the unique conduct of the employee arising from cultural practices and beliefs vis-à-vis the business interests of employer or the inherent requirements of the job. It is also investigated whether or not incompatibility can legitimately arise when the employee is just being eccentric, talks to themselves or when a manager is harsh to his subordinates.

5 Establish procedural and substantive guidelines on dismissals arising from incompatibility.

6 Assess the need for legal or policy reforms where South African labour law falls short taking into consideration how countries like New Zealand and Australia have addressed incompatibility in their employment law.

1.6 Assumptions and hypotheses

1.6.1 Assumptions

Every employer and employee have the constitutional right to fair labour practices.

Misconduct, incapacity and operational requirements are grounds for dismissal expressly provided for by the *LRA*, but not incompatibility.

Although incompatibility is not listed as a ground for dismissal in the *LRA*, it has been recognised as such by various South African courts and other dispute resolution tribunals in a number of cases. This study assumes that incompatibility is a ground of dismissal in South African law despite not being expressly provided for by the *LRA*.

Harmony between the employer and his or her employees and between the employees as colleagues is paramount for a healthy and productive working environment.

1.6.2 Hypothesis

This study hypothesises that a *lacunae* exists in South African labour law regarding incompatibility as a separate and legitimate ground for dismissal due to a lack of statutory guidance in the *Labour Relations Act* 66 of 1996 on the issue, especially when considering best practices of foreign countries. This hypothesis encompasses the following:

Incompatibility of an employee with the employer, the business or his/her colleagues has the potential to hinder efficacy and damage work relationships.

Incompatibility could be used as an independent ground for dismissal.

The lack of guidelines pertaining to dismissal based on incompatibility creates legal uncertainty and leaves employees vulnerable to arbitrary dismissals.

Employers should be allowed to dismiss an employee based on incompatibility when it is to the serious detriment of the employer's business.

Statutory and regulatory reform on the topic of incompatibility in the workplace will go a long way to protect the interests of both the employer and the employee.

An analysis of best practices in other jurisdictions might provide guidance in the South African labour law to address the current *lacunae* regarding the implementation of incompatibility as a ground of dismissal.

The South African law makers can make use of some procedural and substantive guidelines on incompatibility as a ground of dismissal that have been developed by other jurisdictions such as New Zealand and Australia.

1.7 Research method

This study is founded on a literature review of relevant books, case law, journals, statutes and internet sources in order to critically analyse incompatibility as a ground for dismissal in South African labour law. Further, recommendations are made to ensure legal certainty when dealing with dismissals arising from incompatibility in the workplace. In terms of the *Constitution*, the courts should consider international law and foreign law when interpreting any legislation.[61] Therefore, a study of best practices in New Zealand and Australia is justified and undertaken in order to address problems where South African legislation falls short. For purposes of this study, New Zealand and Australia have addressed incompatibility extensively in their case law. Although New Zealand and Australia collectively do not address all the problems involved with implementing incompatibility as a ground of dismissal, it is envisaged that the measures they have in place can assist in augmenting the potential problems posed by the lack of statutory guidance in South African labour law.

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61 Section 39(1)(b), (c), s 232, s 233 of the *Constitution*.

1.8 Scope and limitation of the study

This research is limited to an investigation and a critical analysis of how suitable incompatibility is in the workplace as a separate and legitimate ground for dismissal in terms of the *LRA* and how best it can be regulated. Furthermore, the researcher conducts a study of best practices of other jurisdictions, specifically New Zealand and Australia. This allows for viable recommendations in addressing the objectives highlighted above.

Chapter 2 Conceptualising incompatibility in the workplace

2.1 Introduction

This chapter provides a background to and conceptualises incompatibility in the workplace. The purpose of this chapter is to highlight the crucial concepts and elements of this research. By doing so, this discussion provides more insight as to why incompatibility should be regarded as a separate and valid ground of dismissal in South African labour law. This chapter begins by unpacking the definition of incompatibility in the workplace and thereafter, highlights instances when an employee is deemed to be incompatible. Furthermore, a critical analysis on the crucial elements that constitute incompatibility such as the corporate culture of the workplace, attainable standards in the workplace, irreconcilable breakdown in the working relationship and disharmony in the workplace is carried out in this chapter. This enables one to have a better understanding of the concept of workplace incompatibility as a whole.

2.2 Unpacking the definition of incompatibility

As established in the previous chapter, section 188 of the *Labour Relations Act* 66 of 1995 gives cognisance to misconduct, incapacity due to poor performance or ill health and/or injury and the employer's operational requirements as valid grounds for dismissal in the South African labour law.[62] Grogan[63] submits that dismissal may be justified if effected for a number of reasons which might not necessarily fall into the aforementioned grounds. Although incompatibility is not listed as a ground for dismissal in the *LRA*, the previous chapter introduced that it has been recognised as such by various South African courts and other dispute resolution tribunals in a number of cases.[64]

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62 *The Labour Relations Act* 66 of 1995 (hereinafter, referred to as the *LRA*).

63 Grogan *Dismissal* (Juta Capetown 2007)619.

64 *Erasmus v BB Bread* 1987 8 ILJ 537 (IC); *Wright v St Mary's Hospital* 1992 13 ILJ 987 (IC); *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC); *Hapwood v Spanjaard Ltd* 1996 2 BLLR 187 (IC); *Lebowa Platinum Mines Ltd v Hill* 1998 19 ILJ 1112 (LAC); *Brereton v Bateman Industrial Corporation Ltd and Others* 2000 5 LLD 119 (IC); *Subrumuny v Amalgamated Beverages* 2000 21 ILJ 2780 (ARB); *Nathan v Reclamation Group (Pty) Ltd* 2002 23 ILJ 588 (CCMA); *Cutts v*

Since employers are increasingly dismissing employees for workplace incompatibility, South African courts have endeavoured over the last few decades to develop and elaborate on the concept.[65] It is argued that a better understanding of the concept will assist in applying the appropriate principles and measures when dealing with incompatibility dismissals and the employee concerned.[66]

2.2.1 Defining "incompatibility"

It is true that no clear-cut, all-encompassing definition for incompatibility in the labour law context exists. However, one can conclude its meaning from various definitions formulated by different authors, South African courts and dispute tribunals.[67] The Cambridge dictionary defines incompatibility as the inability to coexist or work with another person or thing because of basic differences.[68] In the context of the workplace, incompatibility subsequently pertains to an employee's inability or failure to maintain cordial and harmonious relationships with his employer and/or fellow employees.[69] Rycroft[70] defines incompatibility as a situation where there has been a breakdown in the employment relationship because interpersonal relationships are tense, conflictual

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Izinga Access (Pty) Ltd 2004 25 ILJ 1973 (LC); *Jabari v Telkom SA (Pty) Ltd* 2006 27 ILJ 1854 (LC); *Lotter and SA Red Cross Society* 2006 27 ILJ 2486 (CCMA); J*ardine v Tongaat Hulet Sugar* Ltd 2002 23 ILJ 547 (CCMA); *Miyeni v Chillibush Communications (Pty) Ltd* 2010 31 ILJ 3054 (CCMA); *Goussard v Impala Platinum Limited* 2012 33 ILJ 2898 (LC); *PSA obo Mbiza v Office of the Presidency and Others* 2014 35 ILJ 1628 (LC); *Mgijima v Member of the Executive Council Gauteng Department of Education and Others* (JR1894/2011) 2014 ZALCJHB 414.

65 Refer to the case law above.

66 Grogan *Dismissal* 620; Grogan *Workplace Law* (Juta Capetown 2020) 282; Singh date unknown https://www.mylexisnexis.co.za.

67 *Jabari v Telkom SA (Pty) Ltd* [2006] 10 BLLR 924 (LC)(Hereinafter, referred to as *Jabari* case); Mgudlwa 2013 *Employment Law: Without Prejudice* 49; Grogan *Dismissal* 620; Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* 285-6; Rycroft 2012 *ILJ* 2276; Van Niekerk *et al Law at Work* 307; Griessel 2019 http://www.labourguide.co.za; Cantebury Employers' Chamber of Commerce 2020 *Incompatibility* https://www.scchamber.org.nz accessed 20 September 2020; New Zealand 2019 *Incompatibility* https://www.employment.govt.nz accessed 6 September 2019; Donovan 2020 *What is Incompatibility* https://www.markdonovan.co.nz accessed 20 September 2020.

68 Cambridge University Press 2019 *Incompatibility* https://dictionary.cambridge.org accessed 20 May 2019; Oxford Learner's Dictionaries 2019 *Incompatibility* https://www.oxfordlearnersdictionaries.com 20 September 2019; Collins English Dictionary 2019 *Incompatible* https://www.collinsdictionary.com accessed 20 September 2019.

69 Mgudlwa 2013 *Employment Law: Without Prejudice* 49; Grogan *Dismissal* 620; Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* 285-6; *Jabari v Telkom SA (Pty) Ltd* [2006] 10 BLLR 924 (LC) (Hereinafter, referred to as *Jabari* case); Griessel 2019 http://www.labourguide.co.za.

70 Rycroft 2012 *ILJ* 2276.

or lacking in harmony. Consequently, this creates an unhappy or hostile environment in the workplace.[71] The definition of Van Niekerk *et al*[72] is congruent with that of Rycroft, stating that incompatibility is a serious clash with the prevailing "corporate culture" or personality clashes with other employees. Mischke[73] further adds that serious breakdowns in interpersonal relationships between employees and managers have devastating effects on the morale of the employees concerned, the atmosphere and ultimately the productivity of the workplace as a whole. From the above definition, it is apparent that an employee's incompatibility can have a detrimental effect on the workplace and the relationships involved.

As mentioned earlier, the courts have also attempted to define incompatibility in a number of judgements. In *Lubke v Protective Packaging*[74] and *Wright v St Mary's Hospital*, [75] incompatibility was defined as an irreconcilable breakdown in the working relationship owing to personality clashes or differences, resulting in the employee's inability to work with others. In *Jabari v Telkom SA,*[76] incompatibility was defined as that which relates to the subjective relationship of an employee and other co-workers within the employment environment. It was additionally held that incompatibility also refers to an employee's failure to adapt to the "corporate culture" of the workplace.[77] Evidently, the courts' definitions echo those of the authors stated above.

Nevertheless, Grogan[78] argues that there is a distinction between "unsuitability" and "incompatibility". It is submitted that "unsuitability" is where the employee in question is unsuited to their work because of their disposition or character.[79] Whereas "incompatibility" is where an employee does not "fit in" with the working environment and relates poorly to their colleagues and/or clients.[80] Nonetheless, from the various

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71 Griessel 2019 http://www.labourguide.co.za.
72 Van Niekerk *et al Law at Work* 307.
73 Mischke 2005 *Contemporary Labour Law* 71.
74 *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC) (Hereinafter, referred to as *Lubke* case) 424.
75 *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC) (Hereinafter, referred to as the *Wright* case) 987.
76 *Jabari* case 1868.
77 *Jabari* case 1868; Grogan *Dismissal* 620.
78 Grogan *Workplace Law* 214.
79 Grogan *Workplace Law* 214; Griessel 2019 http://www.labourguide.co.za.
80 Grogan *Workplace Law* 214.

definitions set out above, one can safely arrive at a plausible definition. It can be argued that the term "incompatibility" would be a neat fit as opposed to the distinction suggested above. It is contended that incompatibility can be said to be the umbrella term, whereas the distinction would merely be a matter of semantics.[81] It seems unsuitability relates to suitability to perform the work, while incompatibility relates to the people and relationships. In essence, incompatibility can be defined as an employee's inability to work harmoniously with fellow employees and/or the employer due to personality clashes, differences and/or failure to fit in with the "corporate culture" in the workplace.

2.3 The concept of incompatibility as developed by the South African courts

It is contended that the various definitions mentioned above provide a literal meaning of what constitutes incompatibility in the workplace. However, these definitions do not fully elaborate on the context behind incompatibility in the workplace. It is submitted that in order to have a comprehensive understanding as to what incompatibility entails, it is important to have an insight into the development of the concept of incompatibility by the South African courts.

2.3.1 The first mention of incompatibility by a South African court

It is noteworthy that the principle of incompatibility was first developed in the case of *Erasmus v BB Bread*[82] by the Industrial Court (as it was then). In this matter, the employees called for the dismissal of Erasmus (the applicant), who was a manager of BB Bread, due to his callous and difficult attitude – failing to relate and manage his subordinates amicably.[83] Amid reports made by subordinates included the applicant's uncompromising and difficult attitude in communicating with the sales representatives, how he exercised his management powers arbitrarily towards his subordinates, his lack of interpersonal skills with his subordinates which was reflected by the careless and insensitive manner in which he spoke to them and the numerous

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81 Both terms can mean the same thing.
82 *Erasmus v BB Bread* 1987 8 ILJ 537 (IC) (Hereinafter, referred to as *Erasmus* case) 542.
83 *Erasmus* case 542.

personality clashes with trade unions and his superiors at that time.[84] In light of the allegations made against him, the applicant did not refute that he had failed in maintaining healthy interpersonal relationships with his subordinates.[85] The Court confirmed that reasons for dismissal based on incompatibility were valid because the employer is entitled to harmonious interpersonal relationships amongst his employees on the factory floor.[86] It is argued that the implication is that an employee has a duty not to act in a disruptive or discordant manner in the workplace. It is contended that the Industrial Court in *Erasmus v BB Bread Ltd* laid the foundation for employers to act against employees whose conduct is not compatible with workplace harmony, regardless the fact that it does not fall within any of the recognised grounds in the LRA. The Industrial Court, therefore, opened the door for the recognition of a new ground for dismissal, but unfortunately failed to elaborate on the meaning of incompatibility and what to take into account to determine whether the employer's reasons were sound or not.

2.3.2 The development of the concept of incompatibility in subsequent South African judgements

2.3.2.1 Incompatibility in the context of common law duties

It is trite that there are common law duties that flow from an existing employment relationship between the employer and the employee. An employee has the obligations to obey the lawful instructions of the employer, to be subordinate to the employer and to render services in good faith towards the employer's business.[87] It is submitted that these duties will also apply when dealing with disputes arising from

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84 *Erasmus* case 542.

85 *Erasmus* case 544.

86 *Erasmus* case 544; Van Niekerk *et al Law at Work* 306. The CCMA and the Labour courts give cognisance to the fact that an employer is entitled to insist on reasonably harmonious interpersonal relationships in the workplace.

87 Garbers C *et al The Essential Labour Law Handbook* (Mace Labour Law Publications Centurion 2019) 35-36; Du Plessis JV and Fouche MA *A Practical Guide to Labour Law* (Lexis Nexis Durban 2019) 22. By obeying lawful instructions and being subordinate, the employer is in a position of authority to the employee. Furthermore, by acting in good faith, an employee should not do anything that breaches the employer's trust. An employee should not do anything that is detrimental to the employer's business.

incompatibility in the workplace. In *Council of Scientific & Industrial Research v Fijen*,[88] the Court highlighted that there is a common law duty on the employer not to act in a manner that is likely to destroy or seriously damage the relationship of confidence and/or trust with the employee. Likewise, this creates a recognised implied term in an employment contract in terms of common law which places a duty on an employee to similarly not act in a manner which disrupts harmony in the workplace or act in a manner that results in the breakdown of the employment relationship.[89] Grogan[90] correctly argues that this implied term emanates from the general assumption that every employee implicitly undertakes to serve the employer in good faith - honestly and faithfully. Moreover, an implied term is one that is read into the contract, irrespective of the wishes or intention of the parties.[91] Hence, implied terms are deemed by law to form terms of the contracts, even if the contracting parties were unaware of them.[92] It is contended that implied terms determine the true extent of the parties' rights and obligations.[93]

Therefore, a breach by either party (in this case the employee) on any obligations imposed by the contract entitles the employer to either accept the breach or to repudiate the contract.[94] It is submitted that if the employee disrupts harmony in the workplace in a manner that results in the breakdown of the employment relationship, this constitutes a material breach of contract. Hence, the employer may terminate the employment contract summarily (without notice) after having met the requirements of substantive and procedural fairness.[95]

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88 *Council of Scientific & Industrial Research v Fijen* [1996] 6 BLLR 685 (AD) (Hereinafter, referred to as *Council of Scientific* case) 17.

89 *Council of Scientific* case 686; Grogan J *Employment Rights* (Juta Capetown 2019) 67.

90 Grogan *Employment Rights* 68; Grogan *Workplace Law* 36; Du Plessis and Fouche A *Practical Guide to Labour Law* 22; Fouche MA *et al Legal Principles of Contracts and Commercial Law* 9th ed (Lexis Nexis Durban 2021) 106.

91 De Stadler E *et al The Law of Contract in South Africa* 4th ed (Oxford University South Africa 2022) 270; Fouche *et al Legal Principles of Contracts and Commercial Law* 106; Grogan *Employment Rights* 67; Grogan *Workplace Law* 36.

92 De Stadler *et al The Law of Contract in South Africa* 270; Grogan *Employment Rights* 67; Grogan *Workplace Law* 36.

93 De Stadler et *al The Law of Contract in South Africa* 271; Grogan *Employment Rights* 68; Grogan *Workplace Law* 36.

94 Grogan *Employment Rights* 90.

95 Van Niekerk *et al Law at work* 96.

2.3.2.2 Incompatibility in the context of an intolerable employment relationship and working hostile environment

Rycroft[96] argues that incompatibility can be viewed in the context of intolerable employment relationships. However, the concept of intolerability in employment relationships was introduced in the *LRA* in terms of section 186(1)(e), section 193(2) and item 3(4) of the *Code of Good Practice: Dismissal Schedule* 8 of the *LRA*.[97] Firstly, section 186(1)(e) of the *LRA* provides for constructive dismissal whereby an *employee* terminates the employment contract with or without notice because the *employer* made continued employment intolerable.[98] Rycroft[99] opines that the aforementioned provisions are based on the underlying presumption that the employment relationship should be tolerable. It is argued that the concept of intolerability can be applied in the context of incompatibility cases between the employee and the employer and/or other employees.[100] In contrast to constructive dismissal, an employer may thus terminate an employee's employment contract for intolerable conduct. This is especially when the employee's conduct has broken down the employment relationship and has made the working environment hostile and ultimately intolerable.[101]

2.3.2.3 Incompatibility as a tenuous concept

In *Subrumuny v Amalgamated Beverages*,[102] incompatibility was described by the Court as a "nebulous concept", meaning it cannot often be explained or articulated in clear objective terms. This presents a challenge when applying the concept of incompatibility as a ground for dismissal. It may prove difficult to establish an objective criterion or reach a judgment as the merits of each case are subjective for every individual. Moreover, what would be regarded by the employer as incompatible behaviour within one business or with relation to its employees, will not necessarily

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96 Rycroft 2012 *ILJ* 2271.
97 S186(1)(e), s193(2) of the *LRA*; Item 3(4) of the *Code of Good Practice: Dismissal Schedule* 8 of the *LRA* (Hereinafter, referred to as the *Code of Good Practice: Dismissal*).
98 S186(1)(e) of the *LRA*.
99 Rycroft 2012 *ILJ* 2271.
100 Rycroft 2012 *ILJ* 2276.
101 Rycroft 2012 *ILJ* 2276; *Council of Scientific* case 692.
102 *Subrumuny v Amalgamated Beverages Ltd* 2000 21 ILJ 2780 (ARB) (hereinafter referred to as *Subrumuny* case) 2789.

be regarded as such in another workplace. Mischke[103] contends that subjective, irrational perceptions and views could also lead to interpersonal conflict between an employee and his or her co-workers which makes them incompatible. He further adds that events, perceived slights, occasional rudeness or even the failure to greet a colleague on a blue Monday morning may be blown out of proportion by sensitive or sensitised employees.[104] In some instances, rumours may contribute to interpersonal conflicts in the workplace that may eventually lead to a perception of incompatibility.[105] Hence, it is argued that incompatibility is based on subjective judgments and feelings of the parties involved, rather than the legitimate facts present in a particular case.[106] Watkins[107] contends that in the South African employment environment where fairness and objectivity plays a pivotal role on any grounds of dismissal, applying such a concept is in its very nature not only dangerous but also imbued with risk. This argument is not necessarily accurate if it is objectively apparent that there are ongoing conflicts between the employee and the employer/other employees that cannot be resolved and are causing discord in the workplace. Contrarily, Van Niekerk *et al*[108] argue that although incompatibility may be a "nebulous" concept, it can still ultimately and legitimately form the basis for a fair dismissal. This argument is fully discussed in the later chapters to ascertain whether incompatibility could be a legitimate ground for dismissal in South African labour law, and if so, which guidelines should be established.

2.4 Instances when an employee is deemed to be incompatible in the workplace

In *Jabari v Telkom SA (Pty) Ltd,*[109] it was specifically highlighted that the factors that cause incompatibility relate to personality conflicts, management style and inability to integrate into the "corporate culture" and the environment of the workplace. It is submitted that an employee can be considered as being incompatible when he or she

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103 Mischke 2005 *Contemporary Labour Law* 74.
104 Mischke 2005 *Contemporary Labour Law* 74.
105 Mischke 2005 *Contemporary Labour Law* 74.
106 *Subrumuny* case 2789; Israelstam 2018 http://www.labourguide.co.za.
107 Watkins 2012 https://www.workinfo.com.
108 Van Niekerk *et al Law at Work* 306.
109 *Jabari* case 1868.

portrays an attitude, behaviour and character that is deemed to be in contrast to the employer's "corporate culture".[110] Additionally, employees are regarded as incompatible when their colleagues, subordinates or superiors are unable to tolerate their behaviour and find it difficult, if not impossible, to work alongside them.[111] Van Niekerk *et al*[112] opine that incompatibility manifests in numerous ways ranging from mildly eccentric to overly hostile behaviour towards supervisors and colleagues. Even so, a simple lack of confidence in the manager's capacity or willingness to carry out his or her duties can be regarded as incompatibility, which could lead to dismissal.[113]

Incompatible employees are often labelled as "difficult", "non-compliant employees", "troublemakers" and "misfits" in terms of the employer's corporate culture and values of organisation.[114] Not only does the employee's behaviour upset or unnerve his colleagues, but it creates a hostile environment that also affects the day to day running of the business.[115] Such behaviour will have a negative impact and thus, also encroach the employer's right to his/her business interests. This issue is dealt with in the next chapter.[116]

Grant[117] and Griessel[118] attempted to elaborate and categorise the different types of incompatible behaviour in the workplace. It is submitted that this categorisation will assist employers, the courts or dispute tribunals to ascertain whether an employee's behaviour could in fact constitute the alleged incompatibility. Moreover, it will also protect employees from being victimised by either their employer or colleagues when their alleged behaviour is deemed incompatible with the "corporate culture" in the workplace without valid grounds. Griessel[119] submits that the alleged incompatible behaviour entails:

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110 Mgudlwa 2013 *Employment Law: Without Prejudice* 50.
111 Griessel 2019 https://www.labourguide.co.za.
112 Van Niekerk *et al Law at Work* 306.
113 *Jabari* case 1868.
114 Grant *Defining incompatible behavior in an employer/ employee relationship* 56.
115 Griessel 2019 https://www.labourguide.co.za.
116 Refer to chapter 3.
117 Grant *Defining incompatible behavior in an employer/ employee relationship* 56.
118 Griessel 2019 https://www.labourguide.co.za.
119 Griessel 2019 https://www.labourguide.co.za.

> the employee's attitude, his way of doing things, his disruptiveness, pushiness, temper, impatience, lack of tact, meddling, manipulation, interpersonal relationships or just his general disagreeability.[120]

Grant[121] adds that disruptive behaviour also comprises of:

> odd or eccentric behaviour, gross disruption in the workplace, defiance of authority, negative effect on staff morale and insubordination.

Furthermore, behaviours that also characterises incompatibility includes:

> aggressive behaviour including intimidation of fellow colleagues and clients; severe insolence, for instance, an employee's continuous use of foul language and disrespect towards colleagues and management; spreading malicious rumours about management and fellow colleagues which are not true and any behaviour that leads to the company being brought into disrepute which directly or indirectly led to the loss of business or confidence in the organisation.[122]

It is unclear as to how the courts deem it justified to dismiss an employee for being perhaps a little quirky or just "different" from other employees on the grounds of incompatibility.[123] It is argued that incompatibility should be distinguished from eccentricity, the latter of which the employer is expected to tolerate.[124] In *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd,*[125] the Industrial Court stipulated that odd or eccentric behaviour of an employee, irrespective of whether he or she is a manager or a senior executive, does not necessarily give rise to a ground for dismissal based on incompatibility. Nonetheless, a distinction should be drawn between mild or harmless eccentricity and extreme forms of inexcusable behaviour.[126] Examples would be where the manager receives customers, visitors and other employees while standing on his head or where the manager cartwheels in the passage outside the office. The Industrial Court highlighted that a dismissal may be deemed appropriate only where the employee's eccentric behaviour is of a gross nature, such that it causes dismay and is disruptive in the workplace.[127] This is also after he or she has been

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120 Griessel 2019 https://www.labourguide.co.za.
121 Grant *Defining incompatible behavior in an employer/ employee relationship* 48,56.
122 Grant *Defining incompatible behavior in an employer/ employee relationship* 74.
123 *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC) (Hereinafter, referred to as *Joslin* case) para 233.
124 Van Niekerk *et al Law at Work* 307.
125 *Joslin* case para 233.
126 *Joslin* case para 233.
127 *Joslin* case para 233.

properly counselled or warned of their gross conduct.[128] It is submitted that a manager should not indulge in whimsical conduct which may impair the dignity of his office or embarrass the employer.[129]

2.5 Corporate culture

In *Jabari v Telkom SA (Pty) Ltd,*[130] it was highlighted that one of the factors that could cause incompatibility relate to the inability of the employee to integrate into the "corporate culture" and the environment of the workplace. Although the Labour Court recognised the concept "corporate culture", it did not elaborate on the meaning thereof. However, one will have to be sure as to when the behaviour of the employee, which does not fall within the "corporate culture" of the organisation, will be considered of such a nature or such gravity to allow for a fair dismissal. It is therefore necessary to investigate the meaning of non-integration into the employer's "corporate culture" as one of the causes of incompatibility. Such an investigation is necessary to be able to ascertain how and when this could truly render the employee incompatible with the employer's business. A clear understanding of what is meant by "corporate culture" is thus vital in an attempt to answer these questions.

2.5.1 Defining "corporate culture"

While evaluating the concept of "corporate culture," it is incumbent to note that the *Constitution of the Republic of South Africa*, 1996, plays a significant determining factor of whether or not the interpretation and application of an employee's inability to fit in the "corporate culture" will not contradict the values that underpin an open and democratic society based on human dignity, equality, and freedom.[131] Of relevance to the investigation into the corporate culture of an employer are amongst others, section 9 (the equality clause), section 10 (human dignity), section 15 (freedom of religion, belief and opinion), section 30 and 31 (right to language, religion and culture), in the sense that the claim that an employee does not fit within the particular corporate

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128 *Joslin* case para 230.
129 *Joslin* case para 230.
130 *Jabari* case Ltd.
131 *Constitution of the Republic of South Africa*, 1996 (Hereinafter, referred to as the *Constitution*).

culture, may infringe on one or more of these constitutionally entrenched rights.[132] On the other hand, section 36 provides for the possibility of limitation of these rights if it should be deemed reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[133] The influence of the *Constitution* on the corporate culture of the workplace is discussed fully in the next chapter.[134]

The meaning and application of "corporate culture" should be bordered on the central rights in the workplace, section 23 of the *Constitution*, which amongst others bestows everyone the right to fair labour practices.[135] As introduced in the previous chapter, the interests of both the employer and the employee are critical components of labour relations, meaning a balance between both parties' interests must be maintained to foster good employment relationships and labour peace. Therefore, the meaning of a "corporate culture" should encompass both the employer's and employee's right to fair labour practice in the workplace. In addition, in terms of the *Employment Equity Act*, the employer has a duty to eradicate all forms of discrimination against his employees on various listed and unlisted grounds.[136] Therefore, the interpretation of "corporate culture" should pass constitutional muster and should not unfairly discriminate against employees.

This being said, the term "corporate culture" is ambiguous and problematic as it has the ability to cause confusion. There is no set definition as to what "corporate culture" is, but the widely accepted description amongst academics is "the way we do things around here".[137] It is argued by Trompenaars and Homme[138] that "corporate culture" is a number of multifaceted factors, that when combined together, they form a prevailing "culture" in the workplace. It can be defined as a system of informal rules,

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132 S9, s15, s30 and s31 of the *Constitution*.

133 S36 of the *Constitution*. Refer to chapter 3, para 3.7 for an in depth discussion on the limitation clause.

134 Refer to chapter 3.

135 S23 of the *Constitution*. Refer to chapter 3, para 3.3 for an in depth discussion on the meaning of fair labour practices.

136 S6 of *EEA*.

137 Trompenaars and Homme *Managing change: Across Corporate Cultures* 13,15; Van Vuuren 2016 *Corporate Culture Change* 1.

138 Trompenaars and Homme *Managing change: Across Corporate Cultures* 14; Davel and Snyman 2005 *SAJIM* 2; CMI Understanding organisational culture 1; FASSET *Culture and Diversity Handbook* 4.

shared values, attitudes, standards, beliefs and assumptions that characterise members of an organisation. According to Mgudlwa,[139] it can then be deduced that an employee is considered as being incompatible when he or she portrays an attitude, behaviour or character that is deemed to be in contrast to these attitudes, values etcetera. It is contended that such behavioural threats have the potential to disrupt workplace harmony which is essential for a healthy and well-functioning business and labour market. An employee's behaviour may actually or potentially disrupt other employees and the rhythm line of the business.

For purposes of labour law, it is however inconclusive to refer to "corporate culture" as simply "the way we do things around here". Although this definition may be considered to be a more pragmatic approach of what corporate culture entails, Simpson and Taylor[140] argue that "the way we do things around here" is rather a more simplistic shorthand definition than it actually is. Alvesson[141] opines that corporate culture is both a complex and difficult concept to fully comprehend. He adds that such a simplified definition connotes the surface phenomena rather than providing a fully elaborated meaning and idea behind "corporate culture". It is thus submitted that there is a need for clarity as to what constitutes a "corporate culture", since a lack of clarity on this issue creates the possibility of employees being victimised by unscrupulous employers who may try to dismiss them for arbitrary reasons, but under the veil of supposed incompatibility. For instance, in *FOCSWU obo Ralawe / Anglican Church,*[142] the applicant was dismissed after the relationship between herself and her superiors had deteriorated to the point where they could no longer work together. The commissioner found that although an employee could be dismissed for incompatibility, she could not be dismissed simply because she was not liked by other employees.[143] It is evident that much more is needed to prove a failure to fit within the corporate culture, and ultimate incompatibility.

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139 Mgudlwa 2013 *Employment Law: Without Prejudice* 50.
140 Simpson and Taylor *Corporate Governance, Ethics and CSR* 38.
141 Alvesson *Understanding organisational culture* 3.
142 *FOCSWU obo Ralawe / Anglican Church* [1999] 9 BALR 1022 (CCMA) (Hereinafter, referred as *FOCSWU obo Ralawe / Anglican Church* case).
143 *FOCSWU obo Ralawe / Anglican Church* case.

It is accepted that "corporate culture" refers to the personality of an organisation as it defines the environment in which employees work and the proper way to behave in the workplace.[144] Van Vuuren[145] contends that the only corporate culture that is truly relevant is the manifestation of culture observed in the behaviour of individuals within the organisation. Notably, corporate culture is implied, not expressly defined, and develops organically over time from the cumulative traits of the people which the organisation employs.[146]

2.5.2 Characteristics of corporate culture

Since there is no conclusive definition, it is important to fully examine the essential characteristics of "corporate culture" and what each of them entails. This enables one to ascertain its true meaning and have an appreciation of the concept of "corporate culture". The visible elements include what you see when you walk through the gate such as employee attitude, expression of common corporate goals, manual of employees containing all strategies and leadership style.[147] What members of the organisation perceive as being central, enduring and distinctive about it, also constitutes as to what corporate culture entails.[148] Trompenaars and Homme[149] submit that there are four possible meanings of corporate culture.

2.5.2.1 How we do things around here

Firstly, "how we do things around here" is considered the common and acceptable corporate culture definition.[150] Moreover, corporate culture are patterns within the organisation that appears both through time and across the organisation.[151] These observations stem from the manner in which the formal organisational structures are

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144 SHRM 2019 https://www.shrm.org; The Balance Careers 2019 https://www.thebalancecareers.com; CMI *Understanding organisational culture* 1.

145 Van Vuuren WJ 2016 *Corporate Culture Change* 1.

146 Investopedia 2019 https://www.investopedia.com.

147 Justine Simpson and John Taylor *Corporate Governance, Ethics and CSR* 39.

148 Trompenaars and Homme *Managing change: Across Corporate Cultures* 14.

149 Trompenaars and Homme *Managing change: Across Corporate Cultures* 13; Van Vuuren 2016 *Make Corporate Culture Change* 1.

150 Trompenaars and Homme *Managing change: Across Corporate Cultures* 15; Driskill GW and Brenton AL *Organisational Culture in Action: A Cultural Analysis Workbook* 2nd ed (SAGE Publications USA 2010) 5.

151 Turner *Creating corporate culture – from discord to harmony* 5.

conducted as well as the organisational procedures or routines. Nevertheless, the challenge of using this definition is that it is difficult to determine what it really entails as it lacks clarity, and it does not reflect a consistent manner of doing things as such can easily evolve over time. In this context, it would thus prove difficult to establish and apply "corporate culture" as a valid basis of determining incompatibility.

2.5.2.2 Informal rules

Secondly, corporate culture also entails informal rules, which refer to rules that one learns as a newcomer in the organisation during their socialisation process.[152] Informal rules give one insight as to how decisions are made, who the real key opinion makers in the organisation are and what one will really be awarded for.[153] In addition, informal rules of the company can be found in stories and jokes that people tell about the company, which corporate stories could give prescriptions of desired behaviour.[154]

Again, the challenge with categorising "corporate culture" as a set of informal rules is that such rules might lack clear guidelines. One's understanding of informal rules differs from individual to individual which means that an employee can be biased towards certain rules. In addition, informal rules give room to unofficial and unconfirmed information that can be spread to employees. All these factors have the potential to cause confusion to both current and prospective employees in the workplace.

2.5.2.3 Shared values

Thirdly, "corporate culture" refers to shared values.[155] In order to comprehend the role of a shared value system in the workplace, a distinction should be drawn between such values and informal rules influencing the corporate culture of an organisation.

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152 Trompenaars and Homme *Managing change: Across Corporate Cultures* 16; Driskill and Brenton *Organisational Culture in Action: A Cultural Analysis Workbook* 52.

153 CMI 2015 *Understanding organisational culture* 1; Trompenaars and Homme *Managing change: Across Corporate Cultures* 16; Driskill and Brenton *Organisational Culture in Action: A Cultural Analysis Workbook* 50.

154 Driskill and Brenton *Organisational Culture in Action: A Cultural Analysis Workbook* 47; Trompenaars and Homme *Managing change: Across Corporate Cultures* 17.

155 Driskill and Brenton *Organisational Culture in Action: A Cultural Analysis Workbook* 28.

Rules and norms define what people think they should do whereas shared values refer to shared orientation of what they decide to do.[156] Another difference is that rules, systems or practices can be changed instantaneously whereas shared values cannot be altered just instantly.[157] It may well be that values dictate attitudes, behaviour patterns, processes and activities, though they are more consistent.[158]

Defining "corporate culture" in terms of shared values and assumptions implies that it is a static, single and an identifiable culture.[159] Such cultures would be identified as "cult like cultures." The challenge in promoting "cult like cultures" results in employers failing to make room for either diversity or change in the workplace.[160] Moreover, the implication is that strong, cult like cultures should be perceived as the ideal corporate culture paradigm.[161] It is submitted that conflicts within the organisations, regarding different cultures often emanate from disparities between various value systems.[162]

It is a clear oversight to assume that organisations only have one style and culture. Different parts of an organisation, such as departments can have their own cultures with the overall tone of the organisation.[163] It is contended that the ability of creating a viable corporate culture is not to confine an organisation to a fixed set of value systems but rather to reconcile these disparities or quandaries.[164] By establishing an internal way of life and setting patterns for internal relationships, this helps to increase mutual understanding, confidence and connect people from different national cultures.[165] It is submitted that the aforementioned characteristics are essential in preserving workplace harmony. Hence, the "corporate culture" in the workplace is

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156 Trompenaars and Homme *Managing change: Across Corporate Cultures* 18.
157 Turner *Creating corporate culture – from discord to harmony* 5.
158 Driskill and Brenton *Organisational Culture in Action: A Cultural Analysis Workbook* 30; Trompenaars and Homme *Managing change: Across Corporate Cultures* 18; Cheema M.U, Mumi. R and Su S *Corporate Governance and Whistleblowing: Corporate Culture and Employee Behaviour* (Routledge New York 2021) 61.
159 Trompenaars and Homme *Managing change: Across Corporate Cultures* 23.
160 Trompenaars and Homme *Managing change: Across Corporate Cultures* 23.
161 Trompenaars and Homme *Managing change: Across Corporate Cultures* 23.
162 Trompenaars and Homme *Managing change: Across Corporate Cultures* 23.
163 Simpson and Taylor *Corporate Governance, Ethics and CSR* 56
164 Trompenaars and Homme *Managing change: Across Corporate Cultures* 24.
165 Trompenaars and Homme *Managing change: Across Corporate Cultures* 24.

often shaped by the different upbringing of individuals in both the social and cultural context.

Furthermore, there is need for clarity as to how the courts justify dismissing an employee for being a little quirky or just "different" from other employees on the basis of incompatibility.[166] The conundrum is whether such a person can still fit with the "corporate culture" of the workplace. The court affirmed in *Joslin v Olivetti Systems and Networks Africa (Pty) Ltd*, that odd or eccentric behaviour of an employee, which makes him or her "not fit", even if he or she happens to be a manager or a senior executive cannot, per se, give rise to a ground for dismissal.[167]

The question that arises is whether one can safely arrive at a more pragmatic meaning of "corporate culture" that reconciles with all these differences in the workplace. Trompenaars and Homme[168] advocates that cultures should reconcile values that accommodate all members of the organisation. In light of this view, it is important to try to reasonably accommodate such differences without excluding certain individuals or groups merely because they have a different value system from that of the organisation or have particular character traits. However, the challenge is to try to reconcile a "corporate culture" that incorporates everyone's value system in the workplace.

2.5.2.4 Affirmations

Lastly, it should be noted that corporate culture is a set of affirmations.[169] It is submitted that for an organisation to realise its true potential, its members need to be instilled with beliefs and assertions.[170] However, Turner[171] opines that culture emanates from the organisation's individual members. It is argued that the most important characteristic of corporate culture are the actual individuals who make up the

166 *Joslin* case para 233.
167 *Joslin* case.
168 Trompenaars and Homme *Managing change: Across Corporate Cultures* 25.
169 Turner *Creating corporate culture – from discord to harmony* 3.
170 Driskill and Brenton *Organisational Culture in Action: A Cultural Analysis Workbook* 30; Turner *Creating corporate culture – from discord to harmony* 3.
171 Turner *Creating corporate culture – from discord to harmony* 2.

organisation.[172] These individuals use culture to reinforce ideas, feelings and information that are inconsistent with their beliefs.[173] Corporate culture can be used as a tool to provide the organisation's members with conformity and identity, provided they share the same ethos.[174]

Irrespective of management's best endeavours to create corporate harmony and engender a feeling of oneness throughout the organisation, individual employees might naturally feel inclined to gravitate towards those they feel most secure and comfortable with.[175] This is especially if they share the same beliefs that are different from other groups.[176] Simpson and Taylor[177] admits that the repelling ramification of an organisation's "corporate culture" is that it imposes a strong yet unnoticeable strain on individual employees. It is often observed that human beings generally feel the need to fit in with group norms.[178] Hence, an employee may be coerced into trying to fit in with "the way we do things around here" even though they may not necessarily be in agreement with it.[179] Failure to comply may result in unpleasant consequences such as social ostracism, disfavour from senior colleagues, reduced promotion prospects and gentle pressure, (or not so gentle pressure), from both colleagues and superiors to leave.[180]

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172 Turner *Creating corporate culture – from discord to harmony* 2.

173 Hinden DR, Sturm P and Teegarden PH *The Non-profit Organisational Culture Guide: Revealing the Hidden Truths that Impact Performance* (Jossey-Bass USA 2011) 29; Turner *Creating corporate culture – from discord to harmony* 2;

174 Turner *Creating corporate culture – from discord to harmony* 2; Hinden, Sturm and Teegarden *The Non-profit Organisational Culture Guide: Revealing the Hidden Truths that Impact Performance* 29.

175 Simpson and Taylor *Corporate Governance, Ethics and CSR* 56; Finnemore, Koekemoer and Joubert *Introduction to Labour Relations in South Africa* 101.

176 Finnemore, Koekemoer and Joubert *Introduction to Labour Relations in South Africa* 102.

177 Simpson and Taylor *Corporate Governance, Ethics and CSR* 55; Mazur B "Basic Assumptions of Organisational Culture in Religiously Diverse Environments" 2015 *International Journal of Contemporary Management* 118.

178 Simpson and Taylor *Corporate Governance, Ethics and CSR* 55; Mazur 2015 *International Journal of Contemporary Management* 118.

179 Simpson and Taylor *Corporate Governance, Ethics and CSR* 56.

180 Simpson and Taylor *Corporate Governance, Ethics and CSR* 56.

2.5.2.5 Organisational climate

Another visible aspect of corporate culture is the organisational climate in a workplace.[181] The organisational climate refers to one's experience and perception of the organisation as a whole.[182] For instance, organisational climate can be regarded as authoritarian if it is difficult for an employee to approach other co-workers amid fears of disparaging remarks, especially if they encounter a problem or one simply fails to understand a task.[183] It is argued that creating a conducive organisational climate is regarded as the sole responsibility of senior management. Management can take steps to encourage initiative and cooperation amongst employees to make them feel valued.[184] In this way, employees will be able to communicate freely without fear or prejudice.[185] It also creates a less hostile environment and encourages workplace harmony which is pertinent to maintaining a viable corporate culture.

2.5.3 The legal quandary in ascertaining the meaning of "corporate culture" in the South African workplace

From the arguments stated earlier, one can safely deduce that it is difficult to establish the meaning of "corporate culture" as a valid basis of determining incompatibility as multiple interpretations exist. This is especially so in the South African workplace, which comprises of diverse individuals. Establishing corporate culture as a valid basis for dismissal may give rise to discrimination in the workplace based on personality differences, religion, beliefs or opinions. Employees are bound to be victimised and marginalised in the workplace by either unscrupulous employers or vindictive colleagues.

One must take cognisance of the fact that individuals are what make up the "corporate culture" of the workplace. Furthermore, the various interpretations of "corporate culture" leaves room for both ambiguity and confusion as to what it really means in

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181 Simpson and Taylor *Corporate Governance, Ethics and CSR* 47; Cheema, Mumi and Su *Corporate Governance and Whistleblowing: Corporate Culture and Employee Behaviour* 61.

182 Simpson and Taylor *Corporate Governance, Ethics and CSR* 47; Cheema, Mumi and Su *Corporate Governance and Whistleblowing: Corporate Culture and Employee Behaviour* 61.

183 Simpson and Taylor *Corporate Governance, Ethics and CSR* 47.

184 Simpson and Taylor *Corporate Governance, Ethics and CSR* 48.

185 Simpson and Taylor *Corporate Governance, Ethics and CSR* 48.

the South African workplace. In addition, the "corporate culture" of an organisation evolves with time which, on one hand, makes it difficult to dismiss an employee on certain practices that may have become obsolete or redundant in the workplace. On the other hand, an employer may feel the need to instil a "corporate culture" in the workplace to create a form of identity and conformity in the workplace. This is premised on the fact that an employer has a right to protect his business interests.

Nevertheless, South African courts and tribunals favour diversity and inclusion in the workplace. Hence, the concept of a "corporate culture" may be difficult to reconcile all the aforementioned differences between employees and employers. Therefore, it is recommended that employers should offer diversity training, team building and conflict resolution as means to reasonably accommodate employees based on the needs of the organisation.[186]

It is evident that there is a legal quandary in ascertaining the meaning of "corporate culture", especially in the South African workplace. Given the potential problems that the concept presents, Trompenaars and Homme[187] suggests that corporate culture should be defined as:

> The pattern by which a company connects different value orientations such as 'rules versus exceptions, people focus versus focus on reaching goals and targets, decisiveness versus consensus, controlling the environment versus adapting to it- in such a way that they work together in a mutually enhancing way.

Alvesson[188] advocates that the term "corporate culture" should be discarded in favour of terms such as informal behaviour patterns, norm system or simply the "social pattern" in the workplace. It is submitted that "social patterns" can be a more plausible term than "corporate culture" because it is susceptible to various interpretations and it presents potential problems in the South African workplace.

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186 FASSET 2013 https://www.fasset.org.za.
187 Trompenaars and Homme *Managing change: Across Corporate Cultures* 25.
188 Alvesson *Understanding organisational culture* 3.

2.6 Crucial elements in determining incompatibility in the workplace

2.6.1 Irreconcilable breakdown in the working relationship and disharmony in the workplace

The first element when determining alleged incompatibility is that there must be an irreconcilable breakdown in the workplace relationships.[189] As stated earlier, the irreconcilable breakdown must emanate from personality differences, resulting in the employee's inability to work effectively with others.[190] In addition, the subsequent breakdown in the employment relationship must be irremediable for the dismissal to be considered as fair.[191] In the case of *Wright v St Mary's Hospital*,[192] it was held that the existence of an irremediable breakdown in working relationship has to be proven. It was further held that the effect of incompatibility that will ultimately result in a dismissal would have caused disintegration in a workplace relationship between the parties, justifying action from the employer to protect his/her business.[193] In the *Subrumuny* case,[194] the tribunal highlighted that if the underlying cause of the disharmony can be removed then the relationship is capable of being restored. Dismissal is only justifiable after remedial action has been attempted, provided it is shown that the employee has substantially contributed to disharmony, which is irremediable, and that proper inquiry was held.[195]

2.6.2 Attainable standards in the workplace

It is argued that in the absence of an objective standard or criteria when dealing with incompatibility disputes, it may prove difficult for the courts to ascertain fairness and justiciability in this regard. There is a need for the courts to protect employees in instances where an employer dismisses an employee whom he or she deems incompatible based solely on personal differences. Moreso, such employees are susceptible to dismissals based on the subjective feelings of the employer. Instead of

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189 *Wright* case 1004.
190 Wright case 1004; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 432.
191 *Subrumuny* case.
192 *Wright* case 987; *Turner v Vestric Limited* (1981) IRLR para 23.
193 *Wright* case 987.
194 *Subrumuny* case.
195 *Hapwood v Spanjaard Ltd* [1996] 2 BLLR para 187.

dismissing the employee due to his or her incompatibility with the organisation, the employer may simply terminate the employment contract with the employee because they do not like him or her. It is thus incumbent that a series of events must take place before an employer argues that the employee is incompatible with the other employees or his corporate culture. Depending on the extent that these events take place, the legislature will have to clearly establish whether incompatibility should be determined by means of an objective or subjective test, or possibly a combination of the two.

Watkins[196] rightly argues that in order to prove that an employee is incompatible, there must be other supporting evidence besides the sole opinion of the employer to establish incompatibility. Although the business and economic reasons regarding the formulation of incompatibility is for the employer to decide, it was held in the *Subrumuny* case that the court should ensure that the employer's standards are attainable.[197] In *Jabari v Telkom SA (Pty) Ltd*,[198] the court held that an employer has the prerogative to set reasonable standards pertaining to the harmonious interpersonal relationships in the workplace.[199] In this regard, it can be argued that a reasonable person test and the reasonable accommodation test can be used to assess the employer's workplace standards.

The "reasonable person" test is a standard used to determine what a reasonable person would have done under the circumstances based on the notion that the person in question, has the skill, attributes and knowledge of an ordinary person. Neethling *et al*[200] submit that the reasonable person is a fictitious person which the law invents in order to have an objective form for conduct in society. Furthermore, it is submitted that the reasonable person test is used when a person in question has acted negligently if he or she has departed from the conduct expected of a reasonably

196 Watkins 2012 https://www.workinfo.com.
197 *Subrumuny* case; Gary Watkins 2012 https://www.workinfo.com.
198 *Jabari* case.
199 *Jabari* case.
200 Neethling, Potgieter and Visser *The Law of Delict* 110.

prudent person acting under similar circumstances.[201] In the context of incompatibility, the reasonable person test would be utilised to avoid the employee from being dismissed on the basis of the subjective feelings or victimisation by the employer or fellow colleagues in the workplace.

Additionally, the reasonable accommodation test can be used to assess the employer's workplace standards. The concept of reasonable accommodation is clearly defined in the *Employment Equity Act*.[202] Reasonable accommodation refers to:

> Any modification, adjustment to a job or the working environment that enables a person to have access to or participate in the workplace.[203]

Reasonable accommodation is more comprehensively defined by Merill[204] as:

> Any action, behaviour or modification to job tasks or a working environment done in an effort to eliminate a barrier to employment or increase access, participation or advancement of a person with a disability, or other categorically disadvantaged group.

The United Nations Development Group[205] further adds that reasonable accommodation can be defined as:

> …necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden...

From the definitions above, it can be inferred that reasonable accommodation may entail making changes to the way a specific task or job is performed.[206] Changes to the work environment can also be made to ensure that an employee can still execute the fundamental functions of the job.[207] In the context of dismissals arising from

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201 *Tuta v The State* (CCT 308/20) [2022] ZACC 19 para 110,111; The free dictionary 2019 https://legal-dictionary.thefreedictionary.com; Sykes LM, Evans WG and Dullabh HD "Negligence Versus Malpractice 2017 *SADJ* 432.

202 The *Employment Equity Act* of 55 of 1998 (hereinafter, referred to as the *EEA*).

203 S1 of the *EEA*; The Law Insider 2019 *Reasonable Accommodation Definition* https://www.lawinsider.com accessed 6 September 2019.

204 Merrill *Reasonable Accommodation Guidelines: An instructional guide to reasonable accommodation for people with epilepsy* 6.

205 The United Nations 2019 I*ncluding the Rights of Persons with Disabilities in the United Nations Programming at Country Level* https://www.un.org accessed 6 September 2019.

206 The Law Insider 2019 https://www.lawinsider.com.

207 South African Human Rights Commission 2019 *Promoting the Right to Work of the Persons with Disabilities: Monitoring Framework* https://www.sahrc.org.za accessed 6 September 2019;

incompatibility, an employer should by all means necessary reasonably accommodate the respective employee provided it does not cause him or his or her business undue hardship.[208] This includes accommodating employees who happen to be little quirky, just different or a bit eccentric. However, Merrill[209] favours the term "unjustifiable hardship" because it is considered to be a more rigorous standard instead of the term "undue hardship." It is submitted that this rigorous standard is necessitated by South Africa's history of failing to provide employment and accommodation for disadvantaged persons in the workplace.[210] Unjustifiable hardship refers to reasonable accommodation that will require significant or considerable difficulty or expense and that would substantially harm the viability of the employer's business.[211] Hence, the court will have to determine the extent of the employer's obligation.[212] Although an employer is not obligated to reasonably accommodate an employee if it causes him undue hardship, failure to do so can be interpreted as discrimination.[213] The court will have to evaluate if there has been any impairment to the dignity of the employee or complainant in question, the impact upon them, and whether there are less restrictive and less disadvantageous means of achieving the purpose.[214]

In *Damons v City of Cape Town,*[215] the Constitutional Court clarified the distinction between the concept of reasonable accommodation and the inherent requirements of a job. It is asserted that the Constitutional Court's interpretation will aid in ascertaining the parameters of the employer's obligation towards reasonably accommodating the incompatible employees in the workplace. In this case, the applicant, who was the

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DC.gov 2019 *Types of Reasonable Accommodation* https://odr.dc.gov accessed 6 September 2019.

208 S1 of the *EEA*.

209 Merrill *Reasonable Accommodation Guidelines: An instructional guide to reasonable accommodation for people with epilepsy* 35.

210 Merrill *Reasonable Accommodation Guidelines: An instructional guide to reasonable accommodation for people with epilepsy* 35.

211 Merrill *Reasonable Accommodation Guidelines: An instructional guide to reasonable accommodation for people with epilepsy* 34.

212 *Department of Correctional Services v Police and Prison Civil Rights Union (POPCRU) 2011 32 ILJ 2629 (LAC)* (hereinafter, referred to as the *POPCRU* case) para 43.

213 *Damons v City of Cape Town* (CCT 278/20) [2022] ZACC 13, (Hereinafter, referred to as the *Damons* case); Merrill *Reasonable Accommodation Guidelines: An instructional guide to reasonable accommodation for people with epilepsy* 34.

214 *POPCRU* case para 43.

215 *Damons v City of Cape Town* (CCT 278/20) [2022] ZACC 13, (Hereinafter, referred to as the *Damons* case).

employee, appealed against the respondent's (the employer) decision not to promote him to the position of senior firefighter.[216] When the applicant was employed as a firefighter, he was injured whilst on duty, which resulted in permanent injury. Due to the permanent injuries he sustained, the applicant could not meet the physical fitness requirement, which was an inherent requirement of the job of operational firefighter under the employer's policy.[217] Nonetheless, the respondent accommodated the applicant in another department where he would assume an administrative and educational position where physical fitness was not required.[218] This also included retaining his title and the salary level as a firefighter. When the applicant applied for a promotion to senior firefighter, the respondent declined his application on the grounds that physical fitness was an inherent requirement of the job, which he did not meet.[219] The respondent further argued that they were under no obligation to reasonably accommodate the applicant by acting in accordance with the request to relax the physical fitness requirement.[220] The courts had to decide whether, in the face of competing interests, the principle of reasonably accommodating an employee in the workplace outweighed an employer's defence of the inherent requirements of the job.[221]

It must be noted that the courts arrived at different conclusions and had differing opinions on this issue. After conciliation was successful at the CCMA, the matter was referred to South African Local Government Bargaining Council (SALGBC) for arbitration. The Bargaining Council advocated for a human rights approach on the matter.[222] Thus, the tribunal opined that confining the applicant to "to one position for such a long time does affect one's dignity and status".[223] It is argued that this rationale is incorrect because it did not adequately weigh the interests of both the employer and the employee. Since the bargaining council did not have the jurisdiction to determine whether the respondent could successfully raise the defence of the inherent

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216 *Damons* case.
217 *Damons* case para 2.
218 *Damons* case para 5.
219 *Damons* case para 6.
220 *Damons* case para 9.
221 *Damons* case para 10.
222 *Damons* case para 12.
223 *Damons* case para 14.

requirements of the job, the dispute was referred to the Labour Court. Notably, two main legal issues were brought before the Labour Court. The first legal question that was posed before the court was whether or not the applicant's advancement or promotion to the position of senior firefighter was disqualified by the employer as the inherent requirement of physical fitness.[224] The second question was whether or not the respondent's policy amounted to justifiable and fair discrimination in that it differentiated between persons on the basis of an inherent requirement of a job.[225] It is asserted that the Labour Court's decision was problematic because it did not sufficiently consider if the respondent had an obligation to "accommodate" the applicant for the promotion even though he did not meet the job requirements. In light of both questions raised, the Labour Court concluded that the employer's policy unfairly discriminated the applicant because it prohibited him from qualifying for the promotion to a more senior position.[226] The court's reasoning was based on the fact that the applicant had sustained permanent injuries whilst working for the respondent, which had financially disadvantaged him.[227]

Apparently, the Labour Court of Appeal (LAC) and the Constitutional Court arrived at a different conclusion. On appeal, the LAC overturned the decision of the Labour Court on the basis that the respondent's "physical fitness" policy had been implemented prior to the applicant's injuries.[228] It is contended that appointing the applicant to the position would prove futile because he would not be able to execute the essential tasks that are expected from a senior firefighter. It is further argued that the LAC was correct in concluding that it is not in the public interest to have firefighters who are incapable of dealing with the fire outbreaks.[229] It is for similar reasons that the majority judgement in the Constitutional Court concurred with the findings of the LAC. Majiedt J affirmed that the respondent had reasonably accommodated the applicant, by offering him an alternative post in the other departments.[230] As a result, the employer

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224 *Damons* case para 17.
225 *Damons* case para 17.
226 *Damons* case para 25.
227 *Damons* case para 25.
228 *Damons* case para 28.
229 *Damons* case para 31.
230 *Damons* case para 133, 147.

is under no legal obligation to accommodate an employee who does not satisfy the inherent job requirements.[231] It is concurred that doing so causes undue hardship on employers since they will be compelled to accommodate employees who simply cannot meet the inherent requirements of the job.[232] In the context of incompatibility, the implication is that the employer will be required to create new roles for disruptive employees whose behaviour or character could potentially harm the business or cause undue hardship for the employer or other co-workers. The concept of reasonable accommodation vis a vis incompatibility arising from different cultures and religions in the workplace is analysed in the next chapter.[233]

The determinant factor whether a dismissal is unfair should be premised on the principal that what is reasonable varies from what is appropriate depending on the circumstances.[234] Having made an objective assessment on whether the actions of the employer are in good faith and that he has reasonable grounds to conclude that the employment relationship is untenable, the court will not interfere in the employer's decision.[235] In addition, an objective assessment of how the employer reasonably accommodated the employee before dismissing them will also determine whether a dismissal is unfair. However, if accommodating the incompatible employee would cause undue hardship to the employer's business, the dismissal will not be deemed unfair.

2.7 Conclusion

It is submitted that although incompatibility is not listed as a ground for dismissal in the *LRA*, it has been recognised as such by various South African courts and other dispute resolution tribunals in a number of case law. Although there is no clear-cut definition as to what incompatibility is, one can deduce its meaning from various definitions formulated by different authors, South African courts and dispute tribunals.

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231 *Damons* case para 147.
232 *Damons* case para 143.
233 Refer to chapter 3.
234 Watkins 2012 https://www.workinfo.com.
235 Watkins 2012 https://www.workinfo.com; Scheepers 2019 https://www.labourguide.co.za; The free dictionary https://legal-dictionary.thefreedictionary.com; Sykes, Evans and Dullabh 2017 *SADJ* 432; Greenfield S *et al* 'Reconceptualising the Standard of Care in Sport: The Case of Youth Rugby in England and South Africa" *2015 PER/PELJ* 2190.

It is, therefore, contended that incompatibility can be defined as an employee's inability to work harmoniously with fellow employees and/or the employer and failure to fit with the "corporate culture" in the workplace. Notably, the significance of the development of the concept of incompatibility by the courts cannot be overlooked as it provides an understanding as to what incompatibility entails. Notably, the *Erasmus v BB Bread* case laid the foundation for employers to act against employees whose conduct is incompatible with workplace harmony.[236]

However, incompatibility is regarded to be a "nebulous concept", meaning it cannot often be explained or articulated in clear objective terms.[237] Further, it is argued that such a concept may prove difficult to establish an objective criterion or reach a judgment that may be deemed "fair" when trying to determine whether an employee is incompatible with the workplace. This is especially where issues of fairness and justiciability play a significant role in our law.

Of note, the important principles regarding incompatibility dictate that there is a common law duty on the employer not to act in a manner that is likely to destroy or seriously damage the relationship of confidence and/or trust with the employee. Hence, the concept of intolerability can be applied in the context of incompatibility cases between the employee and the employer and/or other employees.[238] This is especially when the employee's conduct has broken down the employment relationship and has made the working environment intolerable.[239] Lastly, the factors that cause incompatibility relate to personality conflicts, management style and inability to integrate into the "corporate culture" and the environment of the workplace. It is submitted that the crucial elements that constitute incompatibility in the workplace should include the existence of an irreconcilable breakdown in the working relationship and disharmony in the workplace, attainable standards in the workplace and the existence of a "corporate culture" in the workplace. It is contended

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236 *Erasmus* case 544.
237 *Subrumuny* case 2789.
238 Rycroft 2012 *ILJ* 2276.
239 Rycroft 2012 *ILJ* 2276.

that these crucial elements should be present and should serve as a starting point when determining if an employee is incompatible in the workplace.

Chapter 3 Incompatibility as a ground of dismissal in South African labour law

3.1 Introduction

This chapter is aimed at a critical overview of the use of incompatibility as a ground for dismissal in the South African workplace within the context of the *Constitution of the Republic of South Africa*, 1996; the *Labour Relations Act* 66 of 1995 and the *Employment Equity Act* 55 of 1998.[240] It is true that various rights and interests of both the employer and employee come into play when wishing to implement incompatibility of the employee as a ground for dismissal. It is the primary objective of this chapter to unpack the relevant rights and interests in the context of incompatibility and critically highlight the importance of balancing the rights and interests of the employer's business against those of the employee, through clear and proper regulation of this ground for dismissal. Lastly, this chapter also introduces and assesses how the South African courts have thus far dealt with issues of incompatibility in the workplace.

3.2 Incompatibility within the context of the Constitution

The *Constitution of the Republic of South Africa*[241] plays a fundamental role in determining whether incompatibility can and should be regarded as a separate and legitimate ground for dismissal in South African labour law. As the supreme law of the Republic, the *Constitution* determines the invalidity or inconsistency of any law or conduct that does not safeguard the values embedded in the *Constitution*.[242] As such, the *Constitution* serves as a yardstick and starting point in interpreting any labour laws.[243] As its purpose, the *Constitution* does not determine the legitimacy of legislation, but through its provisions, it may have the effect that certain aspects of

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240 The *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution); *Labour Relations Act* 66 of 1995 (Hereinafter, referred to as the *LRA*); the *Employment Equity Act* 55 of 1998 (Hereinafter, referred to as the *EEA*).

241 Hereafter *Constitution*. This will naturally be argued within the context of the employer's constitutional right to fair labour practices in terms of section 23.

242 Section 2 of the *Constitution*.

243 S39 of the *Constitution*.

legislation can be determined to be unconstitutional as it may go against what the *Constitution* envisions.[244] Further, the Constitution does not give effect to basic rights in the Bill of Rights, that is the job of legislation.[245]

Section 23 of the *Constitution*, which is central to the core rights in the workplace, bestows upon everyone in an employment relationship or something akin to it, the right to fair labour practices.[246] Other rights contained in the Bill of Rights that are also relevant to the workplace include section 9 (the equality clause), section 10 (human dignity), section 15 (freedom of religion, belief and opinion), and sections 30 and 31 (right to language, religion and culture).[247] Van Niekerk *et al*[248] correctly submit that these fundamental rights and their interpretation by the courts have culminated in the formation of a substantive constitutional jurisprudence in the South African labour market applicable to both employers and employees. It is further argued that the constitutional framework under which labour legislation functions is difficult to analyse without discussing the manner in which each right is given expression.[249]

For purposes of this thesis, the role of the abovementioned constitutional rights and national legislation in the workplace is analysed in a quest to ascertain probable reasons why incompatibility should be regarded as a separate and legitimate ground for dismissal in South African labour law, and why it should be properly regulated to prevent the potential unjustified infringement on any of the said rights or statutes. Investigations in this chapter also assist in determining how each of the relevant

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244 Van Niekerk *et al Law at Work* 40.

245 Van Niekerk *et al Law at Work* 40.

246 S23 of the *Constitution*; *NEHAWU v University of Cape Town & Others* (2003) 24 ILJ 95 (CC) para 39,40. The Constitutional court affirmed that section 23 of the Constitution should be broadly construed to guarantee employers, employees and/or trade unions as well as employee organisations, the right to fair labour practices. Bearing in mind the tension between the interests of employers and employees in the workplace, the Court reiterated the need to accommodate both parties to give effect to the concept of fair labour practices. *SANDU v Minister of Defence* 2007 8 BCLR 863 (CC) paras 2, 3. Everyone, including workers, would also include members of the SANDF. They will for instance have the right to join a trade union because their relationship with the Force is "something akin" to an employment relationship.

247 S9, s10, s15, s30, s31 of the *Constitution*. The nature of the relevance of these sections to the workplace will be highlighted below. Especially as far as it is relevant to an employee's purported incompatibility.

248 Van Niekerk *et al Law at Work* 37.

249 Van Niekerk *et al Law at Work* 37.

constitutional rights permeate the employment relationship when an employer is confronted with the perceived incompatible behaviour of the employee.

3.3 Incompatibility and the constitutional right to fair labour practices

As mentioned earlier, the *Constitution* confers everyone in an employment relationship or something akin to it, the right to fair labour practices.[250] However, the *Constitution* does not elaborate further on the definition or the scope of fair labour practices.[251] In *National Education Health & Allied Workers Union v University of Cape Town*,[252] the Constitutional Court noted that the concept of fair labour practice is not capable of a precise definition. The rationale behind the Court's statement is that the deciding factor of fairness depends upon the circumstances of a particular case and often requires a value judgment. Therefore, a precise universal description applicable to every circumstance is not possible.[253] A precise definition for the term or concept is additionally deemed neither necessary nor desirable.[254]

Cohen[255] argues that by not specifying fair labour practices in the *Constitution*, the legislature intended to provide for a flexible definition and subsequently flexible applicability. It is further argued that the objective of this "flexible approach" was to accommodate and balance the evolving rights and interests of employers and employees as determined by constitutional interpretation, the common law and labour legislation.[256] Therefore, anyone involved in this relationship, inclusive of employers, employees, trade unions and employer organisations can rely on section 23 for protection under the *Constitution*.[257] This ensures equitable and unbiased protection within the workplace for both employers and employees.[258]

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250 S23 of the *Constitution*.

251 S23 of the *Constitution*; Cohen 2004 SAJHR 482; *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) (Hereinafter, referred to as the *NEHAWU* case)
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252 *NEHAWU* case 110.

253 *NEHAWU* case 110.

254 *NEHAWU* case 110.

255 Cohen 2004 *SAJHR* 482.

256 Cohen 2004 *SAJHR* 482.

257 *NEHAWU* case para 39.

258 Cohen 2004 *SAJHR* 483.

Furthermore, in the *NEHAWU* judgement,[259] Ngcobo J highlighted that the interests of all parties should be considered in the exercise of labour rights. The rationale is that the interests of all parties are a vital component of labour relations. In other words, a balance between the interests of the two parties needs to be struck and maintained to promote healthy employment relationships and labour peace.[260] In this regard, Rautenbach and Venter[261] argue that, in principle, both the employer and the employee should enjoy equal consideration when it comes to protecting their interests. However, when the rights and interests of one enjoy preference and subsequently limit that of the other party, it must comply with the limitation requirements as stipulated in the *Constitution*.[262] The application of section 36 is discussed later in this chapter.

Furthermore, in *National Entitled Workers Union v Commission for Conciliation, Mediation & Arbitration & others*,[263] the Labour Court sought to interpret the meaning and/or concept of fair labour practices. It is asserted that the court's interpretation is identical to the one reached by the Constitutional Court in the *NEHAWU* case, which concluded that both employers' and employees' interests must be met to ensure harmonious working relations.[264] The Labour Court interpreted what the right to fair labour practices means for the employer. The Labour Court was cognisant that an employee may, in limited circumstances, commit unfair labour practices against their employer.[265] As stated in the previous chapters, any behaviour that has the potential to destroy or severely damage the relationship of trust and confidence between the parties may violate the employer's right to fair labour practices.[266] It is argued that in some instances, the employee's conduct may infringeon the employer's right to fair labour practices, which includes the right to protect his business interests. In addition, Landman J confirmed that the common law contract of employment can be used to

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259 *NEHAWU* case para 40.
260 *NEHAWU* case para 40.
261 Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* 332.
262 S36 of the *Constitution*; Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 332. Refer to para 3.7.
263 *National Entitled Workers Union v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 2335 (LC), (Hereinafter, referred to as the NEWU case).
264 *NEWU* case 2339.
265 *NEWU* case 2336.
266 *Council of Scientific & Industrial Research v Fijen* [1996] 6 BLLR 685 (AD) 686; Grogan J *Employment Rights* (Juta Capetown) 67.

determine the meaning and content of fair labour practices, provided that it does not infringe on the values underlying the *Constitution* or contravene the fairness requirements of the *LRA*.[267] In this context, an unfair labour practice may be the result of the employee's breach of his or her common law duties and the conditions stipulated in the employment contract.[268] It is contended that the Labour Court's interpretation of fair labour practices is correct in that the employer may rely on section 23 of the *Constitution* if the employee's incompatible behaviour threatens the business operations and/or relations in the workplace. Furthermore, Van Niekerk *et al*[269] contend that the meaning and content of fair labour practices can be found in South African labour law jurisprudence and labour legislation. It is asserted that for purposes of section 23, fair labour practices include employee's right to employment prospects and job security (including the right not to be unfairly dismissed).[270] However, for the employer, fair labour practices encompass the protection of his business interests which include the right to fairly dismiss an employee for either misconduct, incapacity or operational requirements.[271] It is submitted that Van Niekerk *et al*'s interpretation of the content and meaning of fair labour practices is correct because it reaffirms the court's findings in the *NEHAWU* case that the competing interests of both the employer and the employee must be accommodated in order to ensure functional relations in the labour market.

Nonetheless, it is argued by Henrico[272] that relying on section 23 of the *Constitution* may cause applicants to bypass the *LRA*. In *SANDU v Minister of Defence*,[273] the

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267 *NEWU* case 2340.

268 *NEWU* case 2340.

269 Van Niekerk *et al Law @ Work* 43 - 44. South African labour law jurisprudence dating back to the Wiehahn Commission's introduction of the concept of "unfair labour practices," the 1956 *Labour Relations Act*, the *Industrial Relations Amendment Act* of 1982, the 1995 *Labour Relations Act* (including sections 186, 187 and 188 which deal with the meaning of dismissals, automatically unfair dismissals and dismissals arising from misconduct, incapacity and operational requirements), the *Codes of Good Practice: Dismissal and Dismissal on Operational Requirements*.

270 Van Niekerk *et al Law @ Work* 43, 44.

271 Van Niekerk *et al Law @ Work* 43.

272 Henrico 2015 Obiter 287.

273 *SANDU v Minister of Defence* 2007 8 BCLR 863 (CC) (Hereinafter, referred to as the *SANDU* case) 881; *NAPTOSA v Minister of Education, Western Cape* 2001 22 ILJ 889(C) (Hereinafter, referred toas the *NAPTOSA* case) 896; Henrico 2015 https://islssl.org. In the case of *Stokwe v MEC, Department of Education, Eastern Cape* [2005] 8 BLLR 822 (LC), the applicant relied solely on

Constitutional Court affirmed the concept of "constitutional avoidance". This means that a litigant may not bypass labour legislation and rely directly on the Constitution without proving that the relevant legislation falls short of constitutional muster.[274] The court held that allowing the litigant to circumvent legislation and relying directly on the *Constitution* negates the mandate conferred upon the legislature in terms of section 7(2) of the *Constitution* to respect, protect, promote and enforce the rights inherent in the Bill of Rights.[275] In *NAPTOSA v Minister of Education, Western Cape*,[276] the court cautioned against encouraging the development of a two parallel system (relying on the Constitution on the one hand and/or the legislation on the other), which was deemed to be highly inappropriate. In light of the findings of the Constitutional Court in the *SANDU* case, it is argued that employers may rely on the constitutional right to fair labour practices directly for protection if legislation does not provide recourse.

Without the aid or statutory guidance in South African labour law, both employers and employees will have to rely on section 23 of the *Constitution* for protection in disputes arising from incompatibility. This is because there is no recourse for incompatibility disputes under the *LRA* or the *EEA*. Bosch[277] correctly asserts that the right to fair labour practices in the context of the *Constitution* includes that an employee should not be dismissed arbitrarily. Therefore, there is subsequent potential for the right to fair labour practices in terms of section 23(1) of the *Constitution* to be infringed if an employee is unfairly dismissed for his perceived incompatibility.

It has been established that the right to fair labour practices means that an employer has a right to protect their business interest.[278] It may prove difficult to rely on section 23 because the term "labour practices" is subject to various interpretations. However,

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sections 9 and 23 of the *Constitution* in alleging language discrimination rather than on the applicable provisions of the *LRA* and the *EEA*.

274 Van Eck BPS "Chirwa v Transnet and Beyond: Urgent Need for the Constitutional Court to Provide Certainty" 2010 *TSAR* 119; Molusi AP "The Constitutional Duty to Engage in Collective Bargaining" 2010 *Obiter* 165.

275 *SANDU* case 881; *NAPTOSA* case 896.

276 *NAPTOSA* case 898.

277 Bosch 2008 *STELL LR* 387.

278 *NEHAWU v UCT* para 52; *NUMSA Obo Nganezi V Dunlop Mixing And Technical Services (Pty) Limited* 966 2019 (8) BCLR 966 (CC) para 38.

although the interpretation is wide, an argument can be made that fair labour practices for the employer could mean that an employee should not behave in a manner to create disruption, hostility and discomfort in the workplace. It will certainly be unfair towards the employer if such behaviour harms his or her business interests. It is further argued that if the employer does not have clarity as to whether and when he can dismiss an employee fairly for incompatibility, there is the potential of his right to be infringed by keeping an employee who may cause damage to the business through their incompatible behaviour. It is, therefore, argued that the breach of section 23(1) can be avoided if proper guidelines for incompatibility as a separate ground for dismissal are developed in the *LRA* and are properly adhered to. This will ensure legal certainty for both the employer and the employee.

3.4 Incompatibility and the constitutional right to equality

In outlining the growing discourse on labour rights as human rights, Du Toit[279] accurately points out the dichotomy between granting the right to equality and the inequality between the employee and the employer. It is trite that there is a distinct power imbalance between the employer and the employee.[280] It is contended that in most cases because they are economically stronger than the employee, the employer has an upper hand in the employment relationship.[281] The importance of constitutional jurisprudence of equality in labour law cannot be disregarded owing to the existence of this disparity between the employer and the employee.[282]

It is contended that the right to equality in the workplace and the right not to be unfairly dismissed are both imperatives of the constitutional right to fair labour practices.[283] In light of this contention, the right to fair labour practices means, among other aspects, that an employee should not be dismissed arbitrarily and that unfair discrimination should not occur when doing so. Regarding dismissals arising from

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279 Du Toit D "The Right to Equality Versus Employer 'Control' and Employee 'Subordination': Are Some More Equal Than Others?" 2016 *ILJ* 1.

280 Du Toit 2007 *ILJ* 1411.

281 *National Entitled Worker's Union v Commissioner for Conciliation Mediation and Arbitration (CCMA) and Others* (JA51/03) [2007] ZALAC 3; [2007] 7 BLLR 623 (LAC) (Hereinafter, referred to as the *NEWU* case) para 20.

282 Du Toit 2016 *ILJ* 1.

283 Henrico 2015 https://islssl.org.

incompatibility specifically, an employer should consequently not unfairly discriminate against an employee based on personality differences, cultural and religious beliefs and/or opinions. Nevertheless, as stipulated earlier, a balance between the interests of both the employer and the employee must be struck and maintained to promote healthy employment relationships and labour peace.[284] Therefore, no party's rights may be unjustifiably limited to the advantage of the other. In the context of incompatibility, an employer should be able to exercise the freedom to protect his business interests and should not be required to accommodate an employee in a way that causes undue hardship to the business. For instance, an employer may feel the need to instil a "corporate culture" to create a form of identity and order in the workplace. Hence, the need to set "inherent job requirements" to preserve this "corporate culture" may arise. If the personal characteristics or belief system, and subsequent behaviour of an employee pose a threat to the employer's corporate culture and ultimately pose a threat to the employer's business, and such cannot be reasonably accommodated, the employer should be able to dismiss the relevant employee without being found to have committed unfair discrimination. Therefore, an appropriate approach to incompatibility as a ground for dismissal should be developed to ensure that the right to equality of the employee is considered and protected.

Section 9 (the equality clause) of the *Constitution* confers everyone equality before the law, equal protection and equal benefit of the law.[285] It is submitted that the right to equality is at the core of the *Constitution* since it is considered one of South Africa's founding values.[286] In giving cognisance to equality as a foundational value, the Constitutional Court emphasised that the right to equality permeates and defines the very ethos upon which the *Constitution* is premised.[287] In addition, as a foundational value, equality serves as a standard against which legislation (and labour practices for

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284 *NEHAWU* case para 40.

285 S9(1) of the *Constitution*.

286 S9(1) of the *Constitution*; Deane T and Brijmohanlall R 2003 *Codicillus XLIV No/Nr* 2 93; Jagwanth S "Expanding Equality" 2005 *Acta Juridica* 131; Van Reenen T "Equality, Discrimination and Affirmative Action" 1997 *SAPR* 152. The theme of "an open and democratic society based on human dignity, equality, and freedom" runs like a golden thread through the *Constitution* and has particular importance because of the historical context in which it arose.

287 *Fraser v Children's Court, Pretoria North* 1997 (2) BCLR 153 (CC), 1997 (2) SA 261 (CC) para 20.

that matter) should be tested to pass constitutional muster.[288] For this reason, section 9 bears a significant impact on equality within the South African labour market, and specifically, on matters relevant to incompatibility.[289]

The equality clause, in particular, has two dimensions. The first concerns guaranteeing and promoting equality and the second concerns the prohibition of unfair discrimination.[290] The first dimension of the relevant clause stipulates that everyone has the right to equality before the law, the right to equal treatment and benefit of the law and the right to full and equal enjoyment of all rights and freedoms.[291] The other dimension concerning the prohibition of unfair discrimination entails the right not to be unfairly discriminated against on listed or other unlisted grounds, issues of fair discrimination and affirmative action.[292] For purposes of labour law, it is important to understand the scope and implementation of the constitutional right to equality in employment relationships. This understanding is extremely useful in analysing the suitability of incompatibility as a separate and legitimate ground for dismissal in South African labour law. It is reiterated that if incompatibility is to be deemed a justifiable ground for dismissal in South African labour law, the competing rights of both the employer (to dismiss disruptive employees who due to their characteristics and personality traits do not fit in and subsequently pose a threat to the productivity of the business) and the employee (not to be unfairly discriminated against for being different) should not be compromised. The respective rights may only be limited where such can be properly justified.

3.4.1 Constitutional guarantee and promotion of equality

Rautenbach and Venter[293] sought to elaborate comprehensively on each of the elements of the equality clause. It is argued that equality before the law implies that people must be treated equally when the law is enforced, while equal protection of

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288 Van Reenen 1997 *SAPR/PL* 152; *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC), 2004 (6) SA 121 (CC) para 22.

289 Van Niekerk *et al Law at Work* 37.

290 Dlamini CRM "Equality or Justice? Section 9 of the Constitution Revisited – Part II" 2002 *Journal for Juridical Science* 16.

291 S9(1), (2) of the *Constitution*; Dlamini 2002 *Journal for Juridical Science* 16.

292 S9(3), (4), (5) of the *Constitution*; Dlamini 2002 *Journal for Juridical Science* 16.

293 Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 332.

the law means that the law must substantively treat all people equally.[294] Lastly, equal benefit of the law refers to the fair disposition of benefits under the law.[295] Moreover, the right to equality includes the complete and fair enjoyment of all rights and freedoms.[296] The right to equality is founded on the principle that the specific attributes and abilities of a person protected by the right to human dignity and other constitutional rights should not be a reason for treating them differently without justification.[297] In the context of incompatibility, it can be inferred that employees who are merely "different" should be accommodated and not be treated in a manner that violates their constitutional rights to fair labour practices, equality and human dignity. This is especially in the absence of clear provisions and statutory guidelines that regulate incompatibility in South African labour law. Although there is no consensus as to the precise definition of equality, Smith[298] contends that the definition of equality can be drawn from the distinction between formal and substantive equality.

3.4.1.1 Formal equality versus substantive equality

Emanating from the original Aristotelian principle of equality, formal equality (equality of consistency or equality of opportunity) dictates that all persons who are in the same situation be accorded the same treatment.[299] Thus, the formal notion of equality implies that as long as there is consistency in treatment, there can be no discrimination.[300] Contrarily, Smith[301] correctly contradicts the notion of formal equality in that it undermines the importance of diversity, especially with the growth of different cultures, religions and traditions, which is the actual reality within the labour

294 Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 332.
295 Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 332.
296 Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 329.
297 Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 330.
298 Smith A 2014 "Equality Constitutional Adjucation in South Africa" *AHLJ* 611.
299 Smith 2014 *AHLJ* 611; Deane and Brijmohanlall 2003 *Codicillus XLIV No/Nr* 2 93; Van Niekerk *et al Law @ Work* 117; Van Reenen 1997 *SAPR/PL* 153; Henrico R "South African Constitutional and Legislative Framework on Equality: How Effective is it in Addressing Religious Discrimination in the Workplace" 2015 *Obiter* 278.
300 Smith 2014 *AHLJ* 611.
301 Smith 2014 *AHLJ* 612.

market in South Africa. Further, Van Reenen[302] concurs that formal equality perpetuates, rather than eradicates discrimination.

When applying the constitutional guarantee to equality, substantive equality, also referred to as "equality in outcome," is used,[303] particularly, section 9(2) of the *Constitution* supports this.[304] In *President of South Africa v Hugo,*[305] it was determined that formal equality which entails treating people the same regardless of their circumstances, cannot always be applied in every situation. It is submitted that the right to equality sometimes demands that individuals be treated differently when it is appropriate to do so in order to regard them as people of equal worth.[306] It is for this reason that the preferred notion of equality would be substantive equality, even in incompatibility disputes. This is because an employer will often come across employees with different attitudes, behaviours, personalities, cultural and religious values, beliefs and/or opinions. Substantive equality ensures that the worth of all employees is recognised and protected by eliminating barriers which exclude certain groups from inclusion in the workplace or by celebrating their diverse cultures and practices.[307] This is achieved by evaluating the impact of legislation, policies and certain practices on vulnerable individual employees or groups of employees.[308] Albertyn and Fredman[309] add that differences are a central feature of substantive equality. It is submitted that the focus of substantive equality is to ensure equality in outcomes.[310] Essentially, in the context of the workplace, substantive equality gives cognisance to the need to affirm diversity and difference.[311] The implications hereof are that the employer could potentially violate the employee's rights to equality,

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302 Van 1997 Reenen *SAPR/PL* 153; Henrico 2015 *Obiter* 278.

303 Van Niekerk *et al Law @ Work* 118; Basson AC *et al The New Essential Labour Law Handbook* (Mace Labour Law Publications CC Centurion 2019) 345.

304 S9(2) of the *Constitution* states that to achieve equality, legislation and other measures must be aimed to protect or advance people who have been unfairly discriminated against, or groups of people who have been unfairly discriminated against.

305 *President of South Africa v Hugo* 1997 (4) 1 (CC) para 112.

306 Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 330.

307 Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 330; Van Reenen 1997 *SAPR/PL* 153.

308 Smith 2014 *AHLJ* 613.

309 Albertyn C and Fredman S "Equality Beyond Dignity: Multi-dimensional Equality and Justice Langa Judgements" 2015 *Acta Juridica* 437.

310 Van Niekerk *et al Law @ Work* 118.

311 Smith 2014 *AHLJ* 614; Henrico 2015 *Obiter* 278; Albertyn and Fredman 2015 *Acta Juridica* 437.

dignity, freedom of religion, belief, and opinion if he or she is considered to be incompatible with his or her workplace for these reasons, and is perhaps dismissed based on the aforementioned differences. Thus, to ensure fairness when dismissing incompatible employees, the employer must be cognisant of the fact that employees are diverse individuals with different personal attributes. It is argued that failure to take the employee's differences into account and attempt to accommodate them without suffering undue hardship may constitute unfair discrimination. It is further submitted that by regarding incompatibility and appropriately regulating it as a legitimate ground for dismissal, clear and fixed guidelines can prevent the potential of employees being unfairly discriminated against based on a listed or unlisted ground.

3.4.2 Unfair discrimination under the Constitution

For a fuller spectrum of the right to equality, understanding the connection between the right to equality and the right not to be unfairly discriminated against is necessary. Section 9(4) of the *Constitution* prohibits direct or indirect unfair discrimination on one or more of the grounds specified in section 9(3) against any person.[312] However, in neither the *Constitution* nor national legislation is unfair discrimination described.[313] It is contended that understanding the term and/or notion of unfair discrimination is critical when deliberating dismissals based on incompatibility. This is to safeguard employees from being victimised and marginalised by unscrupulous employers and/or vindictive colleagues based on arbitrary grounds.

The International Labour Organisation (ILO*) Discrimination (Employment and Occupation) Convention (DEOC)* 111 of 1958 provides a comprehensive definition of what constitutes discrimination.[314] In terms of the DEOC, discrimination refers to:

> any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.[315]

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312 S9(4) of the *Constitution*.

313 Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 335.

314 International Labour Organisation (ILO) *Discrimination (Employment and Occupation) Convention* 111 of 1958, (hereinafter, referred to as the *DEOC*).

315 Article 1 of the *DEOC*.

It is submitted that the wording of the *DEOC* has influenced and has been adopted in South African labour legislation, particularly in some parts of the *EEA*.[316] Therefore, for purposes of determining what can be regarded as discrimination in the context of incompatibility, guidance can also be drawn from the *DEOC*. However, it must be noted that the *DEOC* does not define what is meant by fair or unfair discrimination. South African courts have attempted to define what is meant by unfair discrimination. The Constitutional Court in particular had defined unfair discrimination as a distinction that impairs human dignity or bearers of rights in a comparatively serious manner.[317] Deane[318] opines that the word "unfair" does not merely distinguish between different kinds of differentiation, but rather classifies permissible discrimination from impermissible discrimination, in which discrimination itself has a negative context (pejorative sense). Henrico[319] on the other hand posits that discrimination, in the pejorative sense, is understood to mean a differentiation (distinction) made on a basis that is hurtful, arbitrary, unfair, capricious, or objectionable. However, discrimination in the non-pejorative sense implies differentiation or distinction on a basis that is fair, logical, justifiable, objective, or undisputable.[320] Therefore, all the above definitions and characteristics should be considered when assessing whether a dismissal based on incompatibility amounts to fair or unfair discrimination. For such dismissal not to constitute unfair discrimination, the reasoning of the employer for the dismissal must subsequently be logical, objective and justifiable.

In the judgement of *Du Plessis v De Klerk*,[321] it was made clear that the prohibition of unfair discrimination on listed and unlisted grounds is to be accomplished by applying the right to equality both vertically and horizontally. The court explained that vertical implementation of this right means that the State cannot specifically or implicitly

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316 S5, s6 of the *EEA*.

317 *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC), (Hereinafter referred to as the *Prinsloo* case) para 33; *Harksen v Lane NO* 1997 (11) BCLR 1489, (Hereinafter, referred to as the *Harksen* case) para 50; *MEC v Kwazulu Natal v Pillay* 2008 (2) BCLR 99 (CC), (Hereinafter, referred to as the *Pillay* case) para 94; *Minister of Defence v Potsane* 2002 1 SA 1 (CC) para 44; *De Reuck v Director of Public Prosecutions (WLD)* 2004 1 SA 406 (CC) para 41.

318 Deane and Brijmohanlall 2003 *Codicillus XLIV No/Nr* 2 94.

319 Henrico 2015 *Obiter* 285.

320 Henrico 2015 *Obiter* 285.

321 *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), (hereinafter, referred to as the *Du Plessis* case) para 8; s9(3), (4) of the *Constitution*.

discriminate against a person on the basis of the particular grounds laid down in the Constitution or on any other arbitrary grounds.[322] The horizontal application of this right means that no individual can unfairly discriminate against another on defined or other grounds.[323] Conversely, there is an exception in some cases where a person may be treated differently if circumstances call for him or her to be treated differently.[324] This is when discrimination is rational unless it is proven to the contrary.[325] The complainant is not responsible for proving unfairness on the listed grounds. Unfairness is presumed when discrimination occurred on a listed ground.[326] On this matter, McConnachie[327] correctly highlights that discrimination is only unfair when it is unjustifiable and is an infringement of one's human dignity. This statement directly resonates with the argument above that the employer's decision to dismiss an employee for incompatibility should be based on logic and reasonableness, after having attempted to accommodate the specific employee's personal attributes, so as to avoid committing unfair discrimination in the process.

In particular, the case of *Harksen v Lane NO*[328] was the Constitutional Court's landmark decision, which devised the test to determine whether discrimination occurred and whether it is fair or unfair under section 9 of the *Constitution*. As per Govindjee,[329] it should be noted that this test is applied in instances where there are constitutional disputes under section 9 that are compatible with specific legislation, common law or customary law. Hence, Kruger[330] states that the Harksen test is applied when the right to equality is at stake. Ordinarily, the Harksen test can also apply when the constitutional right to equality is in dispute in incompatibility cases.

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322 *Du Plessis* case para 8; S9(3) of the *Constitution*.
323 *Du Plessis* case para 8; S9(4) of the *Constitution*.
324 S9(5) of the *Constitution*.
325 S9(5) of the *Constitution*.
326 S9(5) of the *Constitution*.
327 McConnachie C "Human Dignity, 'Unfair Discrimination' and Guidance 2014 *Oxford Journal of Legal Studies* 613.
328 *Harksen* case. In this case, the Constitutional Court had to decide on the constitutionality of section 21 of the *Insolvency Act* 24 of 1936. The applicant challenged the sheriff's attachment of her clothes, jewellery and other property as being part of her husband's insolvent estate.
329 Govindjee et al Introduction to Human Rights Law 80.
330 Kruger 2011 *SALJ* 479.

In the *Harksen* case,[331] the courts explicitly established a three-tiered enquiry that the courts can pursue to decide if the right to equality has been violated. The first level of inquiry is to show that the law or a particular provision in question differentiates between individuals and certain categories of people.[332] Differentiation of individuals or certain groups of people based either on their personality traits, culture, religion, beliefs and/or opinions, are examples that would apply in the context of incompatibility disputes. Using a two-stage approach, the second part of the investigation determines if the difference leads to discrimination.[333] After discrimination on a specified ground is established, the analysis proceeds to the second stage. In the second stage, it is assessed whether or not the discrimination in question amounts to unfair discrimination.[334] When discrimination is based on specified grounds, it is presumed that it is unfair.[335] If discrimination is based on an unspecified ground, it must be objectively determined whether the ground is based on certain features and characteristics.[336] Van Reenen[337] argues that specified grounds encompass personal, immutable characteristics that cannot be voluntarily altered by an individual. Thus, discrimination on such features and characteristics must be capable of hurting or negatively impacting people's essential human dignity in a fairly severe manner.[338] The findings of the second stage ultimately determine if the differentiation leads to unfair discrimination.[339] As highlighted above, if the distinction is based on a specified ground, then unfair discrimination would be presumed.[340] Religious and cultural beliefs and/or opinions qualify as specified grounds in the context of incompatibility since they are explicitly stated in section 9(3) of the *Constitution*. Whereas, if the differentiation arises from an unspecified ground, the complainant will have to establish the

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331 *Harksen* case para 54; Deane and Brijmohanlall 2003 *Codicillus XLIV No/Nr* 2 95.
332 *Harksen* case para 54.
333 *Harksen* case para 54.
334 *Harksen* case para 54.
335 *Harksen* case para 54; Grogan *Workplace Law* 78; Van Der Walt J "The Meaning of (Unfair) Discrimination 2019 *Constitutional Law* 36; Nielsen RS "Failure to Recognise a Third Gender Option: Unfair Discrimination or Justified Limitation" 2021 *Law, Democracy and Development* 103.
336 *Harksen* case para 54.
337 Van Reenen 1997 *SAPR/PL* 160.
338 *Harksen* case para 54.
339 *Harksen* case para 54.
340 *Harksen* case para 54.

unfairness in the alleged discrimination.[341] A person's personality and/or character may be considered as an unspecified ground in incompatibility disputes. It is contended, however, that given the criteria set out in the *Harksen* case when dealing with unspecified grounds, it may be difficult for an employee to successfully claim that he or she was unfairly discriminated against by the employer due to their personality and/or character, as the employee would have to prove that differentiation on these grounds had the potential to harm the dignity of the employee. This is the case, especially in the absence of clear guidelines which outline which conduct is not considered incompatible behaviour. The need for proper statutory guidance in this regard cannot be overemphasised. Conversely, if the purported differentiation is unfair, it will have to be decided whether it can be justified in compliance with section 36 of the *Constitution* (limitation clause).[342] Deane and Brijmohanlall[343] stipulate that the limitation clause, however, requires proportionality so that the legislative provision does not compromise the right to equality in such a manner as to fail to achieve the desired objective. It is asserted that proportionality for disputes regarding discrimination based on perceived incompatible traits will entail a careful balancing of the rights of both the employer and the employee. As established earlier, employers should be permitted to fairly dismiss disruptive, incompatible employees when it is to the detriment of the business enterprise. Moreover, such discrimination could likely be fair if certain personality or behavioural traits do not fit in with the "corporate culture" of the workplace and cannot be reasonably accommodated.

In light of the above, it is argued that the Harksen test would serve as a starting point to determine whether there has been unfair discrimination resulting from incompatibility issues. This is especially since the Harksen test is often adopted in South African equality disputes. Not only does this ensure legal clarity but the test also serves as a measure against all unfair discrimination claims, particularly with regard to equality labour legislation.

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341 *Harksen* case para 54.
342 *Harksen* case para 54; s36 of the *Constitution*.
343 Deane and Brijmohanlall 2003 *Codicillus XLIV No/Nr* 2 97.

3.5 Incompatibility and the right to dignity

It is opined that workplace dignity is a crucial component of a healthy workplace environment.[344] Dignity in the workplace denotes that every employee should be treated with respect in an environment free from marginalisation, victimisation and/or discrimination.[345] Hence, any infringement of an employee's right to dignity by either the employer or other employees adversely impacts interpersonal relationships and harmonious relations in the workplace. Incompatibility disputes may result in the relevant employee's dignity being infringed.

Human dignity is also one of the founding values upon which the Republic of South Africa is founded.[346] It is contended that dignity is a primary principle and the cornerstone of the constitutional order of South Africa.[347] In *S v Makwanyane,*[348] the Constitutional Court reiterated that the acknowledgement and preservation of human dignity is the foundation of the new democratic order and is central to the *Constitution*. In particular, this takes into account the history of South Africa, characterised by Apartheid, which denied collective humanity.[349] Section 10 of the *Constitution* states that everyone has inherent dignity and confers everyone the right to have their dignity respected and protected.[350] It is submitted that section 10 imposes a positive duty on any human being to treat all persons in a dignified and human manner irrespective of the circumstances.[351] In the context of incompatibility, differentiating an employee based on personality traits, religion and/or culture will in all likelihood result in an

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344 WTW 2022 *Workplace Dignity Survey* https://www.wtwco.com accessed 25 March 2022.

345 WTW 2022 https://www.wtwco.com.

346 S1 of the *Constitution*.

347 Govindjee *et al Introduction to Human Rights Law* (Lexis Nexis Durban 2016) 69.

348 *S v Makwanyane* 1995 (3) SA 391 (CC) (Hereinafter, referred to as the *Makwanyane* case) para 310,313.

349 *S v Makwanyane* case para 329; Chaskalson A "Dignity as a Constitutional Value: A South African Perspective" 2011 *American University International Law Review* 1381.

350 S10 of the *Constitution*; Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 347. According to Rautenbach and Malherbe "inherent dignity" means that human dignity cannot be earned or abandoned. Steinmann AC "The Core Meaning of Human Dignity" 2016 *PER/PELJ* 11. Steinmann refers to "inherent dignity" as the totality of the uniqueness of a human being's nature, his intelligence and his sensibilities.

351 S1 of the *Constitution*. This is also reaffirmed by s7(1), s36 and s39 of the *Constitution*; Goolam "Human dignity- Our Supreme Constitutional Value" 4; Govender *et al Introduction to Human Rights Law* 69.

infringement on their human dignity. It is, therefore, vital for an employer to instil a culture of upholding human dignity as part of the workplace "corporate culture".[352]

It is asserted that human dignity and equality are tightly interlocked in the South African Bill of Rights.[353] Differentiating treatment with the intention or consequence of perpetuating oppressive power relations between an employer and an employee or fellow colleague undermines their constitutional right to human dignity.[354] Henrico[355] refers to dignity as an inexorable component of equality.[356] Malherbe[357] asserts in a similar vein that equality cannot be sought in isolation from the right to human dignity since it denotes equal worth of all people. It is further argued that human dignity is the basis for the right to equality.[358] It is not every infringement of dignity that leads to unfair discrimination. However, every unfair discrimination can be said to infringe on a person's dignity, as the unfair differential treatment calls into question that person's human worth in comparison to others. Steinmann[359] correctly argues that acknowledgement of diversity and disparities between individuals and cultures is implicit in the underlying assertion of the right to dignity. Therefore, before resorting to dismissing an employee on the basis of incompatibility, an employer must endeavour to uphold the dignity and diversity of all employees. This is to ensure harmonious relations in the workplace. It is submitted that adequately regulating dismissal for incompatibility as a stand-alone ground in South African labour law, particularly where such dismissals are regarded fair, will assist in safeguarding the dignity of employees.

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352 Refer to Chapter 2.

353 Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 330; Henrico 2015 *Obiter* 284; Albertyn and Fredman 2015 *Acta Juridica* 435; Malherbe 2007 *TSAR* 130; *Dawood & others v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 36. Dignity is described as 'the cornerstone of all human rights.

354 McConnachie 2014 *Oxford Journal of Legal Studies* 510.

355 Henrico 2015 https://islssl.org.

356 Goolam NZ "Human dignity- Our Supreme Constitutional Value" 2001 *PER/PELJ* 2.

357 Malherbe R "Some Thought on Unity, Diversity and Human Dignity in the New South Africa" 2007 *TSAR* 130.

358 Govender *et al Introduction to Human Rights Law* 70.

359 Steinmann 2016 *PER/PELJ* 11.

3.6 Incompatibility and the rights to freedom of religion, belief, opinion, language and culture

Significantly, the *Constitution* recognises South Africa as a diverse country, characterised by various cultures and religions, amongst others.[360] "Rainbow nation" is a term that is frequently used to highlight South Africa's multicultural diversity, defined by, but not limited to, various cultural and religious backgrounds.[361] This is further demonstrated by the Preamble of the *Constitution*, which states that "South Africa belongs to all who live in it, united in their diversity".[362] It is argued that this is an open declaration that all religions and cultures should be preserved and safeguarded under the *Constitution*.[363]

The Constitution guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion.[364] Notably, section 15 cannot be read or applied in isolation. It is submitted that section 15 should be read together with sections 30 and 31. Section 30 dictates that everyone has the right to use language and engage in the cultural life of their choosing.[365] In addition, under section 31, no person belonging to a religious group can be denied the right, together with other members of that community, to practice their religion and form, join and maintain religious associations.[366] Both these rights are subject to the condition that they are exercised in accordance with the Bill of Rights.[367] This means that employees' rights can be limited when the exercise of their religion infringes the rights of others, particularly if an employee practices their religion in a manner that causes disruption and consternation in the workplace. For example, in *Uasa on behalf of Zulu and Transnet Pipelines,*[368] the applicant was dismissed on allegations of sexual harassment of a

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360 Govindjee *et al Introduction to Human Rights Law* 67.

361 Prinsloo and Huysamen 2018 *Law, Democracy and Development* 26; Lambrechts 2012 http://ir.cut.ac.za; Henrico 2017 *Obiter* 234.

362 Preamble of the *Constitution*.

363 Prinsloo M and Huysamen E "Cultural and Religious Diversity: Are they Effectively Accommodated in the South African Workplace" 2018 *Law, Democracy and Development* 29.

364 S15 of the *Constitution*.

365 S30 of the *Constitution*.

366 S31 of the *Constitution*.

367 S30, s31 of the *Constitution*.

368 *Uasa on behalf of Zulu and Transnet Pipelines* (2008) 29 ILJ 1803 (ARB), (Hereinafter, referred to as the *Uasa* case).

female colleague on the grounds that such behaviour was "part of his Zulu culture". It was reported that the applicant had repeatedly asked the complainant for sexual intercourse, which he was denied.[369] Moreover, the applicant grabbed the complainant and attempted to lift her skirt, but was stopped from doing so by the intervention of the complainant's supervisor.[370] Upon deliberation of the above-mentioned facts, the tribunal expressed its astonishment that the applicant's union argued that its conduct should not be treated as severe because it was part and parcel of "Zulu culture".[371] The tribunal stressed that such conduct does not have a place in a civilised society.[372] In addition, the tribunal affirmed that the *Constitution* clearly states that every human being has inherent dignity and has the right to have their dignity respected and protected.[373] Ordinarily, section 36 of the *Constitution* is applicable when balancing the rights in question.[374] Indisputably, the employee's right to privacy (and dignity) greatly outweighed the supposed cultural custom of the applicant.[375] It was further held that the employer had taken the correct steps by dismissing the applicant.[376] It is true that the conduct of the employee constituted misconduct, but it is also opined that such behaviour does not only make such a person incompatible with the "corporate culture" of the workplace, but it is regarded as serious enough to justify the termination of the employment relationship on this ground if it adversely affects the relationships in the workplace or the employer's operations. It is evident that the applicant's behaviour caused actual harm to a fellow employee and may have made the workplace environment unsafe for other female employees. It is, therefore, submitted that the tribunal arrived at a correct decision in protecting the dignity of the affected employee.

It is important to note that other clauses of the Bill of Rights complement sections 15, 30 and 31 such as the rights to equality, dignity, freedom of association and freedom of expression.[377] For example, the right to equality complements these rights by

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369 *Uasa* case 1803.
370 *Uasa* case 1805.
371 *Uasa* case 1808.
372 *Uasa* case 1808.
373 *Uasa* case 1808.
374 Refer to para 3.7.
375 Prinsloo and Huysamen 2018 *Law, Democracy and Development* 37.
376 *Uasa* case 1809,1810.
377 Govindjee *et al Introduction to Human Rights Law* 113; s9, s10, s16, s18 of the *Constitution*.

detailing discrimination arising from conscience, religion, belief, language and culture as constituting unfair discrimination.[378] Subsequently, every person should be allowed to observe and exercise the religion of their choosing, in association with others, on equal footing with others. Denying a person this right would invariably infringe on their right to dignity and to be considered worthy of equal concern. In this way, the right to dignity is also complemented by sections 15, 30 and 31, which protect the dignity of each person to exercise his or her conscience, religion, belief, language and culture. In the case of *MEC v Kwazulu Natal v Pillay*,[379] the court highlighted that dignity and identity are inseparably connected as one's sense of self-worth is determined by one's identity. As such, cultural identity is one of the most important aspects of a person's identity, precisely because it flows from belonging to a culture and not from personal choice or achievement.[380] In addition, belonging requires more than mere association; it entails involvement and representation of the practices and traditions of the community.[381] In the context of the workplace, the aforementioned rights must be taken into account against the constitutional guarantee that everyone has the right to fair labour practices.[382]

Phooko and Mnyongani[383] contend that since the dawn of constitutional democracy, South African courts have been faced with the challenge of balancing the right of freedom of religion and culture on the one hand, and the economic interests of the employer on the other. In addition, Van Der Walt *et al*[384] argue that factors that may give rise to religious and cultural discrimination include legal uncertainty, increased religious diversity in the country's labour force, the unique nature of a religion and individual differences. It is opined that religion is a way of life, and therefore cannot

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378 S9(3) of the *Constitution*.

379 *Pillay* case para 53.

380 *Pillay* case para 53.

381 *Pillay* case para 53.

382 S23 of the *Constitution*; Henrico 2015 https://islssl.org.; Prinsloo and Huysamen 2018 *Law, Democracy and Development* 29.

383 Phooko MR and Mnyongani F "When Ancestors Call an Employee: Reflections on the Judgement of the Supreme Court of Appeal in the Kievits Kroon Country Estate v Mmoledi Case" 2015 *SA Merc LJ* 171.

384 Van Der Walt et al " Perceived Religious Discrimination as a Predictor of Work Engagement, with Specific Reference to the Rastafari Religion" 2016 *Verbum et Ecclesia* 3- 4.

be confined to subjective and personally held faith and beliefs.[385] It also has the ability to affect the behaviour and attitude of the employee.[386] For example, in Christianity and Islam, the ten commandments are used as a compass for moral and social behaviour,[387] whereas, in African Religion Tradition, the values and customs of the community play an integral role in an individual's behaviour and character.[388] Given the potential challenges posed by religious and cultural differences in a diverse workforce, this may be regarded as a contentious issue in the South African labour market.[389]

It is further argued that incompatibility may also involve cases where the employer's beliefs are at odds with an employee's cultural and religious beliefs.[390] This is especially apparent if the employee's ideology is incompatible with the employer's value systems or the norms of "corporate culture" in the workplace. In the previous chapter, it has been established that the meaning of "corporate culture" should be centred on section 23 of the *Constitution*.[391] This means that both the employer's and the employee's labour interests should be safeguarded. If an employee is arbitrarily dismissed because of his perceived incompatibility due to religious and/or cultural practices, his right to fair labour practices, religion, and culture may be violated. Given that religious and cultural views are subjective and ultimately personal to an individual or a specific body of persons forming an association, balancing the rights of both the employer and the employee may be challenging in such cases.[392] This is particularly true in the absence of proper statutory regulation and guidelines on how employers should handle incompatibility disputes of this nature. Consequently, this creates situations where the non-conformist employee is regarded to be "incompatible" with the employer's

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385 Henrico 2017 *Obiter* 231.

386 Van Der Walt et al 2016 *Verbum et Ecclesia* 2.

387 Van Der Walt JH "The Search for a Moral Compass and a New Social Contract in the Context of Citizenship Education" 2019 *HTS Teologiese Studies/Theological Studies* 5; The Christian Science Monitor 2022 *The Ten: The Commandments as a moral source code in modern life* https://www.csmonitor.com accessed 12 December 2022; The Religion of Islam 2022 *The Ten Commandments in the Quaran (Part1 of 3): A Quick Introduction* https://www.islamreligion.com accessed 12 December 2022.

388 Nel PJ "Morality and Religion in African Thought" 2008 *Acta Theologica* 42.

389 Van Der Walt et al 2016 *Verbum et Ecclesia* 2.

390 Griessel 2020 https://www.labourguide.co.za; Rycroft 2011 *SA Merc LJ* 106.

391 Refer to Chapter 2, para 2.5.1.

392 Henrico 2012 *Obiter* 504.

"corporate culture". It can be argued that the violation of the employee's right to freedom of opinion, belief or expression can render the resulting dismissal as an automatically unfair dismissal unless the employer can prove that it is fair.[393] An automatically unfair dismissal is a dismissal that seriously infringes on the fundamental rights of the employee in the workplace.[394] In terms of section 187 of the *LRA*, it is automatically unfair for an employer to dismiss an employee directly or indirectly on prohibited grounds such as religion, culture, conscience or belief.[395] There is a need for clarity as to how the courts should deal with issues of incompatibility in the workplace when it is caused by the unique conduct of the employee due to his or her cultural practices or beliefs. It is also important to elucidate on the conflict between corporate culture in the workplace and the incompatibility created by the unique conduct of the employee due to cultural practices or beliefs.

The question thus arises as to when the employer would be able to dismiss an employee fairly in such circumstances, considering that the employer's interests should also be served in these matters as established above. Although it can be argued that section 187 of the *LRA* or section 6 of the *EEA* would naturally play a role, it is unclear as to what the balancing of interests of both the employer and employee would entail when considering the business interests of the employer and the right of the employee to practice his or her cultural or religious activities as provided by the *Constitution* in sections 30 and 31.[396] In this context, it is also important to determine

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393 Collier D *et al Labour Law in South African Context and Principles* (Oxford University Press Southern Africa Cape Town 2018) 195; Du Plessis and Fouche *A Practical Guide to Labour Law* 345.

394 Collier *et al Labour Law in South African Context and Principles* 195; Du Plessis and Fouche *A Practical Guide to Labour Law* 346.

395 S187(f) of the LRA; Collier *et al Labour Law in South African Context and Principles* 202; Du Plessis and Fouche *A Practical Guide to Labour Law* 346.

396 In terms of s 187(f) of the *LRA*, a dismissal is automatically unfair if in dismissing the employee, the employer unfairly discriminated against an employee, directly or indirectly, on an arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility; s30 of the *Constitution*, everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights; s31(1)(a) of the *Constitution*, persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language; Lambrechts 2012 http://ir.cut.ac.za accessed.

the extent to which freedom of religion can be exercised in the workplace.[397] As Bernard[398] argues, religion is an intrinsic element of a person's individuality and identity and forms the foundation of a person's life. Further to this, Mischke[399] correctly asserts that when an employee enters the workplace, he or she is not expected to leave his or her religious beliefs and practices at the door. It is argued that the manner in which the courts have dealt with conflicts of a similar nature would help to resolve these shortcomings.

3.6.1 The scope and meaning of the constitutional right to religion, belief and opinion

Govindjee[400] argues that it might not be necessary to define the terms "belief", "thought", "religion", "conscience" and "opinion" since they are only used to broaden the scope of the right to religion. This argument is correct since the differences between the terms are just semantics. It is submitted that religion encompasses personal faith and beliefs.[401] Furthermore, it is contended that freedom of religion includes both the right to have a belief and the right to express such belief in practice.[402] Consequently, any measures that compel an individual to act or refrain from acting in a manner that is contrary to his or her beliefs infringe this right.[403] This is particularly the case when certain practices require him or her to exercise such religious practices or beliefs.[404] It is submitted that there is a need for statutory guidance on the issue to avoid employers from dismissing an employee on the basis of incompatibility merely because he or she is exercising their religious, cultural practices and/or beliefs. It is further submitted that proper regulation will allow employers to fairly dismiss an employee without victimising him or her on any other

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397 Bernard RB "Reasonable Accommodation in the Workplace: To be or not to be" 2014 *PER/PELJ* 2871.
398 Bernard 2014 *PER/PELJ* 2871.
399 Bernard 2014 *PER/PELJ* 2871.
400 Govindjee et al Introduction to Human Rights Law 114.
401 *Pillay* case para 46; Prinsloo M and Huysamen 2018 *Law, Democracy and Development* 28.
402 Govindjee *et al Introduction to Human Rights Law* 114; Prinsloo and Huysamen 2018 Law, Democracy and Development 28.
403 Govindjee *et al Introduction to Human Rights Law* 114; Prinsloo and Huysamen 2018 *Law,* Democracy and Development 28.
404 Govindjee *et al Introduction to Human Rights Law* 114.

matter which is not incompatibility. The right to freedom of religion extends to all religions whether big or small, irrespective of their creeds and doctrines.[405] In the Canadian matter of *R v Big M Drug Mart Ltd* as referred to in *S v Lawrence; S v Negal; S v Solberg (Lawrence)*,[406] the principle of the freedom of religion was held to include the right to hold such religious beliefs as a person chooses; the right to declare such religious beliefs freely and without fear of hindrance or reprehension and the right to manifest religious belief through worship and practice, through teaching and disseminating.[407] In a similar vein, Currie and De Waal[408] submit that religious freedom requires the right to have a belief, to express that belief openly and to manifest that belief through worship and practice. This requires that an individual should be able to observe and publicly declare his religious beliefs, without fear of reprisal or disadvantage.[409] Henrico[410] argues that religion is a way of life, thus, it cannot be confined to subjective and personally held faith and beliefs. Since religion is integral to a person's way of life and identity, they cannot be separated from their religion, and neither be expected to refrain from observing it. In the same manner that an employer has the right to preserve his business interests, an employee should be permitted to pursue his or her cultural and religious beliefs or practices without fear of being dismissed for incompatibility.

3.6.2 The scope and meaning of the constitutional right to language and culture

As stated earlier, Sections 30 and 31 give effect to the rights of language and culture. In *Mhlekwa v Head of the Western Tembuland Regional Authority and Another;*[411] it was held that both sections imply that the right to culture confers all persons the freedom to associate by granting them the right to choose to be part of their culture,

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405 *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 2 (Hereinafter, referred to as the *Prince* case) para 112.

406 *R v Big M Drug Mart Ltd* 1985 1 295 (SCR) quoted with approval in *S v Lawrence*; *S v Negal*; S v *Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) (Hereinafter, referred to as the *S v Lawrence and others*).

407 *S v Lawrence* and others para 92.

408 Currie I and De Waal L *The Bill of Rights Handbook* 5th ed (Juta &Co Ltd Capetown 2008) 339.

409 Bernard 2014 *PER/PELJ* 2870.

410 Henrico 2017 *Obiter* 231.

411 *Mhlekwa v Head of the Western Tembuland Regional Authority and Another; Feni v Head of the Western Tembuland Regional Authority and Another 2001* (1) SA 574 (Tk) (Hereinafter, referred to as the Mhlekwa case) 6291-6230A.

practices and customs. In addition, it is significant that section 30 invoked the word "choice" which shows that no one may be coerced to either be part or not be part of any particular culture and its practices.[412] The inference is that one may not be victimised or in any way unfairly disadvantaged for forming part or choosing to form part of a particular culture and its practices.

It is argued that there is a difference between culture and religion. This probably clarifies why the legislature contrasted the two concepts, as indicated in sections 15, 30, and 31 of the *Constitution*. In the *Pillay* case,[413] the Constitutional Court observed that the *Constitution* takes cognisance of the distinction between culture and religion. This is confirmed by section 15, which applies specifically to religion, belief and conscience without mentioning culture.[414] It is argued that there are significant differences between culture and religion. Firstly, it is argued that culture is a body of knowledge consisting of traditions, associative activities and values that have been developed by the community or group(s) over time.[415] As a consequence, culture is a vital component of people, because it is the way in which they operate regularly that cannot be escaped or easily discarded.[416] Religion, on the other hand, is a belief system centred on a supreme deity or a higher power.[417] It is further argued that religion, beliefs and conscience are concerned with the individual's state of mind and their set of values that they hold regardless of the beliefs of others.[418] Another notable distinction is that cultural practices evolve over time, whereas religion will always be fixated on specific practices and can be extremely dogmatic. This highlights another significant distinction that two individuals may share the same culture and yet practice different religious practices. Given these distinctions, while assessing whether an employee could or should be dismissed on the basis of incompatibility, the employer should guarantee that both their religious and cultural traditions are accommodated

412 *Mhlekwa* case 6291-6230A.
413 *Pillay* case para 143.
414 *Pillay* case para 143.
415 Prinsloo and Huysamen 2018 *Law, Democracy and Development* 27; Henrico 2017 *Obiter* 231; *Pillay* case para 144; DifferenceBetween.net 2022 *Difference Between Religion and Culture* http://www.differencebetween.net accessed 15 April 2022.
416 Prinsloo and Huysamen 2018 *Law, Democracy and Development* 28.
417 DifferenceBetween.net 2022 http://www.differencebetween.net.
418 *Pillay* case para 143.

without exclusion of the other. This ensures that both the interests of the employee and the employer are balanced and are well protected in terms of section 23 of the *Constitution*.[419]

3.6.3 Requirements set by the courts when dealing with discrimination relating to religious or cultural practices in the workplace

Undoubtedly, there is a highly regulated legislative framework in South African labour law that aims to counter unfair discrimination based on religion and maintain the balance of harmony in the workplace.[420] This is demonstrated by the constitutional values and principles that the *LRA* and the *EEA* adhere to while taking into account the applicable ILO regulations and international law.[421] Various authors[422] correctly recognise that conflicts resulting from the employee's religious and/or cultural beliefs, on the one hand, and the right of the employer to exclude employees on the basis of a religious and/or cultural affiliation, on the other hand, can easily threaten the harmony of the workplace. This is particularly the case if the employer wishes to protect his or her business interests which have a bearing on the operational needs of the company.[423] Although there is no specific case law that explicitly addresses incompatibility arising from religious and/or cultural practices, guidelines can be derived from how the courts have handled similar disputes.

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419 Refer to paragraph 3.2.1.

420 Van Der Walt 2016 *Verbum et Ecclesia* 1.

421 Henrico 2015 https://islssl.org. The applicable ILO regulations and international law is discussed in greater detail in Chapter 5.

422 Henrico 2015 https://islssl.org; Henrico 2012 *Obiter* 506; Prinsloo and Huysamen 2018 *Law, Democracy and Development* 27; Phooko and Mnyongani 2015 SA Merc LJ 170.

423 Henrico 2015 https://islssl.org; Henrico 2012 Obiter 506; Prinsloo and Huysamen *Law, Democracy and Development* 27; Phooko and Mnyongani 2015 *SA Merc LJ* 170.

In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*[424] and *Building Construction & Allied Workers Union on behalf of Zondi and Kusile Civil Works Joint Venture*,[425] the South African courts concluded that in instances when an employee feels called upon to fulfil an internal religious or cultural obligation, an employer cannot trivialise or challenge those beliefs and/practices. It is argued that under such circumstances, the employer should first verify that the employee have a sincere belief.[426] Secondly, the employer must determine whether the employee has an ulterior motive in "practising" their religion and/or culture in the workplace.[427] It is contended that based on the first and second requirements, an employer will be able to determine whether the employee caused unnecessary disruptions and consternation in the workplace. Thirdly, the employer can review and try to understand the supporting evidence presented by the employee.[428] This may include information on how the respective religious and cultural groups observe their practices. Lastly, the employer may ask the employee to clarify the evidence in question.[429] After this enquiry has been made, the employer must attempt to accommodate the employee's religious and/or cultural practices.[430] Nonetheless, the employee will have to exercise his/her religious and/or cultural practices in a manner that does not infringe on the rights of other employees in the workplace. It is submitted that these requirements may apply in incompatibility disputes when balancing the rights of both the employer and the employee. This

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424 *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* (875/12) [2013] ZASCA 189; 201(1) SA 585 (SCA). In this case, the courts addressed the issue of exercising cultural practices in the workplace and the concept of reasonable accommodation. In this case, the employee had been attending a traditional healer's course to qualify as a sangoma. The employee then requested the employer the required one month's unpaid leave to complete the course. Although the employee submitted a certificate issued by her traditional healer and other supporting documents, her application for leave was rejected by the employer. As a result, the employee was dismissed.

425 *Building Construction & Allied Workers Union on behalf of Zondi and Kusile Civil Works Joint Venture* (2013) 34 ILJ 2395 (BCA). In this case, the applicant was dismissed for being absent from work without the employer's permission. The employee argued that he had conveyed to his supervisor that he had been undergoing treatment from a traditional healer, as he was following a call from his ancestors. The employee was dismissed.

426 Rycroft R "Business Needs, Cultural Beliefs and Fairness: Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & Others (2014) 35 ILJ 406 (SCA)" 2014 *ILJ* 916.

427 Rycroft 2014 *ILJ* 916. For instance, an employee may have ulterior motives to undermine the authority of the employer by refusing to comply with certain workplace standards or regulations under the guise of religious and/or cultural practices.

428 Rycroft 2014 *ILJ* 916.

429 Rycroft 2014 *ILJ* 916.

430 Rycroft 2014 *ILJ* 917.

protects vulnerable employees from arbitrary dismissals and at the same time, allows employers to protect their business interests.

In addition, the South African courts have set out requirements for a successful religious-discrimination claim. In *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty)*,[431] the court reviewed the conclusions in the *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (*POPCRU* case)[432] and set out the requirements for a successful religious-discrimination claim. It is contended that these requirements may apply in incompatibility disputes when determining religious and/or cultural discrimination. In light of these guidelines, the burden of proof rests on both the employer and employee.[433] In the first instance, the employee should prove that the employer's prohibition or a particular standard in the workplace has infringed on their involvement or practice of their religion and/or culture.[434] However, the practice in question should be a central tenet of that religion and/or culture.[435] In addition, the employee should also show *prima facie* that his or her employer discriminated against him or her.[436] On one hand, the employer must be or should have been aware of the employee's religious and cultural practices or beliefs.[437] In this way, the employee can successfully prove that the employer failed to accommodate him/her.

On the other hand, the employer should establish that discrimination is fair and that the rule is an inherent requirement of the job.[438] The employer should demonstrate that steps have been taken to adequately accommodate the employee's religious and/or cultural practices or beliefs.[439] Most importantly, the concept of proportionality should be enforced. This means that if accommodating an employee's religious or

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431 *SACTWU v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd* 2012 33 ILJ 972 (LC) (Hereinafter, referred to as the *SACTWU* case).

432 *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA), (Hereinafter, referred to as the POPCRU case).

433 *SACTWU* case para 38.

434 *SACTWU* case para 38.2.

435 *SACTWU* case para 38.3. A central tenet refers to doctrines or principles held by members of a certain religion and/or culture.

436 *SACTWU* case para 38.3.

437 *SACTWU* case para 38.4.

438 *SACTWU* case para 38.5.

439 *SACTWU* case para 38.6.

cultural beliefs would have little or no impact on the business, the employer should not insist on compliance with a discriminatory workplace rule.[440] In the context of incompatibility, the employer is required to balance the operational needs of the business against the religious and/or cultural practices of the employee.[441] It is opined that the aforementioned guidelines set out in the *SACTWU* case[442] are comprehensive and provide the courts with clarity when dealing with disputes arising from unfair discrimination in the workplace in relation to religious and/or cultural practices. In the absence of statutory guidance, these requirements may be applied in incompatibility disputes of this nature.

From the requirements set out above by the courts, it is the responsibility of all employers to reasonably accommodate the religious and/or cultural practices of all employees in the workplace.[443] This ensures harmony in the workplace. In addition, employees should also not have to choose between their religious beliefs and the prerogative or authority of management.[444] There are instances, however, where certain religious and/or cultural practices infringe on the rights of other employees in the workplace. Hence, it would be justifiable for the employer to dismiss an employee because the exercise of his/her religion and/or culture makes them incompatible with other employees and/or the "corporate culture" of the workplace. As previously discussed in the *Uasa* case,[445] the court rejected the applicant's justification for sexually harassing a fellow colleague on the basis of his cultural practices. Furthermore, employers are not expected to endure undue hardship which is to the detriment of their business in order to accommodate the religious and cultural practices of their employees.[446] Therefore, in such cases, an employer should be allowed to dismiss the employee based on incompatibility when it is to the serious detriment of the business enterprise. Proper regulations in this regard are necessary to assist employers in

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440 *SACTWU* case para 38.6.
441 Bernard 2014 *PER/PELJ* 2886.
442 Bernard 2014 *PER/PELJ* 2886.
443 *Pillay* case para 73.
444 Bernard 2014 *PER/PELJ* 2880.
445 *Uasa* case.
446 Bernard 2014 *PER/PELJ* 2880.

conducting the dismissal correctly so as not to unfairly infringe on any of the constitutional rights discussed above.

3.7 Incompatibility and the limitation of rights

Section 36 (also referred to as the limitation clause) of the *Constitution* states that under certain circumstances, all rights enshrined in the Bill of Rights may be limited to protect the rights of others.[447] Hence, no right is absolute.[448] These limitations are deemed reasonable and justifiable in a democratic society for the realisation of equality, human dignity and freedom enshrined in the Bill of Rights.[449] Regarding incompatibility cases, if an employee's attitude, behaviour or character potentially violates the employer's constitutional right to fair labour practices, the court is required to ascertain whether the violation is justifiable.[450] If not, then section 36 will be exercised by the court to balance the rights of both parties. However, the employer's right to fair labour practices is not absolute either. This is especially when an employee's rights to human dignity, equality, religion and culture could be potentially violated by the "corporate culture" in the workplace. In such instances, section 36 is significant in assessing when it would be suitable for the employer to dismiss an employee because the exercise of their religion or culture, or any other personal attributes, makes them incompatible with other employees and/or the "corporate culture" of the workplace, to the extent where it would justify dismissal.

Furthermore, section 36 sets out requirements that should be considered when limiting constitutional rights. Similarly, where necessary in incompatibility disputes, the criteria apply to the limitation of certain workplace rights depending on the

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447 S7(3), s36 of the *Constitution*. Section 7(3) of the Constitution that the rights in the Bill of Rights are subject to limitation in terms of section 36. Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 309.

448 De Vos *et al South African Constitutional Law in Context* (Oxford University Press Cape Town 2021) 431; International IDEA "Limitation Clauses" 2014 Constitutional Building Primers 2.

449 S36 of the *Constitution*; International IDEA 2014 *Constitutional Building Primers* 2; *S v Makwanyane* para 104. The Constitutional Court held that the test to determine whether a limitation is reasonable and justifiable involves weighing up the competing values or different interests. It is also an assessment based on proportionality (also referred to as the proportionality assessment).

450 Iles K "A Fresh Look at Limitations: Unpacking Section 36" 2007 *SAJHR* 75; De Vos *et al South African Constitutional Law in Context* 431.

circumstances. Firstly, it must be determined whether a fundamental right has been limited.[451] The party who alleges the infringement of his/her fundamental right must be a bearer of that right,[452] whereas the party who is alleged to have limited that right, must be bound by the limitation.[453] In the context of incompatibility, one will have to determine if the employer's rights to fair labour practice have been infringed by the employee's incompatible behaviour and/or character. Nonetheless, the employer's rights are not absolute. Conversely, it must be determined if the employee's rights not to be unfairly dismissed (which falls under the right to fair labour practices), equality, human dignity, culture and religion have not been violated by the employer. It is submitted that once this condition has been met in the affirmative, one may proceed to the next requirement. Secondly, the limitation must be in terms of the law of general application.[454] The law of general application includes common law and statutory law, provided it gives clarity on the matter.[455] Govindjee[456] clarifies that any limitation that is not authorised by law is deemed to be unconstitutional. It has been established that the current position in South African labour law is that there is no statutory guidance regarding dismissals arising from incompatibility. The only reliance is case law wherein the courts have provided a few guidelines. However, to ensure that the limitation is in line with the law of general application, the legislature will have to augment the problem areas where South African legislation falls short.

Other factors that should be considered include the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and the purpose and less restrictive means to achieve the purpose.[457] Regarding the nature of the right, the court will have to ascertain which right is being limited as some rights are said to weigh heavily more than others.[458] As mentioned earlier, the courts will have to balance the rights of both the employer (which include the right to fair labour practices) and the employee (which include the

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451 De Vos *et al South African Constitutional Law in Context* 432.
452 De Vos *et al South African Constitutional Law in Context* 450.
453 De Vos *et al South African Constitutional Law in Context* 450.
454 S36 of the *Constitution*
455 Iles 2007 *SAJHR* 76.
456 Govindjee *et al Introduction to Human Rights Law* 63.
457 S36(1)(a)-(e) of the *Constitution*.
458 S36(1)(a) of the *Constitution*; Govindjee *et al Introduction to Human Rights Law* 67.

rights to fair labour practices, equality, human dignity, culture and religion). Secondly, the limitation must serve a purpose and reflect the rights based on human dignity, equality and freedom as enshrined in the Bill of Rights.[459] Govindjee[460] correctly argues that a limitation without a purpose is not regarded as reasonable and/or justifiable. Thirdly, the nature and the extent of the limitation are an integral part of the proportionality assessment.[461] Curie and De Waal[462] assert that the infringement of rights should be limited to what is necessary to achieve the purpose of that limitation. This is in accordance with the rights enshrined in the Bill of Rights. Lastly, for the limitation to be reasonable and justifiable there must not be less restrictive measures to achieve its purpose.[463] This means that the limitation is not appropriate if other, less costly and effective measures may be used to achieve the same purpose.[464] In such cases, a less restrictive measure must be utilised. Evidently, any rule and/or legislation that violates a person's rights more than necessary is regarded as unconstitutional.[465]

It is clear that sections 9, 10, 15, 30, 31, 36 and 39 of the *Constitution* permeate the employment relationship when an employer is confronted with the perceived incompatible behaviour of the employee. The main challenge surrounding incompatibility as a ground for dismissal is the lack of clear statutory guidance when it comes to disputes of this nature. Hence, both employers and employees will have to rely on section 23 of the *Constitution* for protection in disputes arising from incompatibility. It is contended that in protecting their business interests, employers should do so in a manner that is not detrimental to the rights of an employee. This includes protecting an employee's rights to human dignity, equality, religion and culture as well as eradicating unfair discrimination in the workplace. In this way, incompatibility may well be successfully recognised as a separate and legitimate

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459 S36(1)(b),(d) of the *Constitution*.
460 Govindjee *et al Introduction to Human Rights Law* 66.
461 S36(1)(c) of the *Constitution*.
462 Currie I and De Waal J *The Bill of Rights Handbook* (Juta Cape Town 2013) 160.
463 S36(1)(e) of the *Constitution*.
464 Currie and De Waal *The Bill of Rights Handbook* 170; Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* 322.
465 Currie and De Waal *The Bill of Rights Handbook* 171.

ground for dismissal under South African labour law. It will definitely be the recourse for employers who are incompatible with certain employees in the workplace.

3.8 Incompatibility in the context of the Labour Relations Act 66 of 1995 and the Employment Equity Act 55 of 1998

It is opined that South African labour law reflects the ideals and beliefs underpinned by the *Constitution*.[466] Each of these rights (among others but most relevant for this analysis, the right to equality, dignity, fair labour practices, religion and culture) must be taken into account in the context that everyone is equal before the law and has the right to equal treatment and benefit of the law.[467] This is particularly compelling when dealing with conflicts resulting from incompatibility in the workplace. In particular, the *LRA* and the *EEA* have been introduced in order to give effect and substance to the constitutional rights to fair labour practices and equality. However, it is contended that when it comes to issues of equality, fair labour practices, and religious or cultural discrimination, the *LRA* and the *EEA* should not be interpreted separately.[468] In fact, both pieces of legislation should be construed in such a way as to give effect to section 39(2) of the *Constitution* in the promotion of the spirit, purport and objects of the Bill of Rights.[469] This ensures that both pieces of legislation are aligned with the rights enshrined in the *Constitution*.

3.9 Incompatibility and the Labour Relations Act 66 of 1995

As stated earlier, the *LRA* is the principal legislation that was promulgated to give effect to the overarching constitutional right to fair labour practices provided in section 23 of the *Constitution*.[470] Hence, the *LRA* should be interpreted in a manner that accommodates the interests of both the employers and employees as envisaged by

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466 Henrico 2015 https://islssl.org.

467 S9 of the *Constitution*; Henrico 2015 https://islssl.org.

468 S39 of the *Constitution*; Henrico 2015 https://islssl.org.

469 Henrico 2015 https://islssl.org; s39 of the *Constitution*. The courts and tribunals are mandated to interpret any legislation, when developing the common law and/or customary law in a manner that promotes the spirit, purport, and objects of the Bill of Rights.

470 S1(c) of the *LRA*.

the *Constitution*. Consequently, no person is permitted to discriminate against either the employer or employee in the exercise of their rights under the *LRA*.[471]

3.9.1 Incompatibility and unfair dismissals

The *LRA* prohibits *unfair* dismissal of an employee in terms of section 185 to protect the interests of the employee as the vulnerable party to the employment relationship.[472] A dismissal is the termination of the employment relationship with the employee at the behest of the employer.[473] Further, the LRA provides a broader legislative definition of what constitutes a dismissal.[474] For the purposes of section 186(1), a dismissal is the termination of the employment relationship by the employer that is effected either by giving notice of the intention to terminate the employment agreement with the employee or, summarily without notice, among others.[475] However, the *LRA* also provides for the fair dismissal of the employee under circumstances where the employer's business interests are at stake. Section 188 of the *LRA* gives cognisance to misconduct, incapacity due to poor performance or ill health and/or injury and the employer's operational requirements as valid grounds for dismissal in the South African labour law.[476] By providing for the situations of *fair* dismissal, the *LRA* serves the interests of both parties to the employment relationship. On the one hand, an employer should be able to exercise the freedom to protect his business interests. This includes fairly dismissing an employee when necessary, to ensure the smooth operation of the business on a daily basis. On the other hand, an employee should not be dismissed arbitrarily by vindictive and scrupulous employers, without fair reason. Nonetheless, the employee has the onus to establish the existence of a dismissal.[477] After the employee has established that such a dismissal occurred,

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471 S5(1), s7(1) of the *LRA*.

472 In terms of section 185 "every employee has the right not to be unfairly dismissed; and subjected to unfair labour practice."

473 Van Niekerk *et al Law at Work* 221; International Labour Organisation (ILO) *Termination of Employment Convention* No.158 (1982).

474 S186(1) of the LRA; Du Plessis and Fouche *A Practical Guide to Labour Law* 342; Van Niekerk *et al Law at Work* 222.

475 S186(1)(a) of the *LRA*.

476 S188(1) of the *LRA*.

477 S192(1) of the *LRA*.

the onus then shifts to the employer to prove that it was substantively and procedurally fair.`[478] Only then would such a dismissal be deemed valid.

Although incompatibility is not listed as a ground for dismissal in the *LRA*, it has been recognised as such by various South African courts and other dispute resolution tribunals in a number of cases.[479] It could be argued that, like in matters of misconduct or the incapacity of the employee, an employer's business may suffer detriment in situations where an employee's attitude, behaviour or character is incompatible with certain values or personalities of the other employees or the employer and subsequently hinders the functions of the business. This is not to say that an employer will be allowed to unfairly discriminate against or dismiss an employee simply because he or she is different, but he should be able to deal with those disruptive and/or intolerable employees that can potentially harm the business or cause undue hardship for the employer or other fellow employees. To provide recourse (and legal certainty) to employers under such instances, incompatibility may as well be regarded as a separate and legitimate ground for dismissal under South African labour law and be formally regulated as such.

3.9.2 Incompatibility and automatic unfair dismissals

There is a need for clarity as to how the courts should deal with issues of incompatibility in the workplace when it is caused by the unique conduct of the employee, for instance, due to his or her cultural practices or beliefs (which are protected by the Bill of Rights). The question arises as to when the employer would be able to dismiss an employee fairly in such circumstances, considering that the

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478 S188, S192(2) of the *LRA*.

479 *Erasmus v BB Bread 1987 8 ILJ* 537 (IC); *Wright v St Mary's Hospital* 1992 13 ILJ 987 (IC); *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC); *Hapwood v Spanjaard Ltd* 1996 2 BLLR 187 (IC); *Lebowa Platinum Mines Ltd v Hill* 1998 19 ILJ 1112 (LAC); *Brereton v Bateman Industrial Corporation Ltd and Others* 2000 5 LLD 119 (IC); *Subrumuny v Amalgamated Beverages* 2000 21 ILJ 2780 (ARB); *Nathan v Reclamation Group (Pty) Ltd* 2002 23 ILJ 588 (CCMA); *Cutts v Izinga Access (Pty) Ltd* 2004 25 ILJ 1973 (LC); *Jabari v Telkom SA (Pty) Ltd* 2006 27 ILJ 1854 (LC); *Lotter and SA Red Cross Society* 2006 27 ILJ 2486 (CCMA); *Jardine v Tongaat Hulet Sugar Ltd* 2002 23 ILJ 547 (CCMA); *Miyeni v Chillibush Communications (Pty) Ltd* 2010 31 ILJ 3054 (CCMA); *Goussard v Impala Platinum Limited* 2012 33 ILJ 2898 (LC); *PSA obo Mbiza v Office of the Presidency and Others* 2014 35 ILJ 1628 (LC); *Mgijima v Member of the Executive Council Gauteng Department of Education and Others* (JR1894/2011) 2014 ZALCJHB 414.

employer's interests should also be served in these matters as established above. According to Finnemore *et al*,[480] automatically unfair dismissals must be invoked in such instances in order to protect employees from victimisation and from being subjected to unfair discrimination by their employer when dismissing them. Automatically unfair dismissal refers to those circumstances where the dismissal of the employee is unfair by virtue of the reason for the dismissal.[481] Section 187 provides instances whereby a dismissal is classified as being automatically unfair, in that the dismissal was primarily based on one of the listed prohibited grounds.[482] As a result, the employer is not given an opportunity to justify his decision for dismissing the employee or discharge the onus that the dismissal was indeed fair.[483] However, Van Niekerk *et al* [484] accurately underscore that the employee must at the very least establish a *prima facie* case in which the dismissal was effected for an automatically unfair reason or it was the dominant reason for the dismissal. The employer would then have to prove that the dismissal is fair.[485]

One ground relevant to the central theme of this study entails that a dismissal is automatically unfair in terms of section 187 if the employer unfairly discriminates against an employee, directly or indirectly on any discriminatory grounds, including religion, conscience, belief and culture.[486] Although it can be argued that section 187 of the *LRA* would naturally play a role, it is unclear as to what the balancing of interests of both the employer and employee would entail when considering the business interests of the employer and the right of the employee to practice his or her cultural or religious activities as provided by the *Constitution* in sections 30 and 31. The

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480 Finnemore *et al Introduction to Labour Relations in South Africa* 281.

481 Van Niekerk *et al Law at Work* 251.

482 In terms of section 187, automatic unfair dismissals are grounds that relate to an employee's pregnancy; an employee's participation in or support for a protected strike or protest action; a refusal to perform usual work while participating in a conforming strike or lock-out, an employee's taking action or intending to with regards to exercising a statutory right or participate in statutory proceedings, compel an employee to accept a demand relating to a matter of mutual interests between countries, transfers in terms of section 197 or section 197A, an employee made a protected disclosure in terms of the *Protected Disclosure Act* 26 of 2000 and unfair discrimination of an employee on listed or other unlisted grounds.

483 Van Niekerk *et al Law at Work* 251.

484 Van Niekerk et *al Law at Work* 252. Also see Finnemore *et al Introduction to Labour Relations in South Africa* 282.

485 Van Niekerk *et al Law at Work* 252.

486 S187 of the *LRA*.

question thus arises whether the employer would have had a defence against automatically unfair dismissal if an employee was dismissed due to his legitimate incompatibility caused by one of his or her personal characteristics protected by section 187(1)(f) of the *LRA*.

3.9.2.1 Inherent requirements of the job as a defence for the employer

An additional provision that can be of assistance in this respect is section 187(2), which states that a dismissal is not automatically unfair if the reason for dismissal is based on the inherent requirements of a particular job or if an employee has reached a certain age.[487] The most important question will be whether the personal characteristics of an employee are relevant and whether they can legally form the basis of the employer's decision to dismiss.[488] This is particularly when personality traits, as in the case of incompatibility, are the basis for employment disputes.[489] The inherent requirements of a job may be certain unique competencies and characteristics or credentials that an employee should have to be able to perform his or her duties efficiently under a contract of employment.[490] It can, therefore, be argued that the word "inherent" refers to a particular personal trait of the employee, which is considered to be a real requirement for the proper governance of the business.[491] However, the employer must prove that the employee in question is not suitable for business purposes and he certainly will have to prove that the particular personality trait is indispensable and that the job cannot be done without it. For example, an employer may require that an employee in a managerial position should have good interpersonal relations with his/ her subordinates and management. Hence, a difficult and/or abrasive employee would not be best suited for such a position as disharmony and conflict will likely ensue in the workplace. In addition, the employer must also reasonably accommodate the characteristics of the employee.[492]

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487 S187(2) of the *LRA*; Grogan *Workplace Law* 92.
488 Van Niekerk *et al Law @ Work* 115.
489 Van Niekerk *et al Law @ Work* 115.
490 Finnemore *et al Introduction to Labour Relations in South Africa* 217; Wine and Agricultural *Ethical Trade* 2013 http://wieta.org.za accessed 14 June 2020.
491 Wine and Agricultural 2013 http://wieta.org.za; Rycroft 2015 ILJ 901.
492 Refer to para 2.4.2; s1 of the *EEA*.

Various scholars have also attempted to explain the definition of the inherent requirements of a job. Naidu[493] and Rycroft[494] argue that inherent requirements of the job are requirements that cannot be excluded from the job without fundamentally altering the nature of the job. Hence, a job that can be performed without enforcing its particular requirements, fails the test.[495] Du Toit *et al*[496] have asserted that in order for a job to have inherent requirements, it should be analysed against the following criteria. Firstly, the requirements must be a permanent feature of the job.[497] Secondly, the requirements must be essential to the job.[498] Lastly, the requirements must be an indispensable part of the performance of the job.[499]

Gaibie[500] opines that the inherent requirements of a job are a plausible and progressive defence, both in theory and in practice. Theoretically, no anti-discrimination legislation expects or requires an employer to recruit unqualified or unsuitable employees.[501] Successful anti-discrimination laws must, in particular, guarantee that the qualifications for individual positions explicitly assess competencis and preclude bias, preconception and stereotyping.[502] It is argued that the defence is realistic because it allows employers to make objective evaluations of work content and conditions, skills and minimum qualification standards.[503] However, Naidu[504] strongly opposes the adoption of this defence in that it is likely to raise several problems, especially in the case of disputes arising from discrimination. For instance, an expansive interpretation might provide an escape clause for employers who may attempt to circumvent discrimination suits.[505] In addition, a restrictive interpretation can give rise to a rigid

493 Naidu 1998 *SA Merc LJ* 181; Lebepe *Inherent Requirements of the Job as a Defence to a Claim of Unfair Discrimination: Comparison Between South Africa and United States of America* 34-35.
494 Rycroft 2015 *ILJ* 901.
495 Dupper and Garbers *et al Essential Employment Discrimination Law* 83.
496 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 608; Rycroft 2015 *ILJ* 901.
497 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 608.
498 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 608.
499 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 608.
500 Gaibie 2011 *ILJ* 36.
501 Gaibie 2011 *ILJ* 36.
502 Gaibie 2011 *ILJ* 36.
503 Gaibie 2011 *ILJ* 36.
504 Naidu 1998 *SA Merc LJ* 173.
505 Naidu 1998 *SA Merc LJ* 173.

and unyielding application of the defence.[506] Thus, limiting any measure of judicial discretion is usually brought to bear on the facts of individual cases.[507]

If an employee is dismissed based on the fact that his/her religion and/or culture render him incompatible with the employer's business, the employee would first have to discharge the onus of proving that his dismissal, on a balance of probabilities, is based on his/her religious and/or cultural practices.[508] Thus, it likely amounts to an automatically unfair dismissal. Thereafter, it would be up to the employer to prove on a balance of probabilities that the dismissal based on incompatibility was fair because the employee, due to his religion and/or culture, failed to meet the inherent requirements of the job.[509] The employer will have to prove that accommodating the employee's religion and/or culture will cause undue hardship to the business.[510] Ultimately, the employer would have to prove that the employee's incompatibility, brought on by his religion and/or culture, rendered him incapable of performing the job efficiently and that it would have caused harm to the employer's business to keep him in his employ.

From the discussion above, it is submitted that the use of incompatibility as a ground for dismissal vis-à-vis the inherent requirements of the job will pass the test as a plausible defence for the employer. However, the rights enshrined in the *Constitution* will, to a great extent, play a deciding factor in assessing how the interests of both parties would be met in matters of incompatibility of this nature. In addition to the *Constitution*; the *LRA* and the *EEA* would also assist in determining a balance between the business interests of the employer and the right of the employee to practice his or her cultural or religious activities as provided by the *Constitution* in sections 30 and 31. It is further submitted that the employer will have to provide compelling reasons that accommodating an employee's religious and/or cultural practices will cause undue hardship, ultimately crippling the business enterprise.

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506 Naidu 1998 *SA Merc LJ* 174.
507 Naidu 1998 *SA Merc LJ* 174.
508 Henrico 2015 https://isssl.org; S187(1)(f) of the *LRA*.
509 S192(2) and read together with S187(2)(a) of the *LRA*.
510 S192(2) and read together with S187(2)(a) of the *LRA.*

While the legislation does not define the inherent requirements of a job, they have been given meaning by the South African courts.[511] In *Whitehead v Woolworths Pty Ltd*,[512] the Labour Court held that the requirement would have to be so inherent that the applicant would not be qualified for the job if it had not been met.[513] In *Dlamini & others v Green Four Security*,[514] the Labour Court reiterated that the inherent requirement of a job means an indispensable feature which must contribute to the performance of the job. In this matter, the court held that the "clean-shaven rule" of the company was indeed a justified inherent requirement for a job to ensure discipline and uniformity amongst its employees.[515] Contrarily, in the *POPCRU* case,[516] the Supreme Court of Appeal held that shaving dreadlocks was not an inherent requirement due to the fact that the department failed to assess if its "short-hair" policy had any effect on or adversely affected the performance of the employees' duties. It was held that keeping dreadlocks did not jeopardise the safety of the public or other employees, nor did it cause undue hardship to the employer in a practical sense.[517]

McGregor[518] buttresses a strict interpretation of the inherent requirements of the job as envisaged by the South African courts. It is correct that every exception to the constitutional right not to be unfairly discriminated against must be interpreted as narrowly as possible in order to keep the right intact.[519] Befittingly, only requirements which are essential to the nature of the job can be considered as inherent requirements.[520] The indispensable attribute must be linked to the job in question, but must not be applied for other purposes, such as operational reasons.[521] It may be argued that by classifying and defining inherent requirements as constituting business

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511 Ebrahim 2018 *PER/PELJ* 31.
512 *Whitehead v Woolworths Pty Ltd* (1999) 20 ILJ 2133 (LC); *Woolworths (Pry) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) (Hereinafter, referred to as the *Woolworths v Whitehead* case).
513 *Woolworths v Whitehead* case para 2142.
514 *Dlamini* case; I*ndependent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 IL] 1404 (LC) para 1440.
515 *Dlamini* case para 67.
516 *POPCRU* case para 25.
517 *POPCRU* case para 25.
518 McGregor 2002 *JBL* 174.
519 McGregor 2002 *JBL* 174.
520 McGregor 2002 *JBL* 174.
521 McGregor 2002 *JBL* 174.

needs or profit-making, the assumption is that greater priority should be attached to business interests rather than to the discriminatory impact of employment policies and practices on employees.[522] Conversely, dismissal for incompatibility is primarily based on the employer's operational needs and the fact that a person's behaviour or other attributes could be disruptive and cause damage to the relationships and business operations. It is, therefore, contended that an employer can succeed in relying on the inherent requirements of the job as a plausible defence for incompatibility disputes. Moreover, the employer would have to prove that the purpose of the discrimination is not only valid but that the means used to accomplish it are proportionate and reasonable.[523]

Overall, in terms of the *LRA,* there is a need for statutory and regulatory reform to protect the interests of both the employer and the employee when dealing with incompatibility disputes. It is further argued that like other grounds for dismissal, incompatibility should be regarded as a valid and separate dismissal under the *LRA*. This will not only provide legal recourse to employers when dealing with disruptive employees in the workplace, but it will also protect vulnerable employees from being subjected to arbitrary dismissals on unsubstantiated grounds of incompatibility. Lastly, it is submitted that an employer may successfully rely on the inherent requirements of a job defence if an employee's exercise of his or her religion infringes on the rights of other employees and causes consternation in the workplace, affecting the employer's business.

3.10 Incompatibility and the Employment Equity Act 55 of 1998

As highlighted earlier, section 9 of the *Constitution* gave rise to the *EEA*, as it was promulgated to give effect to the constitutional right to equality. Thus, both section 9 of the *Constitution* and the *EEA* should be taken into account *in tandem* when discussing employment equity in South African labour law.[524] The *EEA* is the principal statute that has as its primary objective the protection against unfair discrimination

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522 McGregor 2002 *JBL* 174.
523 McGregor 2002 *JBL* 175.
524 Du Plessis and Fouche *A Practical Guide to Labour Law* 97; Gaibe 2011 *ILJ* 27; Du Toit 2007 *Law, Democracy & Development* 68.

and affirmative action in the South African workplace.[525] It was against a background characterised by Apartheid and discriminatory laws that significant inequalities in employment, occupation and income in the South African labour market were created.[526] Gaibie[527] asserts that the *EEA* has been enacted as part of a wider, deliberate and more systematic approach to establishing a society based on democratic values, social justice and fundamental rights in terms of which every individual is equally protected by the law. Furthermore, the *EEA* was promulgated to give effect to the obligations of South Africa as a member of the International Labour Organisation (ILO).[528] Du Toit[529] highlights that the *EEA* provides employees and employers with more precise and comprehensive protection than that provided for under section 9 of the *Constitution*. Therefore, both employees and employers can rely on the *EEA*, when allegations of unfair discrimination in the workplace arise.[530]

The purpose of the *EEA* is to primarily provide for equity in employment and fair treatment of all persons by eliminating unfair discrimination.[531] Finnemore *et al*[532] argue that the rationale behind the promulgation of the *EEA* is that equality cannot be accomplished by simply repealing past discriminatory legislation. Employers are also mandated to henceforth eliminate any such practices in their employment practices and policies and to advance those who have suffered under unfair discrimination in order to reach true equity.[533] To resolve these problems, the *EEA* is split into two separate parts. Chapter II explicitly deals with the prohibition of unequal treatment and unfair discrimination, under which the employer is obliged to eliminate all possible

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525 S9(4) of the *Constitution*; Van Niekerk *et al Law @ Work* 119; EEA; Du Plessis and Fouche *A Practical Guide to Labour Law* 100.

526 Preamble of the EEA; Gaibe 2011 *ILJ* 27.

527 Gaibe 2011 *ILJ* 19.

528 South Africa adopted the International Labour Organisation *Discrimination (Employment and Occupation) Convention* No. 111 (1958). This is discussed in detail in an upcoming chapter.

529 Du Toit 2007 *Law, Democracy & Development* 68.

530 Du Toit 2007 *Law, Democracy & Development* 68.

531 S2(a) of *EEA*.

532 Finnemore *et al Introduction to Labour Relations in South Africa* 217.

533 S1, S5 of the *EEA*. In terms of the Act, employment policy or practice include recruitment procedures, advertising and selection criteria; appointments and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environments and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissal and dismissal.

types of unfair differentiation among his or her employees, and to ensure equal opportunities for all.[534] This chapter applies to both employers and employees.[535] Chapter III deals with the implementation of affirmative action policies in the workplace which specifically apply to designated employers and individuals from designated groups.[536] For purposes of this study, the focus is placed on the issues surrounding disputes arising from unfair discrimination and how these could relate to incompatibility in the workplace.

3.10.1 Prohibition of unfair discrimination under the Employment Equity Act

Notably, section 6 of the *EEA* mirrors section 9 of the *Constitution* which prohibits direct or indirect unfair discrimination on stated grounds, or any one or more grounds not provided for in the Act.[537] It is contended that both lists of specified or unspecified grounds are not exhaustive as they are premised on the assumption that there might be other grounds of a similar character by the use of the word "including".[538] The employee may consequently argue that he or she has been discriminated against on a ground not set out in section 6(1).[539] As highlighted earlier, no existing legislation, including the *EEA*, has a clear definition of what constitutes unfair discrimination.[540] Therefore, the concept of unfair discrimination have to be construed from the interpretation by the courts in light of the *Constitution* and international law.[541] In *Prinsloo v Van der Linde*,[542] the Constitutional Court defined unfair discrimination as a differentiation that impairs human dignity or bearers of rights in a serious manner. Bearing in mind that incompatibility is an attitudinal and/or personality problem, the employee will have to prove that he/she was discriminated against based on their character, which can be classified as an arbitrary ground.

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534 Van Niekerk *et al Law @ Work* 120; Chapter II of the *EEA*.
535 S4(1) of the *EEA* of 1998.
536 Van Niekerk *et al Law @ Work* 120; s4(2), chapter III of the *EEA*.
537 S6(1) of the *EEA* of 1998.
538 Gaibe 2011 *ILJ* 26; Le Roux 2014 *Contemporary Labour Law* 1.
539 Le Roux 2014 *Contemporary Labour Law* 1. Refer to para 3.4.2.
540 Rautenbach and Venter *Rautenbach- Malherbe Constitutional Law* 335. Rautenbach and Fourie 2016 *TSAR* 117; Garbers 2018 *STELL LR* 241.
541 Du Toit 2007 *Law, Democracy & Development* 68.
542 *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC).

As previously stated, an employer is required by the *EEA* to promote equal opportunity but also eliminate unfair discrimination in the workplace.[543] Effectively, the employer can thus be held liable for conduct on the part of an employee against another employee which constitutes unfair discrimination.[544] It is submitted that similar to the *LRA*, the *EEA* also provides for the interests of both the employer and the employee. Although the *EEA* prohibits and protects unfair discrimination against an employee in terms of section 6(1), it provides for circumstances in section 6(2) where the employer may differentiate between employees on a prohibited ground.[545] An example would be where it is an inherent requirement of the job that a person should either have a particular characteristic or should not have such in order to be able to perform the work effectively.[546]

3.10.2 The burden of proof in unfair discrimination cases under the Employment Equity Act

Section 11 of the *EEA* provides for thorough enforcement of the burden of proof in cases of unfair discrimination. In cases where an employee alleges unfair discrimination on the grounds set out above, it is the employer's responsibility to show that discrimination has either not taken place or is justified.[547] An employee who alleges discrimination on an arbitrary ground not listed is required to identify that unlisted ground and plead it in his or her case.[548] In addition, an employee must prove that the conduct complained of is not reasonable, constitutes discrimination and is unfair.[549] Similarly, in cases where there is an inherent requirement of a job, the employer has to prove on a balance of probabilities, that the discrimination is not unfair and that it did not take place as alleged.[550] If unfair discrimination is alleged on

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543 S5 of the *EEA*. See also S187(f) of the *LRA* and Henrico 2015 https://isssl.org.
544 S60 of the *EEA*.
545 S6(2) of the *EEA*. It is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.
546 Refer to para 3.10.2.2.
547 S11(1) of the *EEA*.
548 S11(2) of the *EEA*; *Minister of Correctional Services and Others v Duma* (2017) 38 ILJ 2487; *Du Plessis v Rickjon Mining and Engineering* (2018) 39 ILJ 1665 (CCMA); Le Roux 2014 Contemporary Labour Law 1.
549 S11(2) of the EEA*; Du Plessis and Fouche A Practical Guide to Labour Law* 105.
550 S11(1) of the EEA.

other arbitrary grounds, the complainant must show on a balance of probabilities that the conduct constitutes unfair discrimination.[551]

It is argued that an employer cannot benefit much from the *EEA* when dealing with dismissals arising from incompatibility disputes. However, in a manner similar to the LRA, the employer may successfully rely on the inherent requirements of the job defence to dismiss incompatible employees from the workplace, thereby protecting his business interests. Similarly, the rights and interests of the employee are also protected, in that the employee is not exposed to unfair discrimination in the process.

3.11 How the South African courts have dealt with incompatibility cases

As discussed in the previous chapter, it is contended that incompatibility can be characterised as an employee's inability to work harmoniously with fellow employees and/or the employer and his or her failure to fit in with the "corporate culture" in the workplace.[552] Various South African courts and other dispute resolution tribunals have dealt with a variety of such cases.[553] It is imperative to determine how the South African courts and tribunals currently deal with disputes on this matter – without regulatory guidance. It is envisaged that the case-by-case analysis will highlight the *lacunae* in this area of law and where there is a need for statutory and regulatory reform. It is asserted that this will go a long way towards protecting the interests of both the employer and the employee.

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551 S11(2) of the *EEA*.

552 Refer to Chapter 2. the factors that cause incompatibility relate to personality conflicts, management style and inability to integrate into the "corporate culture" and the environment of the workplace.

553 *Erasmus v BB Bread* 1987 8 ILJ 537 (IC) (hereinafter, referred to as *Erasmus v BB Bread*); *Wright v St Mary's Hospital* 1992 13 ILJ 987 (IC) (Hereinafter, referred to as the *Wright* case); *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC); *Hapwood v Spanjaard Ltd* 1996 2 BLLR 187 (IC); *Lebowa Platinum Mines Ltd v Hill* 1998 19 ILJ 1112 (LAC); *Brereton v Bateman Industrial Corporation Ltd and Others* 2000 5 LLD 119 (IC); *Subrumuny v Amalgamated Beverages* 2000 21 ILJ 2780 (ARB); *Nathan v Reclamation Group (Pty) Ltd* 2002 23 ILJ 588 (CCMA); *Cutts v Izinga Access (Pty) Ltd* 2004 25 ILJ 1973 (LC); *Jabari v Telkom SA (Pty) Ltd* 2006 27 ILJ 1854 (LC); *Lotter and SA Red Cross Society* 2006 27 ILJ 2(CCMA); *Jardine v Tongaat Hulet Sugar Ltd* 2002 23 ILJ 547 (CCMA); *Glass v Liberty Group Ltd* (2007, 12 BALR 1172); *Miyeni v Chillibush Communication (Pty) Ltd* 2010 31 ILJ 3054 (CCMA); *Goussard v Impala Platinum Limited* 2012 33 ILJ 2898 (LC); *PSA obo Mbiza v Office of the Presidency and Others* 2014 35 ILJ 1628 (LC); *Mgijima v Member of the Executive Council Gauteng Department of Education and Others* (JR1894/2011) 2014 ZALCJHB 414.

3.11.1 Incompatibility arising from personality clashes

There are cases where dismissal on the grounds of incompatibility is justified, in particular where the employee intent on perpetuating disharmony in the workplace. In *Erasmus v BB Bread*,[554] which laid the basis for incompatibility cases, the Industrial Court held that while the employer is entitled to insist on relatively harmonious interpersonal relationships in the workplace, it should act fairly when dealing with the employee. It is argued that this principle affirms that employers are well within their rights to exercise their constitutional right to fair labour practices, which includes the right to protect their business interests from incompatible employees. However, it is inferred that the employer may not exercise their right in a manner that infringes on the employee's right not to be unfairly dismissed on perceived incompatibility. As established earlier in this chapter, the interests of both the employer and the employee must be considered in the exercise of the right to fair labour practices. In addition, it can be argued that the principle of reasonable accommodation also applies even when personality differences exist between the employer and the employee. The court held that on determining the existence and severity of the incompatibility dispute, it is incumbent that the employer assists the employee in resolving his or her personal difficulties.[555] This could involve putting the employee in a role that is more suited to his or her temperament.[556] Therefore, if the employer has done all that can reasonably be required of him, the dismissal of the employee cannot be deemed to be substantively unfair.[557] The seriousness of the impact of the employee's personality on the business should naturally also be investigated to determine whether the employer had sufficient reason to dismiss. If the impact of the personality clash is not such that

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554 *Erasmus v BB Bread* 537, 543, 544; *Glass* case 1172.

555 *Erasmus v BB Bread* 538; *Glass* case 1172.

556 *Erasmus v BB Bread* 538.

557 *Erasmus v BB Bread* 538; In the Glass case, the court highlighted that when determining incompatibility regarding managerial interaction, the exercise of a subjective judgement is required. This means that each case will depend on the circumstances. Although the business and economic reasons regarding the formulation of incompatibility is for the employer to decide, it was held in the *Subrumuny* case that the court should ensure that the employer's standards are attainable. In *Jabari v Telkom SA (Pty) Ltd*, the court held that an employer has the prerogative to set reasonable standards pertaining to the harmonious interpersonal relationships in the workplace. Refer to Chapter 2.

it affected the business seriously enough, one cannot argue that dismissal was an appropriate option.

In the above matter, the Court held that the applicant had been reasonably accommodated before being dismissed by the employer.[558] Not only was the employer patient with the applicant for more than five years, but the employer had assisted the applicant in various ways.[559] Further, the employer had attempted to place the applicant in a position which did not require the management of subordinates but was unable to find such a position.[560] It is opined that the reasoning of the court is correct because, in terms of section 36 of the Constitution (the limitation clause), the limitation of rights is not appropriate if other, less costly and effective measures may be used to achieve the same purpose.[561] This means that it will be inappropriate for the employer to dismiss the employee, thus infringing his or her constitutional right to fair labour practices without exploring other alternatives short of dismissal. Conversely, if it has been established that the employer has taken steps to reasonably accommodate the employee but to no avail, there is no need to compromise the employer's right to protect his business interests.

Similarly, in *McDuling/MIF*,[562] the applicant was dismissed for "continued incompatibility" and "working against and undermining management". In interactions with other fellow colleagues, the applicant would undermine the Divisional Manager and other staff members.[563] The Commissioner held that despite the management's attempts to counsel him on his conduct and provide him with a fair opportunity to

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558 *Erasmus v BB Bread* 544; *McPherson/ North West University - Mafikeng Campus* [2009] 9 BALR 920 (CCMA).It was argued that the applicant had done everything practicable to support the applicant and that his underperformance had adversely affected the university's largest faculty. Furthermore, it was held that if the employer acts in good faith and it is established that the employment relationship cannot be preserved, the arbitrators are not to intervene with the employer's decisions on how to deal with incompatible employees.

559 *Erasmus v BB Bread* 544.

560 *Erasmus v BB Bread* 544.

561 Refer to para 3.7.

562 *McDuling / MIF* [1998] 3 BALR 287 (CCMA) 287 (Hereinafter, referred to as the McDuling/MIF case); *Glass v Liberty Group Ltd* (2007, 12 BALR 1172). Similarly, in the case of *Glass v Liberty Group Ltd*, a senior employee was dismissed on grounds of incompatibility because she was undermining her authority and subordinates in the department. The tribunal held that the employee had disrupted the harmony of the workplace. She had been counselled but had refused to co-operate with the remedial measures. Consequently, her dismissal was justified.

563 *McDuling / MIF* case 288.

eliminate the cause of the disharmony, the applicant had no desire to reform.[564] The Tribunal held that regardless of the Division Manager's management style which was alleged to be aggressive and authoritarian, it was not considered to be unlawful or wrongful.[565] In addition, the Commissioner ruled that dismissal for incompatibility would only be effective if the reasons could be substantially attributed to the employee.[566] Consequently, the applicant's dismissal was found to be justifiable.[567] This is another case in point that clearly shows that employers should be allowed to dismiss an employee based on incompatibility when it is to the serious detriment of the business enterprise. This is especially when an employee shows no intention to reform or correct the cause of disharmony. As in the case of *Erasmus*, it is clear that the courts have been consistent in this approach.

In *Wagenaar / Uniting Reformed Church in SA*,[568] the applicant who was Minister to a Church, was released on grounds of incompatibility after the respondent Church opted to sever his ties with the congregation. It was submitted that there were conflict and tension between the applicant and the congregation.[569] In order to remedy the alleged incompatibility between the applicant and congregation, attempts were made to resolve the conflict through the Consulent – an official of the Church, independent consultants and experts.[570] Attempts, however, proved futile and they were unable to restore peace. The Tribunal held that the test for the fairness of dismissals was whether the employer had taken measures to combat the differences.[571] In addition, it had to be determined whether the disharmony caused by the employee's presence could only be rectified by terminating the employment relationship.[572] In light of this inquiry, it was held that the church had done everything that could reasonably be

564 *McDuling / MIF* case 293.
565 *McDuling / MIF* case 294.
566 *McDuling / MIF* case 293; *Visagie & Andere vs Prestige Skoonmaakdienste (Edms) Bpk* 1995 16 (ILJ) 421; *Wright vs St Mary's Hospital* 987.
567 McDuling / MIF case 294.
568 *Wagenaar / Uniting Reformed Church in SA* [2005] 1 BALR 127 (CCMA) (Hereinafter, referred to as the *Wageenar* case) 127.
569 *Wagenaar* case 135.
570 *Wagenaar* case 135.
571 *Wagenaar c*ase 135.
572 *Wagenaar* case 136.

expected of it.[573] It was also clear that the congregation would not be satisfied if the applicant stayed in his post.[574] It was concluded that the dismissal was justified.[575] As in the cases of *Erasmus* and *McDuling*, the courts have consistently ruled that if an employee shows no intention of addressing the cause of incompatibility even after being reasonably accommodated, the employer has no reason not to dismiss such an employee. This is especially if the employee's attitude or behaviour has the potential to affect harmonious relations and interpersonal relationships in the workplace.

In *Joslin v Olivetti Systems and Networks Africa,*[576] the Industrial Court was tasked to deliberate whether it would be justifiable to dismiss an employee for being perhaps a little quirky or just "different" from other employees on the grounds of incompatibility. In the *Joslin* matter, the applicant was dismissed on the basis of incompatibility on the grounds of his queer behaviour.[577] Complaints about the applicant's conduct included carrying a camera around his neck and up to 36 pens in his pocket, and wearing a floppy cricket hat amidst other complaints.[578] Colleagues and management argued that this conduct was somewhat odd for a senior executive.[579] As a result, he became an object of ridicule because of his eccentric behaviour.[580] The Industrial Court empathised with the applicant.[581] The Court held that odd or eccentric behaviour of an employee, which makes him or her "not fit", even if he or she happens to be a manager or a senior executive, cannot, *per se*, give rise to a ground for dismissal.[582] Although, the Industrial Court cautioned that dismissal can be justified if the employee's eccentric behaviour is of such a gross nature that it creates consternation and disruption in the workplace.[583] In particular, in the case of a manager, he or she should not engage in whimsical activity that is more likely to damage the integrity of his or

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573 *Wagenaar* case 137.
574 *Wagenaar* case 136.
575 *Wagenaar* case 137.
576 *Joslin v Olivetti Systems and Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC) (Hereinafter, referred to as the *Joslin* case).
577 *Joslin* case 229.
578 *Joslin* case 229.
579 *Joslin* case 229.
580 *Joslin* case 230.
581 *Joslin* case 231.
582 *Joslin* case 231.
583 *Joslin* case 230.

her office or trigger an employer's humiliation.[584] In addition, the respective employee should have been properly counselled or warned.[585] In this case, the Court held that the applicant's behaviour did not warrant a dismissal merely because he displayed some form of mild eccentricity. Consequently, the dismissal was held to be unfair.[586] Based on the circumstances stated above, it is contended that the conclusion reached by Industrial Court is correct. The *Joslin* case exemplifies the difficulty that the courts encounter when dealing with employees who have diverse personalities and/or character traits. It is affirmed that an employee should not be treated differently or unfairly because he is "different." It is further argued that such differentiation by the employer or other employees is a clear violation of one's dignity and the right not to be unfairly discriminated against.

From the case analysis above, it is clear that the courts may use their discretion to determine whether the dismissal on the grounds of incompatibility was justifiable. The courts have consistently held in the cases of *Erasmus*, *McDuling*, and *Wageenar* that an employer must endeavour to reasonably accommodate the employee before dismissing him/her on grounds of incompatibility. If the employee fails to remedy his or her incompatible behaviour, the employer may dismiss him or her for incompatibility. Under these circumstances, incompatibility will be a valid reason for dismissal. However, the courts were not consistent with their approach in the *Joslin* case. There is no legal certainty as to what is regarded as incompatible behaviour. It is argued that the lack of statutory guidelines as to what is regarded as incompatible behaviour creates legal uncertainty. Therefore, statutory and legal reform will assist in eradicating these *lacunae* in South African labour law.

3.11.2 Incompatibility arising from unpopular management styles

There are some instances where an employee may be dismissed because of his or her managerial approach, which may be unpopular with the staff that he or she manages.

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584 *Joslin* case 230.
585 *Joslin* case 230.
586 *Joslin* case 231.

In *Wright v St Mary's Hospital*,[587] the applicant was dismissed for incompatibility on grounds of his managerial style, which was not endorsed by management. In this matter, after being promoted to the medical superintendent, the applicant recommended that the hospital be taken forward.[588] These developments included an expansion of the variety of medical services to be offered to the community, such as the creation of a community health initiative and health education.[589] While the applicant met his duties in accordance with the constitution of the organisation, this led to tension in the management committee and the executive committee.[590] After several attempts to convince management to consider his proposals without any success, they were blocked and never considered.[591] This caused the applicant to become frustrated and impatient with his superiors.[592] Management cited a number of "transgressions" committed by the applicant, which resulted in his dismissal.[593] Allegations levelled against the applicant included undermining the authority of the matron, obstructing the administrator's duties, conspiring with other doctors against the hospital board, and issuing negative criticisms of the hospital and staff to the public.[594] All of these allegations were found to be baseless and factually incorrect.

The Industrial Court held that, while the applicant's proposals were balanced, realistic and pragmatic he may have not diplomatically dealt with the issue.[595] It could be that the applicant became passive aggressive when he submitted his proposals to the board. The court, however, attributed the applicant's lack of diplomacy to the way in which management blocked all his proposals.[596] In particular, the court acknowledged that while the working relationship between the applicant and management was strained, their working relationship was not irreparable.[597] This is especially so, given

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587 *Wright v St Mary's Hospital* 1992 13 ILJ 987 (IC) (Hereinafter, referred to as the *Wright* case) 987.
588 *Wright* case 989.
589 *Wright* case 989.
590 *Wright* case 990.
591 *Wright* case 990.
592 *Wright* case 990.
593 *Wright* case 990.
594 *Wright* case 993-997.
595 *Wright* case 1000.
596 *Wright* case 1001.
597 *Wright* case 1004.

that the underlying cause of the disharmony could have been removed.[598] Consequently, the court held that the applicant's dismissal was unfair.[599] In addition, the court highlighted that the employer had not carried out an adequate investigation to strengthen the relationship with the applicant.[600] The applicant was neither informed of the precise allegations of irremediable incompatibility nor was he given an opportunity to present his version of events that culminated in his dismissal.[601] Moreover, the court held that the counselling that the respondent contended the applicant had received was inadequate.[602] It is argued that the court's decision was correct. The *Wright* case demonstrates unequivocally that even managerial employees are susceptible to victimisation in the workplace. This is especially if one's management style is unpopular with either management or subordinates. Another challenge, however, is that such an employee may be dismissed merely because management or other fellow employees do not like him or her, not because he or she is incompatible with the workplace "corporate culture". This is a clear violation of an employee's constitutional right to fair labour practices, not to be unfairly dismissed. It is, therefore, submitted that for purposes of clarity, clear guidelines regarding the dismissal of managerial employees for incompatibility are necessitated.

Similarly, the matter of *Lubke v Protective Packaging (Pty) Ltd*[603] is another example of how changes can affect the dynamics of a workplace that could potentially lead to incompatibility disputes. In the *Lubke* case,[604] the applicant was a managing director who, after a short period was dismissed on the grounds of incompatibility, simply because some of her subordinates did not approve of her management style. It was further alleged that the applicant's management style was incompatible with the employer's business or "corporate culture" because she was restructuring the administrative operations.[605] For this reason, it was alleged that the applicant lacked

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598 *Wright* case 1004.
599 *Wright* case 1005.
600 *Wright* case 1004.
601 *Wright* case 1005.
602 *Wright* case 1005.
603 *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ 422 (IC) (Hereinafter, referred to as the *Lubke* case).
604 *Lubke* case 423.
605 *Lubke* case 425, 426, 427.

leadership, direction, and interpersonal skills and she was autocratic.[606] The Industrial Court held that the dismissal was not only premature but it was also not sensible, because the other employees could not cope with the "new regime".[607] The Industrial Court remarked that the other employees had shown signs of rebellion.[608] Furthermore, the Industrial Court held that no fair or proper assessment of the applicant's alleged incompatibility had been made , in particular, there had not been a sufficiently reasonable period to rectify the cause of the incompatibility.[609] The golden rule, therefore, is that before deciding on the alleged incompatibility, the employer should ensure that some sensible, practical and genuine efforts have been made to improve interpersonal relations.[610] This is especially correct when dealing with a manager whose work is otherwise perfectly satisfactory (and one may add, who is not contravening any valid and reasonable rule of conduct).[611]

Moreover, the Industrial Court set out the requirements that an employer must follow to ensure that the dismissal is justified. Firstly, the employer should inform the employee of the allegations levelled against him and should endeavour to remedy the problem.[612] Secondly, the employer should discuss the situation with the employee and should try to find a reasonable alternative to the incompatibility in question.[613] However, dismissal should be the last resort.[614] In light of these principles, the court also added that fellow employees should learn to live with and adapt to changes and new patterns of work, instead of crying "foul play" simply because they do not agree

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606 *Lubke* case 425, 426.
607 *Lubke* case 425.
608 *Lubke* case 428.
609 *Lubke* case 428.
610 *Lubke* case 429; *Van der Merwe and Agricultural Research Council* (2013) 34 ILJ 3366 (CCMA).The applicant who was a public relations officer was dismissed on grounds of incompatibility. It was alleged that there was an irreconcilable breakdown in the working relationship, an inability to work with her colleagues due to personality differences and inability to adapt to the "corporate culture" of the company. The tribunal held that no remedial action had been taken to assist the applicant in resolving the problems referred to above. In addition, the employer failed to discharge the onus that the dismissal was substantively and procedurally fair. Glass v Liberty Group Ltd (2007, 12 BALR 1172) 1184. It was held that an employee should also be given a reasonable time to make amends*. Hapwood* case 196–7.
611 *Lubke* case 429.
612 *Lubke* case 423.
613 *Lubke* case 423.
614 *Lubke* case 422.

with the changes in the workplace.[615] The court remarked that "new brooms do sweep clean" which, in turn, may be difficult and uncomfortable for other staff in the workplace.[616] The court held that the dismissal was substantively and procedurally unfair.[617]

As in the *Wright* case, the courts have been consistent with their approach. In this case, it is clear that the courts will balance both the interests of the employer and the employee in disputes of this nature. As much as an employer is entitled to a harmonious workplace, an employee should not be arbitrarily dismissed without fair reason(s). As stated earlier, an employer should make reasonable efforts to rectify the cause of incompatibility and accommodate the employee. However, not all complaints made by fellow employees are justifiable reasons to dismiss a managerial employee. The court will have to assess if the sweeping reforms of the managerial employee were reasonable and to the benefit of the business enterprise.

In *Jardine/Tongaat Hullett Sugar Ltd,*[618] the applicant, who was a middle manager, was dismissed on the ground of incompatibility. It was alleged that he lacked the capacity to be compatible with both his senior management and colleagues.[619] This was to the extent that his behaviour and approach had caused disharmony in the effective operation of the mill.[620] It was alleged that the applicant had shown outbursts of anger at meetings, exhibited aggression and was defensive when he encountered challenges in his department and undermined management by issuing inflammatory opinions.[621] The applicant also filed a grievance against one of the general managers of the responders, who had reprimanded him for arriving late at work.[622] The applicant's grievance was considered to be without merit and was subsequently dismissed by the respondent on grounds of incompatibility.[623] According to the

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615 *Lubke* case 423.
616 *Lubke* case 428.
617 *Lubke* case 422.
618 *Jardine /Tongaat Hullett Sugar Ltd* 2002 23 ILJ 547 (CCMA), (Hereinafter, referred to as the *Jardine* case).
619 *Jardine* case 548.
620 J*ardine* case 548.
621 *Jardine* case 556.
622 *Jardine* case 549.
623 *Jardine* case 549.

respondent, the employment relationship had become too strained and intolerable to continue.[624] Notwithstanding the alleged insubordination of the applicant, the tribunal held that the applicant had not been treated unfairly.[625] It was held that the applicant had shown an improvement in his conduct following advice on eccentric behaviour, some years earlier.[626] The tribunal argued that the applicant had not been treated with sufficient sensitivity.[627] This is particularly due to the fact that the conduct of the general manager towards the applicant had been provocative.[628] Moreover, no further counselling or disciplinary action had been taken against the applicant.[629] Therefore, dismissal was considered to be too harsh a sanction.[630] As in the *Wright*, *Lubke* and *Jardine* judgements, it is notable that the courts have been consistent in their approach. It is apparent in the *Jardine* case that the courts have maintained the principle that when dealing with managerial personnel, the employer should undertake reasonable, practical and genuine attempts to improve interpersonal relations in the workplace.[631]

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624 *Jardine* case 566.

625 J*ardine* case 567.

626 J*ardine* case 567.The applicant was held to have had an individualistic and confrontational style of management. In a very strong sense, his way of doing things was the only right way, a maverick. A style of problem solving which came across as uncollegial. In addition, the applicant's lack of acknowledgement of the implications of a written complaint against the general manager, in that it would embarrass and humiliate the manager in the eyes of the group's directors. In the manner in which he proceeded to vindicate himself, the applicant appeared not to be aware that he had totally marginalised himself from the power structure of the mill, making a restoration of relationships hard, if not impossible. The court noted, however, that this did not mean that the respondent was to be found blameless, but the incident that led gave rise to the grievance was open to criticism. In particular, the casual manner in which the verbal grievance was dealt with left much to be desired.

627 *Jardine* case 567.

628 *Jardine* case 567.

629 *Jardine* case 567.

630 *Jardine* case 567.

631 *Lubke* case 429; *Van der Merwe and Agricultural Research Council (2013) 34 ILJ* 3366 (CCMA).The applicant who was a public relations officer was dismissed on grounds of incompatibility. It was alleged that there was an irreconcilable breakdown in the working relationship, an inability to work with her colleagues due to personality differences and inability to adapt to the "corporate culture" of the company. The tribunal held that no remedial action had been taken to assist the applicant in resolving the problems referred to above. In addition, the employer failed to discharge the onus that the dismissal was substantively and procedurally fair. Glass v Liberty Group Ltd (2007, 12 BALR 1172) 1184. It was held that an employee should also be given a reasonable time to make amends. *Hapwood* case 196–7.

On the other hand, the courts adopted a different approach in *Miyeni and Chillibush Communications (Pty) Ltd.*[632] The applicant (who was a manager) was dismissed on grounds of incompatibility in that he did not maintain a healthy interpersonal relationship with his superiors and subordinates. The applicant was said to have an abrasive personality due to the manner that he conducted himself towards his colleagues. In the *Miyeni* case,[633] it was emphasised that the supervisory function of managers including the ability to control their subordinates is of paramount importance. Therefore, there is a need to preserve interpersonal relationships and adhere to the corporate culture of the workplace.[634] Hence, it was held that the respondent had reasonable grounds to dismiss the applicant. From this case, one can conclude that, where necessary, managerial employees can be dismissed on the basis of incompatibility due to their abrasive management style. An abrasive management style can potentially result in conflict and disharmony in the workplace. Fellow employees may find it difficult to yield to the instructions of such a manager. Consequently, this may affect the smooth operations of the employer's business. However, the principle remains that an employer is required to take reasonable steps to remedy the cause of incompatibility to show that they reasonably accommodated the employee before resorting to dismissal. Failure to do so by the employer will deem the dismissal unjustifiable.

In *Lotter and SA Red Cross Society,*[635] the CCMA had to determine if an employee can be dismissed for incompatibility, at the behest of a third party. In this matter, the applicant was appointed as the provincial manager of the respondent organisation on a fixed term contract.[636] Following a meeting with the Council, the applicant walked out of the meeting and then propagated an 'open letter' containing a number of demeaning and disparaging comments about the Council.[637] However, the applicant subsequently apologised for his actions. He also engaged both the chairman and the

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632 *Miyeni* case. In the *Miyeni* case, the manager was said to be abrasive towards his staff. It was argued that his conduct was not conducive to the establishment good relations in the workplace.
633 *Miyeni* case para 151.
634 *Miyeni* case para 151.
635 *Lotter and SA Red Cross Society* (2006) 27 ILJ 2486 (CCMA), (Hereinafter, referred to as the *Lotter* case).
636 *Lotter* case 486.
637 *Lotter* case 486.

secretary general of the Council in an effort to preserve the relations between the parties.[638] Owing to the deterioration in the relationship between the applicant and the Provincial Council of the organisation, the Council unanimously voted to terminate the applicant's services.[639] The applicant then referred the dispute to the CCMA on grounds that he had been unfairly dismissed. On the basis of the evidence submitted to the Tribunal, the Commissioner was of the opinion that the disharmony caused by the applicant was not entirely irreparable.[640] In addition, it was held that the scope of the Council's duties was limited to making recommendations.[641] Therefore, the Council did not have the right to take executive decisions pertaining to the suspension or dismissal of staff.[642] Regarding dismissals at the behest of a third party, they will only be deemed fair if significant damage was caused to the organisation and if reasonable steps have been taken to dissuade the request.[643] Moreover, the exploration of all reasonable alternatives should have been exhausted.[644] The Tribunal held that it was not the case because the Council had not made all the reasonable attempts to remedy the situation.[645] Further, the Tribunal affirmed that the process of dealing with the incompatibility in question should be mitigated by making clear efforts to tackle the conflicts practically and sensibly.[646] Therefore, the respondent's decision to terminate the employment relationship at the request of the Provincial Council without seeking a reasonable alternative or a mediated solution was considered to be misguided, premature, ill-informed and substantively unfair.[647] From this case, it can be deduced that an employee can be dismissed at the behest of a third party on incompatibility. However, in order to address the cause of incompatibility, the employer must seek a feasible alternative of a negotiated resolution with the third party. Only when no other options have been found or exhausted will the dismissal be justifiable.

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638 *Lotter* case 486.
639 *Lotter* case 486.
640 *Lotter* case 494.
641 *Lotter* case 494.
642 *Lotter* case 494.
643 *Lotter* case 495.
644 *Lotter* case 495.
645 *Lotter* case 495.
646 *Lotter* case 495.
647 *Lotter* case 495.

Overall, it is clear that the courts do not use a uniform approach to determine whether the dismissal of managerial employees on the grounds of incompatibility is justifiable or not. It is argued that each case is dependent on its circumstances. Consequently, this might lead to legal uncertainty. Nonetheless, a common thread in all the aforementioned cases is that the employer has an obligation to undertake sensible, practical and genuine efforts to improve interpersonal relations in the workplace before a managerial employee. Furthermore, it has been established that a managerial employee may be dismissed for incompatibility if his or her management style does not fit with the employer's corporate culture. However, the employer may not dismiss such an employee simply because management or other employees dislike his or her improvements in the workplace.

3.11.3 Victimisation under the guise of incompatibility

In some instances, unscrupulous employers may use incompatibility as a means of disguising the real reason why the employer wants to get rid of an employee.[648] In *FOCSWU obo Ralawe / Anglican Church*,[649] the applicant was dismissed for failing to maintain a healthy interpersonal relationship with her superiors. The applicant was employed on a contract providing for a probationary period of three months.[650] After having been employed for about a month, the applicant lodged a number of complaints with the bishop of the diocese. In response to her letter, a "support group" was established. The group found that there were "serious problems" with the way the applicant communicated with other members of the union and recommended that she undergo further training.[651] Subsequently, her probationary period was extended. Three months later the union's executive committee agreed, in the absence of the

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648 Griessel 2020https://www.labourguide.co.za.

649 *FOCSWU obo Ralawe / Anglican Church* [1999] 9 BALR 1022 (CCMA)(Hereinafter, referred to as the FOCSWU obo Ralawe case) 1024-25. The applicant was employed on a contract providing for a probationary period of three months. After having been employed for about a month the applicant lodged a number of complaints with the bishop of the diocese. In response to her letter, a "support group" was established. The group found that there were "serious problems" with the way the applicant responded to other members of the union and recommended that she undergo further training. Subsequently, her probationary period was extended. Three months later the union's executive committee agreed, in the absence of the applicant, that her probationary contract would not be extended.

650 *FOCSWU obo Ralawe* case 1023.

651 *FOCSWU obo Ralawe* case 1024.

applicant, that her probationary contract would not be extended.[652] The Tribunal held that no evidence showed that the applicant was guilty in the event of a breach of duty or any other misconduct.[653] Moreover, the employee was not counselled before she was dismissed.[654] Although the employment relationship had irretrievably broken down, it was not the fault of the applicant alone.[655] It was held that the actual reason for the dismissal was that the relationship between the applicant and senior management had deteriorated to the point where the parties could no longer work together.[656] The Tribunal remarked that an employee should not be dismissed solely because he or she is disliked by other employees.[657] In fact, the employer should afford the employee the opportunity to explain why he or she could not fit into the corporate culture of the workplace and give them a reasonable time to adapt.[658]

In *Jabari v Telkom SA (Pty) Ltd*,[659] the applicant was dismissed on the basis that his attitude, behaviour and general personality were alleged to be incompatible with the employer's corporate culture.[660] The real reasoning behind the dismissal was that the applicant had instituted grievance and legal proceedings against management and refused a voluntary severance package.[661] Though the employer argued that the employment relationship had irretrievably broken down, the evidence presented before the court did not prove this.[662] It was held that the applicant's dismissal constituted victimisation and it was automatically unfair.[663] Similarly, in *SACTWU obo Chanchane / Matwabeng Christian Academy*,[664] the applicant who was a teacher at a private school, was dismissed by the respondent on the grounds of incompatibility in

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652 *FOCSWU obo Ralawe* case 1024.
653 *FOCSWU obo Ralawe* case 1026.
654 *FOCSWU obo Ralawe* case 1026.
655 *FOCSWU obo Ralawe* case 1026.
656 *FOCSWU obo Ralawe* case 1026.
657 *FOCSWU obo Ralawe* case 1026; *Jardine* case 563. It was held that, in addition to the employer's view, there must be at least be some other proof to determine incompatibility.
658 *FOCSWU obo Ralawe* case 1026.
659 *Jabari v Telkom SA (Pty) Ltd* 2006 27 ILJ 1854 (LC), (Hereinafter, referred to as the *Jabari* case) 1855.
660 *Jabari* case 1868.
661 *Jabari* case 1869.
662 *Jabari* case 1869.
663 *Jabari* case 1870; s187(c), (d) of the LRA.
664 *SACTWU obo Chanchane / Matwabeng Christian Academy* [2012] 2 BALR 193 (CCMA) (Hereinafter, SACTWU obo Chanchane case) 193.

the form of operational requirements. The respondent argued that the applicant had generally portrayed a "bad attitude" and that she had assaulted a pupil.[665] However, the tribunal held that the real reason for the applicant's dismissal was "clouded".[666] The real reason for the dismissal was that the applicant had lodged complaints about her salary to management and her refusal to sign an employment contract which was silent on wage increases.[667]

In a recent case of *John v Afrox Oxygen Limited*,[668] the applicant was dismissed for making a protected disclosure of a legal flaw in the employer's re-grading process. However, the employer alleged that the applicant was dismissed for incompatibility with her colleagues.[669] The Court held that the applicant acted in good faith and that it was reasonable to assume that the re-grading process was conducted in a manner which breached the legal obligation to which the respondent was bound.[670] Therefore, it was reasonable to make such a disclosure.[671] In light of the employer's assertions, the Court held that allegations of the purported incompatibility were nothing short of fiction.[672] In fact, the actual reason behind the applicant's dismissal was the employer's retaliation for her disclosure of the irregularities in the re-grading process.[673] Hence, her dismissal was held to be automatically unfair.[674]

Furthermore, employers should not devise some other pretext for dismissing an employee rather than to remedy the incompatibility in question.[675] In the case of *Hapwood v Spanjaard Ltd*,[676] the applicant's employment contract as an area sales manager was terminated less than two months after his employment. Prior to the termination of the contract, the applicant had been offered an alternative position on

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665 *SACTWU obo Chanchane* case 201.
666 *SACTWU obo Chanchane* case 201.
667 *SACTWU obo Chanchane* case 205.
668 *John v Afrox Oxygen Limited* (JA90/15) [2018] ZALAC 4; [2018] 5 BLLR 476 (LAC); (2018) 39 ILJ 1278 (LAC) (Hereinafter, referred to as the *John* case).
669 *John* case para 6.
670 *John* case para 39.
671 *John* case para 39.
672 *John* case para 39.
673 *John* case para 39.
674 *John* case para 39.
675 Griessel 2020 https://www.labourguide.co.za.
676 *Hapwood v Spanjaard Ltd* 1996 2 BLLR 187 (IC), (Hereinafter, referred to as the *Hapwood* case).

a commission-only basis.[677] The applicant was also advised that if he declined to accede to the offer, his services would be terminated on a month's notice.[678] On adducing evidence, the respondent argued that termination of services was deemed to be a more appropriate sanction than a dismissal because the applicant was incompatible with the company's culture.[679] Moreover, a continued employment relationship was deemed unlikely.[680] Concerns raised against the applicant included his style and abrasive attitude which did not fit with the company's "culture"," harassing a client's receptionist during a business call and arguing with the company's security guard.[681] Subsequently, the claimant was informed of the allegations raised against him and was summoned to a disciplinary hearing. However, the court acknowledged that prior to the counselling session, the managing director had written a memorandum to the national sales manager indicating that the applicant be "ditched now".[682] Hence, the hearing was considered to be a farce.[683] From the evidence presented, it was deduced that the respondent had resolved to terminate the services of the applicant long before he was proffered the alternative position.[684] Moreover, the respondent never put the alleged incompatibility forward to the applicant and he was not given the opportunity to respond to the counselling before he was dismissed.[685] Consequently, the applicant's dismissal constituted an unfair labour practice.[686]

In *Sondlo/University of Fort Hare*,[687] the applicant was retrenched after the employer failed to find an alternate post after the applicant had been found to be incompatible with their superior. Complaints against the applicant included initiating fights with a colleague, circulating derogatory emails about her head of department, maliciously issuing false allegations that the head of their department was victimising her,

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677 *Hapwood* case 188.
678 *Hapwood* case 189.
679 *Hapwood* case 201.
680 *Hapwood c*ase 201.
681 *Hapwood* case 202.
682 *Hapwood* case 195.
683 *Hapwood* case 195.
684 *Hapwood* case 201.
685 *Hapwood* case 202.
686 *Hapwood* case 202. When this case was decided, unfair dismissals were considered unfair labour practices under the *Labour Relations Act* 28 of 1956.
687 *Sondlo/ University of Fort Hare* (2011) 5BALR 551 (CCMA) (Hereinafter, referred to as the *Sondlo* case) 559.

deliberately attempting to destabilise the Faculty, fighting an undeclared personal war against the head of the department; and disrupting the work environment with tension, conflict and xenophobia.[688] Despite all of these complaints, the applicant was never charged with misconduct. In addition, the respondent presented no substantial evidence to support these allegations. Thereafter, the heads of the other department to which the respondent proposed that the applicant be transferred, declined to accept the offer.[689] Subsequently, the applicant was served with a notice inviting her to consult over a proposal that she be retrenched.[690] Consequently, the applicant was dismissed after the mediation negotiation reached a deadlock.[691] In light of the facts presented before the Tribunal, it was concluded that, while the dismissal was premised on operational requirements, the actual reason for the dismissal was the applicant's incompatibility with her colleagues.[692] In addition, the respondent had failed to establish the rationale behind the breakdown of relations between the applicant and the wider university community.[693] Not only did the respondent decide to transfer the applicant without properly investigating the dean's allegations, but most of the respondent's complaints were past incidents.[694] The Tribunal found that it was unfair to rehash those matters.[695] The Tribunal noted that it was unethical for the respondent to abuse the incompatibility rule in order to avoid the test of proving its case at the disciplinary hearing.[696] Hence, the dismissal was found to be unfair.[697]

From the cases discussed above, it is clear that an employee can fall prey to unscrupulous employers who may dismiss him or her under the pretext of incompatibility when, in fact, it is a ploy to get rid of him or her. For example, the *FOCSWU*, *Hapwood,* and *Sondlo* cases show how employees can be victimised by senior management based on personal vendettas. This, in turn, violates the employee's right to fair labour practices. It is argued that the court's approach is

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688 *Sondlo* case 561- 562.
689 *Sondlo* case 557.
690 *Sondlo* case 557.
691 *Sondlo* case 557.
692 *Sondlo* case 561.
693 *Sondlo* case 563.
694 *Sondlo* case 560.
695 *Sondlo* case 561.
696 *Sondlo c*ase 563, 564.
697 *Sondlo* case 565.

correct in that an employee cannot be dismissed on grounds of incompatibility simply because they are disliked by staff or senior management. Furthermore, the *Jabari*, *John* and *SACTWU obo Chanchane* cases demonstrate that in some cases, an employee is dismissed on the basis of incompatibility when the actual reason is that the employee either instituted a grievance procedure or issued complaints against management. Without the proper statutory guidelines, it is difficult to test the motives behind an employee's dismissal based on incompatibility. In order to protect the interests of both the employer and the employee, there is a need to address these *lacunae* in the South African law.

Overall, the South African labour courts do not use a uniform approach when dealing with incompatibility disputes as each case is dependent on its merits. The challenge, however, is that this leads to legal uncertainty on the matter. It is submitted that there is a need for statutory and regulatory reform on the topic to protect the interests of both the employer and the employee.

3.12 Conclusion

This chapter unpacked incompatibility as a ground for dismissal in South African labour law, especially in the absence of proper regulation and established guidelines. Although incompatibility is not listed as a ground for dismissal in the *LRA*, it has been recognised as such by various South African courts and other dispute resolution tribunals in a number of cases. This chapter provided an overview of incompatibility within the context of the *Constitution*, the *LRA* and the *EEA*. For purposes of this thesis, the role of the constitutional rights to fair labour practices, equality, dignity, culture and religion was analysed. It was concluded that the right to equality which includes the employee's right not to be unfairly dismissed and the employer's right to protect business interests are all imperatives of the constitutional right to fair labour practices.[698] The implication of these constitutional rights means that employers should be allowed to dismiss an employee based on incompatibility when it is to the serious detriment of the employer's business. Furthermore, an employer should be able to

698 Henrico 2015 https://islssl.org.

exercise the freedom to protect his business interests which includes instilling a "corporate culture" in the workplace. It was also established that an employer is under no obligation to accommodate an employee in a way that causes the business undue hardship. On the balance of interests, an employee should not be dismissed arbitrarily and unfairly discriminated against. It is submitted that differentiating an employee based on personality traits, religion and/or culture will constitute an infringement on their human dignity. For this reason, an employer must instil a culture of upholding the human dignity of all employees as part of the workplace "corporate culture", and when dismissing an employee for incompatibility, he or she must be cognisant of the constitutional rights of the employee.

Overall, one can conclude that there is a need for statutory and regulatory reform to protect the interests of both the employer and the employee when dealing with incompatibility disputes. To a larger extent, the South African labour courts have relied solely on their discretion to address disputes of this nature. Another challenge is that courts are not consistent when dealing with incompatibility disputes because each case is decided on its merits. It is argued that the lack of guidelines pertaining to dismissal based on incompatibility creates legal uncertainty. It is further argued that like other grounds of dismissal, incompatibility should be regarded as a valid and separate dismissal under the *LRA* and be regulated as such. This will not only provide legal recourse to employers when dealing with disruptive employees in the workplace, but it will also protect vulnerable employees from being subjected to arbitrary dismissals on grounds of perceived incompatibility.

Chapter 4 Incompatibility and other grounds for dismissal in South Africa labour law

4.1 Introduction

The foregoing chapter dealt with the challenges that may arise in the absence of statutory regulation and properly established guidelines for incompatibility. However, this chapter provides a comparison between incompatibility and other grounds for dismissal which include misconduct, incapacity and operational requirements. It should be noted again that incompatibility is not listed as a ground for dismissal in terms of the *Labour Relations Act* 66 of 1995 (hereafter the LRA).[699] Therefore, examining each ground will assist in determining why the other grounds of dismissal are included as fair grounds for dismissal. Furthermore, by critically analysing the differences between the grounds for dismissal, this chapter demonstrates why incompatibility should not be regarded as a species of either misconduct, incapacity or operational requirements. In doing so, this determination provides justification as to if and why incompatibility should similarly be considered as a separate and fair ground for dismissal in terms of the *LRA*.[700]

4.2 Unfair dismissals in terms of the Labour Relations Act 66 of 1995

Section 188 of the *LRA* gives cognisance to misconduct, incapacity due to poor performance or ill health and/or injury and the employer's operational requirements as valid grounds for dismissal in the South African labour law.[701] However, a fair dismissal requires that in all these instances, the dismissal should be both substantively and procedurally fair.[702] When an employee alleges that the dismissal

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699 Section 188 of the *Labour Relations Act* 66 of 1995 (Hereinafter, referred to the *LRA*).

700 *LRA*.

701 Section 188(1)(a) of the *LRA*.

702 S188(1)(b), (2) of the *LRA*; *Molontoa v CCMA and Another* (JR1281/19) [2021] ZALC 10. In this matter, the Labour Court affirmed that any dismissal disputed under the LRA must be founded on fairness. Fouche MA and Du Plessis JV *A Practical Guide to Labour Law* (Lexis Nexis Durban) 341;Grogan J Workplace Law 13th ed (Juta Cape town 2020) 151- 152; Garbers C *et al The Essential Labour Law Handbook* 7th ed (Mace Labour Law Publications CC Centurion 2019) 126; Van Niekerk A "Dismissal for Misconduct – Ghosts of Justice, Past, Present and Future" 2012 *Acta Juridica* 108.

was substantively and/or procedurally unfair, the onus rests on him or her to first and foremost establish the existence of the alleged dismissal, in that one of the forms of dismissal recognised by section 186(1) of the *LRA* occurred.[703] If the dismissal is established, the onus then shifts to the employer to prove that the dismissal is indeed fair;[704] that is to say that the prescripts of substantive and procedural fairness have been adhered to. If the dismissal was unfair, the employee may be entitled to a remedy, such as reinstatement or compensation.[705] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[706] the court reaffirmed that a fair dismissal is one that is founded on fair reasons and is carried out in accordance with fair procedure. To reach an informed judgement regarding the fairness of a dismissal, the courts must consider the facts of the case (such as the background, context and behaviour of the parties), the guidelines established by the Labour and Labour Appeal Courts, as well as any relevant code of good practice issued in terms of the *LRA.*[707] These considerations and their applicability to dismissals arising from incompatibility are further analysed in this chapter. The current position, however, is that it is challenging to determine the fairness of a dismissal based on incompatibility, especially without the aid of statutory guidance in South African labour law. It is reiterated that statutory and regulatory reform on the topic of incompatibility in the workplace will go a long way in addressing these *lacunae* in South African labour law.

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703 S192(1) of the *LRA*. The six forms of dismissals listed in the *LRA* include termination of an employment contract with or without notice, non-renewal of a fixed term contract, not permitting a new mother to return to work after maternity leave, selective re-employment, constructive dismissal and dismissals in terms of section 197.

704 S192(2) of the *LRA*.

705 Le Roux PAK "Dismissals for Misconduct Some Reflections" 2004 *ILJ* 868. The remedy appropriate in a scenario will depend on the particular circumstances. Reinstatement will perhaps not be appropriate due to an intolerable employment relationship, in which case compensation will rather be awarded.

706 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (CCT 85/06) [2007] ZACC 22, (Hereinafter, referred to as the Sidumo case).

707 *Sidumo* case paras 68, 173.

4.2.1 Substantive fairness: The concept

Substantive fairness means that there should be a fair and valid reason for the dismissal.[708] According to Du Plessis and Fouche,[709] an employer should substantiate a valid reason for terminating the employee's contract of employment. Similarly, when dismissing an employee for incompatibility, the employer must provide fair reasons for doing so. In *Unitrans Zululand (Pty) Ltd v Cebekhulu,*[710] the Labour Appeal Court (LAC) provided guidance on what is meant by substantive and procedural fairness. The LAC reiterated that substantive fairness pertains to fair reasons for dismissal that must be presented before a court of law.[711] Thus, if the evidence brought before the court fails to establish fair and justiciable reasons for dismissing an employee, the dismissal will be substantively unfair.[712]

It is further submitted that a valid reason should be lawful in accordance with common law, statute law, a collective agreement or the contract of employment.[713] However, there are a number of mitigating factors that should be taken into consideration in determining fair reasons for the dismissal. It is submitted that these factors can also be used as a starting point when establishing substantive reasons for dismissals arising from incompatibility. This is especially in the absence of proper regulations and statutory guidance on the matter. These considerations will include determining the facts of the case, whether the dismissal is the only appropriate sanction, whether there is no other alternative sanction that can be considered, whether the employment relationship has become intolerable or whether the trust relationship in the employment relationship has irretrievably broken down.[714] Nonetheless, the mere presence of a particular recognised ground for dismissal within a scenario will in itself

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708 *Sidumo* case para 68; Du Plessis JV and Fouche MA *A Practical guide to Labour Law* (Lexis Nexis, Durban 2019) 341, 347; Gandidze T "Dismissal on operational requirements" 2007 *Law, Democracy and Development* 84; Electrical Contractor Association "Dismissals for Operational Requirements (Retrenchments) Part 2" 2008 *Vector* 6.

709 Du Plessis and Fouche A Practical guide to Labour Law 341.

710 *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR (LAC), (hereinafter, referred to as the *Unitrans Zululand* case).

711 *Unitrans Zululand* case 688, 696.

712 Unitrans Zululand case 688.

713 Du Plessis and Fouche *A Practical guide to Labour Law* 348.

714 Item 2(1) *Code of Good Practice: Dismissal;* Du Plessis and Fouche *A Practical guide to Labour Law* 348.

not suffice; the circumstances surrounding the said ground and factors mentioned above should ultimately justify the dismissal for it to be substantively fair.

4.2.2 Procedural fairness: The concept

Procedural fairness requires that before an employee is dismissed, a fair procedure must be followed.[715] In *Slagment (Pty) Ltd v Building Construction & Allied Workers Union & others*,[716] the LAC emphasised the importance of fair procedure when carrying out dismissals. The LAC affirmed that it is imperative for the employer to conduct a disciplinary enquiry or an investigation as part of a fair procedure to evaluate the veracity of the allegations levelled against the employee.[717] A fair procedure, for instance, requires that when an employer contemplates dismissing an employee for misconduct, a thorough investigation into the alleged misconduct must be conducted, and the employer should afford the employee the opportunity to be heard (*audi alteram partem* rule) during a disciplinary hearing.[718] Thereafter, the employee should be informed of the decision before the subsequent dismissal.[719]

Furthermore, the *nemo index in sua causa* rule requires that the decision maker should be objective and impartial in their findings when resolving the dispute brought before the tribunal.[720] This forms part and parcel of a fair procedure. When dismissal for an employee's incapacity is, for instance, a possibility, the employer first would have to consider the seriousness of the incapacity and attempt to reasonably accommodate the employee.[721] In the process, the prescribed procedures aim to avoid knee-jerk dismissals and aim to not only protect the interests of the employer but also those of the employee. Another case in point is *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van*

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715 Electrical Contractor Association 2008 *Vector* 6.

716 *Slagment (Pty) Ltd. v Building Construction and Allied Workers Union and Others* (189/92, 720/92) [1994] ZASCA 108, (Hereinafter, referred to as the *Slagment* case).

717 *Slagment case 36; Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Baloyi and Others* (JR1029/2019)[2021] ZALCJHB 407 para 47.

718 Du Plessis and Fouche *A Practical guide to Labour Law* 351; Item 4 of the *Code of Good Practice: Dismissal*.

719 Du Plessis and Fouche *A Practical guide to Labour Law* 351; Item 4 of the *Code of Good Practice: Dismissal*.

720 Du Plessis and Fouche *A Practical guide to Labour Law* 349.

721 Item 10, 11 of the *Code of Good Practice: Dismissal*.

Dyk,[722] in which the LAC held that the respondent's dismissal for operational requirements was procedurally unfair. The court concluded that the purported dismissal was not due to any economic issues or technological changes in the business.[723] On the contrary, it was established that the real reason behind the dismissal was incompatibility between the respondent (who was employed as the senior manager) and a general manager in the applicant's workplace.[724] After engaging in mediation with the parties regarding the dispute, the applicant, who was the employer in this case opted to merge the posts of the two incompatible managers.[725] A number of procedural issues were highlighted by the court. The cause of the dispute was that the applicant urged both managers to apply for the new post without first conducting a fair consultation process with the parties regarding the selection criteria.[726] Thereafter, the respondent was dismissed for operational reasons. The LAC correctly pointed out that the applicant should have first informed the respondent about the incompatible behaviour that was causing disharmony in the workplace, then established how the workplace relationship had been affected, and finally proposed the appropriate remedial action.[727] In addition, the respondent must have been given a reasonable opportunity to rectify the cause of the incompatibility.[728] It is opined that the *Zeda* case illustrates the importance of fair procedure in order to avoid arbitrary dismissals by the employer. It is further argued that the guidelines outlined by the LAC in the *Zeda* case can provide guidance in ensuring fair procedure when dealing with dismissals arising from incompatibility.

Grogan[729] adds that the standard of fairness is also determined by the nature of the employer – whether they are a small or large enterprise. In light of this assertion, Cohen[730] contends that in cases of small enterprises, there should be more flexibility

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722 *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk* [2020] 6 BLLR 549 (LAC), (hereinafter, referred to as the *Zeda* case) para 34.
723 *Zeda* case para 2.
724 *Zeda* case para 38.
725 *Zeda* case para 9,12.
726 *Zeda* case para16, 17.
727 *Zeda* case para 39.
728 *Zeda* case para 39.
729 Grogan *Workplace Law* 13th ed (Juta Cape town 2020) 216.
730 Cohen T "Procedurally Fair Dismissals- Losing the Plot?" 2005 *SA Merc LJ* 42; Item 3(1) of the *Code of Good Practice: Dismissal*.

in applying procedural fairness. Correctly so, such enterprises are not at an advantage of having specialist managers who specialise in dealing with disciplinary matters or procedures to guide them.[731] Le Roux[732] correctly asserts in this regard that stringent and formalistic standards may incur more costs for such employers, which may cause undue hardship. Hence, larger enterprises with the capacity and resources may adopt more formal, stricter procedural standards.[733]

In light of the foregoing, the following discussion highlights the role of disciplinary codes and/or the Code of Good Practice in ascertaining whether an employer is justified in dismissing an employee. In addition, this aids in determining whether a dismissal is substantively and procedurally fair.

4.3 The role of a disciplinary code and/or the Code of Good Practice in dismissal disputes

In ensuring discipline and fair procedure in workplace disputes, a disciplinary code is beneficial. The role of a disciplinary code and procedure is to establish and regulate the required conduct and performance of employees.[734] This includes correcting any behaviour which is contrary to the "corporate culture", impedes production and causes disruption or consternation in the workplace.[735] Grogan[736] adds that the function of discipline in the workplace is to ensure that all individual employees contribute effectively and efficiently to the goals of the business enterprise. Employers, on the other hand, need to ensure that all employees are aware of all the procedures and the reasonable standards that are required of them in the workplace.[737] Similarly, it is the duty of the employee to comply and familiarise himself/herself with the enterprise's disciplinary policy.[738] In some instances, the disciplinary rule and/or

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731 Cohen 2005 *SA Merc LJ* 42.
732 Le Roux 2004 *ILJ* 870.
733 Grogan *Workplace Law* 216; Cohen 2005 *SA Merc LJ* 42.
734 CCMA 2021 Disciplinary procedures https://www.ccma.org.za accessed 24 February 2021.
735 Item 3(1) of the Code of Good Practice: Dismissal; Grogan Workplace Law 120; Finnemore M et al Introduction to Labour Relations in South Africa (Lexis Nexus Durban 2018) 284.
736 Grogan *Workplace Law* 120.
737 CCMA 2021 https://www.ccma.org.za.
738 Van Niekerk *et al Law @ Work* (Lexis Nexis Durban 2015) 283; CCMA 2021 https://www.ccma.org.za.

procedures may, however, be so well established in the workplace that communication is not necessitated.[739] This principle was applied in *Motswenyane v Rockface Promotions.*[740] In this matter, the applicant was dismissed as a salesperson after the respondent (the employer) discovered an unaccounted for deficit in her cash float.[741] In her pleadings, the applicant claimed she had left the money at her home because she was afraid of being robbed after having experienced a similar incident, and that she had returned the money the day after.[742] Furthermore, the applicant's defence was that she was unaware that she would be dismissed without prior warning if a shortage in her float occurred.[743] However, the tribunal rejected the applicant's defence. The tribunal held that the applicant's dismissal was fair because she was made aware of the consequences of having a cash deficit in her float.[744] In addition, other sales staff including the applicant were well aware of the consequences of being caught with a float shortage.[745] It is contended that the tribunal was correct in concluding that some rules (in this case workplace theft) are so well established and understood they do not need to be meticulously explained to the employees.[746]

In addition to the above-mentioned, every disciplinary code must be measured against the provisions of the *Code of Good Practice: Dismissal*. While this is true, Landis and Grossett[747] correctly posit that the primary means of regulating discipline and incapacity within a particular workplace remains the workplace disciplinary code. In the absence of a disciplinary code, the *Code of Good Practice*: *Dismissal* will serve as the minimum guidelines when determining substantive and procedural fairness of dismissals arising from either misconduct or incapacity.[748] The *Code of Good Practice:*

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

740 *Motswenyane v Rockface Promotions* [1997] 2 BLLR 217 (CCMA), (hereinafter, referred to as the *Motswenyane* case).

741 *Motswenyane* case 217.

742 *Motswenyane* case 218.

743 *Motswenyane* case 218.

744 *Motswenyane* case 222.

745 *Motswenyane* case 223.

746 *Motswenyane* case 223; *AMCU obo Mabale v CCMA and Others* (JR1474/19) [2021] ZALCJHB 227 para 7. The Labour Court reaffirmed that all rules and standards in the workplace do not need to be written down.

747 Landis H and Grossett L *Employment and the Law: A Practical Guide for the Workplace* (Juta Cape Town 2014) 156. See also Cohen 2005 *SA Merc LJ* 34.

748 Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 156; Item1(1) of *Code of Good Practice: Dismissal*.

Dismissals based on Operational Requirements establishes minimum guidelines when considering the substantive and procedural fairness of dismissals arising from operational requirements.[749] Given the importance of the above Codes towards a better understanding and regulation of the various statutorily recognised grounds for dismissal and the achievement of fairness and legal certainty, it is not unfathomable that a Code could similarly be designed to regulate dismissals for incompatibility. Important lessons for this purpose can consequently be learned from the existing Codes.

The *Code of Good Practice: Dismissal* is referred to in the discussion below as it is critical in outlining the various substantive and procedural guidelines applicable to each ground for dismissal in South African labour law. Since the guidelines contained in the Code are specifically designed for the unique circumstances that are present when dealing with matters of misconduct and incapacity, an analysis of such will aid in understanding the comparison between incompatibility and other grounds for dismissal and the recognition of their inherent differences.

4.4 The conundrum of incompatibility vs other grounds for dismissal – a species of misconduct, incapacity, operational grounds or a separate ground for dismissal?

While fixed grounds for fair dismissal have been identified by law, as was highlighted earlier, the question should be asked whether the *incompatibility* of an employee could not similarly be recognised as a legitimate ground for dismissal, based on the effect it might have on the various relationships in the workplace. This is especially given that incompatibility has been recognised as a ground for dismissal by various South African courts and other dispute resolution tribunals in multiple judgements.[750] Van Niekerk *et*

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749 *Code of Good Practice Based on Operational Requirements of the Labour Relations Act 66 of 1995*.

750 *Erasmus v BB Bread* 1987 8 ILJ 537 (IC); *Wright v St Mary's Hospital* 1992 13 ILJ 987 (IC); *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC); *Hapwood v Spanjaard Ltd* 1996 2 BLLR 18 (IC); *Lebowa Platinum Mines Ltd v Hill* 1998 19 ILJ 1112 (LAC); *Brereton v Bateman Industrial Corporation Ltd and Others* 2000 5 LLD 119 (IC); *Subrumuny v Amalgamated Beverages* 2000 21 ILJ 2780 (ARB) (Hereinafter, referred to as the *Subrumuny* case); *Nathan v Reclamation Group (Pty) Ltd* 2002 23 ILJ 588 (CCMA) (Hereinafter, referred to as the *Nathan v Reclamation*

al[751] define incompatibility as a serious clash with the prevailing "corporate culture" or personality clashes with other employees. According to Grant,[752] disruptiveness, pushiness, anger, impatience, meddling, manipulation in interpersonal connections or simply basic disagreeability can consequently all pose problems that disturb an employer's operations and affect the employment relationship.

It is argued that establishing incompatibility as a ground for dismissal poses a number of challenges. This is particularly true in the absence of statutory guidance in South African labour law. One of the complexities is that until now, the courts have employed various substantive and procedural factors, or rather a "flexible approach,"[753] to determine whether dismissal based on incompatibility is fair or not.[754] It is argued that incompatibility may in some instances "hover" between misconduct, incapacity or even under operational requirements.[755] This is problematic in the sense that the substantive and procedural requirements have not been applied uniformly by the labour courts as each case is dependent on unique circumstances.

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case); Cutts v Izinga Access (Pty) Ltd 2004 25 ILJ 1973 (LC); Jabari v Telkom SA (Pty) Ltd 2006 27 ILJ 1854 (LC); *Lotter and SA Red Cross Society* 2006 27 ILJ 2486 (CCMA) (Hereinafter, referred to as the *Lotter* case); *Jardine v Tongaat Hulet Sugar Ltd* 2002 23 ILJ 547 (CCMA); *Miyeni v Chillibush Communications (Pty) Ltd* 2010 31 ILJ 3054 (CCMA); *Goussard v Impala Platinum Limited* 2012 33 ILJ 2898 (LC); *PSA obo Mbiza v Office of the Presidency and Others* 2014 35 ILJ 1628 (LC); *Mgijima v Member of the Executive Council Gauteng Department of Education and Others* (JR1894/2011) 2014 ZALCJHB 414; E*dcon Limited v Padayachee and Others* (J331/16) [2018] ZALCJHB 307 (Hereinafter, referred to as the *Edcon v Padayachee* case).

751 Van Niekerk *et al Law at Work* 306; *Erasmus v BB Bread* 1987 8 ILJ 537 (IC)(Hereinafter, referred to as the *Erasmus* case 542; *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC) (Hereinafter, referred to as the *Wright* case) 987; Mokumo MF *The Dismissal of Managerial Employees for Poor Work Performance* (LLM- dissertation University of Limpopo 2012) 59.

752 Grant C *Defining incompatible behaviour in an employer/employee relationship* (LLM-Dissertation University of Johannesburg 2014) 55; Griessel J 2017 Incompatibility in the workplace – those irreconcilable differences https://www.linkedin.com accessed 9 January 2021.

753 *Brereton v Bateman Industrial Corporation Ltd and Others* (2000) 5 LLD 119 (IC) (Hereinafter, referred to as *Brereton* case).

754 *Miyeni v Chillibush Communications Ltd* 2010 31 ILJ 3054 (CCMA)(Hereinafter, referred to as *Miyeni* case); Wright case 987; *Jabari v Telkom SA (Pty) Ltd* 2006 27 ILJ 1854 (LC)(Hereinafter, referred to as *Jabari* case)1868; *Jardine v Tongaat Hullet Sugar Ltd* 2002 23 ILJ 547 (Hereinafter, referred to as *Jardine* case); *Mgijima v Member of the Executive Council Gauteng Department of Education and Others* (JR1894/2011) 2014 ZALCJHB 414 (Hereinafter, referred to as *Mgijima* case) para 70.

755 Manamela T "When the Lines are Blurred – A Case of Misconduct, Incapacity or Operational Requirements" 2019 *Obiter* 98,114; Work law 2022 Labour Law at the Workplace: Proving incompatibility https://worklaw.co.za accessed 11 January 2021.

Further, there is no consensus whether incompatibility indeed falls under misconduct, incapacity or operational requirements, and whether it actually should. The reason for the lack of consensus is that the circumstances of incompatibility are not necessarily compatible with the circumstances as regulated by the Code of Good Practice on dismissals. Additionally, there is also no consensus on whether incompatibility should be regarded as a separate ground entirely for purposes of determining the applicable substantive and procedural requirements catered for in unique circumstances. In this regard, Manamela[756] correctly states that failure by the employer to correctly diagnose which grounds and procedures are applicable in a matter of supposed incompatibility may result in reinstating or compensating the employee who would then have been dismissed unfairly. In addition, some employers may attempt to dismiss employees under some other pretext in order to get rid of those they deem "incompatible".[757] Hence, there is a need for employers to adopt the appropriate pre-dismissal procedures from the onset when dealing with cases of this nature.

The discussion below provides critical justification why the grounds of dismissal identified earlier are statutorily regulated as fair grounds for dismissal. In addition, a comparison between incompatibility and the other grounds of dismissal is carried out. It should be reiterated that a distinction between the three grounds of dismissal is particularly important considering that each of the grounds has its own rules for substantive and procedural fairness that must be followed to effectively guarantee that a dismissal is fair.[758] The said rules will not necessarily be applicable to the circumstances of alleged incompatibility, due to the rules being uniquely designed for the nature of the grounds currently recognised in the LRA. Consequently, this will assist in establishing the need to recognise incompatibility as a legitimate and separate ground in South African labour law. Significantly, statutory and regulatory reform on the topic of incompatibility in the workplace will go a long way to protect the interests of both the employer and the employee.

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756 Manamela 2019 *Obiter* 97- 117, 100; Joordan 2016 *Misconduct and Incapacity – When in doubt?* http://www.leader.co.za/ accessed 1 January 2021.

757 Talent360 2020 *Employers: Dismissal can be incompatible with the law* https://talent360.co.zaaccessed 10 December 2021.

758 Manamela 2019 *Obiter* 100.

4.5 Misconduct as a ground for dismissal

In terms of section 188(1)(a)(i) of the *LRA*, misconduct is listed as the first ground of dismissal.[759] Du Plessis and Fouché[760] argue that misconduct is included as a fair ground for dismissal because of its prevalence in every workplace, and the impact it potentially may have on the tolerability of the employment relationship. Nonetheless, the *LRA* only refers to misconduct as a ground for dismissal but does not expressly provide a definition as to what it entails.[761] It is submitted that workplace misconduct can be defined as inappropriate conduct by an employee that can potentially and/or negatively affect the employment relationship between him or her with his or her employer, colleagues or the workplace environment.[762] Furthermore, misconduct includes situations in which an employee knowingly or negligently violates an established workplace disciplinary rule, resulting in a breach of the employment contract.[763] Hence, misconduct is classified as "fault based" because the employee is held to be directly responsible for the dismissal.[764] Consequently, the employer is required to take appropriate disciplinary action against the employee based on the alleged misconduct.[765]

4.5.1 Substantive and procedural fairness of dismissals based on misconduct under the Code of Good Practice: Dismissal

Items 3 and 7 of the *Code of Good Practice: Dismissal* stipulate detailed guidelines for determining substantive fairness of a dismissal based on misconduct. It should be highlighted that there is a distinction between types of misconduct ranging from minor issues to serious breaches of workplace standards.[766] As mentioned earlier, the *Code of Good Practice: Dismissal* instructs employers to adopt corrective and/or progressive discipline when correcting an employee's behaviour, as opposed to punitive

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759 S188 of the *LRA*.
760 Du Plessis and Fouche *A Practical Guide to Labour Law* 349; Grogan *Workplace Law* 178.
761 S188 of the *LRA*.
762 Indeed for employers 2021 *Ways to Spot and Handle Misconduct in the Workplace* https://www.indeed.com accessed 6 March 2021.
763 Manamela 2019 *Obiter* 100; Griessel 2017 https://www.linkedin.com.
764 Manamela 2019 *Obiter* 100.
765 Manamela 2019 *Obiter* 100;Griessel 2017 https://www.linkedin.com.
766 Indeed for employers 2021 https://www.indeed.com.

measures.[767] This also applies in misconduct cases. For instance, in *Numsa Obo Manyike / Wenzane Consulting & Construction*,[768] the applicant who was the employee was dismissed for pulling his face mask below his chin while speaking to company security on his cellular phone. The applicant argued in his defence that if he had continued to converse with security while wearing a mask, he would not have been heard.[769] However, the tribunal opined that dismissal was an overly harsh penalty for the applicant.[770] The tribunal highlighted that the purpose of discipline should be corrective and rehabilitative rather than punitive.[771] Although not wearing a mask at all during the Covid-19 pandemic was risky, the tribunal contended that the respondent should have considered corrective measures such as counselling and educating the applicant. The tribunal proposed educational measures such as seven days of community service in a hospital, where the applicant would have been exposed to the grim reality of the pandemic's impact on society and people in general.[772] As an alternative to dismissal, the tribunal proposed suspending the applicant without pay would have been a more appropriate sanction.[773] In addition, the tribunal was cognisant of the years of service the applicant had been working for the employer and the negative financial impact the dismissal would have on his livelihood. It is argued that the tribunal's approach is correct because punitive sanctions are only warranted when there is a serious infringement, even if it is the first offence.[774] It is submitted that the proposed corrective discipline measures were more likely to bring about change in the applicant's behaviour and protect his livelihood. In most cases, general misconduct or less serious cases of misconduct are unintentional and have little impact on the workplace.[775] In such cases, informal procedures such as informal advice and

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767 Item 3(2) of the *Code of Good Practice: Dismissal*; Du Plessis and Fouche *A Practical Guide to Labour Law* 349; Finnemore et *al Introduction to Labour Relations in South Africa* 284.

768 *Numsa Obo Manyike / Wenzane Consulting & Construction* [2021] 5 Balr 479 (Meibc), (hereinafter, referred to as the *Numsa* case).

769 *Numsa* case para 28.

770 *Numsa* case para 42.

771 *Numsa* case para 37, 38.

772 *Numsa* case para 44.

773 *Numsa* case para 40.

774 Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 156; *Dlamini/Doves Group (Pty) Ltd* [2022] 7 BALR (CCMA), (hereinafter, referred to as the *Dlamini/Doves* case) para 22.

775 Indeed for employers 2021 https://www.indeed.com; *Maphutha/Bidvest Protea Coin (Pty) Ltd* [2020] 1 BALR 61 (CCMA).

correction can be adopted when dealing with less serious offences.[776] However, there is no succinct rule on how many warnings must be issued before the dismissal.[777] Landis and Grossett[778] opine that the number of required warnings justify dismissal if further infraction occurs and progressive issues have been issued. In this regard, Du Plessis and Fouché[779] contends that dismissals for less significant offences are only justified if the employee has previously been found guilty of misconduct, has received warnings, and was reasonably aware that a further transgression may result in dismissal.

Serious or gross misconduct often results in a summary dismissal of an employee, which is deemed justifiable.[780] For example, in *Dlamini/ Doves Group (Pty) Ltd*,[781] the applicant was dismissed for instructing his subordinates to deliver the wrong body for burial. It was held that the applicant was grossly negligent and dishonest by misleading the family about the identity of the body in the coffin. The general rule is that an employer can dismiss an employee if the conduct is serious to the extent that it renders the continued employment relationship between the parties intolerable.[782] However, the *Code of Good Practice: Dismissal* does not fully elaborate as to what constitutes intolerable employment conditions. In the matter of *Sidumo & Another v Rustenburg Platinum Mines Ltd & others*,[783] it was held that the courts are compelled to make a value judgment on the merits of each case to determine the fairness of the penalty *vis-à-vis* the nature and circumstances of the misconduct in question. Hence, an objective evaluation should be exercised by the Court or Tribunal without any references made to the employer.[784]

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776 Item 3(3) of the *Code of Practice: Dismissal*. Formal procedures do not have to be invoked every time a rule or standard is not met or violated.

777 Du Plessis and Fouche *A Practical Guide to Labour Law* 350.

778 Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 158. See also Du Plessis and Fouche *A Practical Guide to Labour Law* 350.

779 Du Plessis and Fouche *A Practical Guide to Labour Law* 349.

780 Item 3(4) of the *Code of Good Practice: Dismissal*; Du Plessis and Fouche *A Practical Guide to Labour Law* 349.

781 *Dlamini/ Doves Group (Pty) Ltd* [2022] 7 BALR (CCMA).

782 Item 3(4) of *Code of Good Practice: Dismissal*; Du Plessis and Fouche *A Practical Guide to Labour Law* 349.

783 *Sidumo* case. Refer to para 4.2.

784 *Sidumo* case.

Another important factor is that dismissals should be considered to be the last resort, where the severity and repetition of the misconduct are the determinant factors.[785] According to the Code,[786] the first question is whether the employee disobeyed a rule that regulates conduct in the workplace. This is a question of fact, and the employer has the burden of proof.[787] Secondly, the validity and reasonableness of the rule should be considered.[788] Another crucial aspect is whether the employee was aware or could be reasonably expected to have been aware of the parameters of the rules and what the workplace standards entail.[789] Knowledge, in particular, is a determining factor that forms the basis of the alleged misconduct.[790] For instance, in the recent matter of *Eskort Limited v Stuurman Mogotso and Others*,[791] the respondent, who was the employee, was dismissed for failing to comply with the Covid-19 health and safety regulations in the workplace. The respondent knowingly concealed his Covid-19 status from his employer, despite the fact that there was a workplace rule which required employees to duly notify their employer if they suspected they were infected and had taken the test.[792] Given that the respondent was not only a manager but also a member of the Corona site committee, the Labour Court ruled that his conduct was reckless and irresponsible.[793] As a result, the employee was charged with gross misconduct for failing to disclose that he had tested positive for Covid-19, failing to self-isolate and exposing other employees at risk.[794] The Labour Court correctly affirmed that the dismissal was substantively fair.[795] This is a clear case in point where the employee is at fault because he knowingly and negligently violated a workplace rule. In light of the facts of the case, it is opined that both the employer and the Labour Court had compelling reasons to dismiss the employee, hence it was justified. It is submitted that this requirement does not necessitate actual subjective knowledge, but rather

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785 Item 3(3), (4) of *Code of Good Practice: Dismissal*.
786 Item 7(a) of *Code of Good Practice: Dismissal*.
787 Van Niekerk *et al Law @ Work* 282.
788 Item 7(b)(i) of *Code of Good Practice: Dismissal*.
789 Item 7(b)(ii) of *Code of Good Practice: Dismissal*.
790 Van Niekerk *et al Law @ Work* 283.
791 *Eskort Limited v Stuurman Mogotso and Others* (2021) 42 ILJ 1201 (LC), (Hereinafter, referred to as the *Eskort Limited* case).
792 *Eskort Limited* case para 17.1.
793 *Eskort Limited case* para 17.2; 17.3.
794 *Eskort Limited* case para 20.
795 *Eskort Limited* case para 21.

that the employee could reasonably be expected to know the rule.[796] As established earlier, in some cases, an employee can still be reasonably expected to be aware of certain misconduct that is considered intolerable even if it is not communicated to him or her.[797]

In addition to the aforementioned requirements, other factors that an employer should consider include the disciplinary record, personal circumstances and that of the violation, the nature of the job and the employee's length of service.[798] As illustrated in the *Numsa* case discussed above, these factors will ascertain whether a dismissal is an appropriate sanction.[799] Essentially, the employer must have consistently applied dismissal as a penalty in the past amongst the same or other employees,[800] particularly, if the other employees also engaged in related misconduct or misconduct under similar circumstances.[801] The burden of proof rests on the employer, on a balance of probabilities that based on the facts presented, a subsequent dismissal is an appropriate sanction.[802] All these substantive guidelines should be taken into consideration to determine whether the employee's dismissal based on misconduct is deemed to be substantively fair.

As mentioned earlier, the *LRA* requires that all dismissals must be effected in accordance with fair procedure. This means that if the dismissal is not carried out in terms of fair procedure, regardless of whether it was substantively fair, it will be deemed unfair. Item 4 of the *Code of Good Practice: Dismissal* stipulates detailed guidelines for determining procedural fairness of a dismissal based on misconduct. In cases of misconduct, the *Code of Good Practice: Dismissal* requires that the employer must conduct an investigation to ascertain whether there are valid grounds for

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796 Van Niekerk *et al Law @ Work* 283.
797 Van Niekerk *et al Law @ Work* 283.
798 Item 3(5) of *Code of Good Practice: Dismissal*; *Numsa* case para 44; *Sidumo* case para 78.
799 Van Niekerk *et al Law at Work* 274; *Numsa* case para 44.
800 Item 3(6) of Code of Good Practice: Dismissal.
801 Item 3(6) of *Code of Good Practice: Dismissal*; *Kock v CCMA* [2019] 7 BLLR 703 (LC). In this case, the applicant was dismissed for repeatedly disobeying her supervisor's instructions. The Labour Court ruled that the dismissal was fair because the applicant kept repeating the same behavioural offences, which demonstrated no remorse for her conduct.
802 Van Niekerk *et al Law @ Work* 282.

dismissal.[803] The purpose of an investigation is to establish whether there is a *prima facie* case against the employee.[804] Thereafter, the employer must inform the employee of the allegations levelled against him or her in a manner and language that is considered reasonably understandable.[805] In accordance with the *audi alteram partem* rule, the employee should be afforded the opportunity to be heard by stating the allegations levelled against him or her.[806] This includes affording the employee reasonable time to prepare a response and to be represented by a trade union representative or another fellow employee.[807] Subsequently, the employer should communicate the decision taken and furnish the employee with written determination of that decision.[808] A comparison regarding procedural guidelines of misconduct dismissals and incompatibility dismissals is drawn in the discussion below. This will determine whether incompatibility should be regarded as a species of misconduct or as a separate ground for dismissal.

It is clear that the fairness of a dismissal based on misconduct is based on the contravention of a valid and reasonable rule in the workplace that the employee was aware of, or could reasonably be expected to be aware of. It is argued that misconduct is included as a ground for dismissal because it is the right of the employer to maintain discipline and order in the workplace. Employees cannot be left to run rampant. The discussion below highlights the distinction between misconduct and incompatibility. In addition, the discussion ascertains whether incompatibility can be regarded as a species of misconduct or rather as a separate ground for dismissal in South African labour law.

4.5.2 Misconduct vs Incompatibility

As previously stated, there is no consensus on whether incompatibility falls under misconduct, incapacity or operational requirements.[809] Consequently, it is incumbent

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803 Item 4(1) of the *Code of Good Practice: Dismissal*.
804 Grogan *Workplace Law* 221.
805 Item 4(1) of the *Code of Good Practice: Dismissal*.
806 Item 4(1) of the *Code of Good Practice: Dismissal*; Du Plessis and Fouche *A Practical guide to Labour Law* 351.
807 Item 4(1) of the *Code of Good Practice: Dismissal*.
808 Item 4(1) of the *Code of Good Practice: Dismissal*.
809 Manamela 2019 *Obiter* 98,114; Work law 2022 https://worklaw.co.za. Refer to para 4.4.

that one determines whether incompatibility is a species of misconduct or whether it should be regarded as a separate ground entirely for purposes of determining the applicable substantive and procedural requirements. It may be argued that for purposes of clarity and justification for the argument that incompatibility should be a separate ground for dismissal, a definite and legit distinction between incompatibility and other grounds of dismissal should be necessitated.

In a few instances, incompatibility has been classified as a species of misconduct by the South African courts.[810] Furthermore, some academic scholars opine that when an employee conducts him or herself in a way that causes disharmony and disruption in the workplace, they will be found guilty of misconduct arising from incompatibility.[811] For instance, when an employee is disruptive and engages in acts bordering on insubordination,[812] such as abusive language, particularly racism. However, it is submitted that this assertion is not entirely true. It is argued that misconduct arises only when a rule of conduct is contravened, whilst incompatibility may arise as a result of a mere personality issue which caused disharmony, and where no rule of conduct was contravened. Nonetheless, Raligia and Nxokweni[813] contend that racial undertones can also cause interpersonal conflicts between individuals which potentially leads to incompatibility in the workplace. The assertion is that racism in the workplace thrives in a disharmonious climate.[814] In the matter of *Erasmus v BB Bread*,[815] the applicant issued a derogatory remark to one of his subordinates to the effect that "black employees stink and they should consider taking a shower before coming to work".[816]

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810 Mokumo *The Dismissal of Managerial Employees for Poor Work Performance* 58; *Erasmus* case; *Wereley v Productivity SA & another* (2020) 41 ILJ 997 (LC) (Hereinafter, referred to as the *Wereley* case); *SARU v Watson* (2019) 40 ILJ 1052 (LAC) (Hereinafter, referred to as the *SARU* case); *Jardine v Tongaat Hulet Sugar Ltd* 2002 23 ILJ 547 (CCMA) (Hereinafter, referred to as the *Jardine* case); *Miyeni v Chillibush Communications (Pty) Ltd* 2010 31 ILJ 3054 (CCMA) (Hereinafter, referred to as the *Miyeni* case); *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 112 (LAC)(Hereinafter, referred to as the *Lebowa case*).

811 Raligilia HK and Nxokweni U "Legal Pitfalls of Incompatibility in the Workplace: An Examination of the Landmark Ruling on Racism in Rustenburg Platinum Mine v SAEWA obo Meyer Bester 2018 (5) SA 78 (CC)" 2020 *Obiter* 431; Mokumo *The Dismissal of Managerial Employees for Poor Work Performance* 58; Van Niekerk et *al Law at Work* 307.

812 Van Niekerk *et al Law at Work* 307.

813 Raligilia and Nxokweni 2020 *Obiter* 432.

814 Raligilia and Nxokweni 2020 *Obiter* 432.

815 *Erasmus v BB Bread* 1987 8 ILJ 537 (IC)(Hereinafter, referred to as the *Erasmus* case).

816 *Erasmus* case 542.

The applicant was required by management to apologise to his black counterparts after his condescending remarks that they did not know how to use taps and ridiculing the King Goodwill of the Zulus as an "animal".[817] Consequently, the applicant's conduct caused consternation and disharmony in the workplace which resulted in incompatibility. At a first glance, the employee's dismissal could be said to border between both misconduct and incompatibility.[818] However, the court held that reasons for dismissal based on incompatibility were valid because the employer is entitled to harmonious interpersonal relationships amongst his employees on the factory floor.[819] This is a clear indication that incompatibility can exist as a separate and legitimate ground for dismissal without being classified as misconduct.

Other similar matters of this nature include *Lebowa Platinum Mines Ltd v Hill*[820] and *Rustenburg Platinum Mine v SAEWA obo Meyer Bester*.[821] In *Lebowa Platinum Mines*,[822] the respondent was found guilty of referring to another black employee as a "bobbejaan" which translates to a baboon. The trade union that was representing the black employee threatened to strike if the respondent was not dismissed. After numerous attempts were made by the union and management to resolve the matter, the respondent was dismissed because he refused to accept the offer of a transfer to another mine.[823] However, the issue had changed from one of misconduct to whether the employee's further employment was "compatible" with the employer's commercial operations. The trade union argued that a mere verbal warning for misconduct was insufficient to address the respondent's reprehensible conduct.[824] It is argued that the reasoning of the LAC that dismissal was the last resort is correct because retaining the respondent would only hinder the smooth operation of the business and cause the applicant undue hardship.[825] This is especially considering that the unionised workers

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817 *Erasmus* case 542.
818 Raligilia and Nxokweni 2020 *Obiter* 434, 435.
819 Erasmus v BB Bread 544.
820 *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 112 (LAC) (Hereinafter, referred to as the *Lebowa Platinum Mines* case).
821 Rustenburg Platinum Mine v SAEWA obo Meyer Bester 2018 (5) SA 78 (CC) (Hereinafter, referred to as the Rustenburg Platinum Mines case).
822 *Lebowa Platinum Mines* case.
823 *Lebowa Platinum Mines case* 1113.
824 *Lebowa Platinum Mines* case 1113.
825 *Lebowa Platinum Mines* case 1129.

(who represented the majority of the workforce) had threatened to resort to industrial action if the respondent was retained.[826] From this matter, one can deduce that there are circumstances where the line between incompatibility and misconduct is blurred. Moreover, there are also instances where the incompatible behaviour can suitably be addressed through misconduct procedures as it truly does manifest in the contravention of some well-established rule of conduct (such as not committing racism in the workplace). However, when the employee is regarded as incompatible simply because he does not fit within the corporate culture or due to his disruptive mannerisms or management style, following misconduct procedures will not be appropriate and an approach more targeted on the incompatibility itself be required.

Similarly, in the matter of *Rustenburg Platinum Mine*,[827] the respondent was dismissed on the ground of misconduct after making racial remarks about a fellow employee by referring to him as a "black man". Raligilia and Nxokweni[828] correctly argue that the respondent's remarks and conduct not only caused disharmony in the workplace but also potentially deepened divisions amongst employees. Consequently, this would negatively impact the employer's operations. As in the matter of *Erasmus*, both the matter of *Lebowa Platinum Mines Ltd v Hill*[829] and *Rustenburg Platinum Mine v SAEWA obo Meyer Bester*[830] clearly outline the legal pitfalls of incompatibility in the workplace. It is argued that circumstances which could render an employee incompatible could also be appropriately addressed through misconduct rules and procedures because the behaviour of the employee did contravene a workplace rule. Although there is merit in considering incompatibility as a species of misconduct, this cannot always be the case, because it will depend on the circumstances. It is submitted that this classification is problematic in situations where there is no contravention of a rule, but where incompatibility is due to the employee's attitude, disruptive behaviour or character. For this reason, it is argued that incompatibility should be regarded as a separate and legitimate ground for dismissal without being classified as misconduct,

826 *Lebowa Platinum Mines* case 1125.
827 *Rustenburg Platinum Mines* case.
828 Raligilia and Nxokweni 2020 *Obiter* 434, 435.
829 *Lebowa Platinum Mines* case.
830 *Rustenburg Platinum Mines* case.

and proper regulatory provision should be made for how dismissals in this regard should be approached.

Furthermore, the courts have not been consistent in dealing with incompatibility cases as those that fall under misconduct. This is shown in judgements such as *Wereley v Productivity SA*[831] and *SARU v Watson*.[832] In *Wereley v Productivity SA*,[833] the applicant, who is the employee in this case, was issued a notice to appear at a disciplinary hearing on several counts of misconduct while on suspension. In addition, the employer alleged in the notice that the employee had created a toxic and disharmonious working environment, which justified her dismissal regardless of the outcome of the disciplinary investigation.[834] The allegations levelled against the applicant included sending a disrespectful email accusing the CEO of "using the taxpayer's money to pursue a personal vendetta against her".[835] Although the applicant later apologised for her emotional outburst, she did not retract any of the claims she raised against the CEO, thereby undermining management's authority.[836] Subsequently, the employer summarily terminated the applicant's employment contract. The Labour Court held that the case was plainly one of incompatibility falling under misconduct considering that the applicant fostered and aggravated a disharmonious working environment.[837] Therefore, the matter was to be dealt with by way of a disciplinary hearing. Inadvertently, the Court also indicated that the incompatibility can be dealt with as an operational requirement dispute.[838] Evidently, there is no parity in reasoning by the courts in such instances. This was a situation with facts similar to the above cases where the circumstances could constitute misconduct, but in this event, the court was willing to accept that regardless of this fact, operational requirements could similarly have been implemented as the ground for dismissal. The court did not explain why operational requirements were a suitable

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831 *Wereley v Productivity SA & another* (2020) 41 ILJ 997 (LC), (hereinafter, referred to as the *Werely* case).
832 *SARU v Watson* (2019) 40 ILJ 1052 (LAC), (hereinafter, referred to as the *SARU* case).
833 *Wereley* case 998.
834 *Wereley* case 998.
835 *Wereley* case 1012.
836 *Wereley* case 1012.
837 *Wereley* case 998.
838 *Wereley* case 1010.

ground for dismissal, except that it was a possible alternative if the applicant's behaviour could not be classified as misconduct by the employer. It is argued that the court may have opted to rely on operational requirements based on the reasoning that the dismissal could be for "similar reasons".[839] It is argued that this approach would not necessarily be suitable because unscrupulous employers may arbitrarily dismiss vulnerable employees under the guise of "operational requirements", without being able to truly prove that the employee was indeed incompatible and thus responsible for disharmony and disruption. The different classifications of incompatible behaviour draw heavily on the lack of legal certainty and the need to establish incompatibility as a legitimate and separate ground for dismissal in South African labour law.

Another instance where the courts have not been consistent in classifying incompatibility as a species of misconduct is the matter of *SARU v Watson*.[840] In this instance, the respondent, who is the employee, was employed by the applicant as a general manager in charge of rugby referees. He was dismissed for misconduct on the basis of incompatibility caused by his behaviour. Among the reports of his behaviour were allegations that his managerial style was profane, degrading, unprofessional, and aggressive.[841] The question before the LAC was whether the use of profane language when engaging with each other was part and parcel of the "rugby culture".[842] The court held that the applicant's alleged incompatibility cannot be viewed in isolation from misconduct.[843] This is because there is, according to Tlhotlhalemaje J, a fine line between incompatibility and misconduct.[844] Although the LAC opined that there is no reason why an employer should not treat an employee's incompatibility as misconduct if he or she continues to act erratically,[845] this assertion could with respect not be regarded as accurate for all instances of incompatibility. This is especially if the

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839 *Wereley* case 1010. In terms of section 213 of the *LRA*, operational requirements refers to requirements based on the economic, technological, structural or similar needs of an employer.

840 Watson v South African Rugby Union (SARU) [2017] ZALCJHB 264.

841 *SARU v Watson* case para 2, 82. Facts are similar to the *Jardine v Tongaat Hulett* case and Miyeni v Chillibush case. In both cases, the applicants who were managers were found to be incompatible on the grounds of misconduct. Their personalities were found to be abrasive towards other employees. This affected interpersonal relationships in the workplace.

842 *SARU v Watson* case para 2, 82.

843 *SARU v Watson* case para 56, 64.

844 *SARU v Watson* case para 56, 79.

845 *SARU v Watson* case para 79.

employee in question did not contravene an established disciplinary rule through his or her conduct, but simply caused disruption or disharmony due to his or her personality traits or mannerisms or simply for not fitting in with the corporate culture. This being said, there was also a contradiction by the court in classifying the alleged incompatibility as incapacity.[846] The court held that the starting point in dealing with cases of incompatibility is to classify it as incapacity.[847] This is especially when the employee fails to rectify his conduct even after the employer has taken all reasonable steps to assist him or her without any success.[848] This assertion may also be inaccurate because relying on incapacity as a ground of dismissal assumes that the employee is incapable of performing the standard expected of him or her (as per item 9 of the *Code of Good Practice: Dismissals*), which would not necessarily be the case.[849] There was no indication that the applicant failed to carry out his duties competently. It is argued that failure to apply consistency when dealing with incompatibility cases, not only creates discordancy, but it also gives rise to uncertainty as to which substantive and procedural guidelines will be applicable. Therefore, the need to establish incompatibility as a legitimate and separate ground for dismissal in South African labour law cannot be overlooked.

It is further argued that classifying incompatibility as a genus of misconduct is inappropriate. As highlighted above, incompatible behaviour is not misconduct if the employee does not contravene a rule of conduct in the workplace.[850] As in the matter of *Jardine v Tongaat Hulett Sugar*,[851] the applicant incessantly questioned the instructions of management which was a hindrance in carrying out teamwork with other colleagues.[852] The Tribunal held that although the respondent followed a graduated and progressive approach to discipline the applicant by issuing warnings,

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846 *SARU v Watson* case para 79.
847 *SARU v Watson* case para 79.
848 *SARU v Watson* case para 79.
849 An analysis of incompatibility as a genus of incapacity is discussed below.
850 Item 7 of the *Code of Good Practice: Dismissal*. Items 3 and 7 of the *Code of Good Practice*: Dismissal stipulate detailed guidelines for determining substantive fairness of a dismissal based on misconduct. The first question is whether the employee disobeyed a rule that regulates conduct in the workplace. This is a question of fact, and the employer has the burden of proof.
851 *Jardine and Tongaat Hulett Sugar Ltd* (2002) 23 ILJ 547 (CCMA), (hereinafter, referred to as the *Jardine* case).
852 *Jardine* case para 22.

the applicant's conduct did not fall under traditional misconduct.[853] It is in fact correct that it was a matter of the applicant's incompatibility with the "corporate culture" of the organisation as he could not work harmoniously with his other colleagues.[854] It is argued that although an obligation is placed on the applicant to maintain harmony in the workplace, there was no indication that the applicant explicitly contravened a workplace rule.[855] Moreover, Griessel[856] argues that misconduct refers to singular incidents of unacceptable behaviour, whereas incompatibility refers to the employee's ongoing and underlying disharmonious conduct – an assertion Mafojane appears to agree with.[857] Mafojane[858] reaffirms that incompatibility must be a result of a snowball effect of multiple incidents of the employee's inability to maintain harmonious relations with his/her colleagues and/or failing to fit in with the "corporate culture" of the employer. Based on the observations of case law discussed above, it is correct that incompatibility cannot be solely based on a singular incident. This is especially true if an employee is deemed incompatible based on a single incident without first assessing the situation over a reasonable period of time. It may allow the employee to be victimised by the employer and/or other co-workers. Hence, an employee is regarded as being incompatible when their colleagues are repetitively subjected to their behaviour which is not only disruptive but also causes disharmony in the workplace.[859] A clear example is the case of *Erasmus*. The applicant was the subject of a number of reports that occurred on several occasions. These included the applicant's uncompromising and difficult attitude in communicating with the sales representatives, how he exercised his management powers arbitrarily towards his subordinates, and his lack of interpersonal skills with his subordinates which was reflected by the careless and insensitive manner in which he spoke to them and the numerous personality clashes with trade unions and his superiors at that time.[860] It

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853 *Jardine* case para 17.
854 *Jardine* case para 21.
855 *Jardine* case para 38.
856 Griessel 2017 https://www.linkedin.com; *Subrumuny case* 2781.
857 Mafojane 2014 *Incompatibility in the workplace* https://www.lexology.com accessed 5 April 2021.
858 Mafojane 2014 *Incompatibility in the workplace* https://www.lexology.com.
859 Law@Work *Incompatibility in the Workplace- Can you remove the "stirrer"* 2018 http://law-at-work.co.za accessed 10 December 2021.
860 *Erasmus v BB Bread* 542.

is evident that none of the behaviours spell misconduct in the true sense of the word since none of these issues are conduct that the employer can validly prohibit in his workplace in terms of a disciplinary code. The guidelines for misconduct will not be appropriate since the employer will have difficulty proving that valid rules of conduct in this regard existed. It is further argued that it would be impossible for the employer to implement valid rules that relate to one's personality. For instance, it will be difficult to implement a rule stating that his employees may not be introverted, shy, abrasive, short-tempered or eccentric as this will go beyond the scope of what the employer may regulate. To resolve these *lacunae* in the law, it is understandable that incompatibility must be established as a legitimate and independent reason for dismissal in South African labour law.

4.6 Incapacity as a ground for dismissal

Incapacity is the second ground for fair dismissals listed in the *LRA*.[861] However, similar to misconduct, the *LRA* only refers to incapacity as a ground for dismissal but it does not elaborate on what it entails.[862] Unlike misconduct, the uniqueness of this ground for dismissal is that each case of incapacity may be due to a number of factors depending on its facts. The *Code of Good Practice: Dismissal* distinguishes between two categories of incapacity – incapacity arising from poor work performance and incapacity resulting from ill health or injury.[863] It is argued that although there are two categories of incapacity, both dismissals arising from poor performance and ill health or injury refer to the inability of an employee to comply with job requirements and expected reasonable standards.[864] This is opposed to an employee who will not or could not be bothered to meet the required workplace standards, which would constitute misconduct.[865] It is submitted that, unlike misconduct, incapacity is a "no

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861 S188 of the *LRA*.

862 S188 of the *LRA*; Manamela 2019 *Obiter* 101.

863 Item 8 and 10 *Code of Good Practice: Dismissal*.

864 Slabbert JA, Parker AJ and Farrell DV *Employment Relations Management Back to Basics: A South African Perspective* (Lexis Nexis, Durban South Africa 2015) 121.

865 Van Niekerk *et al Law @ Work* 299; *Shoprite Checkers (Pty) Ltd t/a Hyperama v CCMA & others* [2002] 11 BLLR 1105 (LC). The Labour Court ruled in this matter that the employer was justified in dismissing the employee for misconduct who was aware that he was not permitted to possess a firearm during work hours. *Pailpac (Pty) Ltd v Williams de Beer N.O and others* [2021] JOL

fault" dismissal.[866] This means that the dismissal of the employee took place due to circumstances beyond the employee's control which led to substandard work performance.

Poor work performance refers to incapacity arising from an employee failing to meet the performance standard/s set by the employer in the workplace.[867] Secondly, poor performance also refers to situations in which the employee has performed poorly due to a lack of adequate training or supervision, skills, knowledge, machinery and/or equipment.[868] Poor performance, according to Landis and Grossettt[869] is a form of unacceptable failure by the employee to meet standards which puts other employees at risk, as well as performance that results in time and material losses for the business enterprise. However, incapacity arising from ill health or injury refers to instances where an employee is unable to do the job due to a temporary or permanent injury and/or illness.[870] This encompasses injuries caused by an accident as well as hearing, sight, physical or mental impairments.[871] Therefore, depending on the facts of the case, the *Code of Good Practice: Dismissal* clearly sets out substantive and procedural guidelines to follow for poor work performance or ill health/injury.[872]

49836 (LAC). In this matter, the Labour Court held that the dismissed employees for misconduct were reasonably aware of the workplace regulations that prohibited them from carrying weapons during a strike.

866 Grogan *Workplace Law* 246; Du Plessis and Fouche *A Practical Guide to Labour Law* 352; Griessel 2017 https://www.linkedin.com.

867 Items 8 and 9 *Code of Good Practice: Dismissal*. Items 8 and 9 specifically provide substantive guidelines for dismissals arising from incapacity for poor work performance. Notably, item 8 sets out substantive guidelines in respect of probationary employees or those employees who are post probationary period (tenured employees). Whereas, item 9 specifically deals with incapacity arising from poor work performance disputes. The South African Labour Guide 2021 *Poor Performance* https://www.labourguide.co.za accessed 7 April 2021; Institute for Employment Studies *Report Summary: Tackling Poor work performance* 2021 https://www.employment-studies.co.uk accessed 7 April 2021.

868 Slabbert, Parker and Farrell *Employment Relations Management Back to Basics: A South African Perspective* 121.

869 Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 238.

870 Item 10 of the *Code of Good Practice: Dismissal*. Item 10 provides substantive guidelines for dismissals arising from incapacity due to ill health or injury. UKZN 2021 Employee and Labour Relations: Incapacity due to Employee's ill- health or injury http://labourrelations.ukzn.ac.za/ accessed 7 April 2021; Slabbert, Parker and Farrell *Employment Relations Management Back to Basics: A South African Perspective* 121.

871 UKZN 2021 http://labourrelations.ukzn.ac.za.

872 Item 8, 9, 10 and 11 of the *Code of Good Practice: Dismissal*; *SASBO obo Mahlangu v CCMA and Others* (JR1142/15) [2019] ZALCJHB 52 para 18; *Midas Group Komatipoort v NUMSA and Others*

Given the nature of incompatibility being linked to attitudes, personality traits, and not fitting in with the corporate culture or management styles, the issue of ill health or injury is not relevant to the discussion at hand. As far as incompatibility and the argument of incapacity are concerned, this discussion only focuses on poor work performance as a form of incapacity.

4.6.1 Substantive and procedural fairness of dismissals based on incapacity under the Code of Good Practice: Dismissal

As in the case of misconduct, there must be fair reasons for dismissal for incapacity. The *Code of Good Practice: Dismissal* provides different guidelines for poor work performance and ill health or injury. Consequently, each case has to be determined on its merits. Items 8 and 9 specifically provide substantive guidelines for dismissals arising from incapacity for poor work performance.[873] Notably, item 8 sets out substantive guidelines with respect to probationary employees or those employees who are post probationary period (tenured employees).[874] A newly employed employee can be placed on probation for a reasonable period of time, depending on the demands of the job.[875] The purpose of the probationary period is to allow the employer the opportunity to assess the performance of the prospective employee before confirming the appointment.[876] Hence, an employer should, by all means necessary, provide any assessment, guidance, or counselling to an employee as required.[877]

Item 8(2) sets out factors that an employer must prove to justify dismissals for tenured employees. It is argued that the substantive reasons for poor work performance that the employer must prove to justify dismissal for tenured employees are similar to those required for probationary employees. Before a tenured employee is dismissed,

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(JR1585/14) [2018] ZALCJHB 83; *Rema Tip Top(Pty) Ltd v Osman NO and Others* (J2024/08) [2011] ZALCJHB 72.

873 Collier *D et al Labour Law in South Africa Context and Principles* (Oxford University Press Southern Africa Capetown) 230.

874 Item 8 of the *Code of Good Practice: Dismissal*; Grogan *Dismissa*l (Juta Capetown 2022) 339.

875 Item 8 of the *Code of Good Practice: Dismissal*; Grogan *Dismissa*l 339.

876 Item 8 of the *Code of Good Practice: Dismissal*; Finnemore *et al Introduction to Labour Relations in South Africa* 292; Grogan *Dismissal* 339; Mokumo MF The D*ismissal of Managerial Employees for Poor Work Performance* (LLM- dissertation University of Limpopo 2012) 12.

877 Item 8 of the *Code of Good Practice: Dismissal*.

the employer must prove that the individual received proper training, instructions, appropriate evaluation, guidance and counselling.[878] In addition, it is only fair that the employer must grant the employee a reasonable time for the employee to improve his performance.[879] Only after proving all of the above can the employer dismiss a tenured employee for poor work performance. Item 9 also includes additional criteria to consider when dealing with disputes arising from poor work performance.[880] Firstly, it must be determined whether the employee failed to meet the performance standard(s) of the employer.[881] This is proven by an objective assessment or appraisal of the employee's work.[882] It is argued that an objective assessment will protect employees from being susceptible to a subjective and biased assessment by the employer. Furthermore, the employee must have been aware of or is reasonably expected to be aware of the performance standards set by the employer.[883] Grogan[884] contends that this question is a matter of fact. He further adds that factors such as the nature of the employee's work and position; his or her experience, skill and qualifications play a significant role in making this determination.[885] After these requirements have been met, dismissal would be deemed the appropriate sanction.[886]

As established earlier, dismissal must be effected in accordance with fair procedure. Item 8(3) and (4) of the *Code of Good Practice: Dismissal* briefly sets out procedural guidelines when dealing with dismissals arising from poor performance. Any procedure that leads to any dismissal arising from poor performance, ill health or injury should be initiated by an investigation by the employer.[887] The procedure leading to dismissal arising from poor performance should include an investigation to establish the reasons for the unsatisfactory performance.[888] It is argued that neither the LRA nor the *Code of Good Practice: Dismissal* elaborate on the nature of the investigation or how it will

878 Item 8(2)(a) of the *Code of Good Practice: Dismissal*.
879 Item 8(2(b) of the *Code of Good Practice: Dismissal*; Grogan *Dismissal* 340.
880 Item 9 of the *Code of Good Practice: Dismissal*.
881 Item 9 of the *Code of Good Practice: Dismissal*.
882 Grogan *Dismissal* 339.
883 Item 9 of the *Code of Good Practice: Dismissal*.
884 Grogan *Dismissal* 339.
885 Grogan *Dismissal* 340.
886 Item 9 of the *Code of Good Practice: Dismissal*.
887 Item 8, 10 of the *Code of Good Practice: Dismissal*.
888 Item 8, 10 of the *Code of Good Practice: Dismissal*.

be carried out. It is, however, submitted that the basis of this investigation would ordinarily arise from the evaluation, instruction(s), training, guidance, or counselling provided by the employer to enable the employee to reach the required standard of satisfactory service in the workplace.[889] In this regard, weaknesses in managerial support and the extent to which the employer failed to create the conditions that enable satisfactory work performance will be investigated.[890] It is further argued that an appraisal of the employee's performance could also form part of the employer's investigation. Grogan[891] correctly asserts that an appraisal gives the employer the chance not only to assess the employee's performance but also to discuss the problems that may have been identified with the employee. Considering these facts presented, the employer should consider other alternatives to remedy the matter.[892] To ensure a fair process during or after the probationary period, an employee should be given the opportunity to defend their case and be presented by either a trade union representative or a fellow employee.[893]

The case of *Fedcraw Obo Maguyema / Yukon Farms (Pty) Ltd*,[894] illustrates how the courts have applied these substantive and procedural guidelines when dealing with dismissals arising from poor performance. In this matter, the applicant, who was employed as a packer was dismissed for poor work performance after she failed to reach packing targets.[895] The question before the Tribunal was whether the dismissal was substantively and procedurally fair. In reaching its decision, the Tribunal relied on item 9 of the *Code of Good Practice: Dismissal*.[896] Firstly, it was confirmed that the respondent, who was the employer, had a performance policy in the workplace which stipulated the performance standards that employees were expected to meet.[897] Hence, this meant that no exceptions would be made for the applicant. Yet, the

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889 Item 8(2) of the *Code of Good Practice: Dismissal*; Grogan *Dismissal* 343.
890 Van Niekerk *et al Law @ Work* 305.
891 Grogan *Dismissal* 343.
892 Item 8(3) of the *Code of Good Practice: Dismissal*.
893 Item 8(1),(4) of the *Code of Good Practice: Dismissal*.
894 *Fedcraw Obo Maguyema / Yukon Farms (Pty) Ltd* 592 [2020] 6 BALR 592 (CCMA), (hereinafter, referred to as the *Fedcraw* case).
895 *Fedcraw* case para 7.
896 *Fedcraw* case para 22.
897 *Fedcraw* case para 65.

applicant denied any knowledge of any performance standards in the workplace.[898] The Tribunal was correct in its findings that it was highly improbable that the applicant was not aware of the performance standard because she was a member of the trade union that negotiated the performance policy with the employer.[899] Furthermore, the applicant was made aware of the performance standards when she was offered counselling services by the respondent.[900] Nonetheless, the applicant failed to fulfil the performance standard due to her slowness and inability to reach her target.[901] The Tribunal found no justification for the applicant's failure to meet the required targets given that she had done so in the past and on numerous occasions.[902] Procedurally, the applicant was provided with counselling by the respondent, given an opportunity to state her case and was allowed to have representation during the hearing.[903] Moreover, the respondent had given the applicant three months to meet the target.[904] It is submitted that this was a reasonable opportunity for the applicant to meet the standard of the respondent. Based on the facts presented before the Tribunal, the dismissal was held to be substantively and procedurally fair.[905]

It is contended that the Tribunal was correct in its findings because all the substantive and procedural requirements were met by the employer. It is evident that the employee could not perform the services she was appointed for. In this regard, it is submitted that incapacity is based on a poor standard of service delivery, a standard an employee was aware of, but the quality of the services delivered was below that standard or insufficient. In the context of incompatibility, quirky or abrasive behaviour that causes disharmony, or the fact that an employee does not fit in, does not automatically translate into a poor standard of job performance. The discussion below highlights the distinction between incapacity for poor work performance and incompatibility. This assists in ascertaining whether incompatibility can be regarded as

898 *Fedcraw* case para 68.
899 *Fedcraw* case para 68.
900 *Fedcraw* case para 68.
901 *Fedcraw* case para 69.
902 *Fedcraw* case para 74.
903 *Fedcraw* case para 76.
904 *Fedcraw* case para 76.
905 Fedcraw case para 82.

a species of incapacity for poor work performance or as a separate ground for dismissal in South African labour law.

4.6.2 Incapacity vs Incompatibility

Van Niekerk *et al*[906] accurately state that employers are frequently faced with the dilemma of correctly classifying the employee's conduct that renders him/her incompatible because it is often dealt with as a form of incapacity. Various academics and the South African courts in a number of court judgements argue that incompatibility is a species of incapacity.[907] A number of reasons have been put forward to justify this assertion. Firstly, it is argued that incompatibility assumes a form of inability to work within the circumstances in which the employee is engaged, rendering the employee incapable of performing to the standard expected of him or her.[908] In the matter of *SARU v Watson*,[909] which was discussed earlier, the Court held that the starting point is to treat any allegation of incompatibility as an instance of incapacity. In the judgements of *Subrumuny v Amalgamated Beverages*,[910] *Mgijima v MEC of Education*[911] and *Lotter and SA Red Cross*,[912] it was held that incompatibility is a species of incapacity because an employee is unable to maintain an appropriate standard of harmonious relationships with peers, subordinates and superiors, as may be reasonably required by the employer. Particularly, in the matter of *Subrumuny v Amalgamated Beverages,* the Tribunal ruled that incapacity arises from an inability to conform to the workplace standards set by the employer to achieve workplace harmony, rather than from poor work performance. Contrary to the findings of the Tribunal, it is contended that this assertion may not always be true. It is argued that for incompatibility to be a species of incapacity, the incompatibility must directly relate

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906 Van Niekerk *et al Law @ Work* 299.

907 *Jabari v Telkom SA (Pty) Ltd*; *Mgijima v MEC of Education; Subrumuny v Amalgamated Beverage Industries*; *Lotter and SA Red Cross Society*; *Edcon v Padayachee*; *Brereton v Bateman*; Van Niekerk *et al Law @ Work* 307; Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 237; Raligilia and Nxokweni 2020 *Obiter* 432.

908 *Jabari v Telkom* SA. Refer to chapter 2; Van Niekerk *et al Law @ Work* 307.

909 *SARU v Watson* para 79. Refer to para 4.4.1.

910 *Subrumuny c*ase 2781,2790; Griessel 2017 https://www.linkedin.com; Bregman Moodley Attorneys 2021 *Dismissal for incapacity* https://www.bregmans.co.za accessed 13 January 2021.

911 *Mgijima v MEC* case para 70.

912 *Lotter and SA Red Cross* case 2492.

to the employee's performance, not merely his or her inability to maintain harmonious relationships. It is evident from the wording in the *Code of Good Practice* under items 8 and 9, where the word "performance" is used repeatedly, that the legislature intended to consider incapacity primarily in the context of the quality of service delivery and the employee's ability to perform well and meet the employer's required targets. Thus, a person's perceived incompatibility in the various forms it might present itself does not necessarily render the person incapable of performing his job well. As discussed in the previous chapters, incompatibility occurs when an employee fails to fit in with the "corporate culture" in the workplace or when he/she is unable to work harmoniously with either the employer or other employees in the workplace due to personality clashes and differences.[913] This general understanding of what incompatibility is, is at odds with the understanding of what incapacity is.

Furthermore, it is argued that just like in instances of incapacity, before dismissing an employee for incompatibility the employer is expected to make sensible, practical and genuine efforts to maintain harmonious interpersonal relationships among employees in the workplace.[914] This includes counselling and/or reasonably accommodating the employee in a quest to rectify the disharmony. In addition, incompatibility is said to be classified under incapacity because the employee concerned is not to blame or at fault for the conduct that renders them incompatible.[915] Grogan[916] argues that incompatibility and unsuitability are subtle forms of poor performance. He further adds that these are best suited to fall under poor performance because they affect the employees' ability to work in accordance with the terms of their employment contracts.[917] In most circumstances, however, identifying incompatibility as a species

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913 Refer to chapter 2, para 2.6.1.

914 *Jabari v Telkom SA (Pty) Ltd*; *Van Niekerk et al Law* @ Work 307.

915 Tony Healy and Associates 2022 *Incompatibility can be a case of misconduct or incapacity* https://tonyhealy.co.za accessed 9 January 2021.

916 Grogan *Workplace Law* 253; Burger WM *Incapacity as a Dismissal Ground in South African Labour Law* (LLM Labour- Dissertation University of Pretoria 2013)1-70, 5; Moodley Attorneys 2021 *Dismissal for incapacity* https://www.bregmans.co.za accessed 13 January 2021. It is argued that poor performance includes incompetence i.e lack of skill or knowledge, carelessness, inaccuracies and incompatibility i.e poor social skills and failure to comply with reasonable standards.

917 Grogan *Workplace Law* 253.

of incapacity is deemed inappropriate. Watkins[918] points out that incompatibility is clearly more of an attitude and personality problem than one of poor performance. An employee might be very competent at his or her job and perform well and efficiently (thus not incapacitated), while other employees simply feel that due to his or her demeanour or quirks they do not find him or her compatible with the corporate culture and thus collegial relationships suffer. In this regard, Griessel[919] argues that employers may concoct a justification of "incapacity" when dismissing an employee with whom they are incompatible, rather than dealing with the incompatibility effectively. One might be incompatible with the corporate culture of a business, but that does not necessarily affect the individual's ability to still perform their duties well. For instance, in *Nathan v The Reclamation Group*,[920] a new Operations Director accused the applicant, who was the existing director, of being a poor performer. As a result, the applicant was also stripped of his authority, humiliated and degraded in his status within the company.[921] The employee was later dismissed on charges of poor work performance.[922] However, it was held that the purported poor performance was concocted by the Operations Director.[923] In fact, the real reason for this dismissal was due to incompatibility between both parties, which did not necessarily cause poor performance.[924] Hence, the dismissal was found to be unfair. It is, therefore, submitted that under such circumstances, incompatibility is again best dealt with as a separate and legitimate ground for dismissal in South African labour law and it should not be attempted to fit incompatibility into the mould of incapacity.

4.7 Operational requirements as a ground for dismissal

Operational requirements are the last ground for fair dismissals recognised in the *LRA*.[925] Finnemore[926] submits that before the rise of trade unions in South African

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918 Watkins 2012 https://www.workinfo.com.
919 Griessel 2017 https://www.linkedin.com.
920 *Nathan v The Reclamation Group* 587. Similar facts in *Edcon v Padayachee*. The employee was dismissed for incapacity when the real reason was incompatibility.
921 *Nathan v The Reclamation Group* 589.
922 *Nathan v The Reclamation Group* 598.
923 *Nathan v The Reclamation Group* 598.
924 *Nathan v The Reclamation Group* 598.
925 S188 of the *LRA*; Gandinze 2007 *Law, Democracy & Development* 83.
926 Finnemore *et al Introduction to Labour Relations in South Africa* 295.

labour law, employers used operational requirements as a means to exercise unilateral control over retrenchments. Hence, retrenchments were used as a means to arbitrarily dismiss employees who were deemed troublesome or falling short of the workplace standards (unsatisfactory performance).[927] However, section 213 of the *LRA* provides an expansive definition of what constitutes operational requirements.[928] In terms of the LRA, operational requirements are defined as the requirements based on the economic, technological, structural or similar needs of an employer.[929] These business needs often result in retrenchments or rather terminations of employment contracts of the employees in question.[930] In this case, economic needs refer to reduced economic activity or financial management of the enterprise.[931] It should be noted that economic needs are not only those where the business is suffering but it has also been found that retrenchments to increase profits also fall within this category.[932] Organisational restructuring or technology redundancy refers to instances where the posts no longer exist due to restructuring of the business or departments, or because technological advancement has replaced a person which subsequently leads to permanent job loss.[933] For instance, in *Singh & Others v Mondi Paper,*[934] the Labour Court held that the introduction of a new integrated business information system ('SAP') by the respondent, who was the employer, reduced the need for certain employees who had previously performed most of their tasks manually. Hence, the dismissal was fair. The court ruled that the respondent's decision to restructure was

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927 Finnemore *et al Introduction to Labour Relations in South Africa* 295.

928 Grogan *Workplace Law* 267.

929 S213 of the *LRA*; *Code of Good Practice on Operational Requirements*.

930 Slabbert, Parker and Farrell *Employment Relations Management Back to Basics: A South African Perspective* 122. Retrenchments specifically applies to the dismissal of an employee due to operational requirements.

931 Finnemore *et al Introduction to Labour Relations in South Africa* 295; Item 1 of *Code of Good Practice on Operational Requirements*; *SATAWU and Others v GVS Aviation Secure Solutions* (JS49/12) [2016] ZALCJHB; *Van Rooyen and Others v Blue Financial Services (South Africa) (Pty Ltd)* (2010) 31 ILJ 2735 (LC) para 15; *General Food Industries Ltd v FAWU* (2004) 7 BLLR 667 para 52.

932 *Fry's Metals (pty) Ltd v NUMSA and Others* (2003) 2 BLLR 667 (LAC) para 52.

933 Finnemore *et al Introduction to Labour Relations in South Africa* 295; Item 1 of *Code of Good Practice based on Operational Requirements*.

934 *Singh & Others v Mondi Paper* [2000] 4 BLLR 446 (LC), (hereinafter, referred to as the *Singh* case) para 6.

justified because it was motivated by commercial reasons to alleviate cumbersome manual data processing systems.[935]

However, the onus rests on the employer to try and keep the employees in employment, if possible.[936] Notably, neither the LRA nor the *Code of Good Practice on Operational Requirements* elaborate or provide any further description of what is regarded as "similar needs".[937] Collier *et al*[938] argue that the term is used by the courts to extend the meaning of economic, technological and structural needs. In *SATAWU and Others v GVS Aviation Secure Solutions*,[939] the Labour Court opined that the concept of "similar needs" encompasses factors that would ordinarily have economic ramifications for the business enterprise. The court further stated that for the purposes of the definition in section 213 of the *LRA*, these factors will be determined by the merits of each case.[940] Conversely, Collier *et al*[941] also argue that the term can also refer to those needs or reasons that do not fall under economic, technological and structural needs. It is contended that there is no consensus as to what the concept entails. The question would be whether incompatibility can be classified as falling under "similar needs" of the employer.

Similar to the ground of incapacity, operational requirements are a no-fault dismissal because the employee is not in any way responsible for the termination of employment.[942] According to Manamela,[943] the reason behind the dismissal does not arise from the employee's conduct or incapacity but emanates from factors arising from the employer's business needs and interests. On this note, Finnemore[944] submits that retrenchments often have far-reaching and possibly disastrous effects on

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935 *Singh* case para 22, 25.
936 Finnemore *et al Introduction to Labour Relations in South Africa* 295.
937 Manamela 2019 *Obiter* 103, 104.
938 Collier *et al Labour Law in South Africa Context and Principles* 249.
939 *SATAWU and Others v GVS Aviation Secure Solutions* (JS49/12) [2016] ZALCJHB, (Hereinafter, referred to as the *SATAWU* case) para 13.
940 *SATAWU* case para 13.
941 Collier et *al Labour Law in South Africa Context and Principles* 249.
942 Item 1 of *Code of Good Practice based on Operational Requirements*; Slabbert, Parker and Farrell *Employment Relations Management Back to Basics: A South African Perspective* 122; Manamela 2019 *Obiter* 102.
943 Manamela 2019 *Obiter* 102; Electrical Contractor Association 2008 *Vector* 6.
944 Finnemore *et al Introduction to Labour Relations in South Africa* 295.

employees and their families, for which the employees are not to blame. This is especially true when alternative employment is difficult to obtain.[945] In addition, a severe retrenchment exercise can result in the demise of a business operation.[946] Consequently, the *LRA* places an obligation on the employer to ensure that they explore all possible alternatives short of dismissal before terminating the employee's employment contract.[947] This means the employer must prove that the use of operational reasons was legitimate, a true business need and the best option to address the said need, and not simply a ruse to rid the company of employees who should not have been dismissed at all, or who should have been dismissed on other grounds or for other reasons.[948]

4.7.1 Substantive and procedural fairness of dismissals based on operational requirements under the LRA and the Code of Good Practice: Operational requirements

Grogan[949] admits that, unlike other grounds of dismissals, the procedural and substantive requirements of dismissal based on operational requirements may be more difficult to disentangle. Firstly, the employer is required to furnish a notice which discloses all the relevant information regarding the dismissal.[950] This information includes the alternatives considered by the employer to avoid or minimise dismissals, and the proposed selection criteria for identifying who would potentially be

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945 Finnemore *et al Introduction to Labour Relations in South Africa* 295.
946 Finnemore *et al Introduction to Labour Relations in South Africa* 295.
947 Grogan *Workplace Law* 267.
948 Manamela 2019 *Obiter* 104.
949 Grogan *Workplace Law* 270.
950 S189(3) of the *LRA*. "Including but not limited to the reasons for the proposed dismissals, the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives; the number of employees likely to be affected and the job categories in which they are employed; the proposed method for selecting which employees to dismiss; the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed; any assistance that the employer proposes to offer to the employees likely to be dismissed; the possibility of the future re-employment of the employees who are dismissed; the number of employees employed by the employer; and the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months." Item 4 of *Code of Good Practice on Operational requirements*.

retrenched.[951] The *LRA* requires an employer to carry out consultations with the relevant parties.[952] This includes any person who is identified as a consulting party in a collective agreement.[953] If there is no collective agreement that requires consultation, the employer can consult with a workplace forum and/or a registered trade union whose members are most likely to be affected by the dismissal.[954] The consultation process should commence as soon as the employer contemplates retrenching one or more employees on the ground of operational requirements.[955] The objective of the consultation is to enable the parties to arrive at a consensus through a joint problem-solving exercise.[956] Gandidze[957] accurately highlights in this regard that the consultation process allows the relevant parties to explore any practical and viable options such as avoiding or minimising the dismissals, mitigating the adverse effects and changing the time of dismissals. In terms of adjusting the time of dismissals, Grogan[958] argues that in some instances, the proposed timetable may not grant the employees or their representatives sufficient time to absorb the information given to them or devise alternatives to dismissal. In *Van Vuuren v Mondelez Sa (Pty) Ltd,*[959] the respondent, who was the employer, proposed to extend the dismissal dates provided the applicants agreed to hand over their portfolios to an Indian company that would provide accounting services to the business. However, the applicants refused to cooperate with the respondent in this regard. Consequently, the respondent terminated their

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951 S189(3) of the *LRA*. For instance, proposals may include the alternatives that the employer considered before proposing the dismissals, the proposed method for selecting which employees to dismiss; the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed any assistance that the employer proposes to offer to the employees likely to be dismissed and the possibility of the future re-employment of the employees who are dismissed amongst others. Whereas the selection criteria address the reasons for the proposed dismissals; the number of employees likely to be affected and the job categories in which they are employed; the proposed method for selecting which employees to dismiss and the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months. Item 9 of the Code of Good Practice on Operational requirements.

952 S189(1) of the *LRA*.

953 S189(1) of the *LRA*; Grogan *Dismissal* 394.

954 S189(1) of the *LRA*; Grogan *Dismissal* 394.

955 Landis and Grossett *Employment and the Law* 267.

956 Item 3 of *Code of Good Practice based on Operational requirements*.

957 Gandidze 2007 *Law, Democracy and Development* 85. See s 189(2)(a) of the *LRA* and Item 3 of *Code of Good Practice based on Operational requirements* in this regard.

958 Grogan *Dismissal* 402.

959 *Van Vuuren v Mondelez SA(Pty) Ltd* 302 [2019] 3 BLLR 302 (LC), (hereinafter, referred to as the Van Vuuren case).

contracts without extending the dismissal dates.[960] The Labour Court ruled that the respondent had acted fairly in dismissing the applicants because there was no need to apply the extended termination dates.[961] This is especially given that the applicants failed to uphold their side of the bargain.[962] It is argued that the court's findings are correct because the consultation process is a joint problem-solving exercise which requires all parties to work together to reach an agreement.

During this consultation process, the employer should exercise good faith and seriously consider the proposals put forward.[963] Based on the selection criteria, the employer must select the employees to be dismissed in light of the agreement with the consulting parties.[964] However, if no consensus has been reached by both parties, a fair and objective selection criterion should be adopted.[965] It is contended that consultation is not merely a procedural requirement, but it also ensures that the dismissal is substantively fair.[966] This is supported by the court's decision in *SACWU v Afrox*.[967] It was held that part of the inquiry in ascertaining the existence of a genuine operational requirement includes examining legitimate substantive reasons for the dismissal.[968] In *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union,*[969] the LAC ruled that what constitutes fair reasons is whether there is a commercial rationale for the retrenchments and if the decision to dismiss is fair to the employees who will be affected. This means that the employee or the representative trade union should be given the opportunity to respond to the proposals and selection criteria put

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960 *Van Vuuren* case 19.
961 *Van Vuuren* case 45.
962 *Van Vuuren* case 45,
963 Item 3 of *Code of Good Practice based on Operational requirements*.
964 S189(7) of the *LRA*.
965 S189(7) of the *LRA*; item 9 of *Code of Good Practice based on Operational requirements*. Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally, the test for fair and objective criteria will be satisfied using the "last in, first out" (LIFO) principle. There may be instances where the LIFO principal or other criteria need to be adapted. The LIFO principle, for example, should not operate to undermine an agreed affirmative action program. Exceptions may also include the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should, however, be treated with caution.
966 Grogan *Workplace Law* 268, 271; *Broll Property Group v Du Pont* (2006) 27 ILJ 269 (LAC).
967 *SACWU v Afrox* (1999) 20 ILJ 1718 (LAC)(Hereinafter, referred to as the *SACWU* case).
968 *SACWU* case.
969 *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (2001) 22 ILJ 2264 (LAC) para 19.

forward by the employer.[970] After the consultation process, the final decision on whether to dismiss the employees rests with the employer.

It is argued that it may be difficult to view substantive and procedural fairness separately since they often overlap. This may raise questions as to how one determines substantive fairness for operational reasons when one speaks of "true business need" or "commercial rationale" of the employer. In the recent case of *Mbekela v Airvantage (Pty) Ltd*,[971] the LAC affirmed that substantive and procedural fairness cannot be viewed or applied in isolation. In this case, the applicant was interviewed and appointed by the respondent as a technical support manager.[972] However, due to structural changes in the business, the technical support department fell away.[973] Following the applicant's appointment as a quality assurance manager, the position became redundant, and there was no work available for the applicant.[974] The LAC ruled that the dismissal was substantively and procedurally unfair because the applicant was not given the opportunity to make an informed decision regarding her termination.[975] Most importantly, the applicant was not well informed of the repercussions of signing and agreeing to a mutual separation agreement that subsequently led to her dismissal.[976] It was held that the respondent should have consulted and reached a joint consensus with the applicant.[977] In addition, the respondent had an obligation to issue a written notice that disclosed all the relevant information and give the applicant the opportunity to respond to the representations that were made.[978] The LAC was correct in that the respondent did not consider any alternatives to the dismissal by allowing the applicant to meaningfully engage in the process. It is contended that failure to consult on ways to avoid retrenchment may render dismissal based on operational reasons to be substantively and procedurally

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970 Item 7 of *Code of Good Practice based on Operational requirements*.
971 *Mbekela v Airvantage (Pty) Ltd* (JA2/20) [2021] ZALAC 47 para 19.
972 *Mbekela* case para 8.
973 *Mbekela* case para 8.
974 *Mbekela* case para 8.
975 *Mbekela* case para 11, 23.
976 *Mbekela* case para 9.
977 *Mbekela* case para 16.
978 *Mbekela* case para 16, 21.

unfair. It is further asserted that the *Mbekela* case clearly illustrates how dismissals for single employees will be carried out.

4.7.1.1 Small- and large-scale retrenchments

Sections 189 and 189A provide procedural guidelines to be followed by an employer on dismissals based on the ground of operational requirements.[979] Moreover, the *LRA* draws a distinction and provides procedural guidelines on small-scale and large-scale retrenchments depending on the size of the business and the number of employees that would potentially be retrenched.[980] Notably, section 189A of the LRA only provides for the retrenchment threshold for large-scale retrenchments as opposed to small-scale retrenchments.[981] It is argued that by implication, small-scale or "minor retrenchments" refer to dismissals by employers who have less than 50 employees.[982] However, an employer can have 500 employees, but if he retrenches less than 10% of his workforce it will still be a small-scale retrenchment. Large-scale or "major" retrenchments refer to dismissals by employers who have more than 50 employees.[983] Section 189A further elaborates on the number of employees that can be dismissed on operational requirements based on certain thresholds. The significance of the differentiation between large and small enterprises is to cater for the needs of all employers. It is argued that section 189A assists in effectively regulating procedural fairness in both small-and large-scale enterprises and providing speedy remedies.[984] It must be noted that it is possible that a single employee can also be retrenched. This may apply in cases of incompatibility because it would most of the time only be one employee that the employer claims need to be dismissed for operational reasons due to their incompatibility with the corporate culture.

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979 S189, 189A of the *LRA*.
980 S189A of the *LRA*.
981 S189A of the *LRA*.
982 Electrical Contractor Association 2008 *Vector* 6.
983 Electrical Contractor Association 2008 *Vector* 6. These are also referred to as "mass dismissals".
984 Cliffe Dekker Hofmeyr "Retrenchment Guideline" *Employment Law* 3, 4.

4.7.2 Operational requirements vs Incompatibility

In a few instances, it has been argued by courts and academia that incompatibility could also fall under operational requirements.[985] In *Wright v St Mary's Hospital,*[986] incompatibility was classified as a species of operational requirements. However, the Industrial Court did not justify why this was the case. One may argue that the rationale behind this classification was merely because the applicant was not guilty of misconduct or poor work performance, hence the only ground that could be applied in this case was operational requirements.[987] Van Niekerk *et al*[988] and Manamela[989] justify this conclusion by arguing that incompatibility of an employee with other employees or subordinates might have a negative effect on a business, which not only causes disharmony but also serious economic consequences. Since the term "similar needs" has a wide scope, it may be possible that an employee can be retrenched on grounds of incompatibility. Under such circumstances, an employer may be required to prove that, while no tangible financial losses can be attributed to the employee in question, their incompatible behaviour negatively impacted other employees thereby causing a disruption in the production and rhythm line of the normal function of the business. As a result, there was a commercial rationale behind the retrenchment of the employee. However, it is argued that this classification may also be a difficult one to prove.

Manamela[990] correctly highlights that incompatibility is based on the subjective relationship between an employee and other fellow employees, or between an employee and an employer. Hence, incompatibility has no direct association with the narrow definition of operational requirements in terms of the *LRA*.[991] Consequently, it can be argued that this excludes incompatibility as a genus of operational

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985 *Wright v St Mary's Hospital* case 1003; Van Niekerk *et al Law @ Work* 307.
986 *Wright v St Mary's Hospital* case 990.
987 *Wright v St Mary's Hospital* case 990.
988 Van Niekerk *et al Law @ Work* 307.
989 Manamela 2019 *Obiter* 114.
990 Manamela 2019 *Obiter* 115; Horn J and Mulligan 2021 *The Incompatibility Conundrum* https://www.chmlegal.co.za accessed August 2021.
991 Manamela 2019 *Obiter* 115; Mokumo T*he Dismissal of Managerial Employees for Poor Work Performance* 58; Watkins 2012 https://www.workinfo.com.

requirements. Grant[992] correctly affirms that the legislature is more prescriptive in terms of substantive and procedural issues of this nature. Therefore, including and proving incompatibility grounds under operational requirements may not always be successful.

4.8 Conclusion

As discussed, section 188 of the *Labour Relations Act* 66 of 1995 gives cognisance to misconduct, incapacity due to poor performance or ill health and/or injury and the employer's operational requirements as valid grounds for dismissal in the South African labour law.[993] Moreover, a fair dismissal requires that it should be both substantively and procedurally fair.[994] While fixed grounds for fair dismissal have been identified by law, the question should be asked whether the *incompatibility* of an employee could not similarly be recognised as a ground for dismissal, based on the effect it might have on the various relationships in the workplace. This is especially given that incompatibility is recognised as a ground for dismissal by various South African courts and other dispute resolution tribunals in a number of case laws. Various academic scholars and the South African labour court argue that incompatibility may in some instances hover between misconduct, incapacity or even under operational requirements.[995] However, as was seen in this chapter, a number of challenges arise from this classification. It was established that incompatibility cannot be regarded as a species of misconduct if an employee does not contravene a rule in the workplace. It is contended that the principles of misconduct only apply when a rule in the workplace has been contravened. It is further argued that an employee can be incompatible with the employer or other fellow employees but still be disciplined, therefore a *disciplinary* hearing will be unsuitable in such instances.

Furthermore, it has been established that incompatibility should not be regarded as a species of incapacity. It is asserted that incompatibility is not always directly linked to

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992 Grant *Defining Incompatible Behaviour in an Employer/Employee Relationship* 60.

993 Section 188(1)(a) of the *LRA*.

994 S188(1)(b), (2) of the *LRA*.

995 Manamela T "When the Lines are Blurred – A Case of Misconduct, Incapacity or Operational Requirements" 2019 *Obiter* 98,114; Work law 2022 *Labour Law at the Workplace: Proving incompatibility* https://worklaw.co.za accessed 11 January 2021.

an employee's inability to perform, but rather linked to his or her inability to maintain harmonious relationships and/or fit in with the corporate culture of the employer. In addition, it has also been established that incompatibility should not be regarded as a species of operational requirements because it has no direct association with the narrow definition of operational requirements in terms of the *LRA*.[996] Based on these considerations, one can conclude that incompatibility should be regarded as a separate and legitimate ground for dismissal in South African labour law and be regulated as such, with its own set of suitable principles to follow for fair dismissal. This will not only enable employers and the labour courts to adopt the appropriate pre-dismissal procedures but it will also ensure legal certainty on the matter.

[996] Manamela 2019 *Obiter* 115; Mokumo T*he Dismissal of Managerial Employees for Poor Work Performance* 58; Watkins 2012 https://www.workinfo.com.

Chapter 5 Incompatibility under international labour standards and best practices in New Zealand and Australia

5.1 Introduction

The previous chapters discussed incompatibility as a ground of dismissal in South African Labour law and compared it to other grounds for dismissal under the *Labour Relations Act* 66 of 1995.[997] In this chapter international law instruments that regulate termination of employment contracts and workplace discrimination will be reflected upon, and best practices in New Zealand and Australia will be investigated. In terms of the *Constitution of the Republic of South Africa*, 1996, any court or tribunal *must* consider international law and *may* consider foreign law when interpreting legislation.[998] As members of the International Labour Organisation (ILO), South Africa, New Zealand and Australia have an obligation to ensure that their domestic legislation comply with the ILO labour standards.[999]

This chapter will provide a background to the prescribed international guidelines on termination of employment and discrimination in the workplace. It will then be determined which of the ILO standards, in particular, must be followed in the South African law when considering incompatibility as a separate and valid ground of dismissal.

In addition, a critical analysis and regulation of incompatibility as a ground for dismissal in New Zealand and Australia will be carried out in this chapter. It should be noted that while New Zealand and Australia may not have all the solutions, they are among the few jurisdictions that have dealt with the issue of incompatibility in their

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997 *Labour Relations Act* 66 of 1995 (Hereinafter, referred to the *LRA*).

998 S39(1)(b), (c), s232, s233 of the *Constitution of the Republic of South Africa*, 1996 (Hereinafter, referred to as the *Constitution*); *S v Makwanyane* 1995 3 SA 391 (CC) para 34, 35, 37.

999 Article 19 of the *ILO Constitution* obligates member states to report regularly on measures they adopted to give effect to any provision of certain conventions or recommendations in their domestic legislation. International Labour Organisation 2022 *Member States* https://www.ilo.orgaccessed 10 May 2022; s1, s3 of the *LRA*. By virtue of being a member, the *LRA* recognises South Africa's obligations to the ILO.

labour law. Although statutory regulation of incompatibility in New Zealand is absent, the *Employment Relations Act* of 2000 and case law in this jurisdiction can make a valuable contribution to this thesis since the New Zealand courts have set out procedural and substantive guidelines when dealing with incompatibility in the workplace. Similarly, although Australia does not have express or statutory guidelines that specifically recognise incompatibility as a valid ground of dismissal, the case of *Mabry v West Auckland Living Skills Home Trust Board*[1000] provides comprehensive procedural and substantive guidelines that have also been adopted by the New Zealand employment courts.

It is envisaged that by evaluating the lessons that can be drawn from how the mentioned countries address incompatibility disputes, South Africa will be able to bridge gaps where policy reform is required.

5.2 Brief background of the ILO

Collier *et al*[1001] correctly define the ILO as a specialised body that monitors how the world of work has evolved. The ILO also sets out the appropriate international standards to regulate the global labour market.[1002] Against this backdrop, the ILO was established in 1919 as a part of the Treaty of Versailles peace settlement.[1003] This organisation was originally an independent affiliated agency of the League of Nations.[1004] After the demise of the League of Nations, all its members became members of the ILO, which formed a specialised agency of the United Nations.[1005] Long before the onset of World War I, the demands for the achievement of social justice such as just and equal labour standards, as well as improved working and living

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1000 *Mabry v West Auckland and Living Skills Home Trust Board (Inc)* unreported 2001 AC 86/01, (Hereinafter, refer to the *Mabry* case).

1001 Collier D *et al Labour Law in South Africa Context and Principles* (Oxford University Press Southern Africa Cape Town 2018) 53; Standing G "The ILO: An Agency for Globalisation" 2008 *Development and Change* 355; De Stefano D V 2021 "Not as Simple as it Seems: The ILO and the Personal Scope of International Labour Standards" *International Labour Review* 388.

1002 Collier *et al Labour Law in South Africa Context and Principles* 53; Standing 2008 *Development and Change* 355; De Stefano 2021 *International Labour Review* 388.

1003 International Labour Organisation 2022 *History of ILO* https://www.ilo.org accessed 12 May 2022; Sengenberger T*he International Labour Organisation: Goals, Functions and Political impact* 9.

1004 International Labour Organisation 2022 https://www.ilo.org; Van Niekerk *et al Law @ Work* 21.

1005 International Labour Organisation 2022 https://www.ilo.org; Van Niekerk *et al Law @ Work* 21.

conditions for workers worldwide, propelled the need for a specialised institution such as the ILO.[1006]

5.3 The role of the ILO and its international labour standards

The ILO's main goal is to address the growing needs and challenges of working people through collaboration between governments and the relevant social partners, including the employers and the employees.[1007] Furthermore, as stipulated in the Preamble of the ILO Constitution,[1008] its mandate is to promote social justice and the advancement of internationally recognised human and labour rights within the labour market through the establishment of minimum labour standards. These international standards are intended to promote decent and productive work in an environment of equity, security, freedom and dignity in the workplace.[1009] In addition, the ILO *Decent Work Agenda* mandates all member states to provide all employees basic labour rights.[1010] Central to these rights, equality in the workplace, social security, freedom of association and collective bargaining rights are included.[1011] Consequently, in terms of the *Decent Work Agenda*, member states are required to implement and expand on the aforementioned rights in their domestic regulations.[1012]

1006 International Labour Organisation 2022 *Laying the Foundations of Social Justice* http://www.ilo.org accessed 12 May 2022; Collier et *al Labour Law in South Africa Context and Principles* 54.

1007 Article 1(1) of the *ILO Constitution*; Collier *et al Labour Law in South Africa Context and Principles*. 54; ILO 2022 *Subjects covered by International Labour Standards* http://www.ilo.org accessed 24 May 2022.

1008 Part II of the *ILO Declaration of Philadelphia*; Preamble of the ILO Constitution; Rout C "International Labour Organisation: Its Mission and Objectives with Global Reference" 2014 *Indian Journal of Law and Justice* 17 ;ILO 2022 http://www.ilo.org.

1009 Preamble of *ILO Constitution*; Part II of the *ILO Declaration of Philadelphia*; Rout 2014 *Indian Journal of Law and Justice* 17; Sengenberger *The International Labour Organisation: Goals, Functions and Political impact* 27.

1010 ILO 2022 *Decent work* http://www.ilo.org accessed 24 May 2022; Benjamin "Labour Market Regulation: International and South African Perspectives" 7.

1011 Article 2 of the *ILO Declaration on Fundamental Principles and Rights at Work*; Sengenberger *The International Labour Organisation: Goals, Functions and Political Impact* 27.

1012 Sengenberger *The International Labour Organisation: Goals, Functions and Political impact* 19.

The ILO has developed machinery that establishes the applicable international labour standards.[1013] This machinery consists of recommendations and conventions.[1014] Nonetheless, there is a significant distinction between the two regulatory mechanisms. Firstly, Conventions carry more legal weight because they are legally binding, as opposed to Recommendations.[1015] However, Conventions are international instruments that become legally binding once they are incorporated into a member state's legislative framework and may be ratified by the respective member countries.[1016] Furthermore, Conventions establish fundamental principles that must be implemented by those member states who have ratified them. When a member state ratifies a Convention, it becomes subject to the ILO's supervision mechanism which ensures compliance with the Convention in question.[1017] By virtue of their membership to the ILO, South Africa, New Zealand, and Australia are required to implement the core ILO labour standards in their domestic legislation irrespective of whether they have or not ratified the Convention(s) in question.[1018] Recommendations, on the other hand,

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1013 Van Niekerk *et al Law @ Work* 23; Collier *et al Labour Law in South Africa Context and Principles* 55.

1014 Collier *et al Labour Law in South Africa Context and Principles* 55; Sengenberger The International Labour Organisation: Goals, Functions and Political impact 2.

1015 International Labour Standards *Department Handbook of Procedures Relating to International Labour Conventions and Recommendations* (International Labour Organisation Geneva 2019) 3; Collier *et al Labour Law in South Africa Context and Principles* 55; Sengenberger *The International Labour Organisation: Goals, Functions and Political impact* 2.

1016 International Labour Standards *Department Handbook of Procedures Relating to International Labour Conventions and Recommendations* 3; Sengenberger *The International Labour Organisation: Goals, Functions and Political impact* 2; Van Niekerk *et al Law @ Work* 23. This is referred to as voluntary assumption of obligation. Ratification can be defined as a formal procedure whereby a state assents to the convention as a legally binding instrument. Article 19(5) of the *ILO Constitution* states that by ratifying a Convention, the member state undertakes action that is necessary to make effective the provisions of such a Convention.

1017 Article 19(5) of the *ILO Constitution*. Article 19(5) outlines the report procedure that member states must follow when implementing labour standards in their domestic legislation. Firstly, the member state must submit the new labour standards to the appropriate body or authorities. Thereafter, the member state must report to the authorities on the ratified and unratified Conventions to the authorities. Annually, the governing body of the ILO selects a topic covered by the ILO standards and undertakes a general survey of member states' domestic law and practice in applying those standards. International Labour Organisation Reporting on the ILO Standards: Guide for Labour Officers in Pacific Island Member States (ILO Fijen 2013) 1.

1018 ILO 2022 http://www.ilo.org; Collier *et al Labour Law in South Africa Context and Principles* 56. Article 2 of the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* 1998. Member states are mandated to observe, promote, and to implement the core labour standards set by the ILO. This includes ensuring that the member state's national and domestic legislation falls within the ILO standards. In the *Makwanyane* case the Constitutional Court affirmed that section 39 of the Constitution requires that both international instruments binding

supplement and offer further guidelines as to how conventions should be applied.[1019] In addition, Recommendations are not legally binding and are not attached to specific conventions.[1020] Yet, Recommendations can be applied in either legislation, policies and/or practices of a member state.[1021]

In light of the above, the discussion below will highlight which of the applicable ILO standards must be followed in South Africa with regard to incompatibility as a separate and valid ground of dismissal.

5.4 The applicable ILO standards with regards to incompatibility in the workplace

The ILO instruments that will be unpacked in this chapter include the *Termination of Employment Convention* 158 of 1982, which provides guidelines regarding termination of employment at the initiative of the employer and the *Discrimination (Employment and Occupation) Convention* 111 of 1958, which deals with discrimination in the workplace.[1022] In light of these conventions, the South African law can draw guidance from the ILO's standards in its application of incompatibility as a ground for dismissal. This also entails the development of regulations that would guarantee that proper procedural and substantive guidelines are followed when dealing with such disputes.

5.4.1 Termination of Employment Convention 158 of 1982 and its influence in South African labour law

The *Termination of Employment Convention* can be regarded as one of the most significant and influential conventions in the world of work due to its scope and focus

South Africa and those to which South Africa is not a party should be employed as tools for interpretation.

1019 International Labour Standards *Department Handbook of Procedures Relating to International Labour Conventions and Recommendations* 3; ILO 2022 http://www.ilo.org; Collier *et al Labour Law in South Africa Context and Principles* 56.

1020 ILO 2022 http://www.ilo.org; Van Niekerk *et al Law @ Work* 23.

1021 International Labour Standards *Department Handbook of Procedures relating to International Labour Conventions and Recommendations* 3.

1022 *Discrimination (Employment and Occupation) Convention* 111 of 1958 (Hereinafter, referred to as the *Discrimination (Employment and Occupation) Convention)*; *Termination of Employment* Convention 158 of 1982 (Hereinafter, referred to as the *Termination of Employment Convention*).

on the job security of an employee – one of the fundamental rights of an employee.[1023] The main aim of the *Convention* is to safeguard employees from being terminated from their employment without a valid and/or fair reason.[1024] Although the *Termination of Employment Convention* considerably influenced the development of South Africa's labour law on job security, South Africa has not ratified it.[1025] It is contended that South Africa's reliance on the *Termination of Employment Convention* is evident in the regulation of workplace dismissals, historically and in contemporary legislation. The Industrial Court frequently referred to the ILO instruments on dismissal for guidance on the meaning of unfair labour practices and unfair dismissal when the *Labour Relations Act* 28 of 1956 was amended.[1026] For instance, in *National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd,* the Industrial Court unpacked the concept of fairness when effecting dismissals in South African labour law. Notably, the court relied on the *Termination of Employment Recommendation*, 1963 (No. 119) to determine whether the applicant was dismissed in accordance with fair procedure.[1027] The applicant was dismissed for violating a workplace rule that prohibited employees from cooking on company property.[1028] The applicant contended that he was unfairly dismissed because the respondent did not follow any recognised disciplinary or dismissal procedure.[1029] In addition, the applicant argued that he was not given a proper hearing by the respondent, prior to the dismissal.[1030] The Industrial Court affirmed that the *Termination of Employment Recommendation* finds application in the South African labour law.[1031],The Industrial Court stressed that the *Recommendation* advocates that an employee be given the opportunity to present his

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1023 *Termination of Employment Convention*.

1024 International Labour Organisation *Summaries of International Labour Standards* (ILO Geneva 1988) 28.

1025 ILO 2022 *Ratifications for South Africa* https://www.ilo.org accessed 5 June 2022.

1026 The *Labour Relations Act* 28 of 1956; *National Union of Mineworkers & Another v Kloof Gold Mining Co Ltd* (1986) 7 ILJ 375 (IC) para 383; *National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* (1985) 6 ILJ 369 (IC) para 378; *Dlamini v Cargo Carriers (Natal) (Pty) Ltd* (1985) 6 ILJ 42 (IC) para 48; *Gumede & Others v Richdens (Pty) Ltd t/a Richdens Foodliner* (1984) 5 ILJ 84 (IC).

1027 *National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* (1985) 6 ILJ 369 (IC), (hereinafter, referred to as the *National Automobile & Allied Workers Union* case).

1028 National Automobile & Allied Workers Union case 370. Please note that the *Termination of Employment Recommendation has been replaced by the Termination of Employment Convention*.

1029 *National Automobile & Allied Workers Union* case 371.

1030 *National Automobile & Allied Workers Union* case 371.

1031 *National Automobile & Allied Workers Union case* 371.

case either to justify his conduct or mitigate his conduct.[1032] The court subsequently rejected the respondent's "open and shut approach," which states that once an employee admits an offence, the matter is closed.[1033] This approach would imply that the employee will not be allowed to respond to the offence or sanction imposed on him or her.[1034] Thus, the dismissal was found to be procedurally unfair in accordance with the provisions of the *Termination of Employment Recommendation*.[1035]

Secondly, Chapter VIII of the current LRA which deals with unfair dismissals and unfair labour practices, appears to have been heavily influenced by the provisions of the *Termination of Employment Convention* due to the similarities between the provisions.[1036] Most importantly, the influence of the *Convention* on the grounds for dismissal outlined in section 188 of the *LRA* will be analysed for the purposes of this chapter. By the same token, the relevant ILO provisions of the *Termination of Employment Convention* can also be used when developing guidelines that must be followed in South Africa when considering incompatibility as a separate and valid ground of dismissal. This will be unpacked in this chapter.

5.4.2 Overview and scope of the Termination of Employment Convention

As mentioned earlier, the *Termination of Employment Convention* provides guidelines regarding termination of employment at the initiative of the employer.[1037] By implication, an employee's termination of an employment relationship is not covered by the *Convention*.[1038] Similarly, circumstances when the termination of an employment contract is the consequence of a freely negotiated agreement made by both the employee and the employee are not covered by the *Convention*.[1039] Consequently, an employee cannot rely on the *Termination of Employment Convention*

1032 *National Automobile & Allied Workers Union* case 375.
1033 *National Automobile & Allied Workers Union* case 379.
1034 *National Automobile & Allied Workers Union* case 379.
1035 *National Automobile & Allied Workers Union* case 379.
1036 Chapter VIII of the *LRA*.
1037 Preamble, article 3 of the *Termination of Employment Convention*; ILO 2022 *Note on the Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment* https://www.ilo.org accessed 5 June 2022
1038 ILO 2022 https://www.ilo.org.
1039 ILO 2022 https://www.ilo.org.

where they initiated termination of the employment contract. It can also be argued that the principles contained therein can only be relied upon by a party when it has been captured in a country's domestic laws.

Notably, the *Termination of Employment Convention* is divided into three parts. The first part of the *Convention* provides the methods of implementation, scope, and definitions.[1040] This includes who is regarded as an employee for purposes of the *Convention* and measures that may be taken by a competent authority or through appropriate machinery in a member country.[1041] The second part of the *Convention* deals with the standards of general application, which include substantively fair reasons and procedural guidelines for a dismissal.[1042] Fair grounds covered in this section include dismissals arising from misconduct and incapacity from poor work performance and ill health or injury.[1043] The last part of the *Convention* covers supplementary provisions concerning terminations of employment for economic, technological, structural and/or similar reasons.[1044] These are also known as dismissals for reasons based on the employer's operational requirements. Given the resemblance of sections 188, 189 and 189A of the LRA, it is evident that guidance was sought from the ILO in creating the South African labour laws pertaining to job security.[1045] It is submitted that the relevant ILO provisions of the *Termination of Employment Convention* can in a like manner serve as a yardstick when developing guidelines that must be followed in South African labour law when regulating and implementing incompatibility as a separate and valid ground of dismissal.

5.4.3 Applicable provisions concerning terminations of employment

As mentioned earlier, there are a number of provisions of the *Termination of Employment Convention* that have influenced the development of the regulation of workplace dismissals in South African labour law. Article 4 of the *Convention* states that an employer may not unlawfully terminate an employee's employment contract

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1040 Part I, article 1 to 3 of the *Termination of Employment Convention*.
1041 Part I, article 1 to 3 of the *Termination of Employment Convention*.
1042 Part II, article 4 to 10 of the *Termination of Employment Convention*.
1043 Part II, article 4 to 10 of the *Termination of Employment Convention*.
1044 Part III, article 13 to 22 of the *Termination of Employment Convention*.
1045 Refer to chapter 4.

unless there is a valid and/or fair reason to do so.[1046] Fair reasons to terminate an employment contract may include the conduct or incapacity of such an employee and the operational requirements of the business enterprise.[1047] Regarding workplace dismissals, it is clear that section 188 of the *LRA* borrowed its wording from the *Termination of Employment Convention*. In terms of section 188, an employer must provide a fair reason to prove that an employee's dismissal is justifiable and consequently substantively fair. Akin to the *Termination of Employment Convention*, section 188 of the *LRA* gives cognisance to misconduct, incapacity due to poor performance or ill health and/or injury and the employer's operational requirements as valid grounds for dismissal in the South African labour law.[1048]

On the other hand, both the *Termination of the Employment Convention* and the *LRA* do not list incompatibility as a possible ground of dismissal. It is highlighted, however, that although incompatibility is not listed as a ground for dismissal in the *LRA*, it has been recognised as such by various South African labour courts and other dispute resolution tribunals in several cases.[1049] Since the *Termination of the Employment Convention* does not reflect on incompatibility as a ground for dismissal, it will not be able to provide specific guidance to the South African law in this regard. As a result, such guidance must be found elsewhere. However, it is argued that the spirit and purpose of the *Convention* can serve as a general guideline in preventing the possibility of innocent employees being victimised by unscrupulous employers who attempt to dismiss them on unreasonable grounds and/or for arbitrary reasons. Although it is argued that it is possible to test if the employer's motives for the

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1046 Article 4 of the *Termination of Employment Convention*.

1047 Article 4 of the *Termination of Employment Convention*.

1048 Section 188(1)(a) of the *LRA*.

1049 Refer to chapters 2 to 4. *Erasmus v BB Bread* 1987 8 ILJ 537 (IC); *Wright v St Mary's Hospital* 199213 ILJ 987 (IC); *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC) ; *Hapwood v Spanjaard* Ltd 1996 2 BLLR 187 (IC); *Lebowa Platinum Mines Ltd v Hill* 1998 19 ILJ 1112 (LAC); *Brereton v Bateman Industrial Corporation Ltd and Others* 2000 5 LLD 119 (IC); Subrumuny v Amalgamated Beverages 2000 21 ILJ 2780 (ARB); *Nathan v Reclamation Group (Pty) Ltd* 2002 23 ILJ 588 (CCMA); *Cutts v Izinga Access (Pty) Ltd* 2004 25 ILJ 1973 (LC); J*abari v Telkom SA (Pty) Ltd* 2006 27 ILJ 1854 (LC); *Lotter and SA Red Cross Society* 2006 27 ILJ 2486 (CCMA); *Jardine v Tongaat Hulet Sugar Ltd* 2002 23 ILJ 547 (CCMA); *Miyeni v Chillibush Communications (Pty) Ltd* 2010 31 ILJ 3054 (CCMA); *Goussard v Impala Platinum Limited* 2012 33 ILJ 2898 (LC); *PSA obo Mbiza v Office of the Presidency and Others* 2014 35 ILJ 1628 (LC*); Mgijima v Member of the Executive Council Gauteng Department of Education and Others* (JR1894/2011) 2014 ZALCJHB 414.

dismissal have merit, there is legal uncertainty with reference to the factors that need to be considered to ensure a uniform and legally sound approach to each instance of alleged incompatibility. Furthermore, the absence of a fixed test or stipulated criteria for incompatibility makes it difficult for courts or tribunals to establish fairness and justifiability in this regard, whilst remaining uniform in their approach for purposes of legal certainty. Thus, the legislature will have to clearly establish that an employer should prove incompatibility as a ground and fair reason for terminating the employment contract, and how. This is to ensure that the employer does not dismiss an employee on unreasonable or non-existent grounds or does not follow a fair procedure while doing so.

Furthermore, article 5 of the *Termination of Employment Convention* prohibits an employer from relying on grounds such as race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, or social origin as fair reasons for dismissal.[1050] This implies that an employer cannot discriminate against an employee and/or terminate his or her employment contract based on any of these listed grounds. Such dismissals are regarded to be unfair. Regarding workplace discrimination, it is argued that the *LRA* and the *Employment Equity* Act 55 of 1998 draw guidance from both the *Termination of Employment Convention* and the *Discrimination (Employment and Occupation) Convention* which will be discussed in greater detail later in this chapter.[1051] Notably, both section 5 and section 187(f) of the *LRA* prohibit employers from dismissing employees on discriminatory grounds provided for by the *Act*.[1052] Whereas, section 6 of the *EEA* also prohibits direct or indirect discrimination against the employee on stated grounds or any one or more grounds not provided for in that *Act*.[1053] It should be reiterated that in a quest to balance the interests of both parties, employers should be allowed to dismiss an employee based on incompatibility when such incompatibility is to the serious detriment of the employer's business. As established in the foregoing chapters, an employer may need to set inherent job requirements to preserve the workplace

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1050 Article 5 of the *Termination of Employment Convention*.
1051 *LRA*, *Employment Equity* Act 55 of 1998 (Hereinafter, referred to as the *EEA*).
1052 S5, s187(f) of *LRA*. Refer to chapter 3, para 3.10.
1053 S6(1) of the *EEA* of 1998. Refer to chapter 3, para 3.11.

"corporate culture", but the employee should indeed not be suitable for a particular job or for the particular workplace due to their incompatibility, before such a defence can succeed.[1054] Thus, there is a need to protect employees from being subjected to unfair dismissals and victimisation by unscrupulous employers who hide behind the pretext of "incompatibility". Hence, an employer may not unjustifiably use discriminatory grounds as probable reasons to dismiss an employee based on incompatibility. This includes dismissal on grounds for incompatibility based on religion, conscience, belief, and/or culture.[1055]

It must be noted that the *Termination of Employment Convention* provides procedural guidelines that should be followed by an employer when terminating an employee's employment.[1056] It is argued that these guidelines influenced the procedural guidelines provided in the *Code of Good Practice: Dismissal*, Schedule 8 of the *Labour Relations Act* 66 of 1995 and the *Code of Good Practice: Dismissal based on Operational Requirements*.[1057] It is opined that these guidelines may be used as a template to develop procedural guidelines for incompatibility as a ground of dismissal in South African labour law. As stated earlier, there are currently no procedural guidelines for disputes of this nature, hence these regulations have to be developed to guarantee legal certainty.

Article 7 of the *Convention* requires that an employee should be given the opportunity to respond to the allegations levelled against him/her by the employer.[1058] Similar as to what is captured in the *Code of Good Practice: Dismissal*,[1059] the *audi alteram partem* rule requires that an employee be afforded the opportunity to be heard by responding to the allegations levelled against him or her. It is submitted that the *audi alteram partem* rule should similarly apply when dealing with incompatibility disputes. The

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1054 Refer to chapter 3, para 3.1.0.2.1.
1055 Refer to chapter 3, para 3.11.
1056 Article 7, 9, 13 and 14 of the *Termination of Employment Convention*.
1057 *Code of Good Practice: Dismissal, Schedule 8 of the Labour Relations Act* 66 of 1995 (Hereinafter, referred to as the *Code of Good Practice: Dismissal*); the *Code of Good Practice: Dismissal on Operational Requirements of the Labour Relations* Act 66 of 1995 (Hereinafter, referred to as the *Code of Good Practice: Dismissal on Operational Requirements*). Refer to chapter 4, para 4.3.
1058 Article 7 of the *Termination of Employment Convention*.
1059 Item 4(1) of the *Code of Good Practice: Dismissal; Du Plessis and Fouche A Practical guide to Labour Law* 351.

employer should therefore grant an employee an opportunity to defend himself/ herself against the allegations of incompatibility levelled against them. This ensures that due fair process is followed and prevents arbitrary dismissals by the employer.

In addition, the *Convention* also provides procedural guidelines that should be followed by an employee when appealing against the employer's termination.[1060] Bearing in mind that incompatibility is an attitudinal and/or personality issue, the employee will have to prove that he/she was discriminated against based on their character which can be classified as an arbitrary ground.[1061] However, the burden of proof does not only rest on the employee. Article 9 of the *Convention* clearly stipulates that an employer will have to prove the existence of a valid reason for dismissal. Similarly, the employer will have to prove that an employee is indeed incompatible with the corporate culture of the workplace and as a result poses a threat to workplace harmony and efficiency.[1062] Moreover, the employer will have to prove that the employee in question is substantially responsible for the workplace disharmony either with other fellow employees and/or management.[1063]

Based on the analysis above, it can be deduced that, in order to effectively regulate incompatibility as a valid and separate ground of dismissal, inspiration can be derived from the *Termination of Employment Convention*, even though it does not specifically provide for incompatibility. The principles contained therein can still find application when considering incompatibility as a fair ground for dismissal and when developing a regulatory framework for said ground. While this is true, other supplementary guidelines may also be drawn from the *Discrimination (Employment and Occupation) Convention*, which will be analysed below.

5.4.4 Discrimination (Employment and Occupation) Convention 111 of 1958

It is submitted that the *Discrimination (Employment and Occupation) Convention* is one of the fundamental instruments in the world of work due to its scope and focus

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1060 Article 8, 9 and 11 of the *Termination of Employment Convention*.
1061 Article 9(2) of the *Termination of Employment Convention*.
1062 Refer to Chapter 2, para 2.5.
1063 Refer to Chapter 2, para 2.5.

on the protection of employees against workplace discrimination in a diverse world.[1064] The purpose of the *DEOC* is to promote equality and treatment in respect of employment and occupation.[1065] Notably, South Africa has ratified this *Convention*.[1066] Article 2 of the *Convention* specifically places an obligation on member states to pursue national policies designed to promote equality of opportunity and treatment in respect of employment with a view of eliminating such discrimination.[1067] It is opined that the *DEOC* considerably influenced and still influences South Africa's workplace discrimination laws. Loyson[1068] correctly observes that the *DEOC* informs the interpretation of the *EEA*. The *Employment Equity Act* 55 of 1998 explicitly states that one of the aims of the Act is to give effect to the ILO regulations.[1069] In addition, part of the wording of the *DEOC* is apparent in some of the *EEA*'s provisions. This fact will be analysed below. It is submitted that the applicable ILO provisions of the *DEOC* should be considered when developing guidelines that must be followed in South Africa regarding incompatibility as a separate and valid ground of dismissal. This is to safeguard employees from being arbitrarily dismissed or be subjected to unfair discrimination by the employer in the dismissal process.

5.4.5 Overview and applicable provisions of the Discrimination (Employment and Occupation) Convention

Compared to the *Termination of Employment Convention*, the *DEOC* is a short yet detailed instrument. However, only a few provisions are important for the purposes of this discussion. It is noteworthy that the *DEOC* defines discrimination clearly. Discrimination is defined in this *Convention* as any distinction, exclusion or preference based on personal characteristics such as race, colour, sex, religion, political beliefs or affiliation, national extraction or social origin.[1070] As a result, such a distinction invalidates or impairs a person's equality of opportunity or treatment in employment

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1064 *Discrimination (Employment and Occupation) Convention*, (Hereinafter, *DEOC*).
1065 International Labour Organisation *Summaries of International Labour Standards* 18.
1066 ILO 2022 *Ratifications for South Africa* https://www.ilo.org accessed 5 June 2022.
1067 Article 2 of the *Discrimination (Employment and Occupation) Convention*.
1068 Loyson M *Substantive Equality and Proof of Employment Discrimination* (LLM – dissertation Nelson Mandela Metropolitan University 2009) 26; Collier *et al Labour Law in South Africa* Context *and Principles* 425.
1069 The *Employment Equity Act* 55 of 1998 (Hereinafter, referred to as the *EEA*).
1070 Article 1(a) of the *DEOC*.

or occupation.[1071] It is submitted that discrimination on any of these grounds is unfair. Since the *Termination of Employment Convention*, South African *Constitution*, the *LRA* or the *EEA* do not provide an elaborate definition of what constitutes workplace discrimination, one can draw guidance from the *DEOC*.[1072] For instance, in *SA Chemical Workers Union & others v Sentrachem Ltd*,[1073] the Industrial Court had to determine whether there was wage discrimination based on race between employees at any of the respondent's work divisions. Amid reports of unfair labour practices by the respondent, the applicants alleged that the respondent discriminates between its black and white employees on the grounds of race.[1074] It was alleged that the respondent pays black employees less than white employees in the same grade and/or doing the same work, and had done so for many years.[1075] The Industrial Court relied on the *DEOC* for the meaning and content of workplace discrimination. The court referred to article 1, which defines discrimination, and article 2 which requires member states to implement national policies that eliminates discrimination and promotes equality of opportunity in the workplace.[1076] The court concluded that there was indeed a wage disparity between black employees and white employees in the respondent's workplace.[1077] Further, the court affirmed that black employees were paid less than the white and Indian employees.[1078] In accordance with the provisions of the *DEOC*, the Industrial Court ruled that the respondent had committed an unfair labour practice by discriminating against black employees with regards to their wages.[1079] It is argued that one can refer to the aforementioned definition for purposes of contextualising discrimination in incompatibility disputes. Therefore, if the reasons for a dismissal arising from incompatibility falls under any of the aforementioned personal characteristics of an employee, it is presumed to be unfair. Under such circumstances,

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1071 Article 1(b) of the *DEOC*.
1072 Article 5 of the *Termination of Employment Convention*, S9 of the *Constitution*; s5(1), s187(f) of the *LRA*; s6 of the *EEA*; *SACWU & Others v Sentrachem Ltd* (1998) 9 ILJ 410 (IC), (hereinafter, referred to as the *SACWU* case) para 429. Refer to Chapter 3.
1073 *SACWU* case.
1074 *SACWU* case 412.
1075 *SACWU* case 412.
1076 *SACWU* case 429.
1077 *SACWU* case 439.
1078 *SACWU* case 439.
1079 *SACWU* case 439.

an employer may therefore perhaps not successfully rely on incompatibility as a valid ground of dismissal.

On the other hand, the *DEOC* recognises that not all differential treatment amounts to discrimination.[1080] Article 1 (1.2) of the *Convention* states that any exclusion, preference or distinction arising from the inherent requirements of a job is not regarded as discrimination.[1081] Hence, under these circumstances such differential treatment is not considered unfair. Similarly, sections 187(2) of the *LRA* and 6(2)(b) of the *EEA* have recognised the inherent requirements of the job as a fair ground of dismissal or for discrimination respectively. Notably, the phrasing of section 6(2)(b) of the *EEA* is strikingly similar to that of the *DEOC,* which demonstrates that South African labour legislation is influenced by the ILO standards.[1082]

Furthermore, article 5 of the *Convention* allows member states to implement specific measures to protect disadvantaged and vulnerable groups based on their gender, age, disability, family responsibilities or social and/or cultural status.[1083] It is thus asserted that the *Convention* encourages member states to implement both formal and substantive equality law into their national policies.[1084] In the previous chapters, it was deduced that the South African *Constitution* guarantees both formal and substantive equality.[1085] Moreover, both the *LRA* and *EEA* recognise the inherent requirement of a job as justification for differential treatment.[1086] Regarding incompatibility disputes, it should be reiterated that an employer may also be permitted to set "inherent job requirements" to preserve the "corporate culture" of the workplace, but only as far as the employer will be able to prove that an employee is indeed incapable of meeting the inherent requirements of the particular job due to their incompatibility.

1080 Manuela T "Discrimination and Equality at Work: A review of Concepts" 2003 *International Labour* Review 401- 418.

1081 Article 1(1.2) of the *DEOC*.

1082 Du Toit D "Protection Against Unfair Discrimination in the Workplace: Are the Courts getting it right" 2007 *Law, Democracy and Development* 4.

1083 Article 5 of the *DEOC*.

1084 *Hoffman v SAA Airways* (2000) 12 BLLR 1365 (CC) para 51; Collier *et al Labour Law in South Africa Context and Principles* 425;

1085 Refer to chapter 3.

1086 S187(2) of the LRA; s6(2) of the *EEA*. Refer to chapter 3.

Evidently, the *DEOC* informs the interpretation of workplace discrimination law in South Africa.[1087] Thus, the provisions highlighted above must be considered when regarding incompatibility as a separate and valid ground of dismissal in South African labour law.

Overall, it is asserted that the ILO standards play a pivotal role in the content of labour laws in South Africa. It is opined that South Africa's reliance on the ILO standards, such as the *Termination of Employment Convention and* the DEOC, is evident in the regulation of workplace dismissals and the protection of employees from being subject to unfair discrimination in the workplace. It is, therefore, asserted that guidance can be drawn from the ILO standards to formulate guidelines on incompatibility as a ground for dismissal in South African labour law. The following discussion will unpack best practices in both New Zealand and Australia with regards to incompatibility disputes.

5.5 Best practices in New Zealand and Australia with regards to incompatibility disputes

As mentioned earlier, a study of best practices will be undertaken in this chapter to potentially learn lessons from New Zealand and Australia with regards to their implementation of incompatibility as a fair ground for dismissal.[1088] The purpose of this investigation is to make possible suggestions for the *lacunae* in the South African legislative framework regarding incompatibility in the workplace and where policy reform might be warranted. Although New Zealand and Australia do not have express provisions or statutory guidelines that specifically recognise incompatibility as a valid ground for dismissal, their courts have thoroughly addressed such disputes and have provided a few clear guidelines.[1089] However, one must be cognizant of the fact that

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1087 Refer to chapter 3.

1088 The basis of this comparison is that New Zealand and Australia have addressed such dispute and have provided a few guidelines in their case law.

1089 *Terris v The Parliamentary Service* 2012 NZ ERA 29/03/12; *Walker Procure Health Ltd* 2012 NZ EmpC 90 ARC 72/ 90; *Snowdon v Radio New Zealand* NZCA 108 CA149/2013; M*abry v West Auckland and Living Skills Home Trust Board (Inc)* unreported 2001 AC 86/01; R*eid v New Zealand Fire Service Commission* (7/5/08, HRRT Decision No 8/2008; HRRT58/07); *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66; *Bennett v NZ Mushrooms Ltd Auckland* 2008 NZERA

New Zealand and Australia do not address all the problems faced in South Africa. That being said, New Zealand and Australia are amongst the few countries that have dealt with the issue of incompatibility in their labour law. As such, it is hoped that the established measures that these countries follow will to some extent bridge the *lacunae* posed by a lack of statutory guidance in South African labour law.

5.5.1 Incompatibility in New Zealand

5.5.1.1 Key labour legislation that regulates dismissals in New Zealand

The *Employment Relations Act* of 2000 (hereinafter, referred to as the *ERA*) is the principal labour legislation in New Zealand that regulates employment relationships between employers, employees, and trade unions.[1090] A unique feature of the *ERA* is that it sets out the obligations of both employers and the employees towards each other in an employment relationship. Most importantly, the South African common law duty of good faith from both parties is legislated.[1091] The *ERA* further establishes that the duty of good faith means that both parties should act in a manner that maintains a healthy employment relationship founded on trust and confidence.[1092] In the context of incompatibility, it is argued that the duty of good faith requires an employee to maintain good interpersonal and harmonious relationships in the workplace. It

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754; *Birss v Aiku New Zealand Ltd* (AT/195/96) Auckland 1996 NZEmpT 244; *Burns v Chief Executive Legal Services Agency* (WA/22/04) Wellington 2004 NZERA 182; *Buxton v Five Star Beef Ltd* (CT/37/96) *Christchurch* 1996 NZEmpT 486; *Cheol Hong v Auckland Transport (Auckland)* [2017] NZERA 255; *Crooks v Pratt & Whitney Air New Zealand Services Christchurch* 2007 NZERA 278; *De Kater v Streamline Freight (Auckland)* [2016] NZERA Auckland 102; *Gomes v Ministry of Social Development Wellington* 2007 NZERA 473; *Hayward v Tairawhiti Polytechnic* (AA/72/04) Auckland 2004 NZERA 490; *Harris v Chief Executive, Department of Corrections* [2000] 1 ERNZ; *Comberv v Odyssey House Trust Inc* [1992] 3 ERNZ 210; *Wellington Hotel etc IUOW v Hawthorne* [1988] NZILR; *Heriot v Asteron Life Limited Wellington* 2007 NZERA 407; *Hoyte v AIA International Limited (Auckland)* [2018] NZERA 72; *Huntley v Maataa Waka Waka Ki Te Tau Ihu Trust Christchurch* 2008 NZERA 341; *Kee v Bartercard New Zealand Ltd* (AA/296/04) Auckland 2004 NZERA 432; *Marshall v Conway Shipping Ltd ta Seatrade NZ* (AA/311/03) Auckland 2003 NZERA 407; *O Neill v Te Puke High School Board of Trustees* (HT/69/01) Hamilton 2001 NZEmpT 454; *Watt v Canterbury District Health Board* (CA/22/06) Christchurch 2006 NZERA 132; *Erin Therese Dent v Waikato District Health Board* NZEmpC Auckland [2017].

1090 *Employment Relations Act* of 2000.

1091 S4 of the *ERA*.

1092 S4, s4(1A) of the *ERA;* Paul v Mobil NZ Ltd (1992) 4 NZELC (digest); [1992] 2 ENRZ 1 (HC) para 98, 182; Employsure 2022 *Employment Relations Act* 2000 https://employsure.co.nz accessed 5 June 2022; Rudman R *New Zealand Employment Law Guide* (Wolters Kluwer New Zealand 2019) 54; Burton B "Employment Relations 2000- 2008: An Employer View" 2010 *JSTOR* 96.

hasbeen established in the previous chapters that if the employee disrupts harmony in the workplace in a manner that results in the breakdown of the employment relationship, this constitutes a material breach of contract.[1093]

In addition, part 9 of the *ERA* specifically deals with personal grievances of employees, which include the regulation of unfair dismissals. However, unlike the *Labour Relations Act* 66 of 1995, the *ERA* does not explicitly list valid grounds for dismissal in New Zealand labour law. Nonetheless, section 103 of the *ERA* permits an employee to lodge a grievance if he or she considers themselves to have been unjustifiably dismissed by the employer.[1094]

5.5.1.2 Incompatibility and *the Employment Relations Act* of 2000

Although there is no clear provision in New Zealand that recognises incompatibility as a ground for dismissal, the New Zealand labour courts regard it as a justifiable reason for the employer to terminate an employee's employment contract.[1095] Nonetheless, section 103A of the *Employment Relations Act* of 2000 provides a test to determine whether a dismissal is justified.[1096] It may be argued that in terms of section 103A of the *ERA*, one can also determine whether a dismissal based on incompatibility is justifiable based on the employee's actions.[1097] This approach has been adopted by the New Zealand employment courts in a number of case law.[1098] For instance, in *Erin Therese Dent v Waikato District Health Board*,[1099] the applicant, who was the employee, was dismissed by the respondent who was the employer on grounds for

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1093 Refer to chapter2, para 2.3.2.1.

1094 S103(1)(a) of the ERA.

1095 Auckland Chamber of Commerce: Methven Personnel Consultants "Incompatibility, Discipline and Dismissal" Year 2012 *HR Best Practice* 301.

1096 *Employment Relations Act* of 2000, (Hereinafter, referred to as the *ERA*); *Hayashi v Sky City* Management Ltd [2018] NZEmpC para 21; Rudman *New Zealand Employment Law Guide* 523.

1097 S103A of the *ERA*; Rudman *New Zealand Employment Law Guide* 523. This is also referred to as the "test of justification".

1098 *Erin Therese Dent v Waikato District Health Board* NZEmpC Auckland [2017], (Hereinafter, referred to as the *Dent* case); *Bennett v NZ Mushrooms Ltd Auckland* 2008 NZERA (hereinafter, referred to as the Bennett case) para 34; *Cheol Hong v Auckland Transport* (Auckland) [2017] NZERA (hereinafter, referred to as the *Cheol Hong* case) para 13, 21, 84; *Huntley v Maataa Waka Waka Ki Te Tau Ihu Trust Christchurch* 2008 NZERA (Hereinafter, referred to as the *Huntley* case) para 59; *Terris v The Parliamentary Service* 2012 NZ ERA 29/03/12 (Hereinafter, referred to as the *Terris* case) para 37.

1099 *Dent* case para 72, 73.

incompatibility. The applicant alleged that she was unjustifiably dismissed.[1100] The applicant was reported to be belligerent and had poor communication skills with co-workers.[1101] As a result, some employees threatened to resign if the applicant returned back to the office.[1102] The Employment Court had to rely on section 103A of the *ERA* to prove that the dismissal based on incompatibility was indeed fair.[1103] It should be noted that section 103A does not establish a single criteria for what a fair and reasonable employer could have done in the actual employer's circumstances.[1104] Moreso, section 103A allows for different approaches in which a reasonable employer could have reached a fair outcome.[1105] Hence, a number of factors should be taken into consideration before dismissing an employee on the grounds for incompatibility.

Firstly, in terms of section 103A of the above Act, an objective test must be carried out to assess whether the employer acted in a way that a fair and reasonable employer could have done given the circumstances that prevailed at the time.[1106] In the *Dent* case, the court concluded that a fair and reasonable employer could not have made a decision to issue the applicant with a written warning on grounds of bullying other employees, especially if the employer did not confirm the veracity and credibility of the purported allegations.[1107] The court also stated that a dismissal is not justifiable if the employer fails to manage or supervise the situation that led to incompatibility in question. It is argued that this approach is correct since it takes into account the employer's actions in terms of the substantive fairness, and how the employer acted in the process that led to that outcome.[1108] It is further submitted that this approach does not differ from that of South Africa since the employer must prove that the dismissal is substantively and procedurally fair.[1109] In the previous chapters, it has

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1100 *Dent* case para 1.
1101 *Dent* para 47.
1102 *Dent* para 47, 48.
1103 *Dent* case para 63, 72, 148; *Bennett* case para 34; *Huntley* case para 10, 59, 96.
1104 *Cheol Hong* case para 14.
1105 *Cheol Hong* case para 14.
1106 S103A(2) of the *ERA*; *Bennett* case para 35; *Terris* case para 37; *Cheol Hong case* para 13; Rudman *New Zealand Employment Law Guide* 523.
1107 *Dent* case para 87.
1108 *Huntley* case para 10
1109 Rudman *New Zealand Employment Law Guide* 524; *Faapito v Chief Executive of the Department* of *Corrections* para 103. NZEmpC AK (2012) para 103. In this case, the court emphasised that

already been established that an employer's business may suffer detriment in situations where an employee's attitude, behaviour or character is incompatible with certain values or personalities of the other employees or the employer and subsequently hinders the functions of the business.[1110] Hence, it is argued that an employer has the right to protect their business interests and taking such decisions should not be held against them. Nonetheless, it is important that the competent tribunal or court must conduct a thorough investigation into the veracity of the allegations levelled against the employee.[1111]

Secondly, based on the employer's resources, it must be ascertained if adequate investigations into the allegations against the employee were conducted prior to the subsequent dismissal.[1112] The case of *Bennett v NZ Mushrooms Ltd Auckland,*[1113] is an example of how the Employment Court has applied this requirement in incompatibility disputes. In this matter, the employee who was the applicant in this case, was dismissed on grounds of incompatibility with her colleagues due to her disruptive and disharmonious behaviour.[1114] The court held that the respondent was required to undertake a thorough and fair investigation that showed the conduct of what a fair and reasonable employer would consider as serious enough to warrant dismissal.[1115]

Consequently, the court concluded that the applicant was solely responsible for the incompatible behaviour based on the findings of the employer's investigation.[1116] Allegations against the applicant included throwing stalks at another employee; exhibiting immature behaviour and tantrums, and fostering strife among staff, which affected interpersonal relationships in the workplace.[1117] Furthermore, prior to the dismissal, the employer must discuss the concerns raised by other employees and/or

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overall substantial fairness and reasonableness should be the main concern rather than just adhering to the individual aspects by which justification must be judged under s103A of the Act. Refer to chapter 4.

1110 Refer to chapter 2, para 2.4; refer to chapter 3, para 3.4.

1111 S103A(2) of the *ERA*.

1112 103A(3)(a) of the *ERA*; Rudman *New Zealand Employment Law Guide* 561.

1113 *Bennett* case.

1114 *Bennett* case para 8, 24,36.

1115 *Bennett* case para 35.

1116 *Bennett* case para 48.

1117 *Bennett* case para 8, 24, 25, 33, 38.

management against the employee.[1118] Like the *audi alteram paterm* rule in South Africa, an employee should be granted the opportunity to respond to the allegations levelled against him or her prior to the dismissal.[1119] It will also give the employee a chance to rectify his/ her incompatible behaviours that is causing disharmony in the workplace. This is to protect innocent employees from being victimised by unscrupulous employers who may attempt to dismiss them on unreasonable grounds and for arbitrary reasons, without the ability to test whether the employer's motives for the dismissal has merit.

In the *Bennet* case, the applicant was advised accordingly that her incompatible behaviours were affecting workplace relationships and the workplace.[1120] Hence, it would lead to a disciplinary action and a subsequent dismissal.[1121] Additionally, the applicant was given an opportunity to respond to the allegations and rectify the incompatible behaviours, which she did not do.[1122] Based on the evidence that was brought before the court, it was held that the applicant's behaviour did in fact impair or destroy the mutual trust that is required in an employment relationship by causing disharmony in the workplace.[1123] It is submitted that the court's conclusion in the *Bennett* case is correct because any disruptive behaviour that negatively impacts any interpersonal relationships in the workplace is falls under incompatible behaviour, which can ultimately lead to a dismissal.[1124] As correctly highlighted by Rudman,[1125] one can conclude that the respondent acted in a way that a fair and reasonable employer could have done given the circumstances that prevailed at the time.

Lastly, the employer must genuinely consider the employee's plight in light of the allegations levelled against him or her.[1126] This is to ensure a due and fair process is followed. However, a tribunal or court may consider any other factors that are deemed

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1118 S103A(3)(b) of the *ERA*; Rudman *New Zealand Employment Law Guide* 561; *Huntley* para 119.
1119 S103A(3)(c) of the *ERA*. Refer to Chapter 4, para 4.2.1.
1120 *Bennett* case para 38.
1121 *Bennett* case para 39.
1122 *Bennett* case para 44.
1123 *Bennett* case para 41.
1124 Refer to chapter 2, para 2.4
1125 S103A(2) of the *ERA*; *Bennett* case para 35; *Terris* case para 37; *Cheol Hong* case para 13; Rudman *New Zealand Employment Law Guide* 523.
1126 S103A(3)(d) of the *ERA*.

appropriate.[1127] It is argued that this approach adopted by the New Zealand employment courts is correct because the *ERA* neither explicitly excludes incompatibility as a plausible ground of dismissal nor lists other grounds of dismissal. As a result, when dealing with disputes of this nature, the courts can rely on this general legislative provision.

Overall, the spirit and purpose of section 103A does not appear to differ much from the principles and rules already in place in the South African law. Nonetheless, the discussion below will further expose how the New Zealand courts have dealt with incompatibility disputes in the workplace.

5.6 New Zealand case law on incompatibility

As mentioned earlier, various New Zealand employment courts have recognised incompatibility as a ground of dismissal.[1128] Most importantly, the New Zealand employment courts have established procedural and substantive guidelines when dealing with incompatibility in the workplace in their judgements. It is anticipated that the manner in which the New Zealand courts have dealt with similar cases, could assist

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1127 S103A(4) of the *ERA*; Rudman *New Zealand Employment Law Guide* 561.

1128 Rudman *New Zealand Employment Law Guide* 561; *Terris v The Parliamentary Service* 2012 NZ ERA 29/03/12; *Walker Procure Health Ltd* 2012 NZ EmpC 90 ARC 72/ 90; *Snowdon v Radio New* Zealand NZCA 108 CA149/2013; *Mabry v West Auckland and Living Skills Home Trust Board* (Inc) Unreported 2001 AC 86/01; *Reid v New Zealand Fire Service Commission* (7/5/08, HRRT Decision No 8/2008; HRRT58/07); *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66; *Bennett v NZ Mushrooms Ltd Auckland* 2008 NZERA 754; *Birss v Aiku New Zealand Ltd* (AT/195/96) Auckland 1996 NZEmpT 244; *Burns v Chief Executive Legal Services Agency* (WA/22/04) Wellington 2004 NZERA 182; *Buxton v Five Star Beef Ltd (CT/37/96) Christchurch* 1996 NZEmpT 486; *Cheol Hong v Auckland Transport (Auckland)* [2017] NZERA 255; *Crooks v Pratt & Whitney Air New Zealand Services Christchurch* 2007 NZERA 278; *De Kater v Streamline Freight (Auckland)* [2016] NZERA Auckland 102; *Gomes v Ministry of Social Development Wellington* 2007 NZERA 473; *Hayward v Tairawhiti Polytechnic* (AA/72/04) Auckland 2004 NZERA 490; *Harris v Chief Executive, Department of Corrections* [2000] 1 ERNZ; *Comberv v Odyssey House Trust Inc* [1992] 3 ERNZ 210; *Wellington Hotel etc IUOW v Hawthorne* [1988] NZILR; *Heriot v Asteron Life Limited* Wellington 2007 NZERA 407; *Hoyte v AIA International Limited (Auckland)* [2018] NZERA 72; *Huntley v Maataa Waka Waka Ki Te Tau Ihu Trust Christchurch* 2008 NZERA 341; *Kee v Bartercard New Zealand Ltd* (AA/296/04) Auckland 2004 NZERA 432; *Marshall v Conway Shipping Ltd ta Seatrade NZ* (AA/311/03) Auckland 2003 NZERA 407; *O Neill v Te Puke High School Board of Trustees* (HT/69/01) Hamilton 2001 NZEmpT 454; *Watt v Canterbury District Health Board* CA/22/06) Christchurch 2006 NZERA 132; *Erin Therese Dent v Waikato District Health Board* NZEmpC Auckland [2017].

in developing appropriate fixed guidelines for the South African law for purposes of regulating incompatibility as an independent ground of dismissal.

5.6.1 What is regarded as incompatibility in the New Zealand law?

As stated in the earlier chapters, no clear-cut, all-encompassing definition for incompatibility in the labour law context exists.[1129] As a result, various definitions formulated by the courts can be used to deduce its meaning. The New Zealand employment courts have at least sought to provide guidance as to which behaviour an employer may consider incompatible. In most cases, the New Zealand employment courts have defined incompatibility as situations in which an employee's behavior results in an irreconcilable breakdown of trust and confidence that is required in employment relationships or in the workplace.[1130] In *Lubke v Protective Packaging*[1131] and *Wright v St Mary's Hospital*,[1132] as outlined in the preceding chapters, the South African labour courts reached a similar conclusion. It can be deduced that both South African and New Zealand courts have regarded irreconcilable breakdowns in either employment relationships or the workplace as critical elements of incompatibility. In some cases, the New Zealand employment courts have formulated definitions that differ from the one outlined above. Although the Employment Court did not establish a precise definition of incompatibility in *Comber v Odyssey House Trust Inc*,[1133] it can be surmised that it also refers to a clash of personalities between an employer and an employee. This not only disrupts workplace harmony but may also render the continuation of the employment relationship untenable.[1134] Most importantly, the employee must be at fault for the dismissal to be justifiable.[1135] This definition is

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1129 Refer to chapter 2, para 2.2.1.

1130 *Terris* case para 35; Cheol Hong case para 84; *Gomes v Ministry of Social Development Wellington* 2007 NZERA 473 (Hereinafter, referred to as the Gomes case) para 74.

1131 *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC) (Hereinafter, referred to as *Lubke case*) 424.

1132 *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC) (Hereinafter, referred to as the *Wright case*) 987.

1133 *Hayward v Tairawhiti Polytechnic* (AA/72/04) Auckland 2004 NZERA 490 (Hereinafter, referred as the *Hayward* case) referred to *Comber v Odyssey House Trust Inc* (1992) 3 ENRZ 210 in para 17.

1134 *Hayward* case para 17.

1135 *Hayward* case para 17.

affirmed to be correct because it is the same definition that is proposed by different authors as discussed in previous chapters.[1136]

It should be noted that unlike the South African labour courts, the New Zealand employment courts do not expressly define incompatibility as an employee's failure to fit in with the "corporate culture" in the workplace.[1137] Notwithstanding this fact, the New Zealand employment courts have dealt with cases where an employee was deemed incompatible because they did not uphold the values and/or views of the employer. A case in point is *Cheol Hong v Auckland Transport (Auckland)*,[1138] where the applicant was dismissed because he failed to uphold the values and held contrary views to those of the employer.[1139] Rather than employing de-escalation methods ("detach and walk away") while dealing with aggressive customers, the applicant would threaten them and act on his own views that were contradictory to the employer's directives.[1140] As a result, the applicant and other employers were at risk of being violently attacked by the customers in question.[1141] The employer did not approve the applicant's failure to uphold and observe measures that were crucial in upholding the reputation of the company.[1142] It is contended that the *Cheol Hong* case affirms that an employee's failure to fit with the "corporate culture" is also a clear case of incompatibility, although not recognised in those words. This is because failure to adhere to a system of rules in the workplace is an indication that an employee does not fit in with the so-called corporate culture and is subsequently incompatible with the employer.[1143]

Similarly, in the case of *Terris v The Parliamentary Service*,[1144] the applicant was appointed by the Parliamentary Service as a member of parliament's support staff. On the other hand, the applicant was a trustee of the Hutt Manna Community Trust, which was in charge of managing and allocating proceeds from the sale of certain power

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1136 Refer to chapter 2, para 1.2.1. *Wright* case 987; Lubke case 424. Refer to Chapter 2. para 2.2.1.
1137 Refer to chapter 2, para 1.2.1; para 1.5.
1138 Refer to chapter 2, para 1.5.2.3
1139 *Cheol Hong* case para 2.
1140 *Cheol Hong* case para 2.
1141 *Cheol Hong* case para 2, 36.
1142 Cheol Hong case para 22.
1143 Refer to chapter 2, para 2.5.2.3.
1144 *Terris* case para 2.

companies previously owned by the local bodies in the area.[1145] The applicant's opposing opinions and/or public comments about an inquiry being conducted by the trust, which were made to the media, were frequently misconstrued as those of the member of Parliament.[1146] Hence, the applicant's political views as a trustee of the community trust had a negative impact on the office of the member of Parliament due to the politicised climate and the nature of his duties towards the Parliamentary Service.[1147] This resulted in an irreconcilable breakdown of trust and confidence in the employment relationship between the applicant and the member of Parliament.[1148] The New Zealand Employment Court concluded that it was the applicant's obligation as a support staff member to effectively support the Parliamentary Service without a conflict of interest.[1149] Consequently, the court held that the dismissal based on incompatibility was justified.[1150] It is opined that the court's judgment is correct because it is a clear case where an employee fails to fit in with the "corporate culture" of the employer. As discussed in the previous chapters, it should be reiterated that owing to the existence of an employment relationship between the parties, there is a common law duty on the employer not to act in a manner that is likely to destroy or seriously damage the relationship of confidence and/or trust with the employee. [1151] Failure to fulfil that obligation, which in this context includes failing to respect and adhere to the views and values of the employer and his or her business to the detriment of said business, is therefore a valid reason to dismiss one on the grounds of incompatibility.[1152]

The New Zealand employment courts have over time outlined certain behaviours that may provide guidance in the identification of conduct that could render an employee

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1145 *Terris* case para 6.
1146 *Terris* case para 11.
1147 *Terris* case para 17,21,45. The code of conduct specified that the applicant's private activities must not interfere with the performance of his official duties, or reflect negatively on Parliamentary Service and its relationships with its clients or the public.
1148 *Terris* case para 18, 30.
1149 *Terris* case para 21, 22, 45.
1150 *Terris* case para 45.
1151 Refer to chapter 2, para 2.3. *Council of Scientific & Industrial Research v Fijen* [1996] 6 BLLR 685 (AD) (Hereinafter, referred to as *Council of Scientific & Industrial Research v Fijen*) 17.
1152 Refer to chapter 2, para 2.5.2.3.

incompatible. The discussion below will outline these behaviours identified by the courts.

5.6.1.1 Incompatible behaviour

As previously stated, examples of case law determined by the New Zealand employment courts can assist in determining whether an employee is certainly incompatible with the employer or other employees, with the common objective to ensure unfair dismissals are not allowed to take place. As established in the *Bennett* case,[1153] disruptive and/or obstructive behaviour is identified as incompatible behaviour. Furthermore, it is contended that if an employee exhibits any form of aggressive behaviour that makes other co-workers feel unsafe and uncomfortable, that can also be characterised as incompatible behaviour. In *Walker v ProCare*,[1154] the applicant worked as a Management Accountant before becoming the company's Financial Controller. The applicant was dismissed due to incompatibility because she exhibited hostile and antagonistic behaviour that made it difficult to work harmoniously with her colleagues.[1155] Concerns of the applicant's confrontational behaviour included criticising senior staff and sending offensive emails.[1156] Moreover, the applicant would have violent outbursts, which caused her to slam objects around the office, which made other co-workers feel unsafe.[1157] The court confirmed that the applicant's irrational behaviour contributed significantly to a irreconcilable breakdown of trust and confidence in the employment relationship.[1158] Most importantly, the court correctly stated that no organisation can successfully function against a background of such a protracted conflict.[1159] It is asserted that the *Walker* case[1160] is a clear illustration of a case of an employee's personality traits having a negative impacting on working relationships with coworkers and management, without the behaviour

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1153 Benett case para 8, 24, 36. Refer to para 5.4.1.2.
1154 *Walker Procure Health Ltd* 2012 NZ EmpC 90 ARC 72/ 90 (Hereinafter, referred to as the *Walker* case).
1155 *Walker case* para 73, 106
1156 *Walker* case para 19,.
1157 *Walker* case para 26.
1158 *Walker case* para 109.
1159 *Walker case* para 109.
1160 *Walker case* para 25, 26.

necessarily constituting misconduct. Hence, it is reiterated that such behaviours are valid grounds for dismissal simply due to their disruptive nature.

Furthermore, an incompatible employee is one that is uncooperative, unwilling to learn new ways of doing things and/or is overly complex.[1161] This is especially true if any of these behaviours is causing an irreconcilable breakdown or damage in workplace relationships. In *Watt v Canterbury District Health Board*,[1162] the applicant who was employed as a psychiatrist nurse for the Canterbury District Health Board, was dismissed on grounds of serious incompatibility. Management and staff lodged a number of complaints about the applicant's behavior, which subsequently led to his dismissal. The first complaint was that the applicant was the substantial cause of the breakdown in relationships because he vocally criticised other senior colleagues.[1163] As a result, it was difficult for the senior team members to work amicably with the applicant.[1164] Secondly, in an effort to mitigate the effects of workplace restructuring, management offered the applicant a redeployment option to a registered nursing position.[1165] However, the applicant declined the post because it was of a lower status and salary than the Clinical coordinator position, to which he believed he should have been appointed.[1166] Moreover, the applicant alleged that he was being mobbed and isolated by senior management due to past events with certain colleagues.[1167] In a quest to resolve the conflict between the parties, a facilitation process was proposed by management.[1168] Despite management's efforts to rectify the irreconcilable breakdown between the parties, the applicant still refused to participate in the process.[1169] The question before the court was whether the applicant was the sole cause of the conflict that led to incompatibility between the parties.[1170] It is submitted

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1161 *Gomes* case para 113;*De Kater v Streamline Freight (Auckland)* [2016] NZERA Auckland 102, (hereinafter, referred to as the De Kater case para 33).
1162 *Watt v Canterbury District Health Board* (CA/22/06) Christchurch 2006 NZERA 132,(hereinafter, referred to as the *Watt* case) para 1.
1163 *Watt* case para 12, 44, 58, 61.
1164 *Watt* case para 12, 44, 58, 61.
1165 *Watt* case para 28.
1166 *Watt* case para 34.
1167 *Watt* case para 40, 56, 58, 69.
1168 *Watt* case para 16.
1169 *Watt* case para 31.
1170 *Watt* case para 77.

that the court correctly established that the conflict was largely caused by the applicant, hence the dismissal was justified.[1171] Based on the facts of the case, it is indisputable that the applicant was unwilling to cooperate with management to resolve the differences that he had with other staff members. The court correctly established that the purported historical claims were used by the applicant to justify his resistance to the facilitation process that was aimed at resolving the conflict between the parties.[1172] It is argued that the applicant was causing unnecessary conflict and disharmony in the workplace. Therefore, it is opined that not only did the court arrive at the right decision that the dismissal was justified, but it also highlights which behaviours are identified as incompatible.

Overall, incompatible behaviours that have been identified by the New Zealand employment courts are similar to those categorised by South African scholars. This implies that there are certain personality traits that are universally recognised as incompatible behaviours in the workplace. The discussion below will unpack substantive and procedural guidelines that have been established by the New Zealand employment courts.

5.7 Substantive and procedural guidelines laid down by the New Zealand courts

Although there are no express provisions or statutory guidelines in New Zealand that specifically recognise incompatibility as a valid ground for dismissal, the courts, like those in South Africa, have provided guidance on how to handle such disputes. As established in the previous chapters, a dismissal must be substantively and procedurally fair.[1173] Particularly, in the case of *Walker v ProCare*,[1174] the Employment Court laid down comprehensive substantive and procedural guidelines to assist employers when dealing with matters of incompatibility and to provide legal certainty

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1171 *Watt* case para 77.
1172 *Watt* case para 77.
1173 Rudman *New Zealand Employment Law Guide* 524. Refer to chapter 4, para 4.2.1; 4.2.2.
1174 *Walker Procure Health Ltd* 2012 NZ EmpC 90 ARC 72/ 90 (Hereinafter, referred to as the *Walker* case).

in such disputes. This is not to say that the courts have not provided these guidelines in other case law.

5.7.1 Substantive guidelines

Below is a discussion of substantive guidelines that have been developed by the New Zealand employment courts. All these requirements must be met in order for the dismissal to be justified.

5.7.1.1 Irreconcilable breakdown in employment relationship

Regarding substantive guidelines, it was held that when discharging his onus, the employer must prove that there is an irreconcilable breakdown in the employment relationship between the employer and the employee.[1175] Webby[1176] asserts that by failing to discharge this onus, the employer will be unsuccessful in terminating the employment relationship due to incompatibility. Most importantly, the breakdown in the employment relationship must be attributed solely or substantially to the employee due to their attitude, behaviour, or character, which may cause personality clashes with either the employer or other co-workers. It is further submitted that the employee's behaviour must impair or destroy the mutual trust that is required in an employment relationship by causing disharmony in the workplace.[1177] Although there is no clarity as to how to test for incompatible conduct, it is submitted that an employee's incompatible behaviour can be tested against the behaviours that have been outlined earlier in this chapter, as well as their effect or potential effect on the employment relationship and business.[1178] Any disruptive/ obstructive behaviour, or

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1175 *Walker* case para 77, 80; *Terris v the Parliamentary Service* (2012) NZERA Wellington 28; *Cheol Hong* case para 84; *Gomes* case para 74; *Reid v New Zealand Fire Service Commission* (7/5/08, HRRT Decision No 8/2008; HRRT58/07); *Snowdon v Radio New Zealand* NZCA 108 CA149/2013; Webby R Year Unknown "Incompatibility: Deal With it" *Human Resources Institute of New Zealand* 1; Rudman *New Zealand Employment Law Guide* 561.

1176 Webby R Year Unknown "Incompatibility: Deal With it" Human Resources Institute of New Zealand 1. See also *Walker* case para 98, 109; *Terris v the Parliamentary Service* (2012) NZERA Wellington 28; *Hayward* case para 17; *Comber v Odyssey House Trust Inc* (1992) 3 ENRZ 21; *Mabry v West Auckland and Living Skills Home Trust Board* (Inc) unreported 2001 AC 86/01, (Hereinafter referred to as the *Mabry* case); *Wellington Hotel etc IOUW v Hawthorne* 1998 NZILR 352; *Reid v New Zealand Fire Service Commission* (7/5/08, HRRT Decision No 8/2008; HRRT58/07); *Snowdon v Radio New Zealand* NZCA 108 CA149/2013 (Hereinafter, referred to as, *Snowdon v Radio New Zealand*);

1177 *Bennett* case para 41.

1178 Refer to para 5.5.1.1.

aggressive behaviour that makes other co-workers feel unsafe and uncomfortable, uncooperative behaviour; unwillingness to learn and overly complex behaviour have been identified as examples of incompatible behaviour.[1179]

5.7.1.2 Employee must be the substantial cause for the breakdown

The second guideline requires that the employee must be wholly or substantially the cause of the breakdown in the employment relationship and conflict in the workplace.[1180] This means that the employee must be entirely at fault for causing the disharmony in the workplace.[1181] However, the New Zealand employment courts have outlined two instances where an employee may be excluded from being the cause of incompatibility in the workplace. Firstly, if the cause of disharmony is caused by the employer or management, dismissing the employee under these circumstances will be deemed unjustifiable.[1182] Secondly, if it is the fault of the employer due to their words or conduct which cause disharmony and leads to the employee resigning, this a clear case of constructive dismissal.[1183] It is argued that the court correctly identified the aforesaid circumstances where dismissing the employee would be unjustified. Hence, it is submitted that before dismissing an employee for incompatibility, the employer's contribution must be ascertained to prove that the dismissal is indeed fair.

Although the South African labour courts have established that the employee must have contributed substantially or entirely to the disharmony in the workplace, they have not provided additional guidance on this criterion.[1184] It is opined that the New Zealand employment courts have provided more guidelines in this regard. Thus, South

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1179 Refer to para 5.5.1.1.

1180 *Walker* case para 79; *Heriot v Asteron Life Limited Wellington* 2007 NZERA 407 para 50.

1181 *Walker case* para 78; Watt case para 75, 77; *Hayward* case para 17.

1182 *Hayward case* para 17.

1183 *Hayward case* para 17; Rudman *New Zealand Employment Law Guide* 575. Constructive dismissal refers to employees who resign because they are coerced to do so by the employer. *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) 374–375; Rio *Ngawaka* v Global *Security Solutions Limited* [*2022*] *Nzempc* 40 para 7. The court highlighted that constructive dismissal includes cases where an employer gives an employee an option of resigning or being dismissed; an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

1184 *Hapwood v Spanjaard Ltd* [1996] 2 BLLR para 197, (Hereinafter, referred to as the H*apwood* case).

Africa can augment these requirements where its policy reform is needed to ensure substantive fairness.

5.7.1.3 Multiple incidents of incompatibility over a reasonable period of time

In order for the employer to successfully dismiss the employee based on incompatibility, there must have been repeated incidents of related behaviour that resulted in the deterioration of harmonious relations in the workplace.[1185] Furthermore, it is argued that the New Zealand employment courts are correct in their assessment that it may be difficult to dismiss an employee on grounds of incompatibility based on a single occurrence.[1186] The courts further affirm that there must be evidence of a snowball effect regarding incompatibility issues over a reasonable period of time.[1187] It is argued that the burden of proof will rest on the employer in this case. It is, however, unclear as to how an employer determines "multiple" or "repeated incidents" of the employee's related behaviour. In addition, the New Zealand employment courts do not provide any guidance on what constitutes a "reasonable period of time". It is, therefore, argued that what is regarded as repeated incidents and a reasonable period of time will be determined by the circumstances of each case.

With reference to this substantive requirement, South African labour courts have adopted the same approach. Similar to the New Zealand employment courts, the South African labour courts have also affirmed that incompatibility cannot be reflected in any one particular incident but may arise from several incidents.[1188] Nonetheless, the South African labour courts do not provide guidance on how many occurrences must be determined by the employer in order to successfully dismiss the employee on basis of incompatibility.

1185 *Walker* case para 79; *De Kater* case para 27; *Huntley* case para 64.
1186 *Walker* case para 79; *De Kater* case para 27; *Huntley* case para 64.
1187 *Walker* case para 79; De Kater case para 27; *Huntley* case para 64.
1188 *Subrumuny v Amalgamated Beverages* 2000 21 ILJ 2780 (ARB), (hereinafter referred to as the *Subrumuny* case) 2789.

5.7.1.4 Dismissal must be the ultimate sanction

Lastly, provided all the substantive and procedural requirements have been met, the employer may dismiss the employee for incompatibility.[1189] Most importantly, in terms of section 103A of the ERA, it must be determined whether dismissal was the appropriate sanction that a fair and reasonable employer could have imposed under the circumstances.[1190] One must have to reach a conclusion based on the different factors listed in section 103A that a reasonable employer could have used to reach a fair outcome.[1191] It is submitted that this requirement does not differ from the one adopted by the South African labour courts.[1192]

With regards to substantive guidelines when dealing with incompatibility disputes, it is clear South Africa can draw some lessons from New Zealand to bridge gaps where policy reform is required. The discussion below will unpack the procedural guidelines that have been developed by the New Zealand employment courts.

5.7.2 Procedural guidelines

It must be reiterated that like other grounds for dismissal, the employer must carry out incompatibility dismissals in a procedurally fair manner.[1193] The New Zealand employment courts have attempted to develop procedural guidelines in their case law when dealing with dismissals arising from incompatibility.

As established earlier, when dealing with dismissals arising from incompatibility the New Zealand courts will draw guidance from section 103A(3) of the *ERA*.[1194] In terms of section 103A(3), the employer must conduct a fair and full investigation with all the resources that are available.[1195] In addition, fair procedure requires that the employee

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1189 Rudman *New Zealand Employment Law Guide* 519; Dent case para 78.

1190 Refer to para 5.5.1; S103A of the *ERA*; *Birss v Aiku New Zealand Ltd* (AT/195/96) Auckland 1996 NZEmpT 7;*Hayward* case para 17; Huntley case para 40, 82; Rudman *New Zealand Employment Law Guide* 523.

1191 Refer to para 5.5.1.1.

1192 *Hapwood* case 198.

1193 Rudman *New Zealand Employment Law Guide* 524. Refer to chapter 4, para 4.2.1; 4.2.2.

1194 Refer to para 5.5.1.2; s103A(3) of the *ERA*.

1195 S103A(3)(a) of the *ERA*; Ndaba NJ 2018 An employee can be dismissed for not "fitting in" http://www.mmegi.bw accessed 5 June 2018.

must be informed of the allegations levelled against him/her.[1196] This includes issuing the employee fair, clear and formal warnings that his/her behavior(s) is having a detrimental effect on the workplace and workplace relationships.[1197] As discussed earlier, it is crucial that the employee should be granted the opportunity to respond to the allegations levelled against him or her prior to the dismissal.[1198] This is aimed at preventing arbitrary dismissals by the employer for no justifiable cause.

It is contended that these guidelines listed above, do not differ from those applied by the South African labour courts when dealing with incompatibility disputes, yet it does confirm that the approach the South African courts are following are sound, and could these guidelines thus safely be included in the South African regulatory framework towards legal certainty in incompatibility dismissal disputes.[1199] For instance, the South African labour court enunciated that an employee must be advised of the conduct causing the disharmony; who is upset as well as the likely consequences of his/her behaviour and the employer must give the employee an opportunity to put his or her version.[1200] The South African labour courts go on further to state that the employer must advise the employee that he/she has the right to be represented at any subsequent disciplinary hearing.[1201] In this case, the employee has a right to be represented by a trade union representative or coworker.[1202] It is submitted that the elements highlighted here, as they correspond with the New Zealand law on the matter, must form part of the regulations of incompatibility as a ground of dismissal.

On the other hand, the New Zealand employment courts have devised additional procedural standards specifically for dismissals based on incompatibility, which may be useful to the South African regulatory framework. These additional guidelines can be drawn from the *Walker* case.[1203] As discussed earlier, the applicant who was the

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1196 S103A(3)(b) of the ERA; Ndaba 2018 http://www.mmegi.bw.
1197 *De Kater* para 25; Bennett para 38; *Huntley* para 82.
1198 Refer to para 5.5.1.2.
1199 Refer to chapter 4.
1200 *Wright case* 1004; *Hapwod case* 197; *Hayward* para 25; *Lubke* case
1201 *Larcombe v Natal Nylon Industries (Pty) Ltd, Pietermaritzburg* (1986) 7 ILJ 326 (IC) 330-331.The court was held that the holding of a disciplinary enquiry is necessary where the charge against the employee is one of incompatibility. Ndaba 2018 http://www.mmegi.bw.
1202 *Subrumuny* case 2781.
1203 *Walker* case.

employee, was dismissed based on incompatibility due to her aggressive communication style with management.[1204] To ensure fair and due process, the employer undertook various remedial steps to address the conflict.[1205] Firstly, a senior manager was appointed to help improve the staff culture to ensure a healthy and well-functioning work environment.[1206] Notably, it was highlighted that the senior manager had carried out similar tasks with other organisations beforehand, hence, his primary role was to identify the cause of discord and to devise ways to overcome any difference between the staff members and the applicant.[1207] Secondly, a mediator was provided to deal with the personal grievances of other staff members and the formal complaint against the applicant.[1208] Thereafter, the mediator would inform the applicant of the complaints levelled against her and would attempt to reduce tensions and reach an amicable resolution will all the parties in a non-disciplinary manner.[1209] Furthermore, an independent review of the finance department and an Audit and Risk Committee were commissioned to try to investigate and address the serious ongoing divisions in the respective departments.[1210] Subsequently, based on the finding of the investigations, a remedial action plan was developed to assist the applicant to overcome her difficulties.[1211] As a result, the applicant was offered psychological services to assist her to cope with "stress" that was allegedly causing her aggressive behaviour.[1212] Despite the employer's efforts to mitigate the alleged incompatibility, the applicant refused to compromise to rectify the problem. Consequently, the court concluded that the applicant was substantially responsible for the irreconcilable breakdown of the employment relationship.[1213] Hence, she was fairly dismissed on grounds for incompatibility.

It is submitted that there are lessons that South Africa can learn from the *Walker* case when dealing with disputes arising from incompatibility. Firstly, it is deduced that an

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[1204] *Walker* case paras 13-35.
[1205] *Walker* case para 53.
[1206] *Walker* case para 99.
[1207] *Walker* case para 42.
[1208] *Walker* case para 42, 45, 49.
[1209] *Walker* case para 99.
[1210] *Walker* case para 49.
[1211] *Walker* case para 42, 45, 49.
[1212] *Walker* case para 42, 45, 49.
[1213] *Walker* case para 78, 80, 90.

employer must adopt remedial steps such as assistance in the form of support to the employee, which includes counselling and mediation between the parties as well as training.[1214] This is not to say that the South African labour courts do not introduce the concept of remedial steps as a way to address incompatibility issues in the workplace. As discussed in the previous chapters, in the *Lubke* case[1215] it was held that before reaching a decision on the alleged incompatibility, the employer should ensure that some sensible, practical, and genuine efforts have been made to improve interpersonal relations. In this case, remedial action would entail that after evaluating the gravity of the problem, the employer must attempt to assist the employee in overcoming his personality difficulties.[1216] This also includes giving the employee reasonable time to remedy the situation before terminating the employment relationship.[1217] However, the South African labour courts simply recommend counselling as a means of removing incompatibility in the workplace, whereas the New Zealand employment courts provide comprehensive remedial actions that the employer might use before dismissing the employee.[1218]

Firstly, an employer must adopt remedial steps such as assistance in the form of support to the employee, which includes counselling and mediation between the parties as well as training.[1219] In the *Walker* case, a senior manager and a mediator were appointed to assist both the applicant and the staff members to overcome the differences that they had. It is argued that these remedial steps enable the employee to rectify his/her actions where they fall short before they are dismissed by the employer.[1220] Correctly so, dismissal should be the last resort.[1221] Another remedial action is that the employer must engage an independent psychologist to assess the disharmony between the employer and the employee to ensure an independent and

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1214 *Walker* case para 99; *Snowdon v Radio New Zealand* para 100.
1215 *Lubke* case 429.
1216 *Hapwood* case 197; *Erasmus v BB Bread* 1987 8 ILJ 537 (IC) 538.
1217 *Glass v Liberty Group Ltd* (2007, 12 BALR 1172) 1184. It was held that an employee should also be given a reasonable time to make amends.
1218 *Wright* case 1004; *Van der Merwe and Agricultural Research Council* (2013) 34 ILJ 3366 (CCMA).
1219 *Walker* case para 99; *Snowdon v Radio New Zealand* para 100.
1220 *Walker v Procure Health Ltd* para 99.
1221 Ndaba 2018 http://www.mmegi.bw.

unbiased assessment.[1222] Thereafter, the psychologist will provide recommendations that may assist the employer and the employee in resolving their differences before resorting to a dismissal as the last option. Small businesses/employers, on the other hand, may find it difficult to appoint professional counsellors, mediators, and/or psychologists to aid employees in overcoming personality differences. This is especially true when they lack the necessary resources at their disposal. It will not only be costly for such employers, but it may also cause undue hardship to the business. It is, therefore, under such circumstances that such an employer will have to consider options such as engaging a neutral third party to help the employee overcome his or her personality difficulties.

If the aforementioned corrective measures fail, the employer must inform the employee that they will be terminating the employment contract and that the employee will be granted an opportunity to respond.[1223] It is further asserted that these procedures ensure that the employer has sufficient grounds to dismiss the employee after exhausting all possible avenues to try and rectify the incompatibility between them. With regards to the above-mentioned remedial actions, it is contended that South Africa will be able to learn lessons from New Zealand and bridge gaps where policy reform is required.

A few New Zealand scholars have also proposed viable solutions to address workplace incompatibility. Firstly, Webby[1224] suggests that the employer must attempt to resolve incompatibility informally before directly resorting to formal disciplinary procedures. According to Rowe,[1225] this can be achieved by having informal chats with employees to raise concerns openly and offering an open door policy. This will make it easier for employees to come forward with any grievances that could potentially lead to incompatibility. Secondly, mediation is a valuable tool when resolving conflicts arising

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1222 *Walker v Procure Health* Ltd para 101.
1223 *Walker v Procure Health Ltd* para 108.
1224 Webby R Year Unknown "Incompatibility: Deal With it" *Human Resources Institute of New Zealand* 1.
1225 Rowe 2012 *Employment Today* 18.

from incompatibility between the employee, employer and/or management.[1226] However, Webby[1227] correctly argues mediation cannot be the only tool neither should it be used in isolation. Resolving incompatibility differences require all parties to proactively reach a compromise and work towards building a healthy and functional working relationship.[1228] Moreover, Rowe[1229] correctly highlights that an employer must promptly respond to any potential conflict that may escalate to incompatibility in the workplace. Early signs of conflict may be exhibited through aggressive and temperamental behaviour by an employee to either the employer, management or other co-workers.[1230]

Overall, it is asserted that there are a number of lessons that South Africa can learn from New Zealand. It is hoped that the additional guidance developed by the New Zealand employment courts in both the substantive and procedural guidelines, will augment South Africa's legislative framework where it falls short. The discussion below will evaluate the application of incompatibility as a ground of dismissal in Australia.

5.7.3 Incompatibility in Australian labour law

5.7.3.1 Key labour legislation that regulates dismissals in Australia

As mentioned earlier, Australia does not have express provisions or statutory guidelines that specifically recognise incompatibility as a valid ground for dismissal. The *Fair Work Act* 2009 is the principal piece of legislation in Australia that regulates dismissal law in Australia.[1231] Notably, part 3-2 of the *FWA* deals with unfair dismissals. Similar to the *LRA*, the *FWA* recognises misconduct, incapacity, and redundancy as the grounds of dismissal in Australian labour law.[1232] Section 385, in particular, outlines

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1226 Webby Year Unknown "Incompatibility: Deal With it" *Human Resources Institute of New Zealand* 1.

1227 Webby Year Unknown *Human Resources Institute of New Zealand* 1.

1228 Webby Year Unknown *Human Resources Institute of New Zealand* 1.

1229 Rowe 2012 *Employment Today* 17; Webby Year Unknown *Human Resources Institute of New Zealand* 1.

1230 Rowe 2012 *Employment Today* 18.

1231 *Fair Work Act* of 2009, (Hereinafter, referred to as the FWA); CCH *Understanding the Fair Work Act* 2nd ed (Wolter Kulwer Australia 2011) 90; Australian Government 2022 *Fair Work Ombudsman* https://www.fairwork.gov.au accessed 16 November 2022.

1232 S387(a), (e); s389 of the *FWA*.

instances in which an employee is considered to have been dismissed unfairly.[1233] In terms of the *Act*, an unfair dismissal is one that is harsh, unjust, or unreasonable.[1234]

Furthermore, section 387 prescribes the criteria to determine whether a dismissal was harsh, unjust, or unreasonable.[1235] It is argued that the criteria does not differ from the principles and rules that are already in place in South Africa and New Zealand. Firstly, it must be determined whether there was a valid reason for the dismissal that was related to the person's capacity or conduct.[1236] Furthermore, the employee must be informed of the reason for the dismissal and be given an opportunity to respond to the allegations levelled against him/her.[1237] In this case, the *audi alteram parterm* principle applies in both the Australian and South African labour law.[1238] In addition, a person in support of the employee must be present during any discussions about the employee's dismissal, or the dismissal will be deemed unfair.[1239] This is a similar requirement in both the New Zealand and South African labour law that during a disciplinary enquiry, an employee has a right to be represented by a trade union representative or coworker.[1240]

5.7.3.2 Australian case law on incompatibility

Although the Australian law does not address all the issues identified in South Africa regarding incompatibility as a ground of dismissal, their courts have addressed incompatibility disputes and have provided a few clear guidelines. In fact, the New Zealand employment courts have also relied on guidelines that have been developed by the Australian courts.[1241] Particularly, the case of *Marbry v West Auckland Living Skills Home Trust Board* [1242] is the landmark case that deals with incompatibility in the

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1233 S385 of the *FWA*.
1234 S385(b) of the *FWA*.
1235 S387 of the *FWA*.
1236 S387(a) of the *FWA*.
1237 S387(b), (c) of the *FWA*.
1238 Refer to chapter 4, para 4.2.1.
1239 Refer to para 5.7.2.
1240 *Subrumuny* case 2781.
1241 *Walker* case para 77, 78; *De Kater* case para 26; *Hong Cheol* case para 84; *Bennett* case para 32; Dent case para 78; Huntley case para 53; *Marshall v Conway Shipping Ltd ta Seatrade NZ* (AA/311/03) Auckland 2003 NZERA 9.
1242 *Mabry* case.

workplace. In this case, the applicant was employed as a community service worker by a charitable trust that offered services to individuals who were recovering or had experienced mental illness.[1243] The applicant was dismissed on incompatibility.[1244] During the course of her employment, concerns regarding the applicant's poor time and stress management as well as lack of professional boundaries were raised by the supervisor.[1245] Furthermore, the Executive Director of the Trust raised complaints that the applicant was insubordinate and insolent towards management; did not respond well to constructive criticism and correction. Whereas the applicant claimed that she was being patronised by management and that she did not trust her supervisor.[1246] Consequently, this led to animosity between the applicant and her supervisor.[1247] Despite management's efforts to mediate the differences between the parties, those efforts proved futile since the applicant was evasive in her responses.[1248] The question before the court was if the employment relationship had reached a point of incompatibility to justify a dismissal.[1249] The court confirmed that there was an irreconcilable breakdown of trust and confidence between the parties.[1250] Therefore, it was a clear case of incompatibility.

Notably, the *Mabry* case reaffirms the substantive and procedural guidelines that have been established by the New Zealand employment courts.[1251] It is contended that these guidelines do not differ from those applied by the New Zealand courts when dealing with incompatibility disputes. Firstly, the employer must come to a reasonable conclusion that the employment relationship is irreparable.[1252] Secondly, the employer must justify the dismissal by corroborating substantial facts.[1253] This entails an objective approach to prove there was an irreconcilable breakdown in the employment

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1243 *Mabry* case 2.
1244 *Mabry* case 11.
1245 *Mabry* case 7.
1246 *Mabry* case 12.
1247 *Mabry* case 19.
1248 *Mabry* case 8.
1249 *Mabry* case 13.
1250 *Mabry* case 18.
1251 Refer to para 5.7.
1252 *Mabry* case 14; *Lumley v Bremick Pty Ltd Australia t/a Bremick Fasteners* [2014] FWCFB 8278. Refer to para 5.7.1.1.
1253 *Mabry* case 14; *Kolodka v Virgin Australia Airlines Pty Ltd t/a Virgin Australia* [2012] FWA 7828.

relationship that justifies the dismissal.[1254] In addition, the irreconcilable breakdown must be wholly attributed to the employee in question.[1255] It is further reiterated that incompatibility is a "snowballing effect" of issues overtime meaning it cannot be based on a single incident.[1256] Once the burden has been discharged, procedural elements of dismissal must be considered.[1257] Thereafter, the employer may effect the dismissal.

When dealing with incompatibility disputes, there are several lessons to be derived from New Zealand and Australian case law. Generally, the content of substantive and procedural guidelines are the same in New Zealand and Australia save for a few differences. The only notable difference is that the New Zealand employment courts further emphasise the need for mediation as a valuable tool when resolving conflicts arising from incompatibility between the employee, employer and/or management.[1258] Although South Africa has substantive guidelines that are similar to those of the aforementioned jurisdictions, there are a number of valuable lessons that could potentially be considered where there is need for policy reform.

5.8 Conclusion

In conclusion, South Africa must ensure that the regulation of workplace dismissals arising from incompatibility fall within the international labour standards set by the ILO. Although there are no specific conventions that address workplace incompatibility, it is argued that the spirit and purpose of the *Termination of Employment Convention* and the *DEOC* can provide general guidelines in preventing the possibility of innocent employees being victimised by unscrupulous employers who can dismiss them on unreasonable grounds and for arbitrary reasons. Although New Zealand and Australia do not provide all the solutions, South Africa can learn from these jurisdictions in areas where its laws fall short. It is argued that New Zealand and Australia have provided comprehensive substantive and procedural guidelines that

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1254 *Mabry case* 14. Refer to para 5.7.1.1.
1255 *Mabry case* 14. Refer to para 5.7.1.2.
1256 *Mabry case* 14. Refer to para 5.7.1.3.
1257 Mabry case.
1258 Webby Year Unknown "Incompatibility: Deal With it" *Human Resources Institute of New Zealand* 1.

South Africa can implement in the development of its legislative framework to effectively regulate workplace dismissals that arise from incompatibility disputes.

Chapter 6 The Proposed Code of Good Practice: Dismissals based on Incompatibility

6.1 Introduction

In the previous chapters, this thesis provided a background and conceptualisation of incompatibility in the workplace.[1259] This was necessary to set out the crucial concepts and elements of this analysis and to provide a better understanding of the meaning of this issue and the guises it could take. Thereafter, incompatibility as a ground for dismissal in South African labour law was unpacked, particularly against the backdrop of the lack of statutory regulation on the matter.[1260] This was to identify potential problems and rights infringements that could arise as a result of a lack of adequate legislative measures and uniform guidelines on the use of this reason as motivation for dismissal.

The previous chapters assessed how the South African courts have dealt with matters of incompatibility in the workplace on a case-by-case basis.[1261] It is argued that case law emphasises the importance of statutory and regulatory reform on the topic of incompatibility as it shows the *lacunae* in South African labour law when it comes to dealing with disputes of this nature. Thereafter, a comparison between incompatibility and other grounds of dismissal which include misconduct, incapacity, and operational requirements was carried out.[1262] It is hoped that examining each ground will assist in determining why the other grounds of dismissal are regarded as fair grounds for dismissal and why incompatibility could and should similarly be recognised and regulated as an independent ground for dismissal.

This thesis also discussed the prescribed international guidelines on termination of employment and discrimination in the workplace that must be followed in South Africa when considering incompatibility as a separate and valid ground for dismissal.[1263]

1259 Refer to chapter 2.
1260 Refer to chapter 3.
1261 Refer to chapter 3 and 4.
1262 Refer to chapter 4.
1263 Refer to chapter 5.

Furthermore, a critical analysis and an evaluation of the application of incompatibility as a ground of dismissal in New Zealand and Australia were carried out because they are amongst the few jurisdictions that have dealt with the issue of incompatibility in their labour law.[1264]

Against the backdrop of mentioned chapters, this chapter provides a proposed *Code of Good Practice: Dismissal based on Incompatibility* that deals with disputes that emanate from dismissals based on incompatibility.[1265] Substantive and procedural fairness guidelines applicable to cases of incompatibility as developed by the courts are proposed. In particular, a proposal on the correct procedure regarding incompatibility as a fair ground for dismissal in South African labour law is made. By doing so, this chapter demonstrates how incompatibility could be fairly implemented as a separate and legitimate ground of dismissal, rather than as a species of either misconduct, incapacity or operational requirements.

6.2 Code of Good Practice: Incompatibility Dismissals

In the previous chapters, it was established that a disciplinary code or workplace policy plays an important role in ensuring workplace discipline and fair procedure in workplace disputes.[1266] Regarding incompatibility, a workplace policy aims to correct or prevent any behaviour which is contrary to the "corporate culture", which impedes production and causes disruption or consternation in the workplace.[1267] However, in the absence of a workplace code or policy, the *Code of Good Practice: Dismissals based on Incompatibility* will serve as minimum guidelines when determining substantive and procedural fairness of dismissals arising from incompatibility.[1268] As mentioned earlier, this chapter establishes the proposed substantive and procedural

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1264 Refer to chapter 5.

1265 *Code of Good Practice: Dismissals based on Incompatibility* (Hereinafter, referred to as the Code *of Good Practice: Incompatibility*).

1266 Refer to chapter 4, para 4.3.

1267 Item 3(1) of the *Code of Good Practice: Dismissal, Schedule 8 of the Labour Relations Act* 66 of 1995 (Hereinafter, referred to as the *Code of Good Practice Dismissal*); Grogan J W*orkplace Law* 13th ed (Juta Cape Town 2020) 120; Finnemore *et al Introduction to Labour Relations in South Africa* (Lexis Nexus Durban 2018) 284; Item 3(1) of the *Code of Good Practice: Dismissal*.

1268 Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* (Juta Cape Town 2014) 156.

guidelines that can be applied when dealing with incompatibility disputes. The basis of this *Code* is founded on the various principles and guidelines that have been developed and utilised by the South African, New Zealand and Australian courts when dealing with disputes of this nature. In addition, the ILO standards on termination of employment and discrimination in the workplace also influence the proposed guidelines on dismissals arising from incompatibility. Most importantly, the proposed *Code of Good Practice: Dismissals based on Incompatibility* will draw influence regarding the wording (where necessary) and format from the *Code of Good Practice: Dismissal*, Schedule 8 of the *Labour Relations Act* 66 of 1995.[1269]

6.3 Defining incompatibility and "corporate culture" of a workplace

It is submitted that the proposed *Code of Good Practice* must start by describing the purpose of the Code and to whom it applies. This will provide employers or the courts with guidance on how to interpret and apply the Code when dealing with incompatibility disputes. In addition, the *Code of Good Practice* must provide a definition as to what is regarded as incompatibility and a "corporate culture" of a workplace. Clear definitions are necessary to avoid subjective interpretations of what is regarded as workplace incompatibility and/or "corporate culture" by either the courts or employers. This ensures legal certainty and clarity on the matter.

6.3.1 Defining incompatible behaviour(s)

Incompatibility can be defined as an employee's inability to work harmoniously with fellow employees and/or the employer due to personality clashes, personality differences and/or failure to fit in with the "corporate culture" in the workplace.[1270] In order to avoid arbitrary applications of this definition, a test that takes into account various factors needs to be considered. This is discussed in greater detail below.

In addition to the definition provided, the proposed *Code of Good Practice* must further provide a list of potentially incompatible behaviour(s) to understand the definition of

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1269 *Code of Good Practice: Dismissal*.

1270 Refer to Chapter 2; *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC) (Hereinafter, referred to as *Lubke Protective Packaging* case) 424; *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC) (Hereinafter, referred to as the *Wright v St Mary's Hospital*) 987.

incompatibility in context. As discussed in the previous chapters, this categorisation will assist employers, the courts or dispute tribunals to ascertain whether an employee's behaviour constitute the alleged incompatibility or not.[1271] This can naturally not be a closed list. It is submitted that it should only form an idea of what behaviour could be said to be incompatible with the business to better understand the concept. However, one would rather use a test to determine whether the behaviour in the employee's unique situation can still cause incompatibility and lead to a fair dismissal. It is contended that the list can be further divided into behaviour that is distinguished as serious incidents and less serious incidents of incompatibility. This is especially considering that incompatibility as a fair ground for dismissal cannot be based on a single incident of supposed incompatible behaviour, but a continuous state of events which could prove to have a detrimental effect on the business and workplace relationships. It is submitted that this distinction will assist the employer in determining which measures are appropriate based on the facts of each case. This aspect is developed further in this chapter.

It is asserted that Griessel[1272] and Grant's[1273] submissions on what alleged incompatible behaviour entails, could aid in determining this classification. It is, therefore, proposed that general or less serious incidences of incompatibility may include an employee's disruptiveness that manifests as odd or eccentric behaviour; pushiness, temper, impatience, manipulation of interpersonal relationships and/or just general disagreeability with other colleagues in the workplace.[1274] It is submitted that when dealing with less serious incidences of incompatibility, the employer should first attempt to correct the employee's behaviour through a system of graduated corrective measures such as mediation, counselling and warnings.[1275] Whereas, serious incidences of incompatibility may include gross disruption in the workplace that manifests as defiance of authority or management, aggressive behaviour including

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1271 Refer to chapter 2, para 2.3.

1272 Griessel 2019 *Incompatibility in the workplace – these irreconcilable differences* https://www.labourguide.co.za accessed 28 November 2019.

1273 Grant C *Defining incompatible behaviour in an employer/ employee relationship* (LLM dissertation University of Johannesburg 2014).

1274 Griessel 2019 https://www.labourguide.co.za.

1275 Item 3(1) *Code of Good Practice: Dismissal*. Refer to chapter 4, para 4.3; chapter 6 para 6.5.2.

intimidation of fellow colleagues and clients that negatively affects staff morale.[1276] In addition, serious incidences of incompatibility may also include an employee spreading malicious false rumours about management and fellow colleagues and any behaviour that leads to the company being brought into disrepute which directly or indirectly led to, or could reasonably lead to a loss of business or confidence in the organisation.[1277] Unlike less serious cases of incompatibility, serious incidences may warrant final warnings and dismissal.[1278]

It is, therefore, proposed that the aforementioned behaviours serve as a starting point in determining if an employee is deemed incompatible with either his/her fellow employees or the employer due to their personality clashes, management style and/or disruptive behaviour.

6.3.2 "Corporate culture" of a workplace

In the previous chapters, it was established that it is difficult to provide a clear and succinct definition of what is regarded as a "corporate culture" in the workplace because it is comprised of various factors, that when combined, they form a prevailing "culture" in the workplace.[1279] It is, however, submitted that "corporate culture" can be defined as the social patterns in a workplace.[1280] It should be highlighted in the *Code of Good Practice* that the concept of a "corporate culture" is a combination of multifaceted factors that when integrated, form a prevailing "culture" in the workplace.[1281] Thereafter, these factors should be included and listed when defining the term "corporate culture". These factors may include a system of informal rules, shared values, attitudes, standards, beliefs and assumptions that characterise members of an organisation.[1282] If the behaviour, character or attitude of the employee

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1276 Grant *Defining incompatible behavior in an employer/ employee relationship* 48, 46.
1277 Grant *Defining incompatible behavior in an employer/ employee relationship* 74.
1278 Item3(1) *Code of Good Practice: Dismissal*. Refer to chapter 4, para 4.3; chapter 6 para 6.5.2.
1279 Chapter 2, para 2.5.
1280 Alvesson M *Understanding organisational culture* (Sage Publications Singapore 2013) 3.
1281 Chapter 2, para 2.5.1.
1282 Trompenaars and Homme *Managing change: Across Corporate Cultures* (Capstone PublishingLtd Sussex Engalnd 2004) 14; Davel R and Snyman MMM "Influence of corporate culture on the use of knowledge management techniques and technologies" 2005 *SAJIM* 2;CMI 2015 Understanding organisational culture https://www.managers.org accessed 20 May 2019; FASSET *Culture and Diversity Handbook* 2013 https://www.fasset.org.za accessed 6 September 2019.

is measured against the corporate culture of the business to determine whether dismissal could be fair, one must be cognisant that the culture at the workplace must in itself not be unfair, as this would render the dismissal unfair, even if the employee on face value appear to not fit in. The labour courts or tribunals may then be required to assess the behaviour of the employee against the above characteristics to conclude whether such an employee does not fit in with the acceptable and reasonable "corporate culture" of the respective employer.

It should be further established that determining the "corporate culture" of the employer is dependent on the nature and the needs of the business. It may be argued that this is more of a subjective test as each case is dependent on the facts presented before the court or tribunal. As a result, the employer may be required to offer diversity training, team building and conflict resolution as means to reasonably accommodate employees based on the needs of the organisation and to assist with their integration into the business.[1283]

Moreover, it should be expressly stated in the *Code of Good Practice* that the meaning of "corporate culture" must be interpreted and applied in line with the values enshrined in the *Constitution of the Republic of South Africa*, 1996.[1284] Central to this investigation, section 9 (the equality clause), section 15 (freedom of religion, belief and opinion), and sections 30 and 31 (right to language, religion and culture) must be considered in ascertaining whether an employee does not fit within the "corporate culture" of the respective employer.[1285] This is to ensure that the interpretation and/or application of the employee's failure to fit in the "corporate culture" due to some behavioural traits, practices or attitude will not be contrary to values that underlie an open and democratic society based on human dignity, equality and freedom.[1286] In light of these constitutional provisions, it is proposed that the *Code of Good Practice* should highlight that an employer must strive to reasonably accommodate the diversity of all employees in the workplace provided it will not cause undue hardship

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1283 FASSET 2013 https://www.fasset.org.za

1284 *Constitution of the Republic of South Africa*, 1996 (Hereinafter, referred to as the *Constitution*).

1285 Sections 9, 15, 30 and 31 of the *Constitution.*

1286 *Constitution*.

for the business.[1287] In addition, sections 23 (right to fair labour practices) and 36 (limitation of rights) of the *Constitution* must be applied to balance the rights of both parties.[1288] On the one hand, an employee must be protected from arbitrary dismissals and be subjected to unfair discrimination by the employer. On the other hand, an employer should be able to protect his or her business interests when the relevant employee poses a serious risk to said interests. Thus, balancing the rights of both parties ensures that neither party is prejudiced nor disadvantaged in the process. Balancing the rights of the employer in the context of incompatibility means that he may dismiss intolerable or disruptive employees provided it does not amount to unfair discrimination. In addition, an employee may not be dismissed for incompatibility merely because he or she is different or due to religious and/or cultural practices.

After having defined incompatibility and the term corporate culture, it is proposed that the *Code of Good Practice* must expressly provide the distinction between incompatibility, misconduct and incapacity. It should be reiterated that a definite and legit distinction between these grounds for dismissal is particularly important considering that each of the grounds has its own rules for substantive and procedural fairness that must be followed to effectively guarantee that a dismissal is fair.[1289] An employer should not follow the avenues of misconduct and incapacity in a matter of perceived incompatible if the facts of the case are not compatible with the elements involved in true misconduct or incapacity. Moreover, this will enable employers and labour courts or tribunals to adopt the appropriate pre-dismissal procedures. This ensures uniformity and legal certainty when dealing with disputes of this nature.

6.3.3 The distinction between incompatibility and other grounds of dismissals

As stated above, the distinction between incompatibility and other grounds of dismissal, namely misconduct, incapacity and operational requirements should be included in the definition section. Particularly, highlighting why incompatibility may not

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1287 S1 of the *Employment Equity Act* of 55 of 1998. Refer to chapter 2, para 2.4.2.

1288 S23, s36 of the *Constitution*.

1289 Manamela T "When the Lines are Blurred – A case of Misconduct, Incapacity or Operational Requirements" 2019 *Obiter* 100.

be regarded as falling under any of the aforementioned grounds.[1290] This distinction is necessary and beneficial for both the employer and the courts when establishing which pre-dismissal procedures will apply depending on the merits of the case.

Firstly, it is contended that incompatible behaviour may not be regarded as misconduct if an employee does not contravene a rule of conduct in the workplace. It should be further highlighted that misconduct worthy of dismissal can refer to single incidents of unacceptable conduct, whereas incompatibility refers to an employee's ongoing and underlying disharmonious behaviour.[1291] Therefore, for purposes of the proposed *Code of Good Practice*, incompatibility can not necessarily be regarded as a species of misconduct. Thus, it would not be appropriate to dismiss an employee for perceived incompatibility under the auspices of misconduct, as the employee's behaviour may not have constituted misconduct as understood in item 7 of the *Code of Good Practice: Dismissal*.

Secondly, incompatible behaviour may not be regarded as incapacity if an employee is competent at his or her job and performs well and efficiently (thus not incapacitated).[1292] Although it can be argued that in some instances, one may be incompatible with the corporate culture of the employer, this does not necessarily affect an employee's ability to still perform their duties well.[1293] Hence, incompatibility is more of a personality, attitude or behavioural "problem" than an issue of poor performance or incompetence. This is especially when other employees simply feel that due to his or her demeanour or quirks, they do not find him or her compatible with the corporate culture and thus collegial relationships are strained. As a result, incompatibility may not necessarily be considered as a species of incapacity either for purposes of the proposed *Code of Good Practice: Incompatibility*.

Lastly, it is contended that categorising incompatibility as a species of operational requirements is similarly not a perfect fit. Firstly, incompatibility is based on a

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1290 Refer to chapter 4.

1291 Hogan Lovells 2014 *Incompatibility in the workplace* https://www.lexology.com accessed 5 April 2021; Griessel 2019 https://www.labourguide.co.za. Refer to chapter 4, para 4.5.3.

1292 Refer to chapter 4, para 4.6.6.

1293 Refer to chapter 4, para 4.6.6.

subjective relationship between an employee and other co-workers, or between an employee and an employer and has no direct association with the definition of operational requirements in terms of the *LRA*.[1294] Secondly, it is asserted that under the auspices of the *LRA*, the legislature is prescriptive on substantive and procedural guidelines of operational requirements, thereby excluding cases of incompatibility.[1295] While this is true, one may argue that incompatibility may fall under the concept of "similar needs" of the employer.[1296] This may be the only exception where an employer may be required to prove that, while no tangible financial losses can be attributed to the employee in question, their incompatible behaviour significantly impacted other employees, disrupting the production and rhythm line of the business's usual function.[1297] The implication is that, with the exceptions stated, it may not be suitable to regard incompatibility as a species of operational requirements for the purposes of the proposed *Code of Good Practice: Incompatibility*. The employer might find it difficult to prove a commercial rationale for dismissing an employee based on their perceived incompatibility caused by a personality or behavioural trait.

Following the establishment of the aforementioned definitions, the proposed *Code of Good Practice* will have to further provide the substantive and procedural guidelines applicable in dismissals based on incompatibility.

6.4 Proposed substantive guidelines

In the previous chapters, it was established that an employer must substantiate valid reasons for terminating an employee's contract of employment.[1298]

1294 Manamela 2019 *Obiter* 115; Mokumo MF *The Dismissal of Managerial Employees for Poor Work Performance* (LLM- dissertation University of Limpopo 2012) 58; Watkins 2012 *Test for Incompatibility: "Man, What do you have to do to get some recognition in this place?"* https://www.workinfo.com. Refer to chapter 4.

1295 Grant *Defining Incompatible Behaviour in an Employer/Employee Relationship* 60. Refer to chapter 4.

1296 Manamela 2019 *Obiter* 103.

1297 Refer to chapter 4.

1298 Article 3 of the *Termination of Employment Convention* No.158 of 1982 (Hereinafter, referred to as the *Termination of Employment Convention*); Du Plessis and Fouche *A Practical guide to Labour Law* 341.

Consequently, the employer bears the onus of proof to show that the reason for the dismissal is due to the employee's incompatible behaviour and is of such a nature that dismissal is justified.[1299] Only then can the dismissal be considered to be substantively fair. Similarly, the *Code of Good Practice: Dismissal* also provides guidelines for substantive fairness and establishes that sufficient reason for dismissal must exist. It is proposed that the *Code of Good Practice* must include a list of factors that must be present in order to meet this criterion. Firstly, there must be an irreconcilable breakdown in the employment relationship between the employer and the employee.[1300] Secondly, the employee must be substantially responsible for causing disharmony in the workplace and disruption that could potentially harm the employer's business.[1301] Thirdly, the incompatible behaviour in question must have caused serious detriment to the employer's business.[1302] It is argued that serious detriment that is also reasonably foreseeable will suffice. In addition, the employer must take reasonable, genuine and practical efforts to improve the employment relationship before resorting to dismissing the employee.[1303] Lastly, dismissal must be the last resort to remove the cause of disharmony from the workplace.[1304] It is further opined

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1299 Article 9(2)(a) of the *Termination of Employment Convention*; Collier *D et al Labour Law in South African Context and Principles* (Oxford University Press Southern Africa Cape Town 2018) 240; *Walker Procure Health Ltd* 2012 NZ EmpC 90 ARC 72/ 90 (Hereinafter, referred to as the *Walker case)* para 77,80.

1300 *Wright v St Mary's Hospital* 1992 13 ILJ 987 (IC), (Hereinafter, referred to as the *Wright* case); *Subrumuny v Amalgamated Beverages* 2000 21 ILJ 2780 (ARB), (Hereinafter, referred to as the *Subrumuny* case); *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC), (Hereiafter, referred to as the Lubke case); *Mgijima v Member of the Executive Council Gauteng Department of Education* and *Others* (JR1894/2011) 2014 ZALCJHB 414, (Hereinafter, referred to as the *Mgijima* case); *Walker case* para 77, 80; *Terris v the Parliamentary Service* (2012) NZERA Wellington 28 (Hereinafter, referred to as the *Terris* case); Webby R Year Unknown "Incompatibility: Deal With it" Human Resources Institute of New Zealand 1; *Reid v New Zealand Fire Service Commission* (7/5/08, HRRT Decision No 8/2008; HRRT58/07), (Hereinafter, referred to as the *Reid* case); *Snowdon v Radio New Zealand* NZCA 108 CA149/2013, (Hereinafter, referred to as, *Snowdon case*).

1301 *Jabari v Telkom SA (Pty) Ltd* 2006 27 ILJ 1854 (LC), (Hereinafter, referred to as the *Jabari* case); *McDuling/ MIF* (1998) 3 BALR 287 (CCMA); *Visagie & andere v Prestige Skoonmaakdienste* (Edms) *Bpk* (1995) 16 ILJ 421.

1302 *Erasmus v BB Bread* 1987 8 ILJ 537 (IC), (Hereinafter, referred to as the *Erasmus* case); *Walker* case para 98, 109; Terris case; Webby Year Unknown Human Resources Institute of New Zealand 1; Reid case; Snowdon case.

1303 *Lubke* case.

1304 *Hapwood v Spanjaard Ltd* 1996 2 BLLR 187 (IC), (Hereinafter, referred to as the *Hapwood* case).

that all these requirements must be present for dismissal arising from incompatibility to be substantively fair. All these factors are discussed in greater depth below.

6.4.1 An irreconcilable breakdown in the employment relationship

As stated earlier, there must be an irreconcilable or irremediable breakdown in the employment relationship between the employer and the employee.[1305] In addition, the irreconcilable breakdown must be a result of personality differences, the employee's inability to work effectively with others and/or failure to fit into the "corporate culture" of the employer.[1306] It is argued that the inquiry should be objective, which means that an employer must provide actual supporting evidence rather than mere allegations or opinions.[1307] Moreover, an employer may not dismiss an employee solely because he is disliked by other employees.[1308] Once this requirement is met, one may proceed to the next leg of inquiry.

6.4.2 The employee must be substantially or wholly responsible for causing disharmony in the workplace

The next leg of the inquiry will be to assess if the employee is substantially or wholly responsible for causing disharmony in the workplace and for causing the breakdown in the employment relationship.[1309] It is argued that this will be a matter of fact(s). Most importantly, the employee must be to blame for sowing disharmony in the workplace.[1310] It may be that the employee does not fit in with the "corporate culture" of the employer or that he/she cannot work harmoniously with other fellow employees. However, if the cause of disharmony is solely the fault of management and/or the employer and the irrational response to the employee's supposed incompatible

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1305 *Wright case* 1004; *Subrumuny* case p2789; Lubke case; *Mgijima* case; *Walker case* para 98, 109; Terris case 28; Webby Year Unknown *Human Resources Institute of New Zealand* 1; *Reid* case; *Snowdon* case.

1306 *Wright v St Mary's Hospital* 1004; Grogan J *Dismissal, Discrimination and Unfair Labour Practices* (Juta Capetown 2007) 432.

1307 *Subrumuny* case 2789.

1308 *FOCSWU obo Ralawe/ Anglican Church* (1999) 9 BALR 1022 CCMA.

1309 *Jabari* case 1868.

1310 *Jabari* case 1868.

behaviour by his or her colleagues, such a dismissal is unjustified.[1311] Unless the answer is in the affirmative, there will be no need to continue with the inquiry.

6.4.3 The disharmony causes or may potentially cause adverse effects on the employer's business

The employee's incompatible behaviour must have caused or should have had the potential to cause serious detriment to the employer's business.[1312] It is argued that this will similarly be a question of fact. This is premised on the principle that an employer is entitled to protect his business interests and an employee should not pose a risk to said interests.[1313] In addition, an employer is entitled to insist on harmonious interpersonal relationships which are regarded as a crucial component of a healthy and functional workplace.[1314] Should an employee's behaviour disrupt the harmony of such relationships, which consequently affects the employer's business negatively, the employer must be able to address the source of the disharmony and dismiss the relevant employee.[1315] In such cases, the incompatible behaviour must be serious enough to warrant dismissal.

6.4.4 Dismissals must be the last resort

Lastly, dismissal must be the last resort to address the cause of workplace disharmony.[1316] It is contended that before dismissing an employee, the employer must take reasonable, genuine and practical steps to improve the employment relationship and attempt to address the employee's perceived incompatibility.[1317] The determinant factor of whether a dismissal is unfair or not should be premised on the principle that what is reasonable varies depending on the circumstances.[1318] Therefore, an objective

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1311 *Comber v Odyssey House Trust Inc* (1992) 3 ENRZ 21, (Hereinafter, referred to as the *Comber* case). This case was referred to in *Haywardv Tairawhiti Polytechnic* (AA/72/04) Auckland 2004 NZERA 490. *Mabry v West Auckland and Living Skills Home Trust Board* (Inc) unreported 2001 AC 86/01, (Hereinafter referred to as the *Mabry case*).

1312 *Erasmus* case 538; *Walker case* para 98, 109.

1313 Refer to chapter 3, para 3.4.

1314 Refer to chapter 1.

1315 *Erasmus* case 538.

1316 *Hapwood* case 198.

1317 *Jabari* case 1868; *Lubke* case 429.

1318 Watkins 2012 https://www.workinfo.com.

test, such as the reasonable person test can be utilised to protect vulnerable employees from being dismissed on the basis of the subjective feelings of the employer or other fellow colleagues.[1319] It is further submitted that the employer should by all means necessary reasonably accommodate the relevant employee provided it does not cause his or her business undue hardship.[1320] This includes accommodating or finding alternatives for employees who happen to be a little quirky, just different or a bit eccentric.[1321] Perhaps, the employer can offer such an employee a position that suits their personality traits and/or temperament. Although the employer is not obligated to reasonably accommodate the employee if it causes him undue hardship, failure to do so can be interpreted as discrimination.[1322] If the objective assessment concludes that the employer acted in good faith and acted fairly towards the employee, dismissal can be regarded as an appropriate sanction especially if a working relationship is no longer tenable.[1323]

After all the aforementioned substantive requirements have been met, it should be investigated if the dismissal is procedurally fair.

6.5 Proposed procedural guidelines

As established in the previous chapters, procedural fairness requires that fair procedure must be followed before an employee is dismissed.[1324] Therefore, certain procedural guidelines must be complied with to ensure that dismissal due to incompatibility is procedurally fair. Below is a discussion of each of the proposed procedural guidelines for dismissals arising from incompatibility.

1319 Refer to chapter 2, para 2.4.2.
1320 Refer to chapter 2, para 2.4.2.
1321 *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC) p230; Refer to chapter 2, para 2.4.2.
1322 Refer to chapter 3.
1323 *Subrumuny* case p 2781.
1324 Refer to chapter 4.

6.5.1 Investigating the incompatibility allegations and informing the respective employee

Firstly, the employer must conduct a thorough investigation into the purported incompatibility.[1325] This would entail an inquiry into the complaints raised against the employee and assess if he or she is substantially or wholly responsible for causing disharmony and disruption in the workplace and the extent to which the employer's business has been affected. After gathering all the relevant facts, the employer must inform the employee of the complaints against him or her about his or her behaviour which does not fit in with the corporate culture, or which causes disharmony.[1326] This includes advising the employee in question of the incompatible behaviour, or conduct causing disharmony in the workplace; who is affected and the effects on the employer's business.[1327]

6.5.2 Remedial actions by the employer

As established earlier, the employer must take reasonable, genuine and practical efforts to improve the employment relationship before dismissing the employee.[1328] These efforts include counselling and/or reasonably accommodating the employee in a quest to rectify the disharmony.[1329] Before resorting to formal disciplinary measures, the employer must first attempt to informally address the incompatibility.[1330] This can be achieved by having informal discussions with employees to raise concerns openly and by offering an open-door policy.[1331] This will make it easier for employees to come forward with any grievances that could potentially lead to incompatibility and subsequent disharmony.[1332] It is contended that mediation and counselling are

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1325 Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 242; Ndaba NJ 2018 *An employee can be dismissed for not "fitting in"* http://www.mmegi.bw accessed 5 June 2018.

1326 Landis and Grossett Employment and the Law: A Practical Guide for the Workplace 241; Ndaba 2018 http://www.mmegi.bw.

1327 Wright case p1004; Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 241; Griessel *2019* https://www.labourguide.co.za.

1328 *Jabari* case 1868; *Lubke* case 429.

1329 *Subrumuny* p2790; *Wright case* p1004. Refer to chapter 4, para 4.6.3.

1330 Webby R Year Unknown Human Resources Institute of New Zealand 1.

1331 Refer to chapter5, para 5.4.

1332 Rowe C "Workplace Conflict" 2012 *Employment Today* 18.

effective tools for addressing conflicts caused by incompatibility between the employee and the employer/management.[1333] An employer should also, for instance, consider offering management training if an employee's management style is a source of friction, or sensitivity training if an employee has an abrasive personality which causes a hostile work environment. It is submitted that these remedial steps enable the employee to rectify his/her disruptive or incompatible behaviour before they are dismissed by the employer for this reason.[1334] Most importantly, the employer must warn the employee that if these corrective steps fail and if he or she fails to rectify the source of disharmony, termination of the contract of employment will ensue.[1335] Hence, the employee must be given a fair opportunity and a reasonable period to remedy the cause of disharmony.[1336] Nonetheless, resolving incompatibility differences requires all parties to proactively reach a compromise and work towards building a healthy and functional working relationship.[1337] Thus, there must also be room for tolerance. One cannot expect a person to change everything about themselves which supposedly renders them incompatible with their colleagues, without the colleagues also attempting to meet the person halfway. It is argued that incompatibility is not necessarily a one-way street.

It is further proposed that the mediation and/or counselling process must involve engaging an independent person to play the role of a mediator during the process and when conducting a formal investigation into the alleged incompatibility.[1338] It is submitted that an employer may engage an independent psychologist to assess the disharmony between the employer and the employee or amongst co-workers to ensure an independent and unbiased assessment.[1339] Thereafter, the psychologist will provide recommendations that may assist the employer, employee or co-workers in

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1333 *Walker* case para 99; *Snowdon v Radio New Zealand* para 100; Webby Year Unknown *Human Resources Institute of New Zealand* 1.

1334 Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 241; *Walker v Procure Health Ltd* para 99; *Erasmus* case 538; *Subrumuny* case p2790; Griessel 2019 https://www.labourguide.co.za.

1335 Griessel *2019* https://www.labourguide.co.za.

1336 Griessel *2019* https://www.labourguide.co.za.

1337 Webby Year Unknown *Human Resources Institute of New Zealand* 1.

1338 Rowe C 2012 "Workplace Conflict" *Employment Today* 17; Webby Year Unknown *Human Resources* Institute of New Zealand 1.

1339 *Walker v Procure Health Ltd* para 101.

resolving their differences before resorting to dismissal as the last option. However, the application of this standard will be determined by the nature of the employer, whether they are a small or large enterprise.[1340] It is opined that in cases of small enterprises, there may be more flexibility in applying procedural fairness.[1341] This is especially because smaller enterprises or employers may not have the advantage orresources to appoint specialists to assist them in dealing with disciplinary matters or procedures.[1342] Unlike smaller enterprises, larger enterprises or employers may have the capacity and resources to appoint an independent psychologist to assist them with the above mentioned process.[1343] Perhaps, the employer can enlist an arbitrator of the CCMA to provide assistance or an occupational health practitioner.

If the above remedial steps fail, the employer may assist the employee to overcome their personal difficulties by placing him/her in an alternative position that is suitable to his/her temperament, provided it does not cause undue hardship.[1344] If this is not possible, the employer may proceed to a hearing.

6.5.3 A hearing

Before conducting a hearing, the employer must advise the employee that he/she has the right to be represented.[1345] Similar to the position where other grounds of dismissal are concerned, the employee has a right to be represented by a trade union representative or co-worker.[1346] It is well established that dismissal should be the last resort.[1347] Moreover, the employee must be granted an opportunity to respond to the complaints against him or her.[1348] It is further proposed that before reaching the final

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1340 Grogan *Workplace Law* 13th ed (Juta Cape town 2020) 216.

1341 Cohen T "Procedurally Fair Dismissals- Losing the Plot?" 2005 *SA Merc LJ* 42; Item 3(1) of the *Code of Good Practice: Dismissal*.

1342 Cohen 2005 *SA Merc LJ* 42; Le Roux 2004 *ILJ* 870.

1343 Grogan *Workplace Law* 216; Cohen 2005 *SA Merc LJ* 42.

1344 *Erasmus case* p538, *Mgijima* case para 71*; Subrumuny* case p2790.

1345 Ndaba 2018 http://www.mmegi.bw; Griessel *2019* https://www.labourguide.co.za.

1346 Subrumuny case 2790; Griessel *2019* https://www.labourguide.co.za. Refer to chapter 4.

1347 Ndaba 2018 http://www.mmegi.bw.

1348 Article 7 of the *Termination of Employment Convention*; Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 241; *Walker* case para 108; *Wright* case 1004.

decision, the employer must consider the employee's responses to reach a just and fair conclusion.[1349]

In the event that all of the above procedural and substantive guidelines have been met, the employee may be dismissed if indeed he is found to be incompatible with the employer's business and poses a serious risk to the employer's interests.

6.6 Conclusion

To date, the absence of proper regulation and established guidelines has made dealing with incompatibility disputes problematic. It is therefore hoped that the proposed *Code of Good Practice: Dismissal based on Incompatibility* will at least pave the way for the legislature to establish the applicable substantive and procedural guidelines without solely relying on the decisions of the courts. This ensures legal certainty on the matter. It is for this reason that incompatibility should be considered a separate and legitimate ground for dismissal in South African labour law.

[1349] Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 241; *Erasmus* case 538.

6.7 ANNEXURE 1 The proposed Code of Good Practice: Dismissals Based on Incompatibility

1. Introduction

This Code of Good Practice: Incompatibility explicitly deals with the key aspects of dismissals arising from incompatibility. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances.

The number of employees employed in an establishment may warrant a different (less formal or less onerous) approach.

The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of the business. While employees should be protected from arbitrary action, employers are entitled to harmonious interpersonal relationships which are regarded as a crucial component of a healthy and functional workplace.

Definitions of Incompatibility

1) Incompatibility can be defined as :
   a) an employee's inability to work harmoniously with fellow employees and/or the employer due to personality clashes and/or differences;
   b) and/or failure of an employee to fit in with the "corporate culture" in the employer's workplace.

2) General or less serious incidences of incompatibility may include but are not limited to an employee's:
   a) disruptiveness that manifests as odd or eccentric behaviour;
   b) pushiness,
   c) temper, impatience,
   d) manipulation of interpersonal relationships and/or general disagreeability with other colleagues in the workplace.

   If the offence is a less serious incidence of incompatibility, efforts should be made by the employer to correct the employee's behaviour through a

system of graduated disciplinary measures such as mediation, counselling and warnings.

Serious incidences of incompatibility may include gross disruption in the workplace that manifests as:

e) defiance of authority or management,
f) aggressive behaviour including intimidation of fellow colleagues and clients that negatively affects staff morale.
g) an employee spreading malicious rumours about management and fellow colleagues which are not true and any behaviour that leads to the company being brought into disrepute which directly or indirectly led to a loss of business or confidence in the organisation.

Serious incidences of incompatibility may warrant final warnings or other actions short of dismissal. Dismissals should be reserved for severe cases of incompatibility or repeated offences.

3) A "corporate culture" of an employer or workplace can be defined as the social patterns in a workplace. The concept of a "corporate culture" is a combination of multifaceted factors, that when integrated, form a prevailing "culture" in the workplace. These factors may include:
   a) a system of informal rules,
   b) shared values, attitudes,
   c) standards, beliefs,
   d) and assumptions that characterise members of an organisation.

A relevant court or tribunal must assess the behaviour of an employee against each characteristic to conclude whether such an employee does not fit in with the "corporate culture" of the respective employer.

It should be further established that determining the "corporate culture" of an employer is dependent on the nature and the needs of the business. This is a subjective test as each case is dependent on the facts presented. An employer may be required to offer diversity training, team building and conflict resolution

as means to reasonably accommodate employees based on the needs of the organisation.

The meaning of "corporate culture" must be interpreted and applied in line with the values enshrined in the *Constitution of the Republic of South Africa*, 1996. Central to this investigation, section 9, section 15, sections 30 and 31 of the *Constitution* must be considered in ascertaining whether an employee does not fit within the particular corporate culture. In addition, sections 23 (right to fair labour practices) and 36 (limitation of rights) must be applied to balance the rights of both parties. This is premised on the principle that an employee must be protected from arbitrary dismissals and being subjected to unfair discrimination by the employer, whereas an employer should be able to protect their business interests. Thus, balancing the rights of both parties ensures that neither party is prejudiced nor disadvantaged in the process.

2. The distinction between incompatibility and other grounds of dismissal

A definite and legit distinction between these grounds of dismissal is particularly important considering that each of the grounds has its own rules for substantive and procedural fairness that must be followed to effectively guarantee that a dismissal is fair.

1) Incompatible behaviour may not be regarded as misconduct if an employee does not contravene a rule in the workplace. Misconduct refers to single incidents of unacceptable behaviour contrary to an employer's disciplinary code, whereas incompatibility refers to an employee's ongoing and underlying disharmonious conduct.

2) Incompatible behaviour may not be regarded as incapacity if an employee is competent at his or her job and performs well and efficiently (thus not incapacitated). Incompatibility is more of a personality problem than an issue of poor performance or incompetence of the employee. This is especially when other employees simply feel that due to his or her demeanour or "quirks", they

do not find him or her compatible with the corporate culture and thus collegial relationships suffer.

3) Incompatible behaviour may not be regarded as operational requirements. Incompatibility is based on a subjective relationship between an employee and other co-workers or employees, or between an employee and an employer and has no direct association with the definition of operational requirements in terms of the *LRA*.

However, if the alleged incompatibility falls under the concept of "similar needs," an employer is required to prove that:

a) while no tangible financial losses can be attributed to the employee in question, their incompatible behaviour significantly impacted other employees, causing a disruption in the production and rhythm line of the business's usual function.

3. Fair reasons for dismissal

A dismissal for incompatibility is unfair if it is not substantively fair. Fair reasons for dismissal are determined by the facts of the case presented and the appropriateness of dismissal as a penalty.

4. Guidelines in cases of dismissal for incompatibility

Any person who is determining whether dismissal based on incompatibility is unfair should consider the following:

a) Whether there is an irreconcilable or irremediable breakdown in the employment relationship between the employer and the employee due to personality differences the employee's inability to work effectively with others and/or failure to fit into the "corporate culture" of the employer;
b) If the employee is substantially or wholly responsible for causing disharmony in the workplace;
c) If the disharmony causes or may potentially cause adverse effects on the employer's business;

d) Dismissal is an appropriate sanction and must be the last resort.

5. Fair procedure

1) The employer must conduct a thorough investigation into the purported incompatibility. After gathering all the relevant facts, the employer must inform the employee of the allegations levelled against him or her. This includes advising the employee in question of the conduct causing disharmony in the workplace; who is affected and the consequences thereof.

2) Before resorting to formal disciplinary measures, the employer must first attempt to address incompatibility informally. The employer may use mediation and counselling to address conflicts caused by incompatibility between the employee and the employer/management. These remedial steps enable the employee to rectify his/her actions where they fall short before they are dismissed by the employer. The employer must warn the employee that if these corrective steps fail and if he or she fails to rectify the source of disharmony, termination of the contract of employment will ensue. The employee must be given a fair opportunity and a reasonable period to remedy the cause of disharmony.

3) Mediation and/or counselling processes must involve engaging an independent person to act as a mediator during the process and when conducting a formal investigation into the alleged incompatibility. An employer may engage an independent psychologist to assess the disharmony between the employer and the employee to ensure an independent and unbiased assessment. Thereafter, the psychologist will provide recommendations that may assist both the employer and the employee in resolving their differences before resorting to dismissal as the last option.

Application of this standard will be determined by the nature of the employer, whether they are a small or large enterprise. In cases of small enterprises, there may be more flexibility in applying procedural fairness. This is especially because smaller enterprises or employers may not have the advantage or resources to appoint specialists to assist them in dealing with disciplinary matters or procedures. Larger enterprises or employers may have the capacity and resources to appoint an independent psychologist to assist them with the process.

4) If the above remedial steps fail, the employer may assist the employee to overcome their personal difficulties by placing him/her in an alternative position that is suitable to his/her temperament, provided it does not cause undue hardship. If this is not possible, the employer may proceed to a hearing.

5) Before conducting a hearing, the employer must advise the employee that he/she has the right to be represented by a trade union representative or co-worker. The employee must be granted an opportunity to respond to the allegations levelled against him or her. Before reaching the final decision, the employer must consider the employee's responses to reach a just and fair conclusion.

Provided all of the above procedural and substantive guidelines have been met, the employee may be dismissed if he is found guilty on grounds of incompatibility.

Chapter 7 Conclusion and Recommendations

7.1 Introduction

This chapter seeks to conclude this thesis by reflecting on the objectives that have been set for this study and highlighting the findings that have been made in this regard in the previous chapters. This chapter is consequently aimed at finally answering the question whether incompatibility should be regarded as a valid and separate ground of dismissal in South African labour law. In this regard, this chapter will also provide recommendations based on the findings made in this thesis that may assist the South African legislative framework where it falls short.

7.2 General background

The investigation carried out in this thesis suggests that incompatibility should be regulated as an independent, valid ground for dismissal in South African labour law. This thesis is cognisant of the importance of interpersonal relationships and harmonious relations in the workplace.[1350] One cannot disregard the importance of the aforementioned factors because they are among the critical components that contribute to a healthy and well-functioning business and labour market.[1351] This thesis has established that incompatibility of an employee with the employer and/or other employees in the workplace can potentially hinder a healthy and well-functioning enterprise.[1352] However, the current position in South African labour law is that incompatibility is not recognised as a legitimate and separate ground of dismissal in the *LRA*.[1353] Notwithstanding the fact that various South African courts and other dispute resolution tribunals have recognised it as such in a number of cases.[1354]

1350 The *Labour Relations Act* 66 of 1995, hereinafter referred to as the *LRA.*

1351 Refer to chapter 1.

1352 Refer to chapter 1.

1353 Section 188 of the *LRA*.

1354 *Erasmus v BB Bread* 1987 8 ILJ 537 (IC) (hereinafter, referred to as *Erasmus v BB Bread*); *Wright v St Mary's Hospital* 1992 13 ILJ 987 (IC); *Lubke v Protective Packaging* 1994 15 ILJ 422 (IC) ; *Hapwood v Spanjaard Ltd* 1996 2 BLLR 187 (IC); *Lebowa Platinum Mines Ltd v Hill* 1998 19 ILJ 1112 (LAC); *Brereton v Bateman Industrial Corporation Ltd and Others* 2000 5 LLD 119 (IC); *Subrumuny v Amalgamated Beverages* 2000 21 ILJ 2780 (ARB); *Nathan v Reclamation Group (Pty) Ltd* 2002 23 ILJ 588 (CCMA); *Cutts v Izinga Access (Pty) Ltd* 2004 25 ILJ 1973 (LC); Jabari

Against this background, this thesis advanced the proposition that in order to effectively and uniformly regulate dismissals arising from incompatibility disputes in the South African labour market, a statutory and regulatory framework is required. Furthermore, this thesis advanced the proposition that a study of practices from New Zealand and Australia, can assist with possible suggestions for regulatory reform in South African labour law on matters arising from incompatibility in the workplace. The central research question was ultimately, how suitable incompatibility in the workplace is as a separate and legitimate ground of dismissal in terms of the *LRA* of 1995 when considering best practices from foreign countries.

The above research question was divided into the following sub-questions which provided the framework for the chapters in this thesis. These sub-questions were also identified as the aims and objectives of this thesis. They are as follows:

i) What is incompatibility and what is regarded as incompatible behaviour in the workplace?
ii) What constitutes a corporate culture in the workplace and when will it be a valid basis for determining compatibility?
iii) Is incompatibility a species of misconduct, incapacity or does it fall under operational requirements since neither the courts nor legislation provide clarity to this effect?
iv) How do the courts deal with incompatibility when it is caused by the unique conduct of the employee arising from cultural practices and beliefs vis-à-vis the business interests of employer or the inherent requirements of the job?
v) Is incompatibility a result of the employee just being eccentric, talks to themselves or when a manager is harsh with his subordinates?
vi) What are the procedural and substantive guidelines on dismissals arising from incompatibility?

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v *Telkom SA (Pty) Ltd* 2006 27 ILJ 1854 (LC); *Lotter and SA Red Cross Society* 2006 27 ILJ 2486 (CCMA); *Jardine v Tongaat Hulet Sugar Ltd* 2002 23 ILJ 547 (CCMA); *Miyeni v Chillibush Communications (Pty) Ltd* 2010 31 ILJ 3054 (CCMA); *Goussard v Impala Platinum Limited* 2012 33 ILJ 2898 (LC); *PSA obo Mbiza v Office of the Presidency and Others* 2014 35 ILJ 1628 (LC); *Mgijima v Member of the Executive Council Gauteng Department of Education and Others* (JR1894/2011) 2014 ZALCJHB 414.

vii) From best practices in New Zealand and Australia, what lessons can be learnt by South Africa in regulating dismissals arising from incompatibility in its legislative framework?

7.3 The key findings

As established earlier, this thesis investigated the suitability of incompatibility as a valid ground for dismissal in South African labour law. Chapter one, and subsequent chapters, identified the challenges arising from the absence of statutory regulation and properly established guidelines for incompatibility in the South African labour law. It was identified that incompatibility of an employee with the employer, the business or his/her colleagues has the potential to hinder efficacy and damage employment relationships,[1355] yet, the lack of guidelines and legal certainty pertaining to dismissals based on incompatibility leaves employees susceptible to arbitrary dismissals by the employer. Hence, it was identified that statutory and regulatory reform on this issue will go a long way to protect the interests of both the employer and the employee.

7.3.1 Chapter two

Chapter two set out to conceptualise incompatibility. The purpose of this chapter was to unpack the crucial components and elements of this research. Most importantly, this chapter addressed the following objectives/sub-research questions:

i) What is incompatibility and what is regarded as incompatible behaviour in the workplace?
ii) What constitutes a corporate culture in the workplace and when it will be a valid basis for determining compatibility?
iii) Is incompatibility a result of the employee just being eccentric, talks to themselves or when a manager is harsh with his subordinates?

In this chapter, it was concluded that no clear-cut all-encompassing definition for incompatibility and "corporate culture" in the labour law context exists.[1356]

1355 Refer to chapter 1, para 1.2.
1356 Refer to chapter 2, para 2.2.1; para 2.5.1.

Nonetheless, it was established that incompatibility can be defined as an employee's inability to work harmoniously with fellow employees and/or the employer due to personality clashes, differences and/or failure to fit in with the "corporate culture" in the workplace.[1357] It is, therefore, argued that if an employee's behaviour does not match what is stated in this definition, it cannot be regarded as incompatible behaviour. In addition, certain behaviours that may be regarded as incompatible behaviour were identified. This thesis asserts that Griessel[1358] and Grant's[1359] submissions provide a starting point in determining what is regarded as incompatible behaviour. It was established that the following can be regarded as incompatible behaviour:

> odd eccentric behaviour, disruptiveness, pushiness, temper, impatience, manipulation of interpersonal relationships or just general disagreeability with other colleagues in the workplace; gross disruption in the workplace that manifests as defiance of authority or management; aggressive behaviour including intimidation of fellow colleagues and clients that negatively affects staff morale; spreading malicious false rumours about management, and fellow colleagues and any behaviour that leads to the company being brought into disrepute which directly or indirectly led to, or could reasonable have expected to lead to a loss of business or confidence in the organisation.[1360]

It was further established that the South African labour courts do not provide an elaborate meaning to the concept of an employer's "corporate culture". Thus, this thesis asserts that the meaning and application of corporate culture should be bordered on the rights enshrined in the *Constitution of the Republic of South Africa*, 1996.[1361] Particularly, sections 23 (the right to fair labour practices), 9 (the equality clause), section 10 (human dignity), section 15 (freedom of religion, belief and opinion), section 30 and 31 (right to language, religion and culture).[1362] It must be noted that the relevance of these sections were fully unpacked in chapter 3. In essence, it is submitted that the meaning and application of corporate culture should encompass both the employer's and employee's right to fair labour practice in the

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1357 Refer to chapter 2, para 2.2.1.

1358 Griessel 2019 *Incompatibility in the workplace – these irreconcilable differences* https://www.labourguide.co.za accessed 28 November 2019.

1359 Grant C *Defining incompatible behavior in an employer/ employee relationship* (LLM dissertation University of Johannesburg 2014) .

1360 Refer to chapter 2 para 2.4.

1361 Refer to chapter 2, para 2.5.1; *Constitution of the Republic of South Africa*, 1996.

1362 Refer to chapter 3.

workplace.[1363] On the one hand, employers have a right to protect their business interests, which include the right to fairly dismiss an employee if his or her behaviour is incompatible with the workplace "corporate culture" and causes disruption.[1364] On the other hand, an employee has the right not to be dismissed arbitrarily for purported incompatibility due to him or her not fitting in with the employer's "corporate culture".[1365] It is argued that establishing corporate culture as a valid basis for dismissal, may give rise to discrimination in the workplace based on personality differences, religion, beliefs or opinions. For instance, a dismissal arising from failing to fit in the workplace corporate culture could result from an employee practicing cultural or religious practices that are regarded as being incompatible with the employer's corporate culture.[1366] It was established that personality differences such as an employee's odd or eccentric behaviour, are not valid grounds for an employer to dismiss an employee for supposedly failing to fit in with the workplace corporate culture.[1367] Thus, this thesis submits that if incompatibility is to be considered as a lawful ground of dismissal in South African labour law, the meaning and application of corporate culture should not leave innocent employees susceptible to arbitrary dismissals.

In addition, it was established that "corporate culture" is a combination of multifaceted factors, that when combined together, they form a prevailing "culture" in the workplace.[1368] These factors include the way things are done in the workplace, informal rules, shared values, affirmations and the organisational climate in the workplace.[1369] It was established that this definition leaves room for both ambiguity and confusion as to what it really means in the South African workplace. This thesis proposes that "social patterns" is a more plausible term than "corporate culture" because it is subject to various interpretations and it poses potential problems in the South African workplace. It is further asserted that the concept of "corporate culture" may fail to

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1363 Refer to chapter 2, para 2.5.1.
1364 Refer to chapter 2, para 2.5.1.
1365 Refer to chapter 3, para 3.3. *NEHAWU v UCT* para 52; *NUMSA Obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited* 966 2019 (8) BCLR 966 (CC) para 38.
1366 Refer to chapter 3.
1367 Refer to chapter 2, para 2.4; para 2.5.2.3.
1368 Refer to chapter 2, para 2.5.2.3.
1369 Refer to chapter 2, para 2.5.2.

accommodate employees who have diverse backgrounds owing to their personality traits, beliefs, religious and cultural practices.

As mentioned earlier, chapter 2 identified the crucial elements that constitute incompatibility. These elements included the existence of an irreconcilable breakdown in the working relationship and disharmony in the workplace; attainable standards in the workplace and the existence of an employer's "corporate culture".[1370] This thesis advanced the proposition that when the employer and the courts determine alleged incompatibility, all the elements have to be present. It is submitted that this will ensure legal certainty when dealing with disputes of this nature.

7.3.2 Chapter Three

Chapter three investigated the challenges that may arise in the absence of statutory regulation and properly established guidelines for incompatibility as a legitimate ground for dismissal. The purpose of this chapter was to unpack the employer's and employee's relevant rights and interests in the context of incompatibility. This included critically highlighting the importance of balancing the rights and interests of the employer's business against those of the employee through clear and proper regulation of this ground of dismissal. Moreover, this chapter analysed how the South African courts have thus far dealt with issues of incompatibility in the workplace. This chapter addressed the following objective/sub-research question:

i) How do the courts deal with incompatibility when it is caused by the unique conduct of the employee arising from cultural practices and beliefs vis-à-vis the business interests of employer or the inherent requirements of the job?

This chapter analysed the role of the *Constitution of the Republic of South Africa*[1371] in determining whether incompatibility can and should be regarded as a separate and legitimate ground for dismissal in South African labour law. It was established that

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1370 Refer to chapter 2, para 2.6.

1371 Hereafter *Constitution*. This will naturally be argued within the context of the employer's constitutional right to fair labour practices in terms of section 23.

sections 23 (the right to fair labour practices), section 9 (the equality clause), section 10 (right to human dignity), section 15 (right to freedom of religion, belief, and opinion), section 30 and 31 (right to language, religion and culture) are central workplace rights.[1372] This thesis examined how each of these constitutional rights permeate in the employment relationship when an employer is confronted with an employee's incompatible behaviour.

This chapter analysed the meaning and content of section 23 of the *Constitution* which confers everyone in an employment relationship or something akin to it, the right to fair labour practices.[1373] Although the *Constitution* does not define fair labour practices, it was established that the courts have endeavoured to give meaning to the concept.[1374] As previously stated, the right to fair labour practices involves balancing the rights and interests of both the employer and the employee. This thesis submits that fair labour practices for the employer means he can dismiss an employee who behaves in a manner that creates disruption, hostility and discomfort in the workplace. This thesis further argues that it will be unfair towards the employer if such behaviour of the employee negatively impacts his or her business interests and is allowed to continue. In the absence of statutory guidance on the matter, this thesis concluded that both employers and employees may have to rely on section 23 of the *Constitution* for protection in disputes arising from incompatibility. The challenge is that neither the *LRA* nor the *EEA* currently provide legal recourse for incompatibility disputes.

This chapter further unpacked the meaning and application of the rights to equality, human dignity and freedom of religion, belief, opinion, language and culture when dealing with incompatibility disputes. This thesis asserts that the right to equality in the workplace and the right not to be unfairly dismissed are both imperatives of the constitutional right to fair labour practices.[1375] To ensure a balance between the interests of both parties, this thesis contended that the right to equality for the

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1372 S9, s10, s15, s30, s31 of the *Constitution*.

1373 S23 of the *Constitution*.

1374 S23 of the *Constitution*; Cohen 2004 *SAJHR* 482; *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) (Hereinafter, referred to as the *NEHAWU* case) 110.

1375 Henrico 2015 https://islssl.org

employee means that he or she has the right not to be unfairly dismissed on a discriminatory ground. Hence, regarding dismissals arising from incompatibility, it is asserted that an employer should not unfairly discriminate against an employee based on personality differences, cultural and religious beliefs and/or opinions. By the same token, an employer must not violate an employee's right to dignity in the process. This thesis recommends that before dismissing an employee on the basis of incompatibility, an employer should attempt to reasonably accommodate all employees and as a result preserve their dignity and diversity.

This thesis advocates that an employer should be permitted to instil a "corporate culture" to create a form of identity and order in the workplace. Hence, if the personal characteristics or belief system, and subsequent behaviour of an employee are detrimental to the employer's corporate culture and could ultimately affect the employer's business, and reasonably accommodation would be unfair, the employer should be permitted to dismiss the relevant employee without being found guilty of committing unfair discrimination. To answer the sub-question as to how the courts should deal with incompatibility when it is caused by the unique conduct of the employee arising from cultural practices and beliefs vis-à-vis the business interests of employer, this thesis proposes that a viable approach to incompatibility as a ground for dismissal be developed. It is submitted that such an approach must ensure that both the employee's and the employer's constitutional rights are recognised and respected. It is opined that this will maintain harmonious working relations in the workplace and avoid unnecessary unfair dismissal disputes.

This chapter established that the *LRA* and the *EEA* are the principal pieces of legislation that were promulgated to give effect to the overarching constitutional right to fair labour practices and the right to equality provided in section 23 and section 9 in the *Constitution*.[1376] Hence, both pieces of legislation should be interpreted in a manner that accommodates the interests of both the employers and employees as envisaged by the *Constitution*. This chapter reiterated that incompatibility is not recognised as a ground of dismissal under the *LRA*. Nonetheless, it was established that the only

[13761376] S1(c) of the *LRA*.

redress accessible to the employer under the *LRA* is the inherent requirements of the job in terms of section 187(2). It is argued that the employer would have to prove that the employee's incompatibility, brought on by for instance his religion and/or culture, rendered him incapable of performing the job efficiently, thus not meeting the inherent requirements of the job. Similar to the *LRA*, with reference to the *EEA*, the only recourse that the employer may successfully rely on to avoid committing unfair discrimination against his employees when dismissing for incompatibility, is the inherent requirements of the job defence in terms of section 6(2).

Lastly, this chapter carried out a case-by-case analysis on how the South African courts have dealt with incompatibility cases. This analysis included how the courts have dealt with incompatibility arising from personality clashes, unpopular management styles and cases of victimisation of employees under the guise of incompatibility. The general consensus, however, is that the courts are not consistent in their approach when dealing with incompatibility disputes. Regarding incompatibility due to personality clashes, the courts reiterated that an employer should make reasonable accommodations before dismissing the employee on grounds of incompatibility. If the employee does not rectify his or her incompatible behaviour, the employer may dismiss him or her for incompatibility. This thesis submits that under these circumstances, incompatibility will be a valid reason for dismissal. Regarding cases of incompatibility arising from unpopular management styles, it has been observed that the courts allow employers to dismiss a managerial employee provided that his or her management style does not fit with the employer's corporate culture. The courts, however, have cautioned employers not to dismiss such employee simply because management or other employees dislike his or her improvements in the workplace. Further, it was observed that in certain instances, an employee might fall victim to nefarious employers who may dismiss him under the guise of incompatibility when, in fact, it is a ploy to get rid of him for no acceptable reason. Overall, this thesis contends that in the absence of proper statutory guidance on the subject, it may prove difficult to test either the motives of employers, management or other employees when an employee is dismissed for incompatibility. It may also be difficult to test for substantively and procedurally fair dismissals in this regard without a frame of

reference for what must be proven before such fairness can be determined. The Code of Good Practice: Dismissal, with its clear guidelines for fair dismissal, is proof of the importance of set guidelines to ensure clarity on and uniformity in the approach to ensure or determine the fairness of a particular dismissal. This thesis therefore reiterates that statutory and regulatory reform on the topic will go long a way to protect the rights and interests of both the employer and the employee. It will also ensure legal certainty.

7.3.3 Chapter Four

Chapter four was aimed at providing a comparison between incompatibility and the other expressly recognised grounds of dismissal. The purpose of this chapter was to examine whether it is correct or advisable to classify incompatibility as a species of either misconduct, incapacity, operational requirements, or whether it should rather be regarded as a separate ground of dismissal in South African labour law. This chapter addressed the following objective/sub-research question:

i) Is incompatibility a species of misconduct, incapacity or does it fall under operational requirements since neither the courts nor legislation provide clarity to this effect?

To answer the above sub-question, this thesis asserts that it is incorrect to summarily classify incompatibility as a species of either misconduct, incapacity or operational requirements. This chapter showed that in some instances the courts have classified incompatibility as a species of misconduct.[1377] This thesis contends that incompatibility should not be classified as a genus of misconduct because incompatible behaviour is not misconduct if the employee does not contravene a rule of conduct or an

[1377] Mokumo *The Dismissal of Managerial Employees for Poor Work Performance* 58; *Erasmus* case; *Wereley v Productivity SA & another* (2020) 41 ILJ 997 (LC) (Hereinafter, referred to as the *Wereley* case); *SARU v Watson* (2019) 40 ILJ 1052 (LAC) (Hereinafter, referred to as the *SARU* case); *Jardine v Tongaat Hulet Sugar Ltd* 2002 23 ILJ 547 (CCMA) (Hereinafter, referred to as the *Jardine* case); *Miyeni v Chillibush Communications (Pty) Ltd* 2010 31 ILJ 3054 (CCMA) (Hereinafter, referred to as the *Miyeni* case); *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 112 (LAC)(Hereinafter, referred to as the *Lebowa* case).

established disciplinary rule in the workplace.[1378] Further, this thesis argued that incompatibility is more often a result of personality differences, thus misconduct is not a neat or appropriate fit.[1379] Similarly, incompatibility has been classified as species of incapacity by various academics and the South African courts in a number of court judgements.[1380] Nonetheless, this thesis contends that this classification is similarly problematic because incapacity is based on poor work performance standard of an employee that he or she was aware of.[1381] This thesis further argued that an employee can be incompatible with the employer's business due to his abrasive personality, quirkiness or management style, yet is still competent and performs his functions well and efficiently.[1382] It is submitted that this behaviour, may in turn, cause disharmony, or result in the employee not fitting in with the employer's "corporate culture".[1383] It is, therefore, concluded that incompatibility can also not be easily or appropriately classified as falling under incapacity. Although the courts and academics opine that incompatibility also falls under operational requirements, this thesis argues that this classification is a difficult one to prove.[1384] This thesis submits that incompatibility has no direct association with the narrow definition of operational requirements in terms of the section 213 of the *LRA*.[1385] It is further argued incompatibility is based on the subjective relationship between an employee and other fellow employees, or between employee and employer.[1386] Hence, this thesis asserts that operational requirements is an inappropriate classification. Lastly, this chapter established that the legislature is more prescriptive in terms of substantive and procedural guidelines of operational

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1378 Refer to para 4.5.2. Item 7 of the *Code of Good Practice: Dismissal*. Items 3 and 7 of the *Code of Good Practice: Dismissal* stipulate detailed guidelines for determining substantive fairness of a dismissal based on misconduct. The first question is whether the employee disobeyed a rule that regulates conduct in the workplace. This is a question of fact, and the employer has the burden of proof.

1379 Refer to para 4.5.2.

1380 *Jabari v Telkom SA (Pty) Ltd*; *Mgijima v MEC of Education*; *Subrumuny v Amalgamated Beverage Industries*; *Lotter and SA Red Cross Society*; *Edcon v Padayachee*; *Brereton v Bateman*; Van Niekerk *et al Law @ Work* 307; Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* 237; Raligilia and Nxokweni 2020 *Obiter* 432.

1381 Refer to para 4.6.1.

1382 Refer to para 4.6.2

1383 Refer to para 4.6.1.

1384 Refer to para 4.7.2; *Wright v St Mary's Hospital* case 1003; Van Niekerk *et al Law @ Work* 307.

1385 Manamela 2019 *Obiter* 115; Mokumo T*he Dismissal of Managerial Employees for Poor Work Performance* 58; Watkins 2012 https://www.workinfo.com.

1386 Manamela 2019 *Obiter* 115; Horn J and Mulligan 2021 *The Incompatibility Conundrum* https://www.chmlegal.co.za accessed August 2021.

requirements such that it may prove difficult to apply them to incompatibility disputes.[1387] Based on the findings in this chapter, this thesis proposes that incompatibility should be regarded and regulated as a separate and legitimate ground for dismissal in South African labour law. It is further submitted regulating incompatibility with its own set of legislative guidelines for fair dismissal will allow employers and the labour courts to adopt the appropriate pre-dismissal procedures.

7.3.4 Chapter 5

Chapter five analysed international law instruments that regulate termination of employment relationships and workplace discrimination, as well as practices with regard to incompatibility dismissals in other jurisdictions, namely New Zealand and Australia. The purpose of this chapter was to assess if South Africa can make use of some procedural and substantive guidelines on incompatibility as a ground of dismissal that have been developed by New Zealand and Australia. This chapter addressed the following objective/sub-research question:

i) From best practices in New Zealand and Australia, what lessons can be learnt by South Africa in regulating dismissals arising from incompatibility in its legislative framework?

This chapter established that South Africa, New Zealand and Australia are all members of the International Labour Organisation (ILO).[1388] Therefore, South Africa, New Zealand, and Australia have an obligation to ensure that the core ILO labour standards are implemented in their domestic legislation.[1389] This chapter unpacked the *Termination of Employment Convention* 158 of 1982, which provide guidelines regarding termination of employment at the initiative of the employer and the *Discrimination (Employment and Occupation) Convention* 111 of 1958, which deals

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1387 Refer to paras 4.7 – 4.7.2. Grant *Defining Incompatible Behaviour in an Employer/Employee Relationship* 60.

1388 Refer to para 5.3.

1389 ILO 2022 http://www.ilo.org; *Collier et al Labour Law in South Africa Context and Principles* 56. Article 2 of the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up 1998*. Member states are mandated to observe, promote, and to implement the core labour standards set by the ILO. This includes ensuring that the member state's national and domestic legislation falls within the ILO standards.

with discrimination in the workplace.[1390] Notwithstanding the fact that South Africa has not ratified the *Termination of Employment Convention*, this chapter established that it has had a significant influence on the development of South African labour legislation on job security.[1391] It was, however, concluded that the *Termination of the Employment Convention* will not be able to provide guidance to South Africa regarding dismissals arising from incompatibility specifically. This is especially since the *Convention* does not list incompatibility as a possible ground of dismissal. This thesis submits that the spirit and purpose of the *Convention* can however still be used as a general guideline when developing rules and procedures which regulate incompatibility dismissals in South African labour law.[1392]

This thesis further contends that supplementary guidelines may also be drawn from the *Discrimination (Employment and Occupation) Convention*. This is especially as the *DEOC* considerably influenced and still influences South Africa's workplace discrimination laws, particularly the *EEA*.[1393]

It was further established that New Zealand and Australia do not have express provisions or statutory guidelines that specifically recognise incompatibility as a valid ground for dismissal. This chapter examined how the New Zealand and Australian courts have however dealt with incompatibility disputes, where it was found that the relevant courts have devised clear guidelines for matters of this nature. Overall, this thesis submits that South Africa has substantive and procedural guidelines that are similar to those of the aforementioned jurisdictions. It is therefore the opinion in this thesis that this affirms that the approach that has been adopted by the South African courts is on the right track. In the development of clear dismissal guidelines for incompatibility as a ground of dismissal, the guidelines followed in the above jurisdictions can be used as a blue print. While this is true, some valuable lessons and

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1390 *Discrimination (Employment and Occupation) Convention* 111 of 1958 (Hereinafter, referred to as the *Discrimination (Employment and Occupation) Convention*); *Termination of Employment Convention* 158 of 1982 (Hereinafter, referred to as the *Termination of Employment Convention*).

1391 ILO 2022 *Ratifications for South Africa* https://www.ilo.org accessed 5 June 2022.

1392 Refer to para 5.4.3.

1393 Loyson M *Substantive Equality and Proof of Employment Discrimination* (LLM – dissertation Nelson Mandela Metropolitan University 2009) 26; Collier et al Labour Law in South Africa Context and Principles 425.

additional guidance were identified that could augment South Africa's legal framework where it falls short. It is submitted that there are supplementary substantive and procedural guidelines that the courts have developed that can be learnt from New Zealand and Australia. Regarding the requirement that an employee must being the substantial cause for the breakdown, an additional criterion was established.[1394] The first requirement dictates that if the source of disharmony is caused by the employer or management, dismissing the employee under these circumstances will be deemed unjustifiable.[1395] Secondly, it will be a clear case of constructive dismissal when the employer's word or conduct results in disharmony and subsequently leads to the employee resigning.[1396] Procedurally, the New Zealand Courts have established comprehensive remedial actions that the employer can use before dismissing the employee.[1397] These include counselling, mediation, training, and lastly, the engagement of an independent psychologist whose functions is to assess the disharmony between the parties and to provide recommendations on how they can overcome their differences.[1398]

7.3.5 Chapter 6

Chapter 6 provided a proposed *Code of Good Practice: Dismissal based on Incompatibility*. The purpose of this chapter was to recommend a proposed *Code of Good Practice* that will provide some guidance on how to deal with incompatibility disputes in South African labour law, especially in the absence of proper regulation and established guidelines. This chapter addressed the following objective/sub-research question:

1394 Refer to chapter 5.

1395 *Hayward case* para 17.

1396 *Hayward case* para 17; Rudman *New Zealand Employment Law Guide* 575. Constructive dismissal refers to employees who resign because they are coerced to do so by the employer. *Auckland Shop* Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372 (CA) 374–375; Rio *Ngawaka* v Global *Security Solutions Limited* [*2022*] *Nzempc* 40 para 7. The court highlighted that constructive dismissal includes cases where an employer gives an employee an option of resigning or being dismissed; an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

1397 *Wright* case 1004; *Van der Merwe and Agricultural Research Council* (2013) 34 ILJ 3366 (CCMA).

1398 Refer to chapter 5.

i) What are the procedural and substantive guidelines on dismissals arising from incompatibility?

In conclusion, it is clear that incompatibility in the workplace could be regarded as a separate and legitimate ground for dismissal in terms of the *Labour Relations Act 66 of 1995*.[1399] However, the legislature will have to implement statutory regulations and guidelines which effectively regulate dismissals arising from incompatibility. This not only protects the interests of both the employer and the employee, but it also ensures legal certainty on the matter.

7.4 Recommendations

It is recommended that:

a) Incompatibility should be included in the list of statutorily recognised grounds of dismissal

It is recommended that incompatibility should be first and foremost included in the list of statutorily recognised grounds of dismissal. Based on the findings in this thesis, it is clear that incompatibility should be a separate and legitimate ground for dismissal in terms of section 188 of the LRA and be regulated as such, due to the value of this ground of dismissal for the employer and its unique nature. This thesis established that various South African courts and other dispute resolution tribunals have recognised incompatibility as a ground of dismissal in a number of cases. Given this recognition, there is a need to establish incompatibility as a stand-alone ground to legitimately regulate such disputes. It is submitted that statutory regulation will ensure legal certainty on this subject. In addition, statutory regulation will protect the interests of both employers and employees. This will provide legal recourse for the employer to dismiss disruptive employees whose behaviour is likely to negatively impact the business. Whereas, this will protect vulnerable employees from arbitrary dismissals.

1399 *Labour Relations Act* 66 of 1995 (Hereinafter, referred to as the *LRA*).

b) Clarity on the different types of incompatible behaviour in the workplace

It is recommended that clarity be provided on what is regarded as incompatible behaviour for purposes of the workplace. This categorisation will assist employers, the courts and dispute tribunals to ascertain whether an employee's behaviour does in fact constitute the alleged incompatibility. It is further recommended that there should be statutory guidance as to when the behaviour of the employee will be serious enough to allow for a fair dismissal.[1400] Moreover, less serious incidences may warrant measures such as counselling and warnings, whereas serious incidences may warrant dismissal as the appropriate sanction.[1401] In addition, a clear distinction should be made between "quirky" and disruptive employees.[1402] This will assist in determining whether the employee is actually incompatible or simply "different".[1403]

c) Clarity on what constitutes a "corporate culture" of the workplace

It is recommended that there should be clear statutory guidance on what constitutes a "corporate culture" in the workplace. This provides legal certainty in ascertaining if an employee is in fact incompatible with the employer's "corporate culture". This will also protect vulnerable employees from being victimised by unscrupulous employers who may attempt to dismiss or unfairly discriminate against them based on personal differences, religion, beliefs, opinions, or any other arbitrary reasons.[1404] Clarity, on the other hand, will allow employers to confidently rely on incompatibility with the workplace "corporate culture" as a valid ground for dismissing a disruptive employee.

d) Substantive and procedural guidelines be established to effect fair dismissals

As discussed in previous chapters, one of the challenges experienced using incompatibility as a reason for dismissal under South African labour law is a lack of statutory guidance and proper rules on the subject. It is recommended that an objective and set criterion be established that will assist the employers, the courts, or tribunals to determine whether an employee is incompatible with the employer, other

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1400 Refer to chapter 2, para 2.4.
1401 Refer to chapter 6, para 6.3.
1402 Refer to chapter 2, para 2.4.
1403 Refer to chapter 2, para 2.4.
1404 Refer to Chapter 2, para 2.5.

employees or the "corporate culture" of the workplace. It is submitted that South Africa could also adopt some of the substantive and procedural guidelines that have been developed in New Zealand and Australia. This will assist South African labour law developing strong and relevant guidelines for the fair use of incompatibility as a legitimate ground of dismissal.

e) A clear distinction be drawn between incompatibility and other grounds of dismissals in South African labour law

As discussed in the previous chapters, incompatibility should not be regarded as a genus of either misconduct, incapacity, or operational requirements.[1405] It was established that incompatibility may not be classified as misconduct especially if the employee does not contravene a rule of conduct in the workplace.[1406] In addition, incompatibility may not be classified as incapacity if an employee is competent at his or her job, performs well and is not incapacitated in the way intended by the *Code of Good Practice: Dismissal*.[1407] Although incompatibility may not be classified as operational requirements due to its prescriptive statutory guidelines, an employee can be dismissed under "similar needs" in terms of the operational requirements definition if the employer can prove that there is a commercial rationale for retrenching an employee for their incompatibility.[1408] This being said, specific recognition of incompatibility as a ground for dismissal, with its own unique set of rules, guidelines and procedures, will go a long way to ensure clarity and fairness in matters of dismissal which relates to the employee's incompatibility. It is, therefore, recommended that the legislature should provide a clear distinction between incompatibility and other grounds of dismissal in its statutory regulations. This ensures legal certainty and also enables employers to adopt the correct pre-dismissal procedures.

f) Adoption of a Code of Good Practice: Dismissal based on Incompatibility

It is recommended that the legislature adopts the proposed *Code of Good Practice: Dismissal based on Incompatibility* as a starting point in providing regulatory guidance

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1405 Refer to chapter 4.
1406 Refer to chapter 4, para 4.4.1.
1407 Refer to chapter 4, para 4.5.1.
1408 Refer to chapter 4, parar 4.6.1.

on the matter.[1409] Similar to *the Code of Good Practice: Dismissal*,[1410] in the absence of a workplace disciplinary code, the *Code of Good Practice: Dismissals based on Incompatibility* will serve as the minimum guidelines when determining substantive and procedural fairness of dismissals arising from incompatibility.[1411] Furthermore, it is recommended that the legislature implement the ILO standards on termination of employment and discrimination in the workplace into the proposed guidelines on dismissals arising from incompatibility. This includes guidelines on fairness of dismissals, procedural guidelines and the prohibition of unfair dismissals.

7.5 Closing remarks

To conclude, this thesis has submits that incompatibility can be regarded as a separate and legitimate ground for dismissal in terms of the *LRA*. This thesis has established that harmonious relations between the employer and his or her employees are necessary for a healthy and well-functioning labour market. In addition, statutory and regulatory reform on the topic of incompatibility will go a long way in addressing the lacunae in South African labour law.

1409 Refer to chapter 6.

1410 *Code of Good Practice: Dismissal, Schedule 8 of the LRA*.

1411 Landis and Grossett *Employment and the Law: A Practical Guide for the Workplace* (Juta Capetown 2014) 156.

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