

**RIGHTS AND OBLIGATIONS OF EMPLOYER AND
EMPLOYEE: A STUDY IN THE LIGHT OF SOUTH
AFRICAN LABOUR LAW AND THE *SHARĪ'AH***

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by

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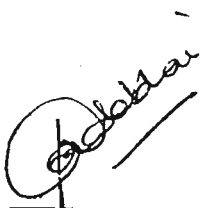
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***RIGHTS AND OBLIGATIONS OF EMPLOYER AND
EMPLOYEE: A STUDY IN THE LIGHT OF SOUTH
AFRICAN LABOUR AND THE SHARĪ'AH***

is the result of my own investigation and research and that it has not been submitted in part or in full for any other degree or to any other University.

All work for this thesis was completed at the University of KwaZulu-Natal.



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ABSTRACT

This thesis looks at the South African development of employment legislation, the provision of the contract of employment, and employee-employer relationship. It briefly examines the historical development of such relationship in South Africa and the most recent legislation.

In addition, this thesis also examines existing Islamic literature on the employee-employer relationship and analyzes these principles. The precedence set by Muslim jurists and the juridical verdicts are critically analyzed and discussed.

The overall findings of this research into Islamic and South African perspectives on employee-employer relationship will hopefully have implications for policy makers, Islamic scholars, non-governmental organizations and a whole range of stakeholders, both locally and internationally.

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INTRODUCTION

*Good treatment of persons under your control
brings good fortune, and bad treatment
brings misfortunes. (Sunan Abī Dāwūd)*

BACKGROUND TO THE AREA OF STUDY

While growing up I remember my late dad impressing upon us to remember the teachings of the Prophet Muḥammad ﷺ when employing someone. Namely, feed the employee first and give them the same food that you eat. Secondly, pay them before the sweat on their brow dries (*Sunan Ibn Mājah*) and thirdly, treat them equitably. Coincidentally my career path veered in the direction of worker rights. During the height of the apartheid era some 20 years ago, the issue of unfair labour practices towards Black workers – the word Black was synonymous with being African, Indian and Coloured - was being addressed by the Wiehann Commission of Enquiry. It was at this time that I developed a keen interest and awareness of worker rights. As a Muslim I was aware of the principles and guidelines but realised from my experiences as mediator and arbitrator that there was either an ignorance or a total disregard by some Muslims of the *Shari'ah* and *Sunnah*. This inspired me to address employee-employer rights from a *Shari'ah* perspective. The challenge of

dealing with the ignorance or disregard demands an immediate as well as a short to long-term solution from an Islamic perspective. I shall be drawing from what is familiar to me, i.e. the South African legislative experience and from the guidance of the primary sources of Islam.

AIM OF THE STUDY

The aim of this study is to critically examine South African and Islamic guidelines that govern the employee-employer relationship in respect of employment. Despite the abundant South African theoretical information and practical solutions available there appears to be a deficiency in terms of the *Shari'ah*. Therefore, this study will:

- (i) Examine post-apartheid legislation in the context of the employee-employer relationship and problems experienced by employees, with specific reference to aspects of the South African law of employment and case law.
- (ii) Examine the Islamic literature on employment, to determine the Islamic concepts, theory and practical solutions and the development of employee-employer patterns as well as the Islamic guidelines regulating the relationship between them.

- (iii) Seek the precedence set up by Muslim jurists, *vis-à-vis* the employee-employer relationship. In addition, the Islamic juridical verdicts, which primarily address the responsibility and obligation that the employer-employee ought to have towards each other.

The importance of this research stems from the fact that there appears to be violation of employee rights and that the obligations of both the employee and employer from the *Sharī'ah* perspective have either been overlooked or ignored completely thus far. Hence, this research envisages being of significance both locally and internationally and hopes to stimulate further research on some of the pertinent issues that this thesis proposes to address.

OBJECTIVES

The objectives of the study are to:

- (i) Examine the implications for employee and employer in South Africa regarding the change in the employment legislation and the provisions of the Labour Relations Act, Basic Conditions of

Employment Act, Employment Equity Act and all other related legislation.

- (ii) Identify the Islamic guidelines and principles in respect of the relationship between employee-employer from the time of the Prophet Muḥammad ﷺ.
- (iii) Examine Islamic guidelines and principles required governing the relationship between employee and employer in the employment sector. The data source is the *Holy Qur'ān* and the *Hadīth*.
- (iv) Formulate a conceptualisation of an Islamic Labour Law and recommendations on the basis of existing Islamic principles and the Muslim jurists precedence and juridical verdicts.

OUTLINE OF CHAPTERS

Chapter one gives a general overview of the *Shari'ah*. Chapter two deals with a critical analysis of employment codes of conduct, legislation, the provision of private-and-public sector employment in South Africa, the contract of employment and the employee-employer relationship in South Africa. It provides an overview of the development of employment rights and employee-employer legislation in the west and in

South Africa. It also deals with a brief examination of the historical development of such a relationship in the west and the development of employment legislation in South Africa and the most pertinent pieces of legislation. Chapter three looks at the Islamic perspective on employment, employee and employer relationship. It deals with the conceptual aspects, definitions and terminology in the discussion of employment; examines very briefly the evolution of employment and the Islamic approach within a social order and rights and obligations of employer and employee. The conclusion also includes some pertinent recommendations.

Chapter One

A GENERAL OVERVIEW OF THE *SHARĪ'AH*

INTRODUCTION

The purpose of this chapter is to shed light on the nature and sources of Islamic Law so that we may lay the necessary foundation for a consideration of the status of a contract of employment under Islam. It is thus expedient to give a brief survey of the general notions of law in the modern world so as to see whether Islamic law differs from this in any way.¹

There is a conflict of opinion, as to the definition of law in general. The jurists approach it from different angles of vision. According to the Theological school, 'Law is the product of human reason and is intimately related to the notion of purpose',² so the question arises: What is the supreme end of law?

Most of the philosophers regard justice as the supreme end and make a distinction between natural and conventional justice, which lends to a

¹ Muslehuddin, Mohammed. *Insurance and Islamic Law*. Lahore. Islamic Publications. Ltd. 1975, p. 73.

² Ibid.

great controversy and a long metaphysical discussion. Kelsen in his attempt to free law from this metaphysical mist advocates separation of jurisprudence from natural science, which deals with cause and effect. According to him the science of law is the study of the nature of norms set up by law.

Ethics and social philosophy are thus far from law while Pound emphasizes the sociology of law since it is deeply connected with the needs of humanity. Savigny of the historical school is of the opinion that the source of law is the custom, which lies deeply embedded in the mind of men.

While the Austinian school holds that law is the command of the Sovereign and that jurisprudence, having nothing to do with the goodness or badness of law, must be distinguished from legislation which is based upon the principle of utility that is, the greater good of the greatest number. This is an accepted principle of the modern world and a view that finds expression in Bentham's utilitarianism, which represents 'a reaction against the metaphysical and abstract character of eighteenth century political and legal philosophy.'³

³ Ibid.

Bentham's work is a violent attack upon the conception of natural law and the essence of his philosophy is that 'nature has placed man under the empire of pleasure and pain. We owe to them all our ideas; we refer to them all our judgements, and all the determinations of our life. He who pretends to withdraw himself from this subjection knows not what he says. His only object is to seek pleasure and to shun pain – these eternal and irresistible sentiments ought to be the great study of the moralist and the legislator. The principle of utility subjects everything to these two motives.'⁴

Good and evil are, thus, interpreted in terms of pleasure and pain. This sensualistic evaluation of life does not accord with the ideology of Islam which is a harmonious blend of the temporal with the spiritual and whose aim it is to win the approval of *Allāh* ﷻ. Human actions are, therefore, classified, under Islamic law, into certain categories so as to indicate what to do and what to avoid in order passing the reckoning on the day of judgement.⁵

⁴ Ibid.

⁵ Ibid.

1.1 THE NATURE OF THE *SHARĪ'AH*

A question that may be posed here is the focus upon *Sharī'ah* for an employment relationship? Simply because in Islam all human interaction, for example employment agreements and the surrounding dynamics, are dependent upon *Sharī'ah*. Simply stated the relationship in employment, i.e. between an employer and an employee invariably leads to an agreement. Hence the in depth focus upon *Sharī'ah*.

The *Sharī'ah* stipulates the law of *Allāh* ﷻ and provides guidance for the regulation of life on the best interests of mankind. Its objective is to show the best way to Muslims and provide them with the ways and means to fulfill their needs in the most successful and most beneficial way.⁶

The *Sharī'ah* is meant to guide the steps of mankind in this respect. It forbids all that is harmful to Muslims, and allows or ordains all that is useful and beneficial to them.⁷

⁶ Ibid.

⁷ Ibid.

The fundamental principle of the Law is that Muslims has the right, and in some cases, it is their bounded duty, to fulfill all their genuine needs and desires and make every conceivable effort to promote their interests and achieve success and happiness – but (and it is an important ‘but’) they should do all this in such a way that not only the interests of other people are not jeopardized and no harm is caused to their strivings towards the fulfillment of their rights and duties, but there should be all possible social cohesion, mutual assistance and co-operation among human beings in the achievement of their objectives. In respect of those things in which good and evil, gain and loss are inextricably mixed up, the tenet of this law is to choose little harm for the sake of greater benefit and sacrifice a little benefit for avoiding a greater harm. This is the basic approach of the *Shari‘ah*.⁸

Broadly speaking, the law of Islam imposes four kinds of rights and obligations upon every man, viz. (i) the rights of *Allāh* ﷻ which every Muslim is obliged to fulfill, (ii) his/her own rights upon his/her own self, (iii) the rights of other people over him/her, and (iv) the rights of those powers and resources which *Allāh* ﷻ has placed in his/her service and has empowered him/her to use for his/her benefit. These rights and

⁸ Ibid.

obligations constitute the cornerstone of Islam and it is the bounden duty of every true Muslim to understand them and obey them earnestly and carefully.⁹

Hence, the *Shari'ah* or Islamic Law is an ideal code of behaviour. 'To the Muslim there is indeed an ethical quality in every human action, characterized by *qubh* (ugliness, unsuitability) on the one hand or *husn* (beauty, suitability) on the other. But this ethical quality is not such as can be perceived by human reason; instead, man is completely dependent in this matter on divine revelation. Thus all human actions are subsumed, according to a widely accepted classification, under five categories: as commanded, recommended, left legally indifferent, reprehended, or else prohibited by *Allāh* ﷻ. And it is only in regard to the middle category (i.e. those things which are left legally indifferent) that there is in theory any scope for human legislation.¹⁰

Islamic law does not recognize the liberty or legislation, for it would be incompatible with the ethical control of human actions and, ultimately, of society. Law, therefore, does not grow out of, and is not moulded by society as is the case with Western systems. Human thought, unaided, cannot discern the true values and standards of conduct; such knowledge

⁹ Ibid.

¹⁰ *Insurance and Islamic Law*, op. cit. p.75.

can only be attained through divine revelation, and acts are good or evil exclusively because *Allāh* ﷻ has attributed this quality to them. In the Islamic concept, law precedes and moulds society; to its eternally valid dictates the structure of State and Society must ideally, conform.¹¹

In order to secure order in the community Islamic law charges man with dual responsibility: one in relation to *Allāh* ﷻ and the other in relation to society which 'results in a law of duties'¹² rather than of rights, of moral obligation binding on the individual, from which no earthly authority can relieve him, and which he disobeys at the peril of his future life.¹³ And, indeed, it is the fear of punishment in the hereafter that has been successful in providing a deterrent against evil, more effective than punitive legislation of the severest type, provided, of course, that the faith is real and not a mere formality. The *Holy Qur'ān* wants Muslims to be conscious of the fact that *Allāh* ﷻ is watching their every action and hence they should have an element of fear for Him ﷻ. For example, it states:

*"O ye who believe! Fear Allāh as He
should be feared." (Āl 'Imrān, 3:102)*

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

“And fear Allāh that you may prosper.” (Āl

‘Imrān, 3:102)

Thus the prosperity of society depends not so much upon the rigors of law as upon righteousness inspired by the fear of Allāh ﷻ, i.e. *taqwā*. And, therefore, *Shari‘ah* is a code of moral conduct, *taqwā* being the standard for the judgement of human actions as is evident from the following Qur’anic citation:

*“O humankind! surely, We have created you
from a single (pair) of a male and female,
and made you into nations and tribes that
you may know each other. Surely the
noblest of you in the sight of Allāh is the one
that fears Allāh most.” (Al-Hujurāt, 49:13)*

Unlike the secular laws of the modern world which are rationalistic and, therefore liable to err, which depend for their existence upon the vagaries of public opinion and which alter with every change in society, the divine law of Islam finds its chief source in the Will of Allāh ﷻ as revealed to the Prophet Muḥammad ﷺ. It contemplates one community

of the faithful, though they may be of various tribes and in widely separated locations. Religion, not nationalism or geography, is the proper cohesive force. The state itself is subordinate to the *Holy Qu'rān*, which leaves little room for additional legislation, none for criticism or dissent. This world is viewed as but the vestibule to another and a better one for the faithful, and the *Holy Qu'rān* lays down rules of behaviour toward others and toward society to assure a safe transition. It is not possible to separate political or juristic theories from the teachings of the Prophet, which establish rules of conduct concerning religious, domestic, social and political life.¹⁴

1.2 THE CHARACTERISTICS OF THE *SHARĪ'AH*

The peculiarity of this law is that it stands for reforming society by way of persuasion rather than coercion, so it remains content with prescribing such punishments only as are most needed to stop crimes of grave nature and create thereby an ordered society. It is for this reason that exemplary punishment was meted out for murder, physical injury, fornication, adultery, theft, highway robbery, false accusation or calumny against chastity and drinking of wine, while usury, gambling and the like were

¹⁴ Ibid.

left to be dealt with in the Hereafter because of their bearing upon transactions rather than upon the establishment of peace and order.¹⁵

Reform by persuasion and exhortation being the principal aim of Islam, it allows time for penitence and to make adjustments in one's life. Islamic law has a twofold object, spiritual benefit and social good, its policy is, therefore, to encourage obedience by offer of reward, and to discourage disobedience by imposition of penalties. Penalties may be imposed in this world or in the next, or in both, but reward (*thawāb*) is given only in future life.¹⁶

The *Shari'ah* in essence embodies the Will of *Allāh* ﷻ Who is the Sovereign and source of law and to whom is due the obedience of man. The Holy Qur'an states:

*"To Allāh belongs the dominion of the
Heavens and the Earth and Allāh has power
over all things. (Al 'Imrān, 3:189)*

¹⁵ Ibid.

¹⁶ Abdur. Rahim, *Muhammadan Jurisprudence*. pp. 58-59.

Hence, the *Sharī'ah* has the character of a religious obligation to be fulfilled by the believer. In other words, the law of *Allāh* ﷻ remains the law of *Allāh* ﷻ even though there is no one to enforce it.¹⁷ The believers, even if they reside outside the territory of Islam, are bound by the law, for the law was revealed to bind the believers as individuals wherever they may be. 'The law takes into consideration primarily the common interests of the community and its ethical standard, the personal interests of the individual believers are protected only insofar as they conform to the common interests of Islam. Not infrequently the interests of the individual were sacrificed for the sake of protecting the common interests of the community.'¹⁸

1.3 SOURCES OF THE *SHARĪ'AH*

Muslim beliefs and practices and code of conduct are all derived from two primary sources, namely, The *Holy Qur'ān* and *Ḥadīth/Sunnah*.

1.3.1 The *Holy Qurā'n*

The *Holy Qur'ān* is the Sacred Scripture of Muslims which is regarded to be the verbatim Word of *Allāh* ﷻ revealed to the Prophet Muḥammad

¹⁷ *Insurance and Islamic Law*, op. cit., p. 80.

¹⁸ Ibid.

ﷻ over a period of 23 years. Embodied in it are the Divine Commandments, which encompass all facets of human life. What is to be noted is that despite the fact that the *Holy Qur'ān* consists of over 6000 *āyāt* (verses) only 200 of them actually pertain to laying down the law.

The *aḥkam āyāt* (mandatory verses of the *Holy Qur'ān*) do in essence cover all aspects of human life. For example, these particular verses make reference to the obligatory religious rites that have to be upheld by all Muslims like *Ṣalāh* (obligatory five times daily prayers), *Ṣawm* (fasting during the holy month of *Ramaḍān*), *Zakāh* (compulsory charity) and the *Ḥajj* (pilgrimage to Makkah). Moreover, they also touch upon civil affairs like selling and buying and usury. Furthermore, they even encompass criminal affairs like murder, adultery, and highway robbery; personal affairs like marriage, divorce, and inheritance as well as international affairs like laws of war, relations of Muslims with their enemies, treaties and the war booty.¹⁹

¹⁹ Iqbal, Afzal. *Culture of Islam*. Lahore. Institute of Islamic Culture. 1974, p. 160.

1.3.2 *Ḥadīth/Sunnah*

Ḥadīth/Sunnah is regarded as *wahyun khafī* (minor revelation) and includes all that has been reported on the authority of the Prophet Muḥammad ﷺ and as such incorporates his exemplary lifestyle (*uswatun ḥasanah*), authentic sayings (*Ḥadīth*), actions, personal habits, tacit approval and explicit disapproval (*Sunnah*).

Legislation laid down by the *Ḥadīth/Sunnah* complements that of the *Holy Qur'ān*. For example, the *Holy Qur'ān* ordains Muslims to pray five times a day and does not provide the details which pertain to the actual manner of observing the *Ṣalāh* (obligatory prayers). It is the *Ḥadīth/Sunnah* that intervenes and provides the exact details. What is important to be noted here is that since *Allāh* ﷻ chose to reveal the *Holy Qur'an* to the Prophet Muḥammad ﷺ, it is thus binding upon Muslims to follow what his ﷺ explanations and interpretations of the Divine Commandments. In other words, therefore, the Prophet Muḥammad ﷺ explained, interpreted and demonstrated how the Divine Law ought to be applied.²⁰

²⁰ *Culture of Islam*, op. cit., p. 163.

1.4 ISLAMIC JURISPRUDENCE (*AL-FIQH*)

Islamic Jurisprudence (*al-Fiqh*) is the science which facilitates the application of the *Shari'ah* (Islamic Law). The term *al-Fiqh* literally denotes "intelligence" in view of the fact that it implies the independent exercise of intelligence in deciding a point of law. However, one has to bear in mind that this exercise is always done within the parameters of the broad teachings of the *Holy Qur'ān* and *Ḥadīth/Sunnah*, which, as stated above, are the primary sources of Islamic Law.

1.4.1 Secondary Sources of Islamic Law

The secondary sources of Islamic Law may be described as the tools employed by Muslim jurists in the application of the *Shari'ah* in all such cases which are not explicitly addressed in either the *Holy Qurā'n* or *Ḥadīth/Sunnah*. These secondary sources play a vital role in facilitating the application of the *Shari'ah* Law as a result of the expanding demands in the rapidly changing Muslim society.

Some of these sources are briefly discussed hereunder:

1.4.1.1 *Al-Ijtihād* (Exercise of Judgement)

Al-Ijtihād is derived from the root verb *jahada*, which means to endeavour, strive, etc.²¹ In legal terminology it implies exerting one's intellect to determine the proper application of the teachings of the *Holy Qur'ān* and *Hādīth/Sunnah* to a particular situation.²² The two branches of *al-Ijtihād* are, namely, *al-Ijmā'* and *al-Qiyās*.

1.4.1.2 *Al- Ijmā'* (Consensus of Juristic Opinion)

Al-Ijmā' is derived from the root verb *jama'a* which means to collect or bring together.²³ Technically, it is defined as agreement of the jurists among the followers of the Prophet Muḥammad ﷺ in a particular age on a question of law.²⁴ In essence, it signifies consensus of opinion of Muslim jurists in a particular age on a point of law. In practice, Muslim jurists congregate and deliberate upon any particular problematic issue, which affect Muslims, and try to resolve it by agreeing and uniting in opinion.²⁵

²¹ Wehr, Hans. *A Dictionary of Modern Written Arabic*. Ed. by J.M. Cowan. New York. Spoken Languages Services, Inc. 1976, p. 142.

²² *A Survey of Muslim Institutions and Culture*, op. cit., pp. 37-38.

²³ *A Dictionary of Modern Written Arabic*, op. cit., p. 134.

²⁴ Abdur Rahim. *Muhammadan Jurisprudence*. Lahore. Mansoor Book House, n.d., p. 97.

²⁵ *A Survey of Muslim Institutions and Culture*, op. cit., p. 34.

1.4.1.3 *Al-Qiyās* (Analogical Deduction)

Al-Qiyās is derived from the root verb *qayasa*, which means to measure.²⁶ As a juridical term, it is defined as a process of deduction by which the law of a text is applied to such cases which, though not covered by the language of the text are covered by the reason of the text on the basis of the *'illah* (effective cause).²⁷ For example, the *Holy Qur'ān* (*Al-Nisā'*, 4:10) censures unjust devouring of the property of orphans. The effective cause of this rule is the “destruction” of the property of orphans by devouring it without compensating the loss. Using this textual rule, Muslim jurists apply it to the physical damaging of the orphan's property, for example, through arson, etc. in view of the fact that the effective cause of devouring the proceeds of the orphans is common to both cases in the sense that it is the destruction of the orphan's property without compensating for the loss.²⁸

1.4.1.4 *Al-Maṣlaḥah* (Public Good)

Al-Maṣlaḥah is derived from the root verb *ṣalaḥa* which means to do good, right or proper.²⁹ In juristic terminology it implies the choice to

²⁶ A Dictionary of Modern Written Arabic, op. cit., p. 804.

²⁷ Muhammadan Jurisprudence, op. cit., p. 117.

²⁸ Hassan, Hussain Hamid. *An Introduction to Islamic Law*. Islamabad. Leaf Publications. 1997, pp. 172-173.

²⁹ A Dictionary of Modern Written Arabic, op. cit., p. 521.

make certain laws for the collective benefit of society. However, these laws ought not to be in contradiction to the basic principles embodied in the *Holy Qur'ān* and *Ḥadīth/Sunnah*. In other words, such laws should result in benefiting the Muslim State or Muslims in general. For example, it would be justifiable for the Muslim State to impose taxes on its wealthy citizens in order to cope with its increasing administrative expenditure.³⁰

1.4.1.5 *Al-ʿUrf* (Customs)

Al-ʿUrf is derived from the root verb *ʿarafa* which means to know.³¹ Hence, *al-ʿUrf* literally means that which is well-known or generally recognised. In other words, customs which have the force of law must be generally prevalent in a particular country. However, if these customs contravene the dictates of the *Sharīʿah* like, for example, drinking of wine and the taking of usury, such customs would not be enforced by Muslims.³²

³⁰ *Islahi, Amin Ahsan. Islamic Law - Concept and Codification.* Lahore. Islamic Publications Ltd. Eng. Trans. by S.A. Rauf. 1979, pp. 80-81.

³¹ *A Dictionary of Modern Written Arabic*, op. cit., p. 605.

³² *An Introduction to the Study of Islamic Law*, op. cit., p. 229.

1.5 DEVELOPMENT OF ISLAMIC JURISPRUDENCE

The Abbasid period (750 –1258 C.E.) was congenial to the development of legal thought, hence a number of schools of law sprung up, outstanding among them being the four *Sunnī* Schools of Islamic Jurisprudence, named after *Imāms* Abū Ḥanīfah, Mālik Ibn Anas, Muḥammad Ibn Idrīs al-Shāfiʿī and Aḥmad Ibn Ḥanbal. But this movement took a downward trend at the end of the above period. Consequently after the fall of Baghdad in the middle of the 7th century *Hijrī*. (13th century C.E.) the *Sunnī* jurists arrived at an agreement that the four schools, referred to above, were sufficient which marks the closing of the door of *Ijtihād* (independent judgement) and the beginning of *taqlīd*, that is, following of opinion without investigating its source.³³

Taqlīd, thus continued for a long time till a new movement of reform was afoot in the 19th century which marks an outright break with this old tradition. What we are faced with in the present state is a state of violent controversy between those who prefer to stick to the same old tradition of *taqlīd* and the Modernists who press the need for new reforms.³⁴

³³Ibid.

³⁴Ibid.

CONCLUSION

In this chapter, it was pointed out that *Holy Qur'ān* contains a set of *Allāh*-given laws, revealed to the Prophet Muḥammad ﷺ and therefore not open to revision. Khaled Abou El Fadl, a specialist in Islamic law at the University of California, says a case for democracy that is presented from within Islam has to accept the idea of divine sovereignty.

“It cannot substitute popular sovereignty but must show how popular sovereignty expresses God’s authority, properly understood”.³⁵

Cynics view the above as an ‘obviously formidable complication, which gives a lot of power to anyone who can claim some special authority to “properly understand”. However in overcoming the cynicism it is *de facto* that, it is not one beyond the wit of humankind to wriggle around. For it is no less obvious to Muslims than to other people that some of *Allāh*’s ﷻ orders leave gaps to be filled in, and that others require interpretation. Thus paving the way for Muslim scholars to exercise *Ijtihād* (interpretation) thereby enabling them to make rules applicable for the time with intense intellectualization. In the same way the *Holy Qur'ān*, for example, does not prescribe any particular system of

³⁵ Abou El Fadl, Khaled. “The Law of Man or the Law of God? Islam and Democracy” in *The Economist*. September 13, 2003, p. 10.

government. And yet government requires rulers, who must be chosen by some method.³⁶

The current times require much more laws than are inscribed in the unalterable *Holy Qur'ān*. Much of what is called *Sharī'ah* is derived from other sources: the *Sunnah* (the practice, sayings and teachings of the Prophet Muḥammad) ﷺ; the *Ijmā'* (the consensus of religious scholars); and the *Qiyās* (legal reasoning). There is thus ample room for *Ijtihād* (interpretation). Islamic judges routinely circumvent even some of the explicit laws laid down in the *Holy Qur'ān*. For legitimate reasons, the *Holy Qur'ān*, for example, says pretty plainly that a thief should be punished by losing his hand. However, the number of crimes requiring the *Hudūd* punishments is small and most Muslim countries with *Hudūd* laws on the statute books have found ways to ensure that the punishments are seldom if ever carried out.³⁷

This does not mean that punishment is not meted out. This is an over simplification of the actual process. In fact there is intense and extensive investigating to ascertain the need to inflict the *Hudūd*. To determine if there are any witnesses and what is their gender? In addition the

³⁶ Ibid.

³⁷ Ibid.

aggravating and mitigating statements raised by both parties respectively
are taken into consideration.

Chapter Two

EMPLOYMENT AND SOUTH AFRICAN LAW

INTRODUCTION

The history of the employer-employee relationship in South Africa is embodied in the development of laws pertaining to employment. In practice there has been a progressive liberalisation of the relationship, with a steady restriction of the employer's absolute freedom and prerogatives at work. These have been effectively constrained by the growth of trade unions and collective bargaining. And by state interventionism in industrial relations - statutory rights, although the specific impact of these factors on particular employees varies by sector, industry, enterprise and establishment.¹

The most fascinating thing about the labour law of South Africa is our ignorance of it and our failure to comprehend how it can support us every day both as employer and employee. We tend to treat it with undue reverence, while simultaneously steering clear of active understanding until the time comes for us to deal with it. In fact, understanding the

¹ David Farnham and John Pimlott, *Understanding Industrial Relations*. (1990). 4th edition, p. 87.

labour law is simply a positive step in taking control of our working environment.² The South African Labour Relations Act has evolved in achieving the humane treatment of employees via legislation.

The following passage contains some of the most important aspects of a person's working environment.

Roughly speaking, between the ages of sixteen and sixty years most of the population will spend nearly 40% of their waking hours working. Allowing for travel, overtime and the cares and concerns about work that you carry home with you, the greater part of your life will be spent devoted to the activity of work. Given that work makes up such a vast component of your time, it is unfortunate that there is no guarantee that work will be a happy experience – it may in fact be totally the opposite. It can place stress and strain on many other aspects of your life, with the potential to spread and affect the people around you, such as your immediate family.³

² Gresak, Gillian A. *From Ostriches to Proteas*, pp. 14-15.

³ Levy, Andrew. *Rights at Work: A Guideline for Employees*. (1992), pp. 1- 2.

Work, in more ways than one, is central to our existence. Very few people work for work's sake. It is only a fortunate few who, discover that the job is its own reward, and few that derive real satisfaction and pleasure from what they do. For many people, work is dull, repetitive, exhausting or downright unpleasant.⁴

Work is done in the main for the financial reward that it brings. Most people work in order to earn the money that they require to live, for in the modern economy one cannot be self-supporting and self-sufficient. Money is a necessary requirement to fulfil, needs, wants and desires and therefore there is constant pressure to work in order to meet this requirement. In this respect, work is the fundamental economic activity, and our whole society is based on this fact.⁵

Work is, however, not only an economic activity. It is also a social one. Work provides a set of relationships and interactions centred, on the people with and for

⁴ Ibid.

⁵ Ibid.

whom you work. Like most social interactions, it may be pleasant or unpleasant, and as such has the potential to colour your whole outlook.⁶

It is this social interaction aspect that is most important in most people's lives. Simply stated, an employment relationship creates a bond analogous to a family relationship. Therefore the trend prevalent in society leaves one with very little time to socialise outside the workplace. Resulting in employers, employees and co-employees becoming surrogate families filling the void of social interaction non-existent outside the employment arena. It is due to this intimacy that, a fundamental need to have total equity in the workplace is required.

2.1 WHY WAS THERE A DEMAND FOR EQUALITY IN SOUTH AFRICA?

Superficially, this may seem obvious. However, because equality was not on the agenda during the apartheid years in South Africa and the consequent inequities to emerge in all spheres of society during those years, it became the very foundation of the new social order. Therefore the individual, and collective, concept of fairness is based on equality.

⁶ Ibid.

On a functional level, equality assists in maximising the use of the varied human resources in a country.

So how is equality addressed in the workplace? In the workplace, the fundamental law to affect approaches to an employment relationship is that which governs unfair labour practices. Resulting in the conceptualisation of equality.

2.2 CONCEPT OF EQUALITY

To address the concept of equality in the South African context one looks to the Constitution of South Africa. Attorney Saber Ahmed Jazbhay alludes to the fact that the South African courts must be bold enough to interpret the Constitution with imagination and foresight so as to make the Bill of Rights worth more than just the paper it is written on.⁷

He found that neither section(s) 8 nor s 9 of the Constitution envisaged a passive or purely negative concept of equality. In fact, he submits that

⁷ Saber Ahmed Jazbhay. *Recent Constitutional Cases*, (January 1999) *De Rebus*, pp. 54-55.

the courts are expected to take positive steps to redress the effects of discrimination in pre-Constitutional times.⁸

From his reading of these provisions it is clear that inherently their primary purpose is the need to prohibit patterns of discrimination. He has also observed a break with the hitherto tradition of mechanically interpreting laws and is clearly presented by s 39(2) of the Constitution which requires that:⁹

“Every court must promote the spirit, purport and objects of the Bill of Rights.”

In addition, he says the State and, through it, the courts are obliged to promote – given the preamble to the Constitution – the achievement of substantive equality by legislative and other means designed to protect and advance persons or categories of persons disadvantaged by unfair discrimination.¹⁰

Although our Constitution has been entrenched for some years, most South Africans have little ownership of their rights, individually or

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid

collectively. In Gillian A. Gresak's opinion, it is for this reason that so few challenges have come before the courts by persons infected or affected by HIV/AIDS.¹¹

However, as this will change since all laws do evolve with time after implementation - except for the Constitution, it is important to take cognizance of the contents of the Constitution. All new laws serve to give substance to the Constitution and thus have direct implications for the South African workplace.¹²

The Constitutional guarantee of equality is of special significance in the fight against discrimination in the workplace. And it is the Labour Relations Act No. 66 of 1995 and the Employment Equity Act No. 55 of 1998 that gives substance to the guarantee of equality. The equality provision consists of four parts:

1. The right to equality before the law and to equal protection;
2. A prohibition on direct or indirect unfair discrimination;
3. Affirmative action as regards persons (or groups or categories of persons) disadvantaged by unfair discrimination;

¹¹ Ibid.

¹² Ibid.

4. Evidentiary presumption of unfair discrimination until the contrary is proven.¹³

Once one understands the concept of equality one realises that in all spheres of the law in South Africa; the courts defer to the Constitution for a clearer understanding of it. As will be observed in the subsequent sections of this chapter.

2.3 FUNDAMENTAL WORKER RIGHTS

The rights of workers have not changed since the early 90's but the *context* in which they operate has. In other words, new legislation has given substance to these rights.¹⁴

For example, reading through the following worker rights, while reflecting on the disadvantaged groups within the private or public sector, one realises that, while the rights do not change, their application does. One also realises how often one takes something (like worker rights) for granted and don't really broaden one's vision to include

¹³ Ibid.

¹⁴ Gresak, Gillian A. *From Ostriches to Proteas*. p. 17.

everyone. One assumes that it includes everyone but one doesn't ensure that it does.

- equality of opportunity to work
- unfair remuneration and service conditions
- access to training and retraining
- organise and belong (or not) to employee organisations
- protection of occupational safety and industrial health
- social security
- protection against unfair labour practices

I shall address the specific employee - employer rights in more detail under each piece of employment legislation. However, to examine any piece of South African legislation we need to firstly look at its Constitution.¹⁵

2.4 THE SOUTH AFRICAN CONSTITUTION ACT NO. 108 OF 1996

The importance of the South African Constitution, No. 108 of 1996, for labour law is usefully evaluated by, Basson et al. They look at two

¹⁵ Gresak, Gillian A. *From Ostriches to Proteas*. pp. 14-15.

issues: important constitutional rights and the direct or indirect influence of the Constitution, 1996.

2.4.1 Important Constitutional Rights

There are three types of rights contained in the Constitution, No. 108 of 1996, which are important to the employment relationship:

- The section 23 labour rights

In section 23 of the Bill of Rights (Chapter 2 of the Constitution, 1996) they find those rights which obviously relate to the employment relationship. They are:

- everyone's right to fair labour practices;
- the right of every worker to form, join and participate in the activities and programmes for a trade union (freedom of association);
- the right of every worker to strike;
- the right of every employer to form, join and participate in the programmes and activities of an employer's organisation (freedom of association);

- the right of every trade union and employer's organisation to determine its own administration, programmes and activities, the right to organise and the right to form a federation;
- the right of trade unions, employers and employer's organisations to engage in collective bargaining; and
- protection of trade union security arrangements such as the closed shop (where employees are forced to belong to a certain trade union) or agency shop (where employees are compelled to contribute subscription fees to a certain trade union).
- Other rights contained in the Bill of Rights, which might affect the employment relationship. The most important of these are the right to equality (section 9), the right to privacy (section 14), freedom of religion, belief and opinion (section 15), freedom of expression (section 16) and the right to just administrative action (section 33).

Then there are other provisions of the Constitution that they analyse which may impact on the employment of certain officials holding public office and furthermore contains, in Chapter 10, some important

provisions which might affect the employment of employees of the public administration.

So in what way do they see a Constitutional influence? According to them the ways in which the Constitution might influence the employment relationship is twofold:

2.4.2 Direct Influence

Section 8(1) of the Bill of Rights provides that the Bill of Rights 'binds the legislature, the executive, the judiciary and all organs of state'. In terms of section 8(2) of the Constitution, 1996 '(a) provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is applicable taking into account the nature of the right and the nature of any duty imposed by the right'. This means that the Bill of Rights has a direct effect on the employment relationship between all employers (State and private) and their employees and that these rights may be enforced as such.

2.4.3 Indirect Influence

Of more practical importance are those pieces of legislation enacted to give effect to the rights contained in the Bill of Rights. For example,

they say that, the Labour Relations Act, 1995 is an endeavor by the legislature to give effect to the labour rights contained in section 23 of the Bill of Rights as well as addressing equality (section 9 of the Bill of Rights) in the workplace. In addition, from their analysis, the fact that the legislature is also bound by the Bill of Rights means that, to the extent that ordinary legislation does not conform to the basic rights contained in the Bill of Rights. The constitutionality's of that piece of legislation may be attached and the Constitutional Court may well decide to invalidate such a piece of legislation to the extent that it conflicts with the basic rights contained in the Bill of Rights.

Finally they also focus upon the field of employment. They say that the Constitution is of great value in ensuring that the basic values are given detailed effect though the enactment of specialised and detailed legislation in the field of employment. Such as the Labour Relations Act 1995, the Skills Development Act, the Basic Conditions of Employment Act 1997 and the Employment Equity Act 1998, etc. I shall address the practical focus in the form of case law in the subsequent sections.

South Africa has been guided by international institutions in drafting the standards of employment legislation over the past few decades. One such

organisation is the International Labour Organisation (ILO). So what are their standards and who are they?

The International Labour Organisation (the ILO), seated in Geneva and of which South Africa is a member country, is an important source of labour standards across countries. Through a large number of Conventions and Recommendations it has built up a set of principles which regulate a large number of labour matters. There are different ways in which the provisions of a Convention or Recommendation of the ILO can play a role in labour law. The most frequently encountered is when a country decides to incorporate the provisions of a Recommendation or a Convention in legislation. This has, for example, happened in South Africa's case with the adoption of the Labour Relations Act 1995 which seeks to give effect to ILO instruments dealing with freedom of association and unfair dismissal. Another way is when a court, faced with a labour dispute in the absence of clear principle to guide it, decides to look for guidance to the principles contained in the Conventions and Recommendations of the ILO.¹⁶

¹⁶ Basson, Christianson, Garbers, Le Roux, Mischke, Strydom. *Essential Labour Law, Individual Labour Law*, (2000). Vol. 1, 2nd ed.

2.5 THE HISTORICAL DEVELOPMENT OF THE SOUTH AFRICAN LAW REGARDING UNFAIR DISMISSAL

The South African law of *unfair* dismissal developed over a relatively short period of time. In 1979, the Labour Relations Act, 1956 was amended in accordance with the recommendations made by the Wiehahn Commission of Inquiry. Two of the amendments constituted the foundation of the South African law of unfair dismissal. They were:

- the introduction of the definition of an *unfair labour practice* and
 - the establishment of the *Industrial Court*.¹⁷
-
- The Labour Relations Act (LRA) 1956 regulated the functions of the Industrial Court. One of the court's main functions was to determine disputes about alleged unfair labour practices.¹⁸
 - The concept 'unfair dismissal' was not defined in the 1979 amendment to the LRA, 1956 and the Industrial Court was also not afforded the specific function of determining disputes about alleged unfair dismissals. This did not, however, deter the Industrial Court from considering such disputes. The definition of an unfair labour practice was phrased in such broad terms that the court had little difficulty in finding that alleged unfair dismissals

¹⁷ Strydom EML cited in *Essential Labour Law*, vol. 1, *Individual Labour Law*, 2000, 2nd ed., Basson et al, p. 79.

¹⁸ Ibid.

were covered by the definition. It was thus prepared to consider disputes regarding alleged unfair dismissals.¹⁹

- When the Industrial Court first had to consider the disputes about alleged *unfair* dismissals, it found little or no guidance in the principles of South African common law because the common law did not concern itself with the *fairness* of a dismissal. The court accordingly turned to English law dealing with unfair dismissal and also to the Recommendations and Conventions of the International Labour Organisation (ILO) for guidance.²⁰

2.5.1 Substantive Fairness of a Dismissal

- In formulating its guidelines regarding unfair dismissal, the Industrial Court relied on Recommendation 119 of 1963 of the ILO. This Recommendation dealt with the termination of employment at the initiative of the employer. Convention 158 of 1982 and Recommendation 166 of 1982 superseded it.²¹

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

Convention 158 of 1982 is entitled 'Termination of employment at the initiative of the employer'. Article 4 of this Convention provides that an employer must have a *reason* for dismissal. It also sets out three broad categories of reasons for dismissal:

- The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.'

- *Article 4 of ILO Convention 158 of 1982.*²²

The importance of article 4 requires the employer to have a *reason* for dismissal. Thus the employer cannot dismiss the employee at will. But article 4 of the ILO Convention goes much further. It also regulates the permissible categories of reasons for dismissal namely:

- the *capacity* of the worker
- the *conduct* of the worker
- the operational requirements of the business.²³

²² Ibid.

²³ Ibid.

I shall specifically look at case law to understand these terms.

- The *capacity* of the worker relates to the worker's *ability* to do a job. In the case of dismissal on this ground, the employer argues that the employee lacks the ability to do the job. In other words, the employer argues that the employee must be dismissed because the latter is incapable of doing the work. Incapability or incapacity generally manifests itself in one of two forms: the employee is either incapable of doing the job due to incompetence or is incapable of doing the job for medical reasons.²⁴
- Dismissal as a result of *conduct* of the worker relates to the worker's behaviour. In the case of dismissal on this ground, the employer argues that the employee must be dismissed because of some form of *misconduct* or *misbehaviour*. Examples of such misconduct or misbehaviour include insubordination towards superiors, assault, and theft of company property, frequent late coming for work and intimidation of co-workers.²⁵
- Dismissal due to the *operational requirements* of the business is an extremely broad ground for dismissal. Such dismissals are also

²⁴ Ibid.

²⁵ Ibid.

referred to as 'no-fault dismissals' because they are not related to the conduct or capacity of the employee, but to the operational needs of the business. In other words, the reason for dismissal is not rooted in the employee's ability or behaviour, but in the needs of the enterprise. The most common form of dismissal for operational reasons is dismissal based on the economic needs of the business.²⁶

- By requiring a reason for dismissal, article 4 of the ILO Convention ensures that the employer does not dismiss the employee arbitrarily. The dismissal must be justified or substantiated. This requirement relates to the *substantive fairness* of a dismissal. A dismissal that is not effected for one or more the three reasons set out above is referred to as a *substantive unfair* dismissal.²⁷

2.5.2 Procedural Fairness of a Dismissal

Article 7 of Convention 158 of 1982 is also extremely important. It sets out a further requirement with which the employer must comply before the employee can be fairly dismissed:

²⁶ Ibid.

²⁷ Ibid.

'The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.'

- *Article 7 of ILO Convention 158 of 1982.*²⁸

- In terms of this article of the Convention, an employer may not dismiss the employee for misconduct or incapacity without first granting the employee an opportunity to respond to the allegations made by the employer against the employee. This requirement is commonly referred to as the *procedural requirement* for a fair dismissal. If such an opportunity was not afforded to the employee, the dismissal will be *procedurally unfair*.²⁹

Convention 158 of 1982 sets out the requirements for a fair procedure in respect of a dismissal for operational reasons:

'When the employee contemplates termination for reasons of an economic, technological, structural or similar nature, the employer shall:

²⁸ Ibid.

²⁹ Ibid.

- 1.1 Provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated the number and categories of workers likely to be affected and the period over which the terminations are intended.
- 1.2 Give, in accordance with national law and practice, the worker's representatives concerned, as early as possible, an opportunity for consultation. On measures to be taken to avert or to minimize the terminations and measure to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.'

- *Article 13 of ILO Convention 158 of 1982.*³⁰

In August 2002 the South African Department of Labour, in a tri-partite agreement with labour representatives and the employer organisation, amended this section of the LRA by breaking down the number of employees involved in joint meaningful consultation on retrenchments. Should an individual be retrenched unfairly then s/he may refer the dispute to the Commission for Mediation Conciliation and Arbitration (CCMA). Failing to settle then may refer to the CCMA for Arbitration or the Labour Court for adjudication. However in the event of two or more

³⁰ Ibid.

employees being retrenched they may refer the dispute for Conciliation to the CCMA but not for Arbitration.

2.5.3 Dispute Resolving Mechanisms

The first issue to address when dealing with an unfair dismissal is the reason for the dismissal. Whether the dismissal was for a reason branded as automatically unfair by the Labour Relations Act (LRA). This Act makes provision for a number of dispute resolution bodies, namely:

- Bargaining councils (BC)
- Statutory councils
- The Commission for Conciliation, Mediation and Arbitration (CCMA)
- The Labour Court (LC)
- The Labour Appeal Court (LAC)

A brief discussion of the above is warranted.

A bargaining council for a sector and area is voluntarily established by one or more registered trade unions and one or more registered

employers' organisations by adopting a constitution which meets the requirements of the LRA. The powers and functions of the BC are regulated in terms of the LRA. The parties to the council must attempt to resolve any dispute between them in accordance with the constitution of the council.

An application may be made for the establishment of statutory council in a sector and area in respect of which no bargaining or statutory council is registered. Such application may be made by a registered trade union whose members constitute 30% of the employees in that sector or one or more registered employer organisation whose members employs at least 30% of the employees in that sector. Parties must resolve any dispute between themselves in accordance with its constitution.

The CCMA is an independent juristic person, created in terms of the LRA. It consists of governing body, commissioners and staff. The functions of the CCMA are regulated of the LRA. The CCMA must attempt resolve through conciliation any dispute referred to it. If the referred dispute remains unresolved after conciliation, the CCMA must arbitrate the dispute if the LRA requires it and any party to the dispute that has requested that the dispute be resolved through arbitration

(compulsory arbitration). The CCMA must arbitrate a dispute, which remains unresolved after conciliation, and both parties consent for the dispute to be resolved by arbitration under the auspices of the CCMA and the Labour Court has jurisdiction – voluntary arbitration.

The Labour Court is a court of law and equity established in terms of the LRA of 1995. It is a superior court and has inherent powers equal to that of a provincial division of the High Court. It has exclusive jurisdiction to matters determined by it in terms of the LRA.

The labour Court of Appeal is established in terms of the LRA. It is the final court of appeal in respect of judgements and all orders made by the LC. It has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that of the Supreme Court of Appeal. It has exclusive jurisdiction to hear and determine all appeals against the final judgements and the final orders of the Labour Court.³¹

As stated from the outset of this section the above description is merely for the purpose of knowing and understanding the dispute resolving mechanisms available in South Africa.

³¹ Basson, Christianson, Garbers, Le Roux, Mischke, Strydom. *Essential Labour Law, Individual Labour Law*, 2000, Great Britain, Cassel Educational Limited, 2nd ed.

2.5.4 Forms of Employment

In South Africa, as indeed in other parts of the developing world, job creation is a priority. This has led to creative forms of employment, and so-called atypical or non-standard forms of employment have mushroomed. As academic writer, Barney Jordaan, has said:

‘Non-standard forms of employment are, for a variety of reasons, becoming popular with employers. Broadly speaking, employees in ‘standard’ employment are those who are employed on a full time basis for an indefinite period. ‘Non-standard’ employment, on the other hand, includes employment for a fixed term (for example, for three months; a season; or until completion of a particular job); part-time employment; casual employment; working from home; and labour-only subcontracting.’³²

Reference to employee rights has always drawn attention. But who or what is the employee?

³² Ibid.

2.5.5 The Meaning of Employee

There are a few select groups of employees who have been excluded from the ambit of the Labour Relations Act, 1995 as a whole and who are not therefore protected against unfair dismissal in terms of the Act.

‘This Act does not apply to members of –

- (a) the National Defence Force;
- (b) the National Intelligence Agency; and
- (c) the South African Secret Service.’
- (d) - s2 of the LRA, 1995³³

Only the uniformed members of the National Defence Force are excluded from the ambit of the Act – civilian employees working for the Defence Force are included and protected against unfair dismissals and unfair labour practices in terms of the LRA, 1995.³⁴

2.6 THE LABOUR RELATIONS ACT, NO. 66 OF 1995

The previous section broadly discussed the law of unfair dismissal, the need for both a substantively and procedurally fair dismissal and to the

³³ Ibid.

³⁴ Ibid.

principles of international law, which form the very essence of our Labour Relations Act, No. 66 of 1995. We turn now to the South African law of unfair dismissal as laid down in the Labour Relations Act, 1995.³⁵

The law of unfair dismissal is codified in Chapter VIII of the Labour Relations Act, 1995, an Act devoted primarily to collective labour law. The stated purpose of the Act is to regulate the organizational rights of trade unions, to promote and facilitate collective bargaining and employee participation in joint decision-making through the establishment of workplace forums. The Act is also aimed at providing simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration and provides for the establishment of the CCMA, the Labour Court and Labour Appeal Court for this purpose.³⁶ A brief description already provide in the previous section.

Two of the schedules to the Act provide guidelines and transitional arrangements for matters of an individual nature. Schedule 8 to the Act contains the Code of Good Practice: Dismissal (the Code) in relation to dismissal for misconduct and incapacity. This schedule is a very

³⁶ Ibid.

³⁷ Ibid.

important part of the law of unfair dismissal. Schedule 7 (Part B) deals with individual labour law, but is concerned with unfair labour practices rather than unfair dismissal.³⁷

2.6.1 How Can We Identify an Employer?

There is a relationship between two parties, i.e. employee and employer. It is therefore important to be able to define and identify who the employer is in borderline or difficult situations.³⁸

In South African law, the parties (the employer and the employee) are free to structure the relationship as they see fit, subject to the limitations imposed by legislation.³⁹

The courts have often been prepared to look at the *real relationship* between the parties rather than merely accepting the parties' arrangements. The court may look very closely at a certain relationship to see whether it is an employment relationship even though it may be called (and may look like) a contract with an independent contractor.⁴⁰

³⁸ Ibid.

In *Shikwambaba v Quantum Construction Holdings (Pty) Ltd* (NH 11/2/2632)⁴¹ Quantum Construction entered into a contract with a close corporation (a juristic person) to perform certain services. The ex-employee provided the same services – but as an independent contractor rather than as an employee. On the grounds of fairness, the court pierced the corporate veil. To lift the corporate veil means that under certain circumstances a company or close corporation will not be permitted to hide behind the fact that it is a corporate body separate from its members and the court will look at the true facts on the grounds of fairness.⁴²

The Labour Appeal Court's decision in *Buffalo Signs Co Ltd & Others v D Castro & Another* (1999) 20 ILJ 1501 (LAC) examined the questions of whom the true 'employer' was. In a case of the transfer or sale of a business and when the court should be prepared to lift the corporate veil.⁴³

The significance is that the fairness of a dismissal will be viewed in terms of all the circumstances and to ensure equity and justice between the various parties in the workplace – not to provide ways for employers to exploit workers who individually are in a weak bargaining position.⁴⁴

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

The need to identify the 'employer' and protect the 'employee' in a situation where one person procures the services of another for a client company or corporation has resulted in 'temporary employment services' being clearly defined in the Act.

Section 1981(1) of the Labour Relations Act, 1995.

This means that it is no longer easy for a temporary employment services or employer to hide behind a façade of not being the real employer and thereby escaping liability for unfair treatment of an 'employee'. Note that the Basic Conditions of Employment Act, 1997 has a similar definition of temporary employment service' in section 82 of the Act.⁴⁵

2.6.2 The State Employer

One of the important developments of the new labour legislation of the post 1995 era is that the Public Service is now included under both the Labour Relations Act, 1995 and the new Basic Conditions of Employment Act, No. 75 of 1997. The State is therefore an 'employer' in terms of these Acts. Schedule 3 to the Basic Conditions of Employment Act, 1997. When does the employment relationship begin?

⁴⁵ Ibid.

In the CCMA decision of *Davids v Comfort Zone Holdings (Pty) Ltd* (1999) 20 ILJ 237 (CCMA), it was held that where a prospective employee accepted the job and the employer subsequently opted out of the agreement prior to the 'employee' commencing 'employment'. The 'employer' could not necessarily deny an 'employment relationship'.⁴⁶

What happens after the contract of employment is terminated or an employee is dismissed? Once the employment contract has come to an end, it is no longer possible to talk strictly about 'employer' and 'employee', because there is no contract that links the parties to each other.

The definition of 'employee' in section 1 of the Labour Relations Act, 1956 included dismissed employees who allege that they have been excluded from re-employment. The employment relationship was seen to extend beyond the common law termination of a contract of employment. In the word of the Appellate Division, 'the relationship.... between "employer" and "employee" is therefore clearly not one that terminates as it would at common law.'⁴⁷

⁴⁶ Ibid.

⁴⁷ Ibid.

National Automobile & Allied Workers Union (now known as National Union of Metal Workers of SA) v Borg-Wagner SA (Pty) Ltd (1994) 15 ILJ 9 (A) 50.⁴⁸

The recognition of the court that there is an employment relationship that may continue even after the employment contract has come to an end has important implications. This addressed under unfair dismissal of the LRA.⁴⁹

I will now focus upon some of the more pertinent and controversial issues under the Labour Relations Act (LRA).

2.6.3 Domestic Workers

For years, domestic workers were the ‘girls’ and ‘boys’ who handled the less appealing side of domestic life for all but the poorest of South African families, a lack of legal protection placing them at the mercy of their ‘madam’ and ‘master’. But groundbreaking new legislation is stirring things up on the home front.⁵⁰

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Knowler, Wendy. “Home Truths” in *Fair Lady*. March 2003, pp. 47-54.

2.6.3.1 Who is a Domestic Worker?

In the legislation, a domestic worker is defined as any person that does chores in and around the house, including gardening, driving and homecare (of children, the aged, the sick, the frail or the disabled). However, a farm worker who performs domestic work in a home on a farm does not fall into this category.⁵¹

In October 1999, Statistics South Africa estimated that there were 800 000 domestic workers in South Africa, accounting for the 18 percent of all people employed in the country at that time. They are now said to number more than a million, making this the biggest employment sector in the country. The domestic worker sector remains the lowest paid in the country.⁵²

Despite the introduction of the minimum wages, South Africa's largest workforce is unlikely to reach the billion-rand status in the near future. The average domestic worker in South Africa today is 41 years old, with a primary school education. Less than four percent of domestic workers are organized in trade unions.⁵³

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

2.6.3.2 What are Employers' New Obligations?

The most significant requirements are:

- R800 minimum monthly salary (R4,10 an hour) in urban areas.
- R650 a month (R3,33 an hour) in rural areas. Domestics working 27 hours a week or less are entitled to a slightly higher rate.
- Payment to be made in a sealed envelope, by cash or cheque, accompanied by a detailed pay slip, a copy of which must be kept for three years.
- Wages to be increased by at least 8 percent annually each November until 2005.
- The drawing up of a legal agreement.
- A maximum of 45 'ordinary' working hours a week. Domestics working five days a week should work no more than nine hours a day, those working six days, eight hours a day.
- Overtime is voluntary and should be paid at one-and-a-half times the usual wage.
- Full-time workers are entitled to 21 days annual leave, paid sick leave, five days' family responsibility leave and four months unpaid maternity leave.

- No compulsory work on public holidays. Those who do agree to work should be paid double the normal hourly rate.⁵³

Employers who were paying their domestic workers more than the prescribed minimum wage and subsequently reduced the wage to the minimum have contravened the Labour Relations Act and the worker would be within her rights to take the matter to the CCMA.⁵⁴

From November 2002, the 'most vulnerable' of South Africa's workers are legally entitled to a minimum wage and other basic conditions of employment.⁵⁵

The Sectoral Determination for Domestic Workers, as it's officially known, begins with a minimum wage for domestic workers but goes a lot further, setting out very specific parameters regarding working hours, overtime pay, annual leave and payslips.⁵⁶

In November 2002, the South African Government announced that, by April 2003, employers will have to register their domestic workers for

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

Unemployment Insurance Fund contributions and started contributing – one percent of the employee’s salaries is to be paid by each party. This means that, for the first time ever in South Africa, domestic workers will be able to draw an income after they are dismissed or while on maternity leave.⁵⁷ During 64 nationwide hearings conducted by the Department of Labour during 2000, it emerged that employers wielded an extremely high level of control over their domestics.⁵⁸ The report also revealed that many workers have no access to medical benefits or compensation for injuries on duty; are unable to accumulate savings, pension or property rights and, given their poor wages, are reliant on the ‘free’ accommodation and food that comes with their jobs to make ends meet.⁵⁹

The need to pay their children’s school fees, renovate a homestead or simply buy necessary clothes and furniture sends many domestic workers to retail houses that grant credit and to potentially usurious moneylenders. If they lack financial acumen, this often results in their being burdened with crippling interest rates, along with inflated debt in the form of club memberships, insurance fees and even funeral policies. And it is a fact that the majority of employers remain unwilling to help

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

out when their domestic worker finds herself caught in a debt trap.⁶⁰

Prior to addressing the plight of the domestic worker the farm workers were given their rights in terms of a sectoral determination. This resulted in them become shareholders on farms or contractors to farmers during harvesting.

2.7 DRIVING TOWARDS ZERO CHILD LABOUR

A survey was commissioned by the Department of Labour, primarily to gather information necessary for formulating an effective program of action to address child labour in South Africa. Now that this information is available, the South African government is embarking on a process of looking at the policy implications and formulating and co-ordinating such a program of action.⁶¹

Technical assistance for the survey was provided by experts of the International Labour Organisation (ILO) and a consultant appointed by the Department of Labour. Funding for the project was raised by the

⁶⁰ Ibid.

⁶¹ *Survey of activities of young children in South Africa, 1999*, Summary report on children's work-related activities, in co-operation with the Department of Labour, Statistics South Africa, International Labour Organisation, International (ILO), Programme Elimination of Child Labour (IPEC), p.1.

ILO's International Programme on the Elimination of Child Labour, primarily from the United States Department of Labour.⁶²

Statistics SA also worked with an advisory committee, consisting of representatives from national government departments most directly concerned with children's work (namely the Departments of Labour, Welfare, Education and Health), non-governmental organizations, the International Labour Organisation (ILO) and the United Nations Children's Fund (Unicef).⁶³

South African children aged between 5 and 17 years are expected to help the family and school by participating in both economic and non-economic tasks. This is the case particularly in the deep rural areas of the 'former homelands' where there are few job opportunities for adults, and where electricity and piped water are rare. For most children, however, this type of work does not take up a large proportion of their time.⁶⁴

Nearly half (45% or 6,04 million) of South African children aged between 5 and 17 years (inclusive) were engaged in one or another kind

⁶² Ibid.

⁶³ Ibid.

of work-related activities, when using low time-based cut-off points. (Statistics South Africa estimated that there were approximately 13,4 million children aged between 5 and 17 years living in South Africa in June and early July 1999, the time of the SAYP interviews).

When higher cut-off points are used, 36% (4,82 million) of such children were engaged in work. As many as 51% of children living in the deep rural areas, that are mainly in the apartheid-created former 'homeland', were engaged in at least one form of work activity. Among children living in commercial farming areas, 35% were engaged in work activities. In informal urban areas the proportion of children involved in work decreased to 30% and in formal urban areas to 19%.

Of all children aged 5 – 17, 0.9% (118 000) were engaged in economic work for three hours or more per week in commercial agriculture, 0.2% (26 000) in manufacturing, 0.01 (2 000) in construction and 0% (none were found) in mining.⁶⁵

⁶⁴ Ibid.

⁶⁵ *Towards a National Child Labour Action Programme for South Africa, Discussion Document, 2002, In cooperation with the Department of Labour, International Labour Organisation, International (ILO), Programme Elimination of Child Labour (IPEC), Chapter 3, p.12.*

2.7.1 What does the Constitution say about Child Labour?

Provisions prohibiting work by children in South Africa were initially applicable only to white children. In 1981 the Basic Conditions of Employment Act extended the prohibition on employing children under 15 to all population groups.⁶⁶

In 1991 a prohibition on employment of children under 15 was inserted in the Child Care Act, administered by the then Department of Welfare. Because this Act applies to all children, those in the agricultural and domestic sectors were now included in the prohibition. However, the Department of Welfare did not have the infrastructure to enforce provisions and thus little enforcement and follow-up occurred.⁶⁷

The Interim Constitution of 1993 contained clauses related to child labour, which was expanded upon by the final Constitution of 1996. Section 28 of the final Constitution states that every child, defined as a person under 18 years of age, has the right:

- to be protected from maltreatment, neglect, abuse or degradation;
- to be protected from exploitive labour practices;

⁶⁶ Ibid.

⁶⁷ Ibid.

- not to be required or permitted to perform work or provide services that:
 - are inappropriate for a person of that child's age; or
 - place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

Section 28 also states that a child's best interests are of paramount importance in every matter concerning the child.⁶⁸

In March 1998 the Child Labour provision of the new Basic Conditions of Employment Act (BCEA) deals explicitly with child work. It prohibits employment of a child:

- who is under 15 years old; who is under the minimum school leaving age (where this is 15 or older).

The table in appendix 2 illustrates the fact that the most prevalent form of children's work in South Africa – household chores, gathering water and fuel, and school labour – is non-market labour. In these segments, regulation is generally weak, not easily enforced, and based on childcare

⁶⁸ Ibid.

legislation rather than labour law, while the work is relatively labour-intensive. The available laws relate largely to abuse. The first problem here arises in relation to defining abuse. The second problem relates to willingness to intervene in the 'private' family.⁶⁹

2.7.2 What will be the Way Forward?

The need to protect children against exploitive and abusive work was established in the Constitution. It provides that children under 18 years should be protected against exploitive labour practices and work that is hazardous or harmful to their education, health or well-being, physical or mental health or spiritual, moral or social development.

The 1998 South African Child Labour Action Programme formulated the definition of 'child labour' as follows:

'work by children under 18 which is exploitive, hazardous or otherwise inappropriate for their age, detrimental to their schooling, or social, physical, mental, spiritual or moral development.'

⁶⁹ Ibid.

It states that the term “work” is not limited to work for economic gain but includes chores or household activities in the household of the child’s care-giver, where such work falls within the definition of child labour. It excludes appropriate activities related to skills training from the definition of child labour.

We need to identify what activities harm or potentially harm children. This is a complex issue because of the different views on what is bad for children, and the different cultural approaches to the issue. There are also divergent views on the extent to which child labour problems can be addressed directly or mainly through economic and social development.

It is proposed that we first try and establish a shared view on what harms children. Once achieved, we can identify whether and what interventions are required, and who is to be responsible for them. We then need to prioritise action in respect of children who are most at risk. We need to do so because those children who are most at risk need urgent protection.⁷⁰

⁷⁰ *Towards a National Child Labour Action Programme for South Africa*, Discussion Document, 2002, In cooperation with the Department of Labour, International Labour Organisation, International (ILO), Programme Elimination of Child Labour (IPEC)] and Survey of activities of young children in South Africa, 1999, Summary report o children’s work-related activities, Department of Labour, Statistics South Africa, International Labour Organisation, International (ILO), Programme Elimination of Child Labour (IPEC).

South Africa has ratified several International Labour Organisation (ILO) conventions on child labour. The following conventions were ratified:

- The United Nations Convention on the Rights of the Child (1989), ratified in 1995.
- Minimum Age for Admission to Employment Convention, (No 138) ratified in 2000.
- ILO Convention 105 on Forced Labour (1957) ratified in 1997.
- OAU African Charter on the Rights and Welfare of the Child 1990, ratified in 2000.

Elimination of the Worst Forms of Child Labour Convention, 1999 ratified in 2000.⁷¹

A memorandum of understanding was signed in August 1998 with the International Labour Organisation (ILO). It sets guidelines on technical co-operation between South Africa and the ILO.⁷²

⁷¹ *Child Labour, Driving towards zero child labour*, pamphlet, Department of Labour.

⁷² Ibid.

2.7.3 Who Networks with the Department of Labour in Eradicating Child Labour?

Inspectors of the Department of Labour may engage in inspections with role players such as the Department of Social Services, Department of Health, South African Police Service, Department of Justice, Department of Water Affairs and Forestry, Department of Education, Department of Minerals and Energy, Local Government, trade unions, non-governmental organizations and other interested groups.⁷³

2.8 BASIC CONDITIONS OF EMPLOYMENT ACT, NO. 75 OF 1997

2.8.1 Purpose of this Act

To advance economic development and social justice by fulfilling the primary objects of this Act which are-

- To give effect to and to regulate the right to fair labour practices conferred by the Constitution:
 - (i) by establishing and enforcing basic conditions of employment;
 - and

⁷³ Ibid.

- (ii) by regulating the variation of the basic conditions of employment;
- To give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.

A basic conditions of employment constitutes a term of any contract of employment except to the extent that:

- (a) any the other law provides a term that is more favourable to the employee;
- (b) the basic condition of employment has been replaced, varied or excluded in accordance with the provisions of this Act; or
- (c) a term of the contract of employment is more favourable to the employee than the basic conditions of employment.

This Act or anything done under it takes precedence over any agreement, whether entered into or after the commencement of this Act.⁷⁴

⁷⁴ Du Toit, D. (Editor). *Labour Law through the cases*, May 2004, Service Issue 3, s1-5

Let me now focus on some of the more significant issues under this legislation per se.

2.8.2 Security Checks in the Workplace

Anastasia Vatalidis, an attorney says security checks are not justifiable in all instances. They can be done with the applicant's consent where the position requires an extraordinary degree of trustworthiness – for example, if the individual will be working with valuables and/or where the employer has had a specific problem with security in the past.⁷⁵ Vatalid says that an employer can ask an applicant if he or she has been convicted in the past of any honesty-related offences if the position requires a high degree of trustworthiness or creditworthiness. If the candidate admits to an irrelevant offence, or where a satisfactory explanation is given, the candidate should not be prejudiced.⁷⁶ If an organisation plans to carry out a security check, it must disclose its intention to the candidate as soon as possible. A prospective employer must be able to prove that the security check was justifiable in the

⁷⁵ *Sunday Times / Business Times* 'CAREERS' – 14 September 2003.

⁷⁶ Ibid.

circumstances. An applicant must give his or her consent, preferably in writing.⁷⁷

Only relevant convictions or information emerging from a search should be used to refuse an applicant employment. If it emerges that a person does have a conviction, the steps an employer can take depends on each case.⁷⁸ If the employer had asked a question about the applicant's criminal record or creditworthiness and the applicant lied, the employer could discipline the employee for dishonesty.⁷⁹ If the employee was not asked, it must be determined whether the candidate ought to have disclosed the information, despite not having been asked the question directly.⁸⁰ If the employer can show that the employee should have made the disclosure – given the seriousness of the prior conviction or the nature of the vacancy – but chose to remain silent to mislead the employer, the employee could be disciplined for material non-disclosure.⁸¹ The employer would have to demonstrate an intention by the employee to mislead the employer.⁸²

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸² Ibid.

⁸³ Ibid.

2.8.3 Sick Leave

In many other countries, it is far easier to dismiss someone for abusing sick leave than it is in South Africa.⁸³

Perhaps because of this, many local employees abuse the sick-leave system and try to use the allocated sick days as they would annual leave. The absenteeism that results can be costly and disruptive, because it is usually sudden and unplanned, at least from the point of view of the employer.⁸⁴

The minimum number of paid sick-leave days an employer must offer are 36 days per three-year cycle for someone working a six-day week and 30 days per three-year cycle for those working a five-day week.⁸⁵

Myths, however, do exist:

⁸⁴ Ibid

⁸⁵ Ibid.

1. Employees may stay away from work for up to two days, often linked to weekends or public holidays, without being too ill to work.
2. Employers may not question the content of medical certificates.⁸⁶

The facts are that employees must first of all be too ill or injured to work in order to claim sick pay.⁸⁷

If the employer has proof that the employee was not ill enough not to work, disciplinary action can follow for abuse of sick leave, or absence without leave, in both cases the employee may not claim payment for the period of absence.⁸⁸

The word “day” is not defined in the Basic Conditions of Employment Act, but for purposes of the sick-leave provisions, it can be assumed as meaning a ‘calendar’ day.⁸⁹

The employer would therefore be able to require a medical certificate when the employee is absent on a Friday or a Monday because the

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

employee is then absent from work for longer than the two days provided for in section 23 of the Act.⁹⁰

The Act states that the employer may require a certificate when the employee is absent for reasons of ill health on more than two occasions in any eight-week period.⁹¹

Medical certificates constitute only indirect evidence of an employee's illness. Employers are within their rights to use the services of their own in-house medical personnel or that of a consulting medical practitioner before rejecting a certificate. All medical certificates must comply with Section 23 of the Act before they can be accepted. There must not be any reason to doubt their authenticity and it must be clearly stated that in the practitioner's opinion, the employee was too ill or injured to work for the entire period of absence.

This would require some proof of the fact that the patient was actually examined by the practitioner and an indication that the practitioner was of the professional opinion that the employee was unfit for work for the entire period of absence. A certificate that merely reflects what the

⁹⁰ Ibid.

employee told the practitioner does not meet these requirements.⁹² It is recommended that employers, as part of their efforts to combat absenteeism, develop a clear policy regarding absence due to ill health.⁹³

2.8.4 Employer Discretion and Pension Benefits

The Pension Fund in terms of South African law makes provision for employees in the event of retirement.

However, the government as an employer together with the private sector realised that it was premature to give a lump sum amount to employees who lacked the capacity or intellect to manage their funds and, therefore created a Provident Fund. This allowed for employees post-retirement to receive an amount of money after a specific period and in the event of death this money would go to the family or spouse as a beneficiary. The fund was either market related or managed by the employer and employees in a committee. Lets us look at the analytical factors of pension schemes.

⁹² Ibid.

⁹³ Ibid.

For employers, the decision-making process in relation to pension benefits is not quite as simple as it once was. There is now far more attention being paid to the manner in which pension decisions are made and implemented by relevant role players, and employers need to be mindful of these new considerations and obligations when managing a pension promise. In this section, Graham Damant considers the duty of good faith and the notion of an unfair labour practice as applied to pension benefits. Using case law and practical examples, he examined the limitations and obligations on employers with respect to pension matters.⁹⁴

The employer's role in determining the employee's pension destiny in South Africa often goes beyond merely ensuring membership to the fund and paying contributions. It is not uncommon for an employer to be given powers or the discretion to make decisions that significantly impact the delivery of the pension promise. These powers and discretion may be found either in the employment contract or the rules of both.⁹⁵

⁹⁴ Damant, Graham and Jitho, Tashia, *Employer Discretion and Pension Benefits: The Limitations and Obligation*, 2-4 July 2003, Labour Law Conference, Johannesburg, p.1.

⁹⁵ Ibid.

In terms of the fund rules, the employer often has the power to withdraw from or liquidate the fund, or to initiate a transfer of members or conversion of the fund. In addition, the rules may require the employer to consent to rule amendments that would alter benefits, change contribution rates, approve pension increases or enhance withdrawal benefits, or approve early retirement applications. In some instances, the employer may be empowered under the rules to make these decisions entirely independent of the trustees.⁹⁶

Under the employment contract, the employer's powers or discretion may arise from two sources. The first may be powers or discretion granted by the employment contract itself to make decisions that would impact the pension promise. These would include, for example, the power or discretion to set or change the retirement age, or to determine the reason for termination of employment, or to decide whether an employee is to be a permanent or temporary worker and so qualify for pension benefits. The second may be powers or discretion granted under the rules that are then incorporated into the employment contract as terms and conditions.⁹⁷

⁹⁶ Ibid.

⁹⁷ Ibid.

The manner in which the employer exercises these powers or discretions is not free from regulation and employers should be mindful of the limitations that may arise from the duty of good faith, the unfair labour practice provision or general contractual restraints.⁹⁸

The question of which regulatory mechanisms apply in a given situation depends very much on the relationship between the pension benefits and the employment contract. However, it is beyond the scope of this paper to explore the nature of this relationship. Its focus is rather on two of the regulatory mechanisms, namely the good faith and the unfair labour practice.⁹⁹

2.8.4.1 The Duty of Good Faith

A participating employer's duty of good faith, in the context of a pension scheme, was given express recognition by the Supreme Court of Appeals in *Tek Corporation & Others v Lorentz*. 1999 (4) SA 884 (SCA).¹⁰⁰

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Cited in Damant, Graham and Jitho, Tashia, *Employer Discretion and Pension Benefits: The Limitations and Obligation*, 2-4 July 2003, Labour Law Conference, Johannesburg, p. 3.

The Court referred to the English decision of *Imperial Group Pension Fund Ltd & Others v Imperial Tobacco Limited & Others*, which defined the duty as follows:

“In every contract of employment there is an implied term – ‘that the employers will not, without reasonable and just cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee’ ... I will call this implied term ‘the implied obligation of good faith’. In my judgement, that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to the other rights and powers of an employer.”¹⁰¹

In essence, the duty of good faith regulates the decision-making process as opposed to the substantive outcome and requires an employer to exercise its powers in a rational manner that is not arbitrary or capricious, and to take into account all relevant considerations and discount all irrelevant considerations when taking any decisions. The limits of the duty were summarized by the Adjudicator in *IBM*

¹⁰¹ [1991] 2 All ER 597 (Ch) Damant, Graham and Jitho, Tashia, *Employer Discretion and Pension Benefits: The Limitations and Obligation*, 2-4 July 2003, Labour Law Conference, Johannesburg, p. 3.

Pensioners Action Group v IBM SA (Pty) Ltd & Another [(2000) 21 ILJ 1467 (PFA) cited in *Employer Discretion and Pension Benefits*:¹⁰²

as follows:

- that the employer not exercise a veto capriciously;
- that it exercise its rights for the efficient running of the scheme;
- that it not exercise its rights for the purpose of forcing the members to give up their accrued rights;
- that the duty is not a fiduciary duty and in deciding whether or not to give its consent the employer is free to look after its own interests, financial or otherwise, in the future operation of the fund;
- that the employer may not announce a blanket policy to consider benefit increases but rather that it should be willing to review its decision in changed circumstances; and
- that the employer may not use the power to wind-up, make transfers, veto amendments or discontinue contributions in a manner which forces the sacrifice of existing rights.¹⁰³

¹⁰² (2000) 21 ILJ 1467 (PFA) cited in Damant, Graham and Jitho, Tashia, *Employer Discretion and Pension Benefits: The Limitations and Obligation*, 2-4 July 2003, Labour Law Conference, Johannesburg, p p. 3-4.

¹⁰³ Ibid.

2.8.4.2 The Duty Applied

According to Damant, the duty has been adapted and applied by the courts and by the Adjudicator in a range of circumstances, which illustrate that it is by no means a static or rigid concept.¹⁰⁴

2.8.4.2.1 Disclosure of Information

Damant has further found that the duty of good faith has also been applied to find both a negative and a positive obligation in an employment contract to bring to the attention of an employee certain information relating to pension rights.¹⁰⁵

In *Phillips v Johannesburg Municipal Pension Fund & Another*,¹⁰⁶ the employee was told by his employer that he was not eligible for a disability benefit. Instead he opted for early retirement but had not been informed about the possibility of an assessment by a medical board, with a view to a boarding – which would have been more advantageous in his circumstances. The Adjudicator found that the employer owed him a

¹⁰⁴ Ibid.

¹⁰⁵ 11 BPLR 2745 (PFA) cited in Damant, Graham and Jitho, Tashia, *Employer Discretion and Pension Benefits: The Limitations and Obligation*, 2-4 July 2003, Labour Law Conference, Johannesburg, p. 4.

¹⁰⁶ Ibid.

duty of good faith, which required that he be properly advised of his options before retirement.

A similar position was adopted by the Adjudicator in *Mellet v Orion Money Purchase Fund & Another*.¹⁰⁶ The member's claim in this case was based on the contingent right under the rules of the fund to take an early retirement as opposed to retrenchment.

In *Aucamp & Others v University of Stellenbosch*, (2002) 6 BPLR 3497 (C) [cited in *Employer Discretion and Pension Benefits: The Limitations and Obligation*, Labour Law Conference, Johannesburg 2-4 July 2003, Graham Damant and Tashia Jithoo, p5] despite the absence of any contractual obligation to provide group life assurance benefits to the employee, the Court held that the employer had breached the duty of good faith in not ensuring that an employee was fully and properly apprised of the availability of such benefits and in not ensuring that he was given an adequate opportunity to subscribe for these.¹⁰⁷

¹⁰⁶ [(2001) 12 BPLR 2824 cited in Damant, Graham and Jitho, Tashia, *Employer Discretion and Pension Benefits: The Limitations and Obligation*, 2-4 July 2003, Labour Law Conference, Johannesburg, p. 4.

¹⁰⁷ *Ibid.*

Fund rules often grant the employer a discretion or veto power in a wide range of circumstances such as pension increases, general benefit enhancements, withdrawal benefits and the like. The exercise of this discretion is subject to the duty of good faith and it is interesting to observe the limitations on employer conduct that have emerged through the application of this duty.¹⁰⁸

The Adjudicator has noted in *Trundle v Midland Chamber of Industries Pension Fund & Another* [2002] 6 BPLR 3594 (PFA)¹⁰⁹ of that he will be very slow to intervene in disputes relating to the content of withdrawal rules and the monetary amount that members ought to be entitled to. These are interest disputes that he feels are more appropriately settled by negotiation or power play rather than through adjudication. However, where employer discretion exists as part of a withdrawal rule, it must be exercised in accordance with the duty of good faith.¹¹⁰

There are many examples of where the duty of good faith is applied to test the manner in which a particular decision is reached. However, the duty has also been applied to test the implementation of certain

¹⁰⁸ Ibid.

¹⁰⁹ Cited in *Employer Discretion and Pension Benefits: The Limitations and Obligation*, Labour Law Conference, Johannesburg 2-4 July 2003, Graham Damant and Tashia Jithoo, p. 6.

¹¹⁰ Ibid.

decisions. This is particularly significant in the context of terminations, liquidations or the employer's withdrawal from a fund.

In *Johannesburg Municipal Pension Fund v The City of Johannesburg* Case No 02/3965, unreported at 7¹¹¹ the High Court held that “*any summary, abrupt or unreasonable termination (of the Fund) would not only be in conflict with the rules but also contrary to the demands of good faith.*” In considering the manner in which this power of termination was to be applied, the Court held that mere notice of the termination was not sufficient. The duty of good faith required such notice to be reasonable. The Court then went on to assess what would be reasonable notice in the circumstances and concluded that the notice given in this case was not reasonable.¹¹²

Case law has interpreted the duty of good faith to permit the employer to take into account its own interests when exercising its discretion. This issue arises very pertinently in the context of benefit enhancements and pension increases that are often motivated by factors such as affordability and the employer's business imperatives. In defined benefit

¹¹¹ Ibid.

¹¹² Ibid.

funds, these are even more important because such as enhancement may require additional from the employer.¹¹³

Where one is dealing with the discretion granted under the rules, the duty of good faith is the primary regulatory mechanism of employer conduct. However, where one is dealing with discretion that is granted under the employment contract, or that is incorporated into the contract from the rules, the duty of good faith has found limited application. What role then is there for the unfair labour practice provision in pension matters?¹¹⁴

The relevant part of the unfair labour practice is defined in section 186(2) of the LRA as:

“any unfair act or omission that arises between an employer and an employee involving (a) unfair conduct by the employer relating to the provision of benefits to an employee”¹¹⁵

Do pension benefits constitute ‘benefits’ for purposes of the unfair labour practice provision? The Labour Appeal Court in *Hospersa and*

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

*Another v Northern Cape Provincial Administration*¹¹⁶ has held that to qualify for consideration under the unfair labour practice provision, a benefit has to be granted by virtue of contract or some other law.

Pension benefits that are derived from the fund (if incorporated into the employment contract) or originally from the employment contract itself, would be 'benefits' for the purpose of the unfair labour practice provision. This would mean that where the contract guarantees the provision of these benefits, which is not subject to a discretion, then such an obligation would be capable of enforcement through the unfair labour practice jurisdiction.¹¹⁷

In Damant's view, there are at least four factors that lean toward the possibility that discretionary benefits can be scrutinized under the unfair labour practice provision.¹¹⁸

Firstly, the essential find of *Hospersa* is that the relevant benefit has to derive from a contractual or other legal right and that the provision was not intended to allow an employee to acquire an entitlement that s/he is

¹¹⁶ (2000) 21 ILJ 1066 (LAC) cited in Damant, Graham and Jitho, Tashia, *Employer Discretion and Pension Benefits: The Limitations and Obligation*, 2-4 July 2003, Labour Law Conference, Johannesburg, p. 9.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

not otherwise entitled to. In this regard, there is no reason why a discretionary benefit cannot be grounded in a contractual or other legal right, such as the employment contract or the fund rules. Further, a right to a discretionary benefit does not give an employee the right to the benefit itself. Rather, it gives the employee the right to be properly considered for that benefit. A discretionary benefit, therefore, does not in any way entitle the employee to something s/he would not otherwise have been entitled to and does not in any way create new rights.¹¹⁹

The second factor is that the unfair labour practice definition already makes provision for the consideration of discretion in relation to promotions and training, as these are very rarely framed as unconditional rights in a contract or workplace policy.¹²⁰

The third is that the wording of the provision itself supports the consideration of discretionary benefits. Section 186(2)(a) is concerned with an act or omission that involves the unfair 'conduct' of the employer. Conduct is defined in *Black's legal Dictionary 7ed (1999)* at

¹¹⁹ Ibid.

¹²⁰ Ibid.

292 cited in¹²¹ as “*personal behaviour, whether by action or inaction; the manner in which a person behaves.*”

It seems that the courts were in the past willing to test the exercise of a contractual discretion under the unfair labour practice provision. In our view, there seems to be a mistaken assumption that the narrowing of the unfair labour practice definition as well as the finding in *Hospersa* have somehow changed this position. It is submitted that the changes made to the unfair labour practice definition in recent years are of no consequence to the question of whether a contractual discretion is properly an issue for consideration under the provision. As argued above, there is also nothing in the *Hospersa* judgement that would appear to suggest that this is the case.¹²²

It appears that there is no reason why the unfair labour practice provision could not be used to challenge an unfair exercise of discretion, or unfair conduct, on the part of the employer.¹²³

The above suggests that even where an employer has a veto power or discretion that is not expressly constrained, this does not mean that the

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

power is an unfettered one. The duty of good faith and the unfair labour practice provision impose a range of limitations and obligations that employers must consider when they take a decision in relation to pension matters.¹²⁴

2.9 EMPLOYMENT EQUITY ACT No. 55 of 1998

2.9.1 Why the Employment Equity Act?

South Africa has a legacy of discrimination in relation to race, gender and disability that has denied access to opportunities for education, employment, promotion and wealth creation to the majority of South Africans. The Employment Equity Act was passed to address this legacy and has two main objectives-

- to ensure that our workplace are free of discrimination; and
- to ensure affirmative action measures are implements to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.¹²⁵

¹²⁴ Ibid.

¹²⁵ CCMA Information Sheet: Employment Equity- January 2002.

2.9.2 Why should Employers Implement Employment Equity?

Not only is there a legal requirement, but also good human resource management is increasingly being regarded as the differentiating factor between businesses. This is critical if the country is to achieve the levels of economic growth that are necessary for sustainable growth and future returns.¹²⁶

Introducing equity in the workplace through the Employment Equity Act is but one of the ways of achieving these goals. The eradication of discrimination and entrenchment of equity in the workplace will contribute to laying the foundation for sustainable development in South Africa.¹²⁷

2.9.3 How is the Employment Equity Act related to other Legislation?

This Act together with the Skills Development Act (more on this further on) supports government's human resource development strategy in a complementary way. The Department of Labour is striving towards a more integrated approach that will ensure that skills development and employment equity objectives are achieved in an effective manner. On

¹²⁶ Ibid.

¹²⁷ Ibid.

the other hand, this Act together with the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000, work together to address the legacy of racism and apartheid in our country.¹²⁸

2.9.4 Employment Commission

The Act provides for the establishment of the Commission for the Employment Equity, which is responsible for-

- Advising the Minister of Labour on the implementation of the Act; and
- Monitoring and ensuring compliance.
- Chapter 3 of the Employment Equity Act requires that employers take certain affirmative action measures to achieve employment equity in the workplace. It is therefore necessary that all employers that employ 50 or more employees, or an employer who is appointed by a collective agreement, municipalities and most public service departments are required to submit a report to the Employment Equity Commission. Measures that need to be considered by the employers when compiling an Employment Equity Plan will include the following:

¹²⁸ Ibid.

- Employers must consult with union and employees to ensure that the plan is accepted by everyone;
- Employers must review all employment policies, practices and procedures;
- Prepare a profile of their workforce in order to identify any problems relating to employment equity; and
- Employers must prepare and implement an employment equity plan setting out the affirmative actions measures they intend taking to achieve employment equity goals.¹²⁹

Employers must thereafter report to the Department of Labour on the implementation of their plan in order for the department to monitor their compliance. They must also display a summary of the provisions of the Act in all languages relevant to the workforce.¹³⁰

All reports submitted are included in the Employment Equity Register. This enables all stakeholders at the workplace to actively monitor and implement employment equity. The Minister has already issued two Codes of Good Practice to assist employers in developing their plans.

The codes are:

¹²⁹ Ibid.

¹³⁰ Ibid.

- Code of Good Practice on Preparing, Implementing and Monitoring Employment Equity Plans; and
- Code of Good Practice on Key Aspects on HIV/AIDS and employment.¹³¹

This certainly leaves one the impression that South Africa has developed an ideal formula to achieve employment equity quite strategically. Instead the process is slow and accountability is not so strictly monitored. Needless to say the Minister has indicated a greater vigilance on this issue in the coming year.

I shall now look at the discrimination issues that have an impact on certain people's employment lives. And what the law says on discrimination.

2.9.5 People with Disabilities

Charles Ngwenya Critically evaluated, the Department of Labour's Code of Good practice: Key Aspects on the Employment of People with Disabilities. The Department in August 2002 adopted this Code.

¹³¹ Ibid.

When juxtaposed with race and gender, disability tends to be overshadowed for historical and political reasons. Worldwide, unemployment and poverty are accentuated for people with disabilities more than any other historically disadvantaged class. The rate of unemployment among people with disabilities in South Africa is over 80%.¹³²

The Code is not intended to be the last word by way of furnishing guidance to employers, employees and trade unions on the interpretations and application of the disability-related provisions of the Employment Act No 55 of 1998. A technical manual is being prepared to provide fuller operational guidelines about application of the Act to disability. Such a manual is not only desirable but also necessary given the novelty of disability jurisprudence in South Africa.¹³³

Such a technical manual will provide much more explicit guidance and thereby supplement the provisions of the *Code* and the Act, including providing illustrative examples and hypothetical scenarios so that

¹³² Ngwena, Charles Critically evaluated, the Department of Labour's Code of Good practice: Key Aspects on the Employment of People with Disabilities.

¹³³ Ibid.

employers, employees and trade unions have a more concrete picture of what the provisions mean in practice.¹³⁴

It will always be difficult to come up with comprehensive guidelines on disability not least because, unlike race and gender, people with disabilities are not a homogenous group. Moreover, these categories admit many variations in terms of limitations in the workplace. Some have very little impact on the ability to work and others have a major adverse impact, requiring considerable support and assistance.¹³⁵

I will, however, focus only on what I see as problematic areas:

- the definition of disability; and
- reasonable accommodation for people with disabilities

Paragraph 5.1 begins by saying:

“The scope of protection for people with disabilities in employment focuses on the effect of the disability of the person in relation to the working environment, and not on the diagnosis of the impairment.”¹³⁶

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ A Report by Despouy, L. United Nations Centre for Human Rights Human Rights and Disabled Persons (1993). Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities 12.

Such an approach supports a liberal and progressive jurisprudence on disability where one transcends the medical model of disability to also look at disability in a social context.¹³⁷

Disability should not be confined to the medical and clinical aspects and exclude socio-cultural factors. It is the interaction between the impairment and the environment that holds the key to understanding the kind of protection that is required by people with disabilities.¹³⁸

Disability is a listed ground in s 9(3) of the Constitution for which unfair discrimination is prohibited. Though the Act is a piece of parliamentary legislation, it must, nonetheless, be interpreted in compliance with the Constitution so as to give effect to purpose. [Section 3 of the Employment Equity Act.]

Paragraph 5.1.2(iii) provides that:

“Progressive conditions are those that are likely to develop or change or recur. People living with progressive conditions or illnesses are considered as people with disabilities *once the impairment starts to be*

¹³⁷ Ibid.

¹³⁸ Philpott, S. & McLaren, P. (1997) “Disability”. In *Health Systems Trust South African Health Review*, pp. 197 – 181.

substantially limiting. Progressive or recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities" [Section 3 of the Employment Equity Act].

Paragraph 5.1.2(iii) excludes from the definition of people with disabilities, those who have progressive conditions which have no overt symptoms or which do not substantially limit them. A narrow interpretation of this guidance means that a person with asymptomatic multiple sclerosis, muscular dystrophy or HIV is excluded until the condition shows symptoms that limit functional impairment in a physical sense. It would neither be here nor there whether on account of a known latent condition, the person's chances of entering employment or remaining in employment are adversely affected. For as long as that person is not suffering from overt symptoms and in a functional sense is not substantially impaired, they fall outside the protected class. Whilst such an approach can be defended on the ground that the targeted beneficiary is a person with an *actual* disability, it ignores the social realities of disability. It seems to accommodate only a person who has functional impairment as a result of a physical or mental impairment. It does not seem to envisage as within the protected class, a person who despite having a physical or mental impairment, is nonetheless not

functionally impaired and yet his or her chances of entering or advancing in employment are limited on account of the attitude of the employer. A person with asymptomatic disease seems to be excluded here.¹³⁹

Unless employers are given clear guidance regarding essential functions of the job, then people with disabilities might still be confronted with the same structural barriers that they faced prior to the Act. The areas determining what constitutes the "essential functions of the job" requiring the job applicant or employee to perform the "inherent requirements of the job". The Employment Equity Act provides in s6(2)(a) that it is not unfair discrimination to distinguish, exclude, or prefer any person on the basis of an "inherent requirement of the job". The aim of accommodation is to reduce the impact of the impairment of the person's capacity to fulfill the "essential functions" of a job. The Code conflates the two in that inherent requirements of the job are what the employer stipulates as necessary for a person to do the job and are what is necessary to enable an employee to perform the essential functions of the job.

¹³⁹ A Report by Despouy, L. United Nations Centre for Human Rights Human Rights and Disabled Persons (1993). Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities 12.

2.9.6 Pregnancy

Attorney Susan Stelzer, head of the Labour Law Department at Sonnenberg, Hoffmann & Galombik states "If you want your employer to be understanding and helpful, you need to behave in the same way. You are under no legal obligation to tell your employer that you are pregnant, but you would have to apply for leave in advance anyway, or give notice if you plan to leave your job. You are also entitled to a certain number of days' leave per year, but your employer can decide when you take them. If you need specific time off work, your employer will need to plan accordingly. If you wait until one month before you give birth to tell her, she is likely to be a bit peeved, as she won't be able to put a contingency plan in place."¹⁴¹

The Employment Equity Act states that you are not allowed to discriminate against any person based on pregnancy. This Act applies even to a person applying for a job.¹⁴²

The Labour Relations Act prohibits dismissal on the grounds of pregnancy or for any reason connected to a woman's pregnancy. But if you do not tell your employer that you are pregnant, then he or she has

¹⁴¹ "Working, How and When to tell Your Boss" in *Healthy Pregnancy* (2002,; pp. 71-72. .

¹⁴² Ibid.

the right to dismiss you on the grounds of poor performance, as long as the dismissal is fair in all other respects. That is why it is advisable to inform your employer that you are pregnant. An employer will be under a legal obligation to be accommodating to your situation – within reason.¹⁴³

There is a Code of Good Practice attached to the Basic Conditions of the Employment Act. If people are on night work, for example, or work in areas that could be hazardous to their pregnancy, it is the duty of the employer to move that person to a different position temporarily.¹⁴⁴

If there has been a contravention of the Basic Conditions of the Employment Act, you can go the Department of Labour to lay a complaint, or you can consult an attorney. “The reality is that it takes time. The Department of Labour can only handle so much at once, and lawyer’s fees are not cheap,” says Stelzner.¹⁴⁵

“It differs vastly among companies in South Africa. Attitudes differ, especially when it comes to smaller companies that can’t afford to have people off and pay them. Some employers take the view that it is not suitable for a new mother to return to work only for half-day, for

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

example.” It is important to realize that an employer is under no obligation to adapt our job to accommodate you after the birth of your child. If companies are not prepared to adapt, they ultimately lose out. It doesn’t do much for a company’s employment equity profile if there are no women in senior positions.¹⁴⁶

The law is on the side of expectant mothers. Under the Basic Conditions of Employment Act, all women are entitled to four months’ unpaid maternity leave. This is regarded as continuous employment, which means that their job has to be kept open for them. In South Africa, the Unemployment Insurance Act makes specific provision for claiming maternity benefits in addition to unemployment benefits.¹⁴⁷

Ordinarily, you qualify for unemployment benefits for a six-month period if you lose your job. You don’t have to be dismissed to claim your unemployment benefits. If you cannot work because you are pregnant, you can also claim, provided that you qualify. This depends on how much you earn. More highly paid people would not qualify for benefits.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

The situation is different at different companies and in different industries.¹⁴⁸

The Basic Conditions of the Employment Act negotiates the minimum conditions of employment, but in some industries, a Bargaining Council might be set up to decide how things should work in their specific industry. The agreement will effectively take the place of the Basic Conditions of Employment Act.¹⁴⁹

In this case, there might be different maternity provision made, such as partial or full payment during maternity leave, or a longer period of leave. Although companies cannot agree to less than the minimum leave requirements, many companies have agreed to more. In industries such as the retail industry, where companies are largely staffed by women, the unions usually manage to negotiate particularly good maternity agreements.¹⁵⁰

You've been to the doctor and she confirmed what you already suspected in less than nine months, a new life will depend on you to love, nurture

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

and provide for him or her. But in 10 months time, how will you be earning money? And in a year, will you still have a job?¹⁵¹

Although there is no 'right' time to tell your boss, giving sufficient warning will demonstrate a level of professionalism and commitment to your work, which your employer will appreciate. Whatever you do, try to make sure that the news comes from you – not from a co-worker. Do it in person, but also put it in writing so that it is properly documented. Tell your employer your intentions and decisions.¹⁵²

Indeed it is important to address the inequities but what would it cost the employer and the state to implement this?

2.10 THE COST OF EMPLOYMENT EQUITY

Daan Groeneveldt, Daan examines the cost of Employment Equity by focusing upon:

2.10.1 Corporate Governance and Employment Equity

The core element of all our labour legislation is to create opportunities for affirmative development of people, equality, fair practice and the affordable transformation of the workplace.¹⁵³

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Groeneveldt, Daan. *Cost of Employment Equity*, 4 July 2003 16th Annual Labour Law Conference

The King II Report on the other hand sets out guidelines for enterprises to develop codes of corporate practice and conduct, and structures to manage and control risks, audit, account and report on all operational activities.¹⁵⁴

How do we reconcile the requirements for human opportunity and consequently high risk, with that of greater organizational control and accountability? Inherent job requirements and individual accountability link both these interventions, and are the key to the synergy for achieving cost effective workplace transformation.¹⁵⁵

Key questions are whether existing employment policies and practices are fair, and are management information systems adequate to support the required decision making processes and the commercial measurement of affordable and sustainable transformation.¹⁵⁶

2.10.2 What do we need to do for Performance Measurement?

- Build understanding of the value (measurement) of Human Capital and Empowerment – Job Classification by Accountability Levels,
- Integrate management information systems;

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

- Manage the risks of performance.¹⁵⁷

2.10.3 What are the Business Benefits of Corporate Governance?

To have:

- (1) Opportunity
- (2) Development
- (3) Competence

Together they form a synergy.¹⁵⁸

In 2003, in supporting the implementation of the Skills Development Act, No. 97 of 1998, Clem Sunter wrote:

“You either put your shoulder to the wheel and do your bit, or you do as little as possible until you are dragged down by social disruption.”

The article published by the Department of Labour to illustrate the value of the scenario-planning matrix to uncover the positive and negative scenarios in planning.¹⁵⁹

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

Applying the matrix at individual enterprise level, facilitates creating the focus need to use both Corporate Governance and Labour Legislation as commercially relevant business tools, with the control and certainty of implementation moving back to within the management of the unique operational requirements of every enterprise.¹⁶⁰

To guarantee fair and mutually beneficial labour policies and practices, one needs operational (workplace) governance. So, how can this be ensured?¹⁶¹

To ensure that expenditure on implementation of the requirements of Labour Legislation, Corporate Governance and workplace transformation initiatives are planned and controlled to deliver short term returns on capital employed, long term returns on investment and sustainable growth and development.¹⁶²

This becomes possible through identifying and managing the enterprise in line with the specific:

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

- (a) Operational circumstances and requirements;
- (b) Operational risks;
- (c) Internal control and audit requirements.¹⁶³

2.11 SKILLS DEVELOPMENT ACT, NO. 97 OF 1998

The Skills Development Act, No. 97 of 1998, is aimed at developing strategies and improving the skills of the workforce, to provide for learnerships, to provide for financing of skills development and to regulate employment services. It is vital to have skills development and a strategy, as only 14 million people out of over 40 million in South Africa are economically active, which equates to 27 million persons who are not economically active.¹⁶⁴

The purpose of this legislation:

- To develop skills of the South African workforce (improving quality of life, productivity and competitiveness, promote self employment and to improve the delivery of social services);
- Increase levels of investments in education and training;

¹⁶³ Ibid.

¹⁶⁴ CCMA Information Sheet: Skills Development – January 2002.

- To encourage employers to use the workplace as an active learning environment; to provide opportunities to acquire new skills and new entrants to the labour market with experience;
- To encourage participation in learnership and training programmes;
- To improve employment prospects of previously disadvantaged persons.¹⁶⁵

A National Skills Authority (NSA) is the body advising the Minister of Labour on the national skill development policy and strategy establishes guidelines for the implementation and allocates subsidies from the National Skills Fund.¹⁶⁶

The South African government has decided to form a Sectorial Education and Training Authority (SETA) for all sectors in South Africa (for example – banking; local government; health and welfare; construction and wholesale/retail). There are approximately 27 SETAs. Each sector will have its own chambers within the SETA. The purpose of this was to regulate the mushrooming of educational institutions and enabling them to legitimately provide accredited educational knowledge and issuing of certificates. This allows for a more formalised and

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

regulated approach of training. In addition, once people have exited from the learnership they will enter the employment arena more skilled, experienced and prepared.

SETA functions are as follows:-

- Develop sector skills plans;
- Implement the plans by establishing learnerships; improving workplace skills plans; allocating grants and monitoring education and training in the sector;
- Promote learnerships (identify workplaces for practical work experiences; support development of learning materials and assist in learnership - contract of employment - agreements);
- Apply accreditation;
- Liaise with the NSA; and
- Report to the Director-General of Labour.¹⁶⁷

SETAs establish learnerships which leads to a qualification registers by the South African Qualifications Authority, which are also registered with the Director-General.

¹⁶⁷ Ibid.

Learnerships create a bridge between learning and working. It establishes occupational competence, which is able to respond to labour market demands. There are learnerships for workers (persons already employed by the company) and unemployed persons (they are employed on a learnership for a fixed periods of time). Any dispute pertaining to learnerships (interpretation/application of the agreement; contract; a determination in terms of s18(3) of the Skills Development Act; termination of the agreement or contract of employment). Disputes are referred to the CCMA like other referrals. The dispute must be arbitrated if not settled at conciliation.

So what are the skills programmes about? It is occupationally based, gives credits toward a qualification, makes use of accredited training providers and complies with prescribed requirements. All programmes support lifelong learning.¹⁶⁸

It is intended that each of the sectors will have its own chambers within the SETA to distribute grants and subsidies from the proceeds of the levies, which will be paid by all employers from April 2000.¹⁶⁹

¹⁶⁸ Ibid.

¹⁶⁹ *Labour Law News*, December 1999, De Rebus, p. 50.

All individuals who are employers, regardless of size, are required to pay skills development levy calculated at 0,5% of their payroll with effect from April 2000, The levy was increased by 1% of the payroll since April 2001.¹⁷⁰

This form of taxation creates a financial “kitty” monitored by the state. The fear is to ensure that there is no mismanagement of funds and competent services delivery on all aspects of the project. The programme is still in its infancy therefore there hasn’t been anything untoward being raised as yet. Only time will tell how successful this noble intention will be.

2.12 UNEMPLOYMENT INSURANCE ACT, NO. 63 OF 2001

All workers enjoy the benefits of unemployment insurance regardless of their salaries. The employee and the employer must each contribute a percentage of the salary and payroll respectively to the fund. The Department of Labour can prosecute those employers, who fail to pay this money. All employees are registered with the fund. If they are non-

¹⁷⁰ Ibid.

South Africans, they must be registered by the Department of Home Affairs and have a valid work permit.

Once employees have passed the window period of registration with the fund and are unemployed, incapacitated, disabled and on maternity leave they may claim a dividend of their salary for a limited period or until they obtain employment.

2.13 OCCUPATIONAL HEALTH AND SAFETY ACT NO. 85 OF 1993 (OHSA), AND COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT No. 130 of 1993 (COIDA)

A noble idea and intention that can result in a piece of legislation are being convoluted. Let me explain why I say this from my research of the case law below. In addition, I have advised many people who have been precluded from obtaining this benefit from the state due to an obstinate employer refusing to do the paper work or the lack of assistance from the Occupational Health and Safety Commission.

2.13.1 Workmen's Compensation

Before any discriminatory legislation can be found to be valid, two conditions have to be fulfilled, namely:

- the classification inherent in the discrimination has to be founded on *intelligible differentia*; and
- the differentiation has to bear a *rational relationship* to the object sought to be achieved by the statute.¹⁷¹

Although these are necessary conditions, it is submitted that they are not sufficient conditions and that legislation conforming to these criteria can nevertheless be unfair.¹⁷²

The case of *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 (9) BCLR 1106 (E) [cited in Recent constitutional cases, Attorney Saber Ahmed Jazbhay, De Rebus, November 1998, p. 55] deals with this principle. In this case, the plaintiff sued the defendant, her employer, for damages' arising from injuries, which she had sustained through the latter's negligence during the course of her employment. As a special plea, the defendant contended that she was precluded from instituting her claim by reason of s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (the Act) (1108C).

¹⁷¹ Attorney Saber Ahmed Jazbhay, *Recent constitutional cases*, November 1998, De Rebus, p. 55.

¹⁷² Ibid.

In terms thereof, 'No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee's employer and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement.'¹⁷³

This provision of the Act, the plaintiff contended by way of replication, was unconstitutional in that it was in conflict with s 9(1), 9(3) (equality), 23(1) (labour relations) and 34 (access to courts) of the Constitution (1109G-1110G). Since the stated object of the Act was to benefit employees, the impugned provision, which precluded any action against the employer in instances where the latter was negligent,

- and precluded recovery of general damages for pain and suffering and loss of amenities of life, was held by the court to be in conflict with s 9(1) of the Constitution (1111F).¹⁷⁴

The rationale underpinning this decision weighed against the stated objects of the Act, the court found that the impugned provision did not benefit and that what it did, in fact, do was to restrict their rights.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

Accordingly it had no rational connection to that purpose. For that reason, the impugned provision constituted unfair discrimination (1111F).¹⁷⁵

The impugned provision was thus declared to be inconsistent with the Constitution and was therefore unconstitutional and invalid and, in terms of s 172 was referred to the Constitutional Court for a final decision on its validity.¹⁷⁶

The Constitutional Court refused to confirm the decision of the Eastern Cape High Court in *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 (9) BCLR 1106 (E) which declared s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 unconstitutional and therefore invalid.¹⁷⁷

The provision prevents employees from claiming damages from their employers, except where provided for in the Act.¹⁷⁸

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Attorney Sabar Ahmed Jazbhay, Recent constitutional cases, November 1998, De Rebus, p. 55.

¹⁷⁸ Ibid.

The Constitutional Court in the case of *Jooste v Score Supermarket Traders (Pty) Ltd* said that it was clear that s 35(1) differentiated between employers and employees. Consistent with the equality jurisprudence developed by the court since 1996, the court's approach to the issues raised in the court *a quo*, per Jacob J, was that there was an identifiable legitimate purpose (and hence a rational connection) for which the Act was passed, namely provide a system of compensation for disability or death caused by injuries or diseases in the workplace. This was irrespective of whether or not the employer was negligent.¹⁷⁹

The relationship which the state chose to effect through the Act was to strike a balance which it considered appropriate and given the foregoing, especially the speedy procedure for adjudication and payment due to employees out of a fund – it was an open question whether this was to the advantage of employees (para 15).¹⁸⁰

CONCLUSION

Indeed the relationship of the employee and employer in South Africa has evolved over the years due to the efficacy of the progressive labour legislation and its groundbreaking Constitution. However, this is to a

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

limited extent. From my experience and readings I find the legislation to be convoluted. This is simply because the legislation was written in the most simplified form for the benefit of the layperson in order to make the law accessible to all. I find it astounding considering that South Africa has reached 10 years of independence and the labour law has been amended for the benefit of the masses. However, this message has not been received by all due to the lack of service in education. This is apparent at both the employee and employer level. One finds employers flouted the law due to being nonchalant or on the other hand are innovative in signing fixed term contracts with employees with them not having an expectation of renewal on the date of termination. On the other hand employees are unaware of the CCMA and the free services it provides. But one should not despair, the courts are hoping to address the issue of who is an employee at the Labour Court of Appeal level in order to let the matter rest. One would not rely upon the BCEA or the dominant impression test only but also the surrounding circumstances.

In addition, drafting and promulgating legislation is not where this panacea begins. In fact it is at the implementation and the interpretation of the legislation stage that determines its efficacy. There has been an inconsistency at the highest level, i.e. the Labour Court and the Labour

Appeal Court judges have been inconsistent in their judgements. There has been an increased backlog with cases both at the courts and the CCMA. This may translate as inefficiency but the more realistic reason is the bleak labour market and the conflict that is increasing between parties. Nevertheless, the Constitutional Court holds the Labour Court, the Labour Appeal Court and all legislation promulgated by the state accountable should it conflict with the basic rights of employees sustained in the Bill of Rights. In addition, the dispute resolving mechanisms are a means to address these grievances. Therefore, the moral and ethical reasons for having this labour legislation cannot be ignored. It has made employees have rights when they had none and in areas where they were not even recognised, such as the farming and domestic sector.

When we looked at the pertinent and controversial legislation earlier in this chapter we realised the discriminatory and arbitrary issues are dealt with more vigilantly. For example, the issues of child labour, privacy in the case of cyber law – employee emails and body searches. With the introduction of the Skills Development Act in order to develop a skilled workforce. In addition, addressing the ills of the past with the Employment Equity Act even if it is at a financial cost to all in the

country. Furthermore, the recognition of the diverse cultures in South Africa and the contribution they make. Finally, the recognition of women who are now considered as equal but who have different needs. They have and are the potential new generation individuals contributing to both the productivity and the economy of the country.

The efficacy of the labour arena may appear to have gone off-track but this does not mean we need to 'throw in the towel'. We still have a great deal to look forward to, to bring South Africa back on track.

Chapter Three

RIGHTS AND OBLIGATIONS OF EMPLOYER (*MUSTA'JIR*) AND EMPLOYEE (*AJĪR KHĀṢ*)

INTRODUCTION

Today, there are a large number of people whose only means of feeding their families is employment. If after sweating the whole day they do not get paid anything, subsequently in the evening neither they nor their families will have enough to eat. It is for this reason today that every government directs its attention to the labour question, and makes provision for these workers welfare.¹

The Prophet Muḥammad ﷺ was so concerned for the working class (slaves) that among the last admonitions that he gave on his deathbed was: "Take care of your *ṣalāt* and of those under your control."²

In terms of *Shari'ah*, Muslim scholars apply a two-pronged approach in addressing the question of employment, viz.:

- a) Moral
- b) Legal

¹ Nadvi, Mujibullah. *Commercial Law in Islam*, p. 32.

² As cited in *Commercial Law in Islam*, p. 35.

Under moral principles, they quote excerpts from the original sources of Islam, namely, the *Holy Qur'ān* and the *Ḥadīth* of the Prophet Muḥammad ﷺ.

It is imperative to point out here that many of the *Aḥādīth* that relate to the subject of employment refer to the treatment of slaves, for during the time of the Prophet Muḥammad ﷺ personal servants and general workers were mostly slaves. In today's context we can equally apply these *Aḥādīth* to employees, workers and labourers.³

It is mentioned in the *Holy Qur'ān*, with reference to women who are hired as wet-nurses for the babies of other people. That since they are expanding their physical strength to provide milk for the babies and are also looking after them, it is obligatory on the parents, to see to their needs from their income. In this regard, the *Holy Qur'ān* states:

“The mothers shall give suck to their offsprings for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms....” (Al-Baqarah, 2:233)

³ *Commercial Law in Islam, op. cit., p. 33.*

However, the financial position of the man has to be taken into account. If he is, affluent then he should provide her with food and clothing accordingly. And if he is poor, then he should pay her according to his condition.⁴ But, the *Holy Qur'ān* also states that both parties ought to be considerate to each other. It states:

“No person is to be burdened more than he can bear.” (Al-Baqarah, 2:233)

Mawlānā Mujibullah explains the above Qur'anic verse by stating that if the woman were to ask for more than *Ujrah Mithlī*, that is to say the amount in return for which other women usually feed babies, she will not be given more, and if the guardians of the baby give less than this, they would be forced to pay the full amount.⁵

In this chapter, an attempt is made to contextualise these moral guidelines within our ever-changing nature of employment by drawing parallels from the teachings of the *Holy Qur'ān* and *Āḥādūth* applying them to employer/employee relationship.

⁴ Ibid.

⁵ Ibid.

3.1 INTERPERSONAL RELATIONSHIP

The Prophet Muḥammad ﷺ in the following *Ḥadīth* touches upon the duties of the employer towards her/his employee:

They (your slaves and servants) are your brethren. *Allāh* has placed them under your control. So whoever has his brother under his control should feed him from what he (himself) eats. And give him clothes the like of which he (himself) wears; and do not impose on them a task which, should be too hard for them, and if you impose on them such a task, then help them (in doing it).”⁶

From this *Ḥadīth*, the following may rightly be inferred:

Firstly, the employer and the employee should regard one another as brothers in faith and not as master and slave. This change in the attitude of the employer will surely improve their relations. This would in turn

⁶ *Sahih Bukhari*, Urdu Edition, translation by Mirza Hairat Dehlvi, Vol. III, Bab-al-Adab, p. 232, No. 983.

make it incumbent upon the employee to take special interest in her/his work and work hard to the best of her/his ability and strength.

Secondly, the words of the Prophet Muḥammad ﷺ “should feed him from what he eats and give him clothes the like of which he wears” provide the fundamental principle that the employer ought not to regard herself/himself as superior to her/his employee. This would in turn demand from the employee to look after the assets of her/his employer and not to be involved in any form of activity that would lead to the detriment of her/his employer.

Thirdly, this *Ḥadīth* demands “right to livelihood” of the employees from the employers so that they may not be thrown in degradation and misery of poverty and hunger. They have worked and helped the employers to the position of prosperity, which they now enjoy, and, in return, they have the right to claim from them equitable remuneration to meet their customary requirements. Besides, wages should be high enough to enable them to enjoy a comfortable life, so that they might come closer to their employer, at least in the satisfaction of their basic needs. This in turn would make the employees have peace of mind and be diligent in the discharge of their duties.

Fourthly, an employee should not be given too heavy or too difficult a task that is beyond her/his capacity. Or is likely to put her/him to great hardship in doing it; and that s/he should not be made to work for long hours that might tell upon her/his health. In other words, the nature of the work both from the point of view of physical capacity and time should not be too burdensome for her/him. And if the employer is given difficult and burdensome tasks, s/he should be assisted with more labour and capital in order to render her/his task less difficult and cumbersome. Besides, s/he must be adequately compensated in the form of extra remuneration for difficult jobs and longer hours of work. This would soften the heart of the employee towards her/his employer and s/he would willingly oblige whenever the need arises for her/him to put in some extra time and effort at the request of her/his employer.⁷

The Prophet Muḥammad ﷺ further emphasised the rights of people in these words:

None of you will be a (perfect) believer, until he wishes for his brother Muslim what he wishes for himself.⁸

⁷ See Yūsuf al-Dīn. *Islām Ke Mu‘āshī Nazariyāt*. Vol. II, p. 369 – 370.

⁸ Khan, Muhammad Muhsin. *The Translation and Meanings of Ṣaḥīḥ al-Bukhārī*. Vol. I. Ḥadīth no. 12, p. 19.

In the context of having compassion for people, the Prophet Muḥammad ﷺ said:

*Allāh ﷻ has no mercy on him who is not merciful to people.*⁹

The Prophet Muḥammad ﷺ further states:

He who is not merciful to others will not be treated mercifully.¹⁰

These sayings of the Prophet Muḥammad ﷺ are no doubt general in application, but are very expressive and persuasive in demanding equal rights for all, including the employees, in particular, who are in a very weak position in comparison with the employers. It may, however, be pointed out that it is a commandment to the believers, who do acts of righteousness and goodness for no monetary reward, but merely to seek the pleasure of Allāh ﷻ. It is expected of such people that they will be generous in giving wages to their employees. It is in fact an attribute of these people that they wish for their sister/brother Muslims what they

⁹ *Mishkāt, Urdu translation*. Pakistan. Noor Mohammad Aṣaḥḥ al-Maṭābi'. Vol. II. No. 4703, p. 214.

¹⁰ Khan, Muhammad Muhsin. *The Translation and Meanings of Ṣaḥīḥ al-Bukhārī*. Vol. VII. Ḥadīth no. 42, pp. 26-27.

wish for themselves. As such, every Muslim employer is expected to give a reasonable wage to her/his employee merely to seek the pleasure of *Allāh* ﷻ. It follows that no Muslim employer (provided s/he is a true Muslim and not a conventional Muslim) could ever give low wages to her/his employees that would not buy even the bare necessities of life. In fact, a true Muslim employer will feel real pride and pleasure in giving good and reasonable wages to her/his employees.¹¹

3.2 PROHIBITION OF EXPLOITATION

Islamic ethics does not permit the exploitation of the poor by the rich; nor does it condone indefinite savings and investments by the individuals without regard to the social consequences of such action. Islam prohibits ostentatious personal consumption, but extols giving as a means of equalising income distribution and of achieving spiritual bliss as well. Private property is a sacred trust, to be shared by all, particularly by the poor and the needy. The initial wealth differentials can lead to income differentials as well. The possibility of lending money at a positive rate plays a key role in this de-equalising wealth income chain. Islam

¹¹ Rahman, Afzal-Ur. *Economic Doctrines of Islam*. Vol. II, p. 249.

prohibits interest (*ribā*) and severely restricts the right to private property to eliminate economic exploitation in all its forms.¹²

The above Islamic welfare dictum corresponds to the social welfare system of the non-Muslim world. It is contained in the following Qur'anic verse: "*And in their wealth the beggar and the destitute had due share*" (*Al-Dhāriyāt*, 51:19) clearly and explicitly the "separability" of consumption from the individual's capacity to earn has been laid down here. Islam stipulates to bridge this gap by a conscious redistribution policy, equalising income and wealth marginally as well as intra-marginally. In fact, Islam goes much further along the egalitarian road. It does not even recognise wo/man's unlimited right to what s/he owns because all wealth belongs to *Allāh* ﷻ. Furthermore, by adding a spiritual dimension to socially desirable acts, Islam strengthens the operational effectiveness of egalitarian forces in the society.

According to Sayed Nawab Haider Naqvi this economic welfare is important because he sees Islam's philosophy as, emphasising equilibrium, freedom and responsibility, therefore setting the Islamic State apart from every other system, such as capitalism, democracy,

¹² Naqvi, Sayed Nawab Haider. *Ethics and Economics an Islamic Synthesis*. Islamic Economic Series-2, p. 80.

socialism, etc. In addition he adds that moral obligations both restrain and reinforce economic compulsions strictly according to the dictates of Islam's ethical philosophy. When the pursuit of economic welfare turns into the worship of money, Islam has nothing to do with such an immoral preoccupation.¹³

On the other hand, in so far as redistribution of income and wealth enhances material welfare, Islam adds a spiritual dimension to such an activity:

"Ah, what will convey unto you what the Ascent is! (It is) to free a slave, and to feed in the day of hunger; an orphan near of Kin, or some poor wretch in misery." (Al-Balad, 90:12-16).

By applying Naqvi's theory a Muslim employer holistically achieves equity, freedom of choice and takes responsibility of her/his behaviour to develop humane tendencies towards employees.

Then how best can the responsibility of an individual stay regulated? According to Naqwi regulation of the economic life by the State will be

¹³ Ibid.

quite considerable in an Islamic economy. However, unlike socialistic societies, Islam has nothing authoritarian in its attitudes towards economic processes, for totalitarian nightmares haunt an Islamic economy. State intervention directs wo/man's ethical and economic behaviour, hence this cannot lead the society onto the "road to serfdom" but will guide it gently along the road to human freedom and dignity. Nor is moral degradation allowed in the name of economic prosperity and unrestrained human freedom. The middle of the road economic philosophy of Islam steers clear of undue extremism in human behaviour.¹⁴

3.3 JUSTICE AND BENEVOLENCE

Justice and benevolence should be the basis of an employer's behavior. The entire ethos of economic enterprise can be summed up as consisting of a sincere devotion to the two values of Justice and Benevolence. As the learned scholar *Imām* Ibn al-Qayīm al-Jawzīyah states:

Allāh ﷻ has classified human conduct in economic affairs in the concluding paragraphs of *Surat al-*

¹⁴ Ibid.

Baqarah. They are of three types: Just, Offensive and Benevolent.¹⁵

Obviously, offence is the opposite of justice, and the two values of Justice and Benevolence define the Islamic conduct. These values in themselves are not peculiar to the economic sphere of life. They are the basic values that offer guidance in almost every walk of life. Then while determining the proper economic conduct, they unite and harmonise the economy with the political and the social conduct. Such is the nature of the Islamic System. It starts with a few basic values that are a reflection of the Islamic norms of Goodness and Well-being, and seeks to make the entire life activity a realisation of these values. Thus the truly Islamic Culture emerges as a well integrated whole.¹⁶ We can now acquire a clearer understanding of the nature of justice in the words of Dr. Muhammad Nejatullah Siddiqi.

Nejatullah's Islamic Idea of Justice is the first and the foremost principle in this connection. The *Holy Qur'ān*, ordains us to observe this principle throughout our lives. Though this principle has its impact upon even the purely private and individual aspects of human personality, its main

¹⁵ See Siddiqi, Muhammad Nejatullah. *The Economic Enterprise In Islam* (1972), p. 36.

¹⁶ Ibid.

concern is with the social life. Whenever we enter into some form of relationship with others, the question of justice inevitably comes in. It is all the more true as regarding an economic relationship. There is always a just path and an unjust path. Or to employ the economic phraseology, there are not only *various* means to the ends we seek to achieve, but also *just* means and *unjust*. An individual faces not only the problem of choice between alternative means but also the choice between just means and unjust means. Each economic choice is accompanied by an ethical choice as well, particularly so as regards the choices that the entrepreneur has to make. Whether it is a question of deciding her/his price policy or the manner in which s/he shall advertise her/his goods, or of the more important questions of allocation of resources or distribution of returns, it is both an economic as well as an ethical question.¹⁷

According to Nejatullah, oppression means putting a thing in other than its proper place. Seen in the light of its opposite, justice would be putting a thing in its proper place. This significant definition further substantiates the broad and positive nature of the Islamic idea of justice and equity.¹⁸ Clearly indicating that a Muslim employer will exercise

¹⁷ Ibid.

¹⁸ Ibid.

justice by preventing any form of oppression. This would engender greater harmony in the long term between the employer/employee.

Insofar as *Ihsān* (benevolence) is concerned, it means good behaviour, generous dealing, sympathetic attitude, tolerance, humane and kind approach, mutual consideration and regard of one another's interests; rendering to others even something more than their due right, contenting oneself with even something less than one's own due right. It is something more than justice and its importance in social life to be even more than that of justice. Hence, benevolence is a necessary complement to justice in making the Islamic spirit effective upon entrepreneurial policies.¹⁹

The *Holy Qur'ān* and the *Ḥadīth* clearly instructs individuals on all aspects of life. In this case it has a prohibition on money worship, obliges a Muslim to be just and benevolent at all times to each other and finally they should have a humane approach in dealing with each other. Simply stated whatever colour, creed or race they all should be treated equally.

¹⁹ Ibid.

3.4 EMPLOYMENT CONTRACT

Mawlānā Mujibullah correctly points out the transaction of employment is a contract. In the same way that the transaction of buying and selling is defined in the *Shari'ah* of Islam as a contract, so also the transaction between an employee and an employer of giving and taking work is defined as a contract. That is to say an employee offers his work, and an employer promises to give a wage in return for it. Both of them freely agree to this arrangement. An employee gives his effort and the employer gives wages in return. Neither is doing the other a favour and both parties are on a par respecting the transaction.²⁰

The parable on the Prophet Musa عليه السلام, the *Ajir* (employee) and the Prophet Shu[ayb عليه السلام, the *Musta'jir* (employer), in the *Holy Qur'ān* (Al-*Qaṣṣaṣ*, 28:22-28) clearly highlights the beginnings of an employment relationship. This parable defines the material facts that are essential in an employment contract. Before he was conferred with the prophethood, the Prophet Musa عليه السلام was travelling towards Madyan. One evening he came to a well and saw a large crowd there of herdsmen and animals. Two girls were standing to one side with their animals. He عليه السلام felt sorry

²⁰ *Commercial Law in Islam*, op. cit. p. 36.

for them and asked them why they were standing like that. They told him ﷺ that their father was old and he could not come to get water. They also mentioned to him that only when the herdsmen would have gone that they would go to get water for their animals.

The Prophet Musa ﷺ stepped forward and drew water from the well and gave it to their animals. These girls were the daughters of the Prophet Shu‘ayb ﷺ. When they took their animals’ home, they related the incident to their father. However, what is important to note here is that the Prophet Musa ﷺ had not given water to the animals of the girls with the idea of getting work. But the Prophet Shu‘ayb ﷺ could not let any person’s effort go unrewarded. Therefore Shu‘ayb ﷺ called him ﷺ, so that Shu‘ayb ﷺ could show him some hospitality in return. The Prophet Mūsā ﷺ went up to him ﷺ, and the Prophet Shu‘ayb ﷺ received him with great courtesy. In the course of conversation, one of the girls came to speak to her father and said to him:

“O my (dear) father, engage him on wages; truly the best of men of thee to employ is the (man) who is strong and trustworthy.” (Al-Qaṣṣaṣ, 28:26)

There is no doubt that on the basis of these two great qualities, strength and trustworthiness, in an employee that an employer could consider to give a larger wage.

While the employer may abuse and oppress her/his workers, the *Holy Qur'ān* informs us that the Prophet Shu'ayb عليه السلام actually spelt out the terms of the contract of employment stating:

“I intend to wed one of these my daughters to you, on condition that you serve me for eight years; but if you complete ten, it will be (grace) from you. But I am not going to put you into difficulties, you will find me Allāh willing one of the righteous (fair in my dealings).” (Al-Qaṣṣaṣ, 28:27)

This is indicative of the fact that before one enters into an agreement both parties have the right to state the terms and conditions of their agreement and, so the Prophet Mūsā answered in this way:

“This (is agreed) between yourself and myself that whichever of these two periods (of contract) I

*complete, there will be no pressure on me. And
Allāh is the guarantor over what we have agreed,”
(Al-Qaṣṣaṣ, 28:28)*

The concluding statement: “*and Allāh is the guarantor over what we have agreed*” prevents either party from abuse and overstepping the limits, and keeping the two parties together should not simply be material gain, but it should also be kept in mind that this agreement is being made in the presence of *Allāh* ﷻ Who has total power over all things and who know everything open or hidden.²¹

Mawlānā Mujibullah’s inclination is that defining employment as a contract has great advantages and he enumerates it in the following way:

1. This puts both parties on par, so that the position of the working class in society can be raised, and they can gain the same social status as the employer’s class.
2. At the time of agreement, both parties should then keep the other’s needs and social conditions fully in mind and not only rabidly pursue their own personal objectives.

²¹ Ibid.

3. Just as a buyer has the right to inspect and think carefully about the thing s/he is buying. The seller has the right to consider carefully the price at which s/he will sell it, so in the same way an employee and an employer have the right to examine and estimate both the amount of work to be done and wage to be paid, and then decide.²²

However, it is imperative to mention here the employee has the right to cancel the contract. For example, an employer may say to a worker that s/he needs so much sand from a particular place transported to her/his house, and that s/he would be paid an amount of money when the job is completed. The worker accepts and starts work. But when s/he starts digging, s/he finds the earth is much harder than s/he had thought and that the payment would not be just. In that case, according to *Mawlānā Mujibullah*, the worker has the right to cancel the agreement, or ask for more pay.²³

3.5 REMUNERATION

Mawlānā Mujibullah gives us an important insight into the wage system of Islam. He points out that although the main aim of the employer is to

²² Ibid.

²³ Ibid.

make a profit, it ought to be born in mind that the relationship between the employer and the employee is not merely that of an owner and a machine operator, but a relationship between one human being and another, and a sister and her sister or a brother and his brother. Just as the employer has a heart in her/his breast, so also does the employee have a heart in her/his breast. And just as s/he has hopes and feelings in her/his heart, her/his employees also have hopes and feelings. Therefore, both should relate to each other and make their agreements on this level.²⁴

In addition, neither do the employees have the right to count their labour as being fundamental and give trouble to their employer, nor does the employer have the right to regard capital as fundamental and give trouble to her/his employees or disregard their rights.

Insofar as the wages is concerned, at the beginning of this chapter mention was made that the *Holy Qur'ān* has set out a basic condition in this regard. In other words, the wage must be *ma'rūf*, that is to say, recognized – meaning recognized by all parties. It should not be so

²⁴ Ibid.

much that it is beyond the means of the person paying, or so little that the person receiving cannot fulfil her/his needs.²⁵

In South Africa, like in many other countries, the employment contracts or a letter of appointment would include a clause specifically dealing with salaries. Generally agreements between employers and employees are based purely on material benefit and self-interest. What is in the mind of the workers is that the relationship with the employer is only to get as much as possible from her/him in the way of wages, regardless of whether s/he makes a profit or a loss. And the employer thinks that my connection with workers is only for as long as their work brings me a profit. And if their effort is no longer useful to me, then I have no further relationship with them; they may be thrown on the scrap heap like a worn-out machine. They also take the view that the profits are basically coming, not from their labour, but from the employer's capital. Therefore the basic right to profits belongs to them and the workers have only a secondary right. *Mawlānā* Mujibullah is of the view that the employer should particularly consider that without labour, capital is completely useless. And labour, though it is certainly dependent on capital, is not completely useless without it. How are these relationships created, and how should it be maintained? In *Mawlānā* Mujibullah's

²⁵ Ibid.

view they are both moral and legal principles and lays them out as follows:²⁶

The first condition in making an agreement is that the employer and employee must both be of sound mind and understanding. It is not necessary that they be *bāligh* (reached the age of puberty). Therefore, wage agreements cannot be made with completely ignorant children or with mad or mentally defective adults. The guardian of small children may make them participate in her/his own work. But they may not be directly employed nor may they employ others.

Secondly, in human terms, both the employer and the worker are brothers. Therefore, employers should not have this attitude that a worker is some kind of inferior person, or that s/he is somewhat superior to her/him. And this brotherhood should show itself in the payment of wages.

Thirdly, the free agreement of both parties is necessary. The owner of capital is not allowed to use her/his financial power to try to get work done at a minimum rate. Neither is the employee allowed to use force or

²⁶ Ibid.

pressure to extract higher wages from her/his employer – such as demonstrations and the threat of going on strike.

Fourthly, wages must be fixed and specified, that is, so much per day or so much per month. It is not valid to say that a suitable wage will be paid. If someone is employed without fixing her/his salary or wage, then the agreement is invalid, and s/he will have to be paid *Ujrah Mithlī*. However, if the rate for some work is previously generally fixed, then agreement can be made without specifying the wage. But in this case, the employer will have to pay the same wage, and the employee will have to accept the same wage as is generally paid to workers for that work. However, difference of place will be taken into account. The same rate will not be paid in a small town as in a big city, nor will the same amount be paid in a big city as in a small town.

Fifthly, together with the wage, the nature, place and times of work must be specified. The person being employed must be told the kind of work s/he will be required to do, where he will work and the time he will have to work, or the amount of work s/he will have to do and then her/his wage should be agreed. For example, if you employ a worker you have to tell her/him that you will be paid so much. Each day you will have to

do so much work. And you will be working in this factory or in this place and it will be in a cloth mill or a shoe factory or a cement plant or a quarry or motor car or aeroplane factory, because the place and type of work makes a difference to the wages.

Sixthly, wages may also be fixed on the basis of the amount of work to be done. So much work for so much pay, as in generally done in contract work. But if the work is excessive in relation to the payment, or is too hard, then the same amount will have to be paid as is generally paid for that much work. This is called *Ujrah Mithlī*. A worker can also be employed on a monthly salary basis, but it is necessary that the place and nature of the work be specified.

If any of these conditions are not met, then the agreement will be invalid. And in the event of cancellation of the agreement, the worker will have to be paid for as many days as s/he has worked.

This brings us to the question of when does a Muslim employer pay the employee?

3.6 PAYMENT OF WAGES

Guidance in this regard may be drawn from the *Aḥādīth* of the Prophet Muhammad ﷺ:

Give an employee his wages before the sweat of his forehead becomes dry.²⁷

From this *Ḥadīth*, we gather that the employer must pay her/his employees on the day that is fixed for paying their wages. If by chance, one day or one month there is a delay, then this is acceptable. But if s/he delays habitually, then this is both a moral and a legal offence. To delay a worker's payment is extremely serious.

What would happen if an employee is not paid, not paid in full or the employer prevaricates over payment? In this regard, Prophet Muḥammad ﷺ said:

There are three people against whom I will lay charges on the Day of Reckoning. One of them is:
The person who employs someone and takes full

²⁷ As cited in *Commercial Law in Islam*, op. cit. p. 32.

work from him but does not give him full
payment....²⁸

According to *Mawlānā* Mujibullah this *Ḥadīth* does not only deal with the payment of full salaries, but also by not paying as much as should be paid for work done, and, taking advantage of the man's helplessness, means taking work from him at a reduced wage.²⁹

3.7 DISMISSAL OF THE EMPLOYEE

If an employer sees that an employee is incompetent or is not working seriously, then the employer according to *Mawlānā* Mujibullah has the right to dismiss her/him. But before dismissal, two matters should be looked into. The first is whether the employee is unable to discharge her/his duties as the consequence of some physical difficulty (e.g. sickness, injury) in which case s/he cannot be penalized. The second is whether her/his lack of interest is not the result of being paid low wages. If neither of these factors is the cause for her/his not fulfilling her/his

²⁸ Ibid.

²⁹ Ibid.

duty, then the employer has the legal right to demand that s/he do a proper day's work.³⁰

3.8 CATEGORIES OF PEOPLE WHO MAY NOT BE EMPLOYED

Mawlānā Mujibullah points out that no one should take service from her/his parents, her/his uncle (father's brother) or her/his elder brother, nor should s/he employ them. Even if her/his parents are not Muslim, it is still not permissible to take service from them. Similarly, parents may not keep their (minor) sons or daughters as employees, because they are themselves responsible for seeing to their needs. And if the parents are disabled, then the responsibility of their maintenance devolves on their sons. Conversely, if the son is not disabled, then for the parents to be serving him is a disgrace for them, and in *Sharī'ah* it is not permitted to disgrace one's parents.³¹

3.9 OBLIGATIONS OF THE EMPLOYEES

Islam lays equal responsibility upon the employee to abide by the contract of work that s/he has made with the employer and to bear in

³⁰ Ibid.

³¹ Ibid.

mind that the contract is not only a legal obligation but also a moral obligation. Some of the obligations of the employee are as follows:³²

1. An *Ajīr Khāṣ* or employee is an *amīn* without *ḍamānah*, i.e. a trustee without liability. A trustee has to take full care of the thing that s/he is entrusted with. But if by chance that thing is lost or damaged, s/he will not be liable for compensation, but if s/he deliberately damages it, then s/he will be liable. In the same way, every worker and employee is a trustee of her/his employer's property, i.e. the things that s/he uses or is put in charge of and of the work s/he has been given to do. So if by chance or because of some difficulty s/he falls short in her/his work, or by chance the things that s/he is using or are in his/her charge break down, or get damaged. Then s/he will not be held responsible and would have to pay compensation for that which has been damaged due to her/his negligence.
2. Whatever time or amounts of work the employee has agreed to complete in her/his contract, s/he is under obligation to complete it, and does not have the right to leave before its completion without a valid excuse.

³² Ibid.

3. Similarly, s/he does not have the right to make demonstrations or to go on strike. But if her/his employer is oppressing her/him in some way, s/he does have the right to take the matter to court or arbitration. There is also the question that if her/his employer holds back her/his pay, does s/he have the right to stop working? On this question, there is a difference of opinion. On the basis of the general principles of *Imām* Abū Ḥanīfah, s/he does not have this right, but on the principles of the other three *Imāms* s/he is permitted to do so.

4. If the employer has not specified that you yourself should do this work, then the employee can get someone else to do the work in her/his place. But if it has been specified that s/he should do it herself/himself, then s/he must do so. If s/he gets someone else to do the work, s/he will be liable, that is to say that if some damage comes about, even if it is accidental, then s/he will be liable to pay compensation.

CONCLUSION

We have seen that Islam tries to strike a balance between economic pursuits of humans and their spiritual wellbeing in that in a quest to

improve their material wealth, they are not to be unmindful of their accountability to *Allāh* ﷻ. However one must not lose sight of the fact that Islam does not in any way restrict its followers from engaging in such economic enterprises so that they may be in a position to fulfil their basic needs. In other words, Islam takes cognizance of the fact that the spiritual lives of its followers can be improved only if they enjoy material wellbeing. But what is even more important is that Islam impresses upon its followers that they have responsibilities not only upon themselves, but also towards their families, and humanity at large. Hence, while they enjoy the fruits of their wealth, they ought not to forget that others too have a right over their wealth.

This imposes moral duties both upon the employee and employer. The employee is obligated to discharge her/his duty diligently, efficiently and honestly, while the employer is equally responsible to a just and reasonable wage as soon as the work is accomplished.

CONCLUSION AND RECOMMENDATIONS

Globally we are faced with a cross-cultural society that enjoy total integration of cultures/religions at the employment level. Employment is not in any specific industry but across-the-board. It is not any specific culture or religion that is exclusively employed by any one group alone. In fact these groups are not even mutually exclusive in the employee relationship.

1. This thesis at the global employment level seeks to:

- Press for the urgency of holding a world conference of leading Islamic scholars on the employee/employer relationship.
- Produce a template based on the *Shari'ah* to regulate the rights and obligations of both employee and employer.
- Inculcate an Islamic orientation in the world community, the sense of sacredness that Islam offers as a basis for a new relationship eloquently argued by all the Islamic scholars.

2. At a micro level in (South Africa) this thesis seeks to:

- Stimulate interests among Islamic scholars and organisations to research the field of the employee/employer relationship collaboratively.
- Make recommendations to government that the South African labour legislation runs congruent and in harmony with *Shari'ah* on the employee/employer relationship.

Simply stated Islamic scholars and organisations both locally and internationally should strive to establish an equitable and harmonious social order. The employee/employer relationship is in some areas totally or partially neglected, requires urgent attention. Some of the areas I found have limited expansion in and/or others have deficiencies they are:

- The development of a code of conduct. This would be in the guise of the propagation of brotherhood, i.e. in the treatment of non-Muslim employees by Muslim employers.
- The development of a pension scheme, employee medical health care programme/policy or medical aid scheme that is *Shari'ah* compliant.
- Addressing the de-stigmatisation of employees with, congenital and acquired, disabilities.

- The recognition of the rule rather than the exception of women being part of the workforce and specifically addressing their needs, for example maternity leave.
- A guideline on the age when a minor reaches the age of maturity. The assumption is that Islam prescribes that when a child reaches puberty then s/he is an adult. Thus perpetuating the exploitation of 'child labour'. Since Islam is a progressive religion we can re-address, by this I do not mean alter the religion, but the age limit can be more intensely deliberated by drawing from the policies of various Muslim countries.
- The encouragement of employer's sharing in their profits with employees on the *Mudārabah* principle by promoting equal distribution of wealth.
- The respect for the privacy, integrity and dignity of individuals towards each other in Islam is paramount. Hence we need to look at ways to legitimately govern this part of the employee and employers relationship.
- We need to draw inspiration from various cultures on the development of an occupational health and safety policy coupled with a compensation guideline on occupational injuries in the workplace. The compensation funds can be generated from the mechanisms

already available, i.e. the *Zakāh* fund, thus ensuring more creative ways of distributing this money without digressing from the rule of law.

- Increase and encourage the use of alternative forms of dispute resolution in the case of employment contracts, dismissals and strikes.
- We need to work out the logistics and the feasibility of implementing an equitable employment environment in harmony with Islam.

At an international level, a great deal of work has been undertaken by Western movements and organisations that can be supported and supplemented with *Shari'ah* principles. This would require:

1. Consensus by Muslim scholars necessitates dealing directly with the employment relationship by organising a methodology for progress. Then it is only through the opening of the gates of *ijtihad* that the Muslim mind would be able to mediate between the terms of the employment relationship and the constantly changing conditions of time. This would necessitate:
 - Revisiting and thoroughly investigating the collection of *Aḥādīth* and *fatāwā* (juristic decisions).

- In-depth knowledge of employment relationships under the different Muslim governments.
- Knowledge of the contemporary developments on employment relationships, laws and regulations.
- Developing a legal framework for the employee/employer relationship with the *Qur'ān* and *Sunnah* as the two primary sources.

This task and responsibility would require a major paradigm shift from the one-dimensional view and approach of not 'opening the gates' of *ijtihād*.

APPENDIX I

TABLE OF STATUTES (LEGISLATURE)

1. Basic Conditions of Employment Act, No. 75 of 1997.
2. Child Care Act, No. 106 of 1997.
3. Compensation for Occupational Injuries and Diseases Act, No. 130 of 1990.
4. Constitution of South Africa, Act No. 108 of 1996.
5. Employment Equity Act, No. 55 of 1998.
6. Labour Relations Act, No. 66 of 1995.
7. Occupational Health and Safety Act, No. 85 of 1993.
8. Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000
9. Skills Development Act, No. 97 of 1998.
10. Unemployment Insurance Act, No. 63 of 2001.
11. International Labour Organisation (ILO) Convention, No. 158 of 1982

APPENDIX II

TABLE OF CASES

1. *Aucamp & Others v University of Stellenbosch*, (2002) 6 BPLR 3497 (C).
2. *Buffalo Signs Co Ltd & Others v D Castro & Another* (1999) 20 ILJ 1501 (LAC).
3. *Dauids v Comfort Zone Holdings (Pty) Ltd* (1999) 20 ILJ 237 (CCMA).
4. *Hospersa and Another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC).
5. *IBM Pensioners Action Group v IBM SA (Pty) Ltd & Another* [(2000) 21 ILJ 1467 (PFA)].
6. *Imperial Group Pension Fund Ltd & Others v Imperial Tobacco Limited & Others* [1991] 2 All ER 597.
7. *Johannesburg Municipal Pension Fund v The City of Johannesburg* Case No 02/3965.
8. *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 (9) BCLR 1106 (E).
9. *Mellet v Orion Money Purchase Fund & Another* (2001) 12 BPLR 2824.

10. *National Automobile & Allied Workers Union (now known as National Union of Metal Workers of SA) v Borg-Wagner SA (Pty) Ltd* (1994) 15 ILJ 9 (A) 50.
11. *Phillips v Johannesburg Municipal Pension Fund & Another* 11 BPLR 2745 (PFA).
12. *Shikwambaba v Quantum Construction Holdings (Pty) Ltd* (NH 11/2/2632).
13. *Tek Corporation & Others v Lorentz*. 1999 (4) SA 884 (SCA).
14. *Trundle v Midland Chamber of Industries Pension Fund & Another* [2002] 6 BPLR 3594 (PFA).

APPENDIX III

GLOSSARY OF ARABIC TERMS

<i>Abū Ḥanīfah (Imām)</i>	One of the four <i>Imāms</i> of <i>Sunnī</i> School of Islamic Jurisprudence
<i>Abū Yūsuf (Imām)</i>	One of the pupils of <i>Imām</i> Abū Ḥanīfah
<i>Ajīr:</i>	worker, employee
<i>Ajīr Khāṣ</i>	Employee
<i>Ajr</i>	Wage, payment, reward
<i>Amānah</i>	Something held in trust, trust with something, Trustee
<i>Amr Bi'l Ma'rūf</i>	Enjoining good behaviour
<i>‘Aqd</i>	Agreement, contract
<i>‘Āqil</i>	Mentally competent, rational
<i>Awlād</i>	Children
<i>Āyah</i>	Verse of the <i>Holy Qur’ān</i> , sign something significant

<i>Bāligh</i>	Legally adult. In Islam, this is at puberty or 15 years. A second stage is <i>Rushd</i> or good sense and discretion. The age for this is not set but some jurists consider 25 a maximum.
<i>Bāṭil</i>	Illegal, invalid in its inception; wrongful, null, void, false.
<i>Al Majallah</i>	A book setting out the Laws of Islam in clause form, according to <i>Ḥanafī fiqh</i> (jurisprudence), compiled by the ' <i>Ulamā</i> ' (scholars) of Turkey
<i>Ma'jūr:</i>	The item that is hired or rented.
	<i>Ujrah Musammā:</i>
	The <i>Ujrah</i> that is agreed on between the <i>Ajīr</i> and the <i>Musta'jir</i> i.e. the wage or payment agreed on between employee and employer, tradesman and customer etc. In other words, this is the fixed or agreed wages.
	"The agreed wage is the payment specified and fixed at the time of agreement."
<i>Musta'jir</i>	employer
<i>Ujrah:</i>	the payment given in return for work, also called <i>Mujar</i> or <i>Masta'jar</i> ; Wage.

Ujrah Mithlī:

Wage fixed by Government or by those persons who are aware of the conditions of the industry and under which workers live, and who have no vested interest in the issue.

Ujrah Mithlī is the *Ujrah* fixed by a disinterested third party who is informed of all the relevant circumstances” (*Al-Majallah*).

In the *Holy Qur’ān*, this is referred to by the word *Ma‘rūf* and in *Ḥadīth* literature mentioned is made of it as follows:

“Whatever your own living standard is, you should also let them share together with you in that.”

Ṣaḥīḥ al-Bukhārī

One of the main collections of Six Authentic Books of *Ḥadīth*.

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