THE IMPACT OF THE ADMINISTRATIVE ADJUDICATION 
OF ROAD TRAFFIC OFFENCES ACT 
ON THE EMPLOYMENT RELATIONSHIP

by

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CONTENTS

1. Chapter 1
   Introduction ........................................ Page 1

2. Chapter 2
   Overview of AARTO
      2.1 Committing Traffic Offences and Infringements .......... Page 4
      2.2 Complying with an infringement by paying the penalty .... Page 6
      2.3 Complying with an infringement by submitting a representation or application, providing information or notification Page 7
         2.3.1 Representations .................................. Page 7
         2.3.2 Pay in Instalments ............................... Page 9
         2.3.3 Identification of Driver .......................... Page 9
         2.3.4 Elect to follow Court Procedure ................. Page 10
         2.3.5 Courtesy Letter .................................. Page 10
      2.4 Notices .............................................. Page 11
      2.5 Enforcement Orders .................................. Page 12
      2.6 Revocation of Enforcement Orders ....................... Page 13
      2.7 Warrants .............................................. Page 14
B) Articles Page 54

8. Table of Legislation Page 55

9. Table of Cases Page 56
SUMMARY

The focus of this dissertation is the impact that the Administrative Adjudication of Road Traffic Offences Act 45 of 1998 (AARTO) will have on the employment relationship between employers and employees.

AARTO was promulgated in order to, amongst other things; assist with the streamlining of the traffic offence administration and the collection of payable fines for traffic infringements. Very little has been written with regard to the implications of AARTO on the employment relationship.

The purpose of this dissertation is to unpack the mechanics of AARTO, and further to provide the writer’s view on its impact, problems and possible solutions, of the employment relationship within the South African Labour law framework.

The writer will attempt to reconcile the Labour Relations Act and AARTO insofar as it impacts on the employment relationship, more especially the termination thereof. Writer will set out the provisions of AARTO and the sections pertaining to the allocation of demerit points on an individual driver’s licence. Unfortunately for the sake of completeness the writer will deal with the majority of sections in AARTO to provide a better understanding of the mechanisms envisaged by the Act to bring about the demerit points.

It is writer’s view that dealing with the allocation of demerit points in vacuum will not provide the reader with a clear understanding of the impact of AARTO on labour relations. With regards to the actual implications that AARTO will have on the employment relationship writer has taken it upon himself to provide a categorization of employees in the broad sense and thereafter to discuss the impact of AARTO on the different categories of employees.

More over the writer will examine the different categories of dismissal specifically misconduct, incapacity and operational requirements as well as the impact and applicability of AARTO thereon.
The writer will also attempt to deal with peripheral issues that arise as a spinoff or AARTO insofar as employment relationships are concerned.
CHAPTER 1
INTRODUCTION

In light of the statistics below it is clear that South Africa is faced with a crisis with regard to road safety.

The following statistics\(^1\) paint a grim picture:

1. From the 1\(^{st}\) of April 2007 to the 31\(^{st}\) of March 2008 there were 11577 fatal vehicle accidents.

2. In the same period 4283 drivers were killed, 5073 passengers and 5272 pedestrians respectively.

3. In the same period 279 busses, 244 mini-bus taxis and 1138 mini-busses were involved.

4. As far as accident types are concerned, 472 can be attributed to unsafe turning manoeuvres, 5182 to pedestrian hit and run accidents and 881 failures to stop or yield.

In light of the above, it is important to look at the objectives of AARTO. These objectives\(^2\) are:

a) to encourage compliance with the national and provincial laws and municipal by-laws relating to road traffic and to promote road traffic safety;

b) to encourage the payment of penalties imposed for infringements and to allow alleged minor infringers to make representations;

c) to establish a procedure for the effective and expeditious adjudication of infringements;

\(^1\) Statistics Road Traffic Management Corporation March 2008.
\(^2\) S 2 of AARTO.
d) to alleviate the burden on the courts of trying offenders for infringements;

e) to penalise drivers and operators who are guilty of infringements or offences through the imposition of demerit points leading to the suspension and cancellation of driving licences, professional driving permits or operator cards;

f) to reward law-abiding behaviour by reducing demerit points where they have been incurred if infringements or offences are not committed over specified periods;

g) to establish an agency to support the law enforcement and judicial authorities and to undertake the administrative adjudication process; and

h) to strengthen co-operation between the prosecuting and law enforcement authorities by establishing a board to govern the agency.

It is immediately apparent that the objectives of AARTO (if applied correctly) will lead to a reduction of fatalities on our roads as the present unacceptable attitude of South African motorists will hopefully cease.

There is therefore no disputing that the objectives and aims of AARTO are noble.

The year 2008 saw the implementation of the provisions of AARTO in the Tshwane Municipal District.

Following the implementation of this pilot project, AARTO will be implemented country wide during 2009\(^3\). As outlined below, AARTO sets out the administrative system to deal with the payment of fines, the making of representations to court as well as the consequences of non-compliance with AARTO.

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\(^3\) The Herald 3\(^{rd}\) of October 2008.
Coupled to the administrative function, AARTO further makes provision for the allotment with demerit points for traffic infringements and/or offences⁴. It is these demerit points that are of particular importance to the employment relationship as an excessive accumulation thereof will lead to the suspension of an employee’s drivers licence⁵ or operator permit or professional driving permit and the repeated suspension will lead to a cancellation thereof.⁶

It is therefore of particular importance to investigate the impact of an employee’s inability to legally operate a motor or any other vehicle as part of his or her employment functions. One would therefore have to conceptualize these consequences in terms of the labour legislative framework currently in operation in South Africa.

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⁴ S 24.
⁵ S 25.
⁶ S 27.
CHAPTER 2
OVERVIEW OF AARTO

2.1 COMMITTING TRAFFIC OFFENCES AND INFRINGEMENTS

In accordance with AARTO, if a person commits a road traffic violation in terms of the National Road Traffic Act, No. 93 of 1996, such violation will be categorised as follows:

- A traffic offence; or
- A minor infringement; or
- A major infringement.

A traffic offence is regarded as a very serious violation of the law, which warrants a major sentence on conviction, such as imprisonment, or a substantial monetary fine, or both. Traffic offences will therefore still be dealt with in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which means an offender will be arrested, charged and the case will be placed on the role for a hearing in court.

Minor and major infringements mean offences categorised as such in terms of section 29(a) of AARTO detail of which is provided in the Regulations. Traffic infringements will be dealt with in accordance with the administrative procedures, as prescribed in AARTO. If a person is alleged to have committed an infringement, the traffic officer will issue an Infringement Notice.

Infringement notices will initially be written by hand while electronic notices, generated by means of hand-held computers used by traffic officers at the roadside, will be phased in over a period of time. In the case of so-called camera infringements, for example exceeding the speed limit and ignoring traffic signals, infringement notices will be electronically generated by the

7 https://www.up.ac.za/dspacehandle22636002.
National Traffic Information System (NaTIS), and served on the Infringer by registered mail.

On receiving, through either registered mail or being served in person, an Infringement Notice, an alleged Infringer has several choices that he or she should comply with within a period of 32 days after having received such notice. These choices are the following:⁸

(a) in the case of a minor infringement, pay the penalty and qualify for a substantial discount, or make representations to the Agency; or

(b) in the case of a major infringement, pay the penalty and qualify for a substantial discount (in this case no representations may be made); or

(c) make arrangements to pay the penalty in monthly instalments; or

(d) identify the person who was the driver of the vehicle at the time when the offence or infringement was committed; or

(e) elect to be tried in court.

Failure by the alleged infringer to exercise any of the above options within the prescribed time of 32 days will result in the following steps being taken:

(a) A courtesy letter will be served on the alleged Infringer, requesting that either payment be made or to exercise any of the other options provided, within a further period of 32 days. In such case the discount will no longer be applicable, and the Infringer will have to pay the full penalty plus an additional fee for the letter.

(b) Should the infringer still fail to respond to the letter, an Enforcement Order will be served.⁹ The Order will demand that payment must be

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⁸ S 17(f) (i-v) of AARTO.
⁹ S 20.
made within yet a further period of 32 days, and in which case the
discount will no longer be applicable and the Infringer will have to pay
the full penalty plus an additional fee for the letter as well as an
additional fee for the order. Once an enforcement order is served,
none of the other options provided will be valid any longer.

(c) Should the alleged Infringer again fail to respond to the order, a warrant
will be served and handed to a Sheriff for immediate execution.\(^{10}\)

Such execution will include seizing and selling of movable property, seizing
and defacing of the driving licence; removing and defacing of the licence disc
of the motor vehicle/s; if applicable, seize and deface the operator card of the
motor vehicle/s of which the Infringer is the registered operator; immobilising
such vehicle/s; and reporting the Infringer to a credit bureau.\(^{11}\)

2.2 COMPLIING WITH AN INFRINGEMENT NOTICE BY PAYING
THE PENALTY

Infringers may comply with an Infringement Notice by paying the penalty, as
reduced by the discount amount shown on the Infringement Notice, to the
issuing authority within a period of 32 days. Regardless of the place of issue,
payments can be made at any post office in the country; at any automatic
teller machine of a bank with which an agreement for this purpose has been
concluded by the Agency or by registered mail or delivered by courier
services.

Arrangements may be made with the Agency to pay the penalty in
instalments.

On receipt of such payments the Agency will record the payment received and
allocate the applicable demerit points for the specific infringement against the

\(^{10}\) S 21 of AARTO.
\(^{11}\) S 21 (1) (a)-(e).
name of the Infringer in the contraventions register on NaTIS; and notify the Infringer by registered mail.\textsuperscript{12}

(i) of the number of demerit points allocated for the specific infringement; and

(ii) the total number of demerit points accumulated to date; and

(iii) the number of points left before his or her driving licence, professional driving permit or operator card will be suspended or cancelled.

\section*{2.3 COMPLYING WITH AN INFRINGEMENT NOTICE BY SUBMITTING A REPRESENTATION OR APPLICATION, PROVIDING INFORMATION OR NOTIFICATION}

Infringers may further comply with an infringement notice by submitting a representation or application, or informing or notifying the agency, in the prescribed manner, within a period of 32 days after being issued in person or receiving the infringement notice by registered mail. The respective options available to the Infringer are more fully explained below:

\subsection*{2.3.1 REPRESENTATIONS\textsuperscript{13}}

The infringer will/must submit a representation, only in the case of a minor infringement, to the Agency. Such representations are made by submitting a sworn statement or affirmation indicating the existence of reasonable grounds why the Infringer should not be held liable for the penalty payable in terms of the Infringement Notice. The Agency will forward such Representations to an independent Representations Officer for consideration.

\textsuperscript{12} S 18 (8) (a)-(d).

\textsuperscript{13} S 18 of AARTO.
The representations officer will consider the representation and may conduct an independent investigation to verify facts;\(^{14}\)

Thereafter he/she may allow the representation, if there are reasonable grounds indicating why the infringer should not be held liable for the penalty or may reject the Representation if no reasonable grounds for allowance could be found.

If the representation is accepted the agency will cancel the infringement notice and inform the infringer accordingly of the decision.\(^{15}\)

If a representation is rejected the representations officer will provide reasons for the decision and may further advise that the infringer may elect to be tried in court.\(^{16}\)

The agency will notify the Infringer of the decision/s of the representations Officer by registered mail, upon receipt of which the infringer may elect to be tried in court (only if so recommended by the representations officer)\(^{17}\) or must pay the penalty in full, plus the prescribed fee for the representation plus the prescribed fee for the courtesy letter, if any, within 32 days or apply for payment of the penalty in instalments within 32 days.\(^{18}\)

\(^{14}\) S 18(5).
\(^{15}\) S 18(6).
\(^{16}\) S 18(7) of AARTO.
\(^{17}\) S 18(9)(c).
\(^{18}\) S 18(9)(b).
2.3.2 PAY IN INSTALMENTS

The infringer may submit an application to the agency that payments will be made in monthly instalments. The agency will investigate the credit worthiness of the infringer and inform him or her of the outcome and the monthly instalments to be paid, should the application be granted. The first instalment has to be paid within 32 days after receipt of the approval by the infringer. Should the application not be granted, the Infringer must pay the full penalty within 32 days after receipt of such notification plus the prescribed fee for the application. The discount (as indicated in the initial infringement notice) is not applicable to payments made in instalments or once an application has been received and recorded.

2.3.3 IDENTIFICATION OF DRIVER

The infringer can provide information, to the satisfaction of the agency that he or she was not the driver of the motor vehicle at the time of the alleged infringement, together with the full name, acceptable identification as well as residential and postal addresses and telephone numbers of the alleged driver or person in control of the vehicle at the time of the infringement. In such cases the agency will cancel the original infringement notice and serve a second infringement notice per registered mail to the person so identified.

Should such identified infringer fail to respond in the prescribed manner within 32 days, the original Infringement notice will be reinstated and the first infringer will become liable to pay both the penalty and the prescribed fee of the courtesy letter to be issued in such a case.
2.3.4 ELECT TO FOLLOW COURT PROCEDURE

The infringer must notify the agency of his or her intention to follow the court procedure. In such cases the agency will cancel the infringement notice and instruct the issuing authority to issue a summons to the alleged infringer to appear in court, which will be posted by registered mail.19

2.3.5 COURTESY LETTERS

If an infringer has failed to comply with an infringement notice the agency will issue a courtesy letter and serve it on the infringer by registered mail.

Such courtesy letter will inform the infringer that he or she has failed to comply with the requirements of the infringement notice; and that he or she must, within a period of 32 days after receipt of the courtesy letter pay the penalty; as well as the prescribed fee for the courtesy letter.20

In the case of a minor infringement the infringer may submit a representation to the agency or apply to make payments in instalments alternatively notify the agency, if he or she has elected to be tried in court.21

Failure to comply with the above requirements of the courtesy letter within the time permitted will result in the issuing of an enforcement order.22

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19 S 22(1)(a) of AARTO.
21 S 19(2)(b)(i)-(iii).
22 S 19(2)(c).
Should the infringer exercise more than one of the options provided, the matter will be concluded without consideration of any of the other options.

Without following the issuing of an infringement notice, courtesy letters will be automatically generated by NaTIS and served on Infringers by registered mail for the following infringements after expiry thereof and the prescribed grace period lapsed:

(a) Failure to renew a vehicle licence; and

(b) Failure to renew a driving licence card or professional driving permit; and

(c) Failure to submit a vehicle for a compulsory roadworthiness test within the prescribed time frame.

In addition to the applicable fees payable in the above cases, a fee for the courtesy letter will be applicable.

2.4 NOTICES

Notices will be issued if an infringer makes an insufficient payment, or the cheque used for payment is dishonoured.

Notices will also be served if an infringer who has made arrangements to pay a penalty in instalments, fails to pay such instalments or makes an insufficient payment on an instalment or the cheque used for payment of that instalment is dishonoured.

In the case of: (a) an insufficient payment; or (b) the cheque used for payment is dishonoured, the infringer will be notified that the full amount owed, including the prescribed fee for the notice, must be paid within 32 days of
service of the notice; and failure to comply with the notice will lead to a warrant being issued against him or her.\textsuperscript{23}

In the case where the infringer fails to pay the penalty in instalments as arranged, or makes an insufficient payment on an instalment, or the cheque used for payment of that instalment is dishonoured; the infringer will be notified that the outstanding balance of the instalment, including the fee for the notice must be paid within 7 days of service of the notice or that arrangements must be made within that time for the payment thereof; and failure to comply with the notice will lead to a warrant in respect of the full amount owed being issued against him or her.\textsuperscript{24}

2.5 ENFORCEMENT ORDERS

Enforcement orders will be issued if an infringer has failed to comply with:

(a) The requirements of a courtesy letter; or

(b) The requirements of a notice, or

(c) Has failed to appear in court, either:

   (i) following a traffic offence, or

   (ii) after specifically electing to be tried in court.

In such cases the following steps will be taken and accordingly recorded in the contraventions register on NaTIS:\textsuperscript{25}

(a) Issue an enforcement order and serve it by registered mail on the infringer; and

\textsuperscript{23} S 19B(1) of AARTO.
\textsuperscript{24} S 19B(2) of AARTO.
\textsuperscript{25} S 20(1).
(b) automatic allocation of the demerit points incurred by the infringer for the offence or infringement.

The infringer will simultaneously be notified of the number of demerit points that have been allocated and recorded against his or her name and the total number of demerit points accumulated to date as well as the number of points left before his or her driving licence, professional driving permit or operator card will be suspended or cancelled.26

The enforcement order served on the infringer will require payment of the penalty in full, plus representation fees and the fee of the courtesy letter, if any, as well as the prescribed fee of the enforcement order within a period of 32 days of the date of service of the order; and state that a failure to comply with the requirements of the enforcement order within 32 days will result in a warrant being issued to recover the applicable penalty and fees.27

Until such time as an infringer has paid the penalty and the additional fees as required in terms of an enforcement order, no driving licence, professional driving permit (PrDP); or vehicle licence disc will be issued to an infringer or in respect of a motor vehicle which is registered in the name of the infringer until such enforcement order has been complied with or has been revoked.28

2.6 REVOCATION OF AN ENFORCEMENT ORDER

An enforcement order will be revoked if the infringer applies to the agency in the prescribed manner and submits satisfactory reasons why an enforcement order must be revoked or the issuing authority applies in the prescribed manner for a revocation of the enforcement order.29

26 S 20(1)(c)-(d) of AARTO.
27 S 20(3).
28 S 20(5).
29 S 20(9).
If an enforcement order is revoked its consequences will be cancelled and the national contraventions register on NaTIS will be updated. The infringer will be informed accordingly and his or her driving licence, professional driving permit or operator’s card will be issued or returned, unless he or she has been disqualified otherwise.\textsuperscript{30}

2.7 WARRANTS

If an infringer does not comply with the provisions of an enforcement order within 32 days after issuing thereof, a warrant will be issued and handed to a sheriff for execution, which will include seizing and selling of movable property, seizing and defacing of the driving licence, removing and defacing of the licence disc, if applicable, seize and deface the operator card of the motor vehicle/s of which the infringer is the registered operator, immobilising such vehicle/s; and reporting the infringer to a credit bureau.\textsuperscript{31}

An infringer may, at any time prior to the execution of a warrant, comply with an enforcement order through the payment of the penalty and all applicable fees, including the prescribed cost of the warrant, in which case the warrant will not be executed.\textsuperscript{32}

If a warrant has been executed, the payment of the penalty and fees from the proceeds of the execution will be recorded in the national contraventions register.\textsuperscript{33}

\textsuperscript{30} S 20(10).
\textsuperscript{31} S 21(1)(a)-(e), (2) of AARTO.
\textsuperscript{32} S 21(6).
\textsuperscript{33} S 21(5).
2.8 ALLOCATION OF DEMERIT POINTS

A person, who has committed an offence or an infringement, incurs a number of demerit points ranging from 1 to 4 for any one offence or infringement committed, depending on the seriousness thereof.

Demerit points are incurred on the date on which the penalty and fee, if any, imposed for the infringement are paid, an enforcement order is issued or the infringer is convicted of the offence in court.\textsuperscript{34}

If a person has committed two or more infringements, or is convicted by a court of two or more offences arising out of the same circumstances, demerit points are recorded only in relation to one such infringement or offence, being the infringement or offence to which the highest number of demerit points applies.\textsuperscript{35}

The demerit points in respect of offences or infringements by operators and drivers are recorded separately even if they arise out of the same circumstances.\textsuperscript{36} If a person appeals against a conviction by the court for an offence no demerit points are recorded unless the appeal is rejected or abandoned in which case demerit points are incurred in the prescribed manner.\textsuperscript{37}

2.9 REDUCTION OF DEMERIT POINTS

If demerit points have been incurred by an infringer, such total number of points as recorded in the national contraventions register on NaTIS against that person will be reduce with one (1) point for every three (3) months during which no demerit points were incurred by that person, except for the time the

\textsuperscript{34} S 24(2).
\textsuperscript{35} S 24(3) of AARTO.
\textsuperscript{36} S 24(3)(b).
\textsuperscript{37} S 24(4).
court found that the court process had been deliberately delayed by that person to obtain a reduction in points.38

2.10 PROHIBITION ON DRIVING OR OPERATING A MOTOR VEHICLE

If a person incurs demerit points which, when added to the points previously recorded against that person in the national contraventions register on NaTIS, exceeds a total of twelve (12), that person will be disqualified from driving or operating a motor vehicle.39 The disqualification period equals in months the number of points by which the total of twelve (12) is exceeded, multiplied by three (3).40

A person who is so disqualified must immediately hand in any driving licence or professional driving permit to the issuing authority for retention by such authority during the disqualification period or must remove the prescribed operator card from the vehicle in applicable cases and may not apply for a driving licence, professional driving permit or operator card during the disqualification period.41

Any person who drives or operates a motor vehicle during his or her disqualification period is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding one (1) year or to both a fine and such imprisonment.42

Upon expiry of his or her disqualification period, a person may apply to the issuing authority to return his or her driving licence or professional driving permit or to reissue an operator card.43

38  S 28.
39  S 25(1).
40  S 25(2).
41  S 25(3)(a), (b) of AARTO.
42  S 25(4).
43  S 25(5).
2.11 CANCELLATION OF A DRIVING LICENCE, PROFESSIONAL DRIVING PERMIT OR OPERATOR CARD

A person who incurs demerit points resulting in a disqualification to drive or operate a motor vehicle for a third (3rd) time, must immediately hand in his or her driving licence, professional driving permit or operator card issued in respect of that vehicle to the issuing authority.\textsuperscript{44} Upon receipt of such a driving licence, professional driving permit or operator card, as the case may be, the authority will take the necessary steps to destroy such licence, permit or card.\textsuperscript{45}

Upon expiry of his or her disqualification period, a person may reapply for and be issued with a driving licence, professional driving permit or operator card in terms of the applicable road traffic laws.\textsuperscript{46}

\textsuperscript{44} S 27(1).
\textsuperscript{45} S 27(2).
\textsuperscript{46} S 27(3).
CHAPTER 3
CATEGORIES OF EMPLOYEES

3.1 BACKGROUND

During the research embarked upon for this dissertation it became apparent to writer that the impact of AARTO on individual employment relationships would be different depending on a number of factors.

AARTO’s impact would vary depending on the employee’s position in the company or organisation, the employee’s job description, the employee’s designation and the function that the employee is required to perform.

Based thereon employees as a generic term were divided in category A, B and C employees. Please note that there are no legal or statutory bases for these classes. The classification as done below is to clarify the differing impact of AARTO on the broad spectrum of employment relationships.

3.2 CATEGORIES OF EMPLOYEES

The three categories are set out as follows:

3.2.1 CATEGORY A EMPLOYEES

Category A employees are employees who are employed for the sole purpose of driving. Such driving may entail the making of deliveries,\(^47\) the conveying of goods\(^48\) or the transportation of passengers.\(^49\)

Employees employed in this capacity spend the majority of their working hours driving either a company or a private vehicle and the driving done forms the fundamental function for which they were employed.

\(^{47}\) For example UTI, or a similar courier company.
\(^{48}\) Examples would include Furnisher removers such as Biddulphs or Stuttaford van Lines.
\(^{49}\) Algoa Bus or Trans Lux.
3.2.2 CATEGORY B EMPLOYEES

Employees employed in Category B are not employed as drivers. However, driving forms a part of the function for which they are employed. Examples of such employees would be attorneys who have to see clients and attend to court. Estate agents and auditors would also fall in this category.

These employees need to drive to perform the function for which they were employed.\(^50\)

3.2.3 CATEGORY C EMPLOYEES

Employees employed in this category rely on their licences to ensure their arrival and departure at the employer’s premises where they perform the functions for which they were employed.

Employees in this category do not need a licence in order to perform the functions for which they were employed.

Having classified the different categories of employees coupled to the demerit point system as set out in AARTO it is clear that the implications for the employer may be far reaching. The impact of the employment relationship will most definitely be hampered when an employee is unable to drive. This would affect the business continuity and productivity. It is clear that an employer can very quickly loose whatever competitive edge it had over its rivals if it does not take cognisance of the impact of AARTO.

CHAPTER 4
IMPACT OF AARTO ON DISMISSALS

4.1 INTRODUCTION

Prior to the examination of the different grounds of dismissal and the relevance of AARTO thereto it is important to discuss the relevance of this examination. In terms of the South African Labour Law coupled with the rules of conduct in the CCMA, the bargaining councils and the Labour Court disputes concerning dismissals are dealt with in very specific manners.

An understanding of the impact and the relevance of AARTO on the different categories of dismissal is important in light of the classification of disputes concerning misconduct, incapacity and operational requirements.

The incorrect classification by an employer will lead to a situation where the employee’s dismissal might be unfair on procedural and substantive grounds. More-over, an incorrect classification will lead to a situation where the Bargaining Council or the CCMA and the Labour Court might not have the necessary jurisdiction to deal with a dispute placed before it.

As stated previously no examination of this impact had been done therefore the following views are done on the basis of the writers understanding of the relevant section of labour legislation and case law and the conclusion’s drawn are as a result thereof.

4.2 IMPACT OF AARTO ON DISMISSAL

In terms of South African labour law and particular the Labour Relations Act\textsuperscript{51} (hereinafter referred to as the “LRA”), the employer may terminate an

\textsuperscript{51} Act 66 of 1995.
employee’s services on the grounds of misconduct by the employee, the employee’s capacity or the employer’s operational requirements. What follows is a commentary on the applicability of the above three grounds as grounds for terminating an employee’s services in light of the demerit point system governed by AARTO.

4.3 INCAPACITY

4.3.1 ILL HEALTH

Schedule 8 of the LRA, states that incapacity as a result of ill health or injury may be of a temporary or permanent nature. If the employee is unable to work for a temporary period there is a duty on the employer to investigate the extent of the incapacity. If the period of incapacity will be unreasonably long it is the duty of the employer to investigate all alternative short of dismissal. Such alternatives may include the nature of the job, the period of absence, the seriousness of the illness of the injury and the possibility of securing temporary replacement for the ill and injured employee.

In the case of the employee being permanently incapacitated the employer must ascertain whether there is a possibility of an alternative position for the employee, conversely whether the employee’s duties or work circumstances can be adapted to accommodate the employee in his/her disability. While the employer is investigating the above possibilities the employee must be given an opportunity to state his/her case.

In determining the fairness of a dismissal the degree of incapacity will be taken into account as well as the cause of such incapacity. For example

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52 Schedule 8 Item 7 of the Labour Relations Act 66 of 1995 and S 188.
53 S 188 and Item 9 and 10 of Labour relations Act.
54 S 188 and Ss 189 and 189A of the Labour Relations Act.
55 Schedule 8 Item 10(1).
56 Schedule 8 Item 10(2). See MTN Service Provider (Pty) Ltd v Matji NO (2007) 28 ILJ 2279 (LC).
alcoholism or drug abuse might necessitate counselling or rehabilitation as appropriate steps for an employer to consider.\textsuperscript{57}

With regards to work related injuries or illnesses that lead to an employer’s incapacity the courts have indicated that there is a more onerous duty\textsuperscript{58} on the employer to accommodate an employee who has been incapacitated under these circumstances.\textsuperscript{59}

In determining whether a dismissal that has resulted from ill health or injury is unfair one has to consider whether the employee is capable of performing the work he or she is employed for and if the employee is not capable, to what extent he/she is able to perform the work, to what extent he’s work circumstances may be adapted to accommodate him, how his duties may be adapted and whether there is suitable alternative work available.\textsuperscript{60}

In terms of \textit{Davies v Clean Deal CC}\textsuperscript{61} the erstwhile industrial court set out the requirements in terms of Schedule 8 as follows:

"The employer must be in the first instance ascertain whether the employee is or is not capable of performing the work he previously performed and for which he was employed, and if not, the extent to which he will be able to perform his former duties. This investigation, in which the employee is entitled to participate to the extent necessary to protect his interest, may, in the light of the facts of each case, require further medical investigation and opinion and/or the employee being asked to perform his former tasks to demonstrate his ability or lack of ability …

The employer should next, after consultation with the employee, ascertain whether the duties required of the employee or the manner in which those duties are to be performed can be so adapted that the employee is capable of

\textsuperscript{57} Schedule 8 Item 10(3). See \textit{Naik v Telkom SA} (2000) 21 ILJ 1266 (CCMA).


\textsuperscript{59} Schedule 8 Item 10(4).

\textsuperscript{60} Schedule 8 Item 11.

\textsuperscript{61} (1992) 13 ILJ 1230 (IC) at 1232G-1233A.
fulfilling his previous function either alone or with such assistance as is reasonable under the circumstances …

The employer must, if the employee cannot be placed in his former position, ascertain whether alternative work even at a reduced salary is available within the employer's organisation.”

Based on the above, it is clear that the employer would not rely on this ground of dismissal when an employee has reached an amount of 13 points as the reason for such an accumulation of points is not related to the employee’s health.

The accumulation of points is as a result of the employee committing some infringement or offence.

CONCLUSION

It is therefore the writer’s view that incapacity as a result of ill health would not amount to a ground for the dismissal of an employee given that the reason for the employee not being able to fulfil his contractual obligation is related to a reason removed from his health. Incapacity as a result of ill health relies solely on the fact that the employee cannot perform his or her functions as a result of deteriorating health or injury. An employee whose licence is suspended is still healthy enough to perform the function for which they were employed.

In the *Eskom and National Union of Mine Workers on behalf of Fillisen* case the arbitrator held as follows:

“South African law has also taken up the empathetic approach. The incapacity due to ill health is not the fault of the employee, and should be tested with great compassion before it is found that the employee’s incapacity is of such a nature that dismissal is justified..”

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It is therefore clear that as the demerit points are accumulated as a result of the actions or inactions of the employee fault cannot be taken out of the equitation and flowing there from the notion of a no-fault dismissal will not find a foothold in terms of dismissals under AARTO.

4.3.2 POOR WORK PERFORMANCE

When considering a dismissal for poor work performance the employer has to determine whether the employee has met a performance standard required of him. On the determine that he did not meet this required this performance standard the employer has to determine whether he knew or could reasonably have been aware of this standard, whether he was given a fair opportunity to meet this standard and whether dismissal is the appropriate sanction for not meeting this performance standard.\(^63\)

When it comes to employees who have completed their probationary period such employees cannot be dismissed unless the employer has given an employee who is not performing to the required performance standard the necessary evaluation, instruction, training, guidance or counselling as well as a reasonable time to improve. In the event of the employee not having improved after all of the above interventions by the employer, the employer will have to establish the reasons for the unsatisfactory performance as well as other ways short of dismissal to remedy the matter.\(^64\)

One view may be that driver’s performance is coupled directly to the manner in which he/she drives. An indicator of a driver’s driving prowess would be the absence of traffic infringements/offences on his/her part. The argument may further be made to state that once a driver has accumulated demerit points a process of counselling, training, guidance and instruction may be embarked on and the driver given an adequate opportunity to improve his/her performance.

\(^{63}\) Schedule 8 Item 9.
\(^{64}\) Schedule 8 Item 8 s 2 and 3.
It would therefore flow from this standpoint that once the employer has embarked on corrective measures such as training the driver in question on the relevant traffic legislation coupled to added driver (K53) training as well as giving the driver adequate opportunity to improve, such a driver would in all probability become more proficient at his assigned task and possibly negate the need to dismiss such a driver.

This is however only the case if the accumulation of demerit points is in fact akin to poor work performance.

Given the nature of the Category A employee, one would possibly amplify his standpoint by treating drivers in the same fashion as senior managers in the sense that their sole function is to drive.

Senior managers may indeed have a duty to assess their own performance standards and the courts have long accepted that senior employees are not always entitled to an opportunity to improve.65

Stevenson v Sterns Jewellers (Pty) Ltd66 elaborated as follows:

“But those employed in senior management may by nature of their job be fully capable of judging themselves whether they are achieving that requirement. In such circumstances, the need for a warning and an opportunity for improvement is much less apparent. Again, cases arise in which the inadequacy of performance is so extreme that there must be an irredeemable incapacity. In such circumstances, exceptional though they are a warning and opportunity for improvements are of no benefit to the employee and may constitute an unfair burden on the business.”

The courts have also found that a manager is entitled to receive warnings and to be properly informed of any allegations, but the current view seems to be that senior managers have both the ability and the duty to monitor their own

66 (1986) 7 ILJ 318 (IC).
work performance. They are not always entitled to a hearing or an opportunity to improve.

The poor work performance of senior managers has been assessed in cases such as Unilong Freight Distributors (Pty) Ltd v Muller\(^67\) and Eskom v Mokoena\(^68\)

In A-B v SA Breweries Ltd\(^69\) it was confirmed that the senior employee should be aware of the performance standards required of him.

In Somyo v Ross Poultry Breeders (Pty) Ltd\(^70\) the Labour Appeal Court considered the situation where a senior manager was required to have a high degree of skill and even a slight departure from the standard required resulted in a serious breach, serious enough to justify dismissal – one error of judgement on the part of an airline pilot may have disastrous consequences. In this matter the Labour Appeal Court elaborated as follows\(^71\):

> These requirements may not apply in two cases which are relevant to this matter. The first is the manager or senior employee whose knowledge and experience qualify him to judge for himself whether he is meeting the standards set by the employer ... The second is where "... the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal"

All of the above does not change the fact that even senior managerial employees have the right to be treated fairly\(^72\).

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\(^{67}\) (1998) 19 ILJ 229 (SCA).

\(^{68}\) [1997] 8 BLLR 965 (LAC).

\(^{69}\) (2001) 22 ILJ 495 (CCMA).

\(^{70}\) [1997] 7 BLLR 862 (LAC).

\(^{71}\) at 866C-E

\(^{72}\) Unilong Freight Distributors (Pty) Ltd v Muller (1998) 19 ILJ 229 (SCA)
CONCLUSION

The counter argument however with regards to the poor work performance heading as a ground for dismissal would be that poor work performance (and incapacity as a whole) is a “no fault” dismissal. In light thereof one can argue that the accumulation of points is as a result of the employee/driver having committed a traffic infringement/offence.

Therefore, there is blame-worthy conduct on the part of the employee and further the employee is at fault. Once this situation occurs, the poor work performance ground falls away as it is reserved under the “no fault” heading of dismissal.

Hence it is clear that poor work performance would find no application in terms of the dismissal of an employee based on an accumulation of demerit points and an eventual suspension of such an employee’s licence.

4.3.3 OPERATIONAL REQUIREMENTS

In terms of sections 189 and 189(a) of the LRA, the process by which an employer can terminate an employee’s services based on such an employer’s operational requirements are set out.

At the outset however, it is important to determine the definition of operational requirements and such a definition is included in section 213 of the LRA.

Operational requirements are defined as:

“requirements based on economic, technological, structural or similar needs”. It would therefore appear that operational requirements and the need to retrench flow from a situation where an employee’s position has become redundant.
The situation usually arises when the employer finds itself in a dire economic situation and is left with no alternative but to retrench certain employees to ensure the continued existence of the business.

There has however been case law indicating that in terms of the broad definition of economic requirements, an employer may retrench to increase its profits. In the *Hendry v Adcock Ingram* case the following was held:

“If the employer can show that a good profit is to made in accordance with a sound economic rationale and it follows a fair process to retrench an employee as a result thereof it is entitled to retrench. When judging and evaluating an employer’s decision to retrench an employee this court must be cautious not to interfere in the legitimate business decisions taken by employers who are entitled to make a profit and who, in doing so, are entitled to restructure their business.”

Again flowing from this, the excess employees find themselves in a situation where their position is no longer needed.

Importantly, as with incapacity dismissals, dismissals on the basis of operation requirements are also termed “no fault” dismissals.

In *Food & Allied Workers Union & Others v SA Breweries Ltd* the no-fault issue was explained as follows:

*Dismissals for operational requirements have been categorised as “no fault” dismissals - in other words, the employee is not responsible for the termination of employment, the effective cause of termination is one or more external or internal factors related to the employer's business needs. For this reason, together with the human costs of retrenchment, this Act places particular obligations on an employer, most of which are directed ensuring that all possible alternatives to dismissal are explored and that those employees to be dismissed are treated fairly.*

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The situation therefore, where an employer argues that due to its operational requirements it cannot have employees who have had their licences suspended or who are on the point of having such licences suspended would not hold.

**CONCLUSION**

It is clear from legislation and case law that these employees' positions do not become redundant but the employee will merely be replaced by another driver. The driver position he held has therefore not fallen away.

Further, as with incapacity, the reason for the employees finding themselves in the current situation is as a result of them having committed traffic infringements/offences. Therefore, there is fault on the part of such employee. Hence, as a result of this fault the employees cannot be retrenched in terms of a "no fault" dismissal.

**4.4 MISCONDUCT**

In light of the commentary on incapacity and operational requirements, it is clear that the accumulation of points in terms of AARTO is as a direct consequence of the conduct of the employee as such points are amassed by committing a traffic infringement/offence. Fault can therefore be placed at the door of the employee in most instances, subject to nomination of the driver of the motor vehicle.

Logically, it would therefore indicate that the dismissal of an employee for the accumulation of demerit points in terms of AARTO would happen under the ground of misconduct.
In terms of Schedule 8, Item 7 of the LRA, an employer can dismiss an employee for misconduct once the employer has shown:

1. That the employee has contravened a rule or standard regulating conduct in or of relevance to the workplace.

2. That the rule was a valid and reasonable rule or standard.

3. That the employer was aware, or could reasonably be expected to have been aware of the rule or standard.

4. The rule or standard has been consistently applied by the employer; and

5. That the dismissal was an appropriate sanction for the contravention of the rule or standard.

What is important however is that the disciplinary action is taken against the employee based on specific infringements/offences that has resulted in the accumulation of demerit points.

Alternatively, the accumulation of such demerit points as a misconduct. Therefore, disciplinary action cannot be taken against the actual suspension of the licence unless the employer has a specific rule stating that the suspension of an employee’s licence is an act of misconduct in terms of the company’s rules?
4.5 WAS THERE A CONTRAVENTION OF THE RULE?

To determine whether there was a contravention of the rule one would quite simply take into account the demerit points obtained. The writer believes that no further enquiry would be called for and it would be the employee’s responsibility to make the necessary representations if such points should not be attributed to his or her licence.

By the accumulation of the demerit points both requirements of *mens rea* and *acquis reus* have been complied with. The employer might however want to safeguard itself against claims in this regard by drawing up a disciplinary code setting out misconducts in terms of AARTO.

With regards to category A employees, an employer might argue that infringements/offences in terms of AARTO would constitute breaches of rules that are “of relevance to the workplace”. Therefore any demerit obtained by a driver is of relevance to the workplace and as such would not entail a specific set of policies and procedures in this regard.

4.6 VALIDITY AND REASONABLENESS OF THE RULE

A valid rule is one that is not contrary to any law or public policy. An unreasonable rule is one that is arbitrary, capricious or unfair.

To determine whether a rule is reasonable and valid, one has to take into account the employer’s circumstances.

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75 Schedule 8 Item 7 (a)
76 Solomons v Wynland Vervoer (Pty) Ltd (1998) 19 ILJ 1308 (CCMA)
78 See *Metro Cash and Carry Ltd v Tshela* [1997] 1 BLLR 35 (LAC); *Mathatane v Shoprite Checkers (Pty) Ltd* (1996) 17 ILJ 964 (IC); *Dube v Sandton Sun and Towers International* [1997] 3 BLLR 302 (CCMA); *Nedcor Bank Ltd v Frank* [2002] 7 BLLR 600 (LAC) at para 15.
Grogan\textsuperscript{79} had the following to say regarding the reasonableness of the rule:

One is dealing here only with the legitimacy of the rule per se, and not with the sanction for contravention. Generally, a rule or standard will pass muster if it is lawful and justifiable with reference to the needs and circumstances of the employer's business. Negotiated rules will, it seems, be less rigorously tested than those which are unilaterally imposed by the employer, particularly if they are embodied in a collective agreement. If the rule is found to be invalid (for example, because it is in contravention of the BCEA) or unreasonable (for example, because it lacks any form of economic rationale), a dismissal for infringing it will be substantively unfair.'

Based on the objects and aims of AARTO the outcomes which it attempts to achieve are for the good of society as a whole. One must bear in mind that AARTO does not rewrite or create new traffic offences. Therefore an employee cannot take exception to an employer including the committal of traffic offences/infringements as misconduct. Therefore the rule will never be unreasonable or invalid.

One must remember however that the employer will be using what is essentially "an objective-subjective test". The broader impact of AARTO will obviously play a major role in determining the validity and reasonableness of the rule however the employer's operational situation (on which only the employer can comment) must be taken in account. There can be no doubt that employers of category A employees would see a rule to the continued operation of its business as reasonable and valid.

\textsuperscript{79} Employment Law Journal October 1997 'Cracking the Code - Reasonableness of the Rule'
4.7 EMPLOYEE’S KNOWLEDGE OF THE RULE

To meet this requirement the employer would adopt a specific disciplinary policy with regards to offences/infringements in terms of AARTO. Alternatively an employer will amend its existing policies to include the requirements of AARTO. The absence of rules in this regard does not necessarily mean that misconduct is not committed.

The argument is quite simply that one is not allowed to commit traffic offences/infringements and it therefore translates into the working environment as well. The potential problem however arises where the employer does not have a policy in this regard and after the commencement of AARTO starts disciplining employees in terms thereof. As employees were never in the past disciplined for the committal of traffic infringements/offences, it is possible to raise this defence.

Such a defence would not hold much water as AARTO only became a reality at a given point and therefore an employer could not implement what did not exist.

An employer is therefore urged to adopt policies and practices in this regard, alternatively make the employees aware of the implications of AARTO. This may be done in a number of ways including supplying employees with a new copy of the disciplinary code, memos being sent to employees, emails and memorandums on the notice boards.
4.8 CONSISTENT APPLICATION OF THE RULE

Schedule 8 item 3(6) of the LRA states that the employer must apply the penalty of dismissal consistently insofar as it has been applied to the same or other employees in past transgressions and consistently between two or more employees who have been charged with the same misconduct.

Given the fact that AARO will only become applicable during the course of 2009 the issue of consistent application of rules in this regard will only become relevant subsequent to the first disciplinary action being taken. Employers are therefore urged to apply the rules in this regard consistently from the outset.

4.9 DISMISSAL AS THE APPROPRIATE SANCTION

The courts have adopted the concept of corrective or progressive discipline, the idea being that the employee’s behaviour is corrected through a system of gradual disciplinary action including counselling and warning so that the employee’s transgression can be highlighted and brought to his attention and the discipline meted out against them would prevent a reoccurrence of the same offence.

As a general rule it is not appropriate to dismiss the employee for a first offence. If, however, the misconduct is of such a serious nature that it makes continued employment intolerable and brakes down the trust relationship between the employer and employee dismissal will be justified.

Schedule 8 has included a list of examples of serious misconduct which include gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, a client or customer and gross insubordination.

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80 See National Union of Metalworkers of SA on behalf of Du Toit and Atlantis Foundries (2006) 27 ILJ 1975 (BCA)
81 Schedule 8 item 3(2).
82 Schedule 8 Item 3(4).
83 Schedule 8 Item 3(4).
Schedule 8, however, stresses that every matter must be judged on its own merits and that a dismissal will not be fair if it does not meet the requirements of section 188.84

When deciding whether or not to impose a penalty of dismissal the employer must not only look at the gravity of the employee’s misconduct but also look at the employees circumstances. Such circumstances would include inter alia the length of service, previous disciplinary record and the employee’s personal circumstances as well as the nature of the job and the circumstances under which the misconduct took place.85

In Sidumo another v Rustenburg Platinum Mines Ltd others86 the following was added to the list:

(i) the importance of the rule that was breached;
(ii) the reason the employer imposed the sanction of dismissal;
(iii) the basis of the employee’s challenge to the dismissal;
(iv) the harm caused by the employee’s conduct;
(v) whether additional training and instruction may result in the employee not repeating the misconduct;
(vi) the effect of dismissal on the employee; and
(vii) the long-service record of the employee.

In the discussion of AARTO above it is clear that specific infringements carry specific demerit points. The crisp issue revolve around when dismissal becomes appropriate for the accumulation of demerit points.

84 Schedule 8 Item 3(4).
85 Schedule 8 Item 3(5).
86 (2007) 28 ILJ 2405 (CC)
It is the writer’s view that the committance of an infringement or an offence in terms of AARTO may amount to misconduct. The question further arises when this misconduct will amount to a dismissal. As stated in schedule 8 of the LRA the legislature prefers a system of progressive discipline. It is therefore clear that an employee who commits a minor traffic infringement and accumulates for example two points will not have committed a misconduct that would lead to his or her dismissal.

In essence an employee will be disciplined as and when the traffic infringement/offences occur. In terms of the series of progressive discipline the employee might be issued with a warning, second warning, final written warning and ultimately a dismissal.

A further question that arises is whether an employee may only be dismissed once his or her licence has been suspended. It is the writer’s view that the situation is dealt with very much in the same way as incapacity where an employee may be dismissed even if he or she have not exhausted their sick leave. In the event of an employee committing a major traffic offence that leads to immediate suspension and/or cancelation of their licence, it is the writer’s view that this single instance would be sufficient to warrant the employee’s dismissal.

For a dismissal to be the appropriate sanction in cases of misconduct the employer must show that as result of the commission of this misconduct there has been a breach of trust. In the event of the employer not being able to show that there has been a breach of trust the CCMA, Bargaining Councils and the Labour Court will determine that dismissal is not the appropriate sanction.

In *Amalgamated Pharmaceuticals Ltd v Grobler NO & Others*\(^7\) breach of trust was explained as follows:

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\(^7\) (2004) 25 ILJ 523 (LC)
Whether there is or is not a reasonable suspicion and breach of trust is a factual enquiry and depends on the circumstances of each case....

The mere fact that the applicant does not trust the individual respondents cannot, without more, be a basis for holding that the employment relationship has broken. In a constitutional democracy implicit in the notion of fair labour practice is the obligation to balance the respective interests of the parties. To punish the individual respondents with unemployment, even if this is accompanied with some compensation, without finding them guilty of any wrongdoing is grossly unfair. The breach of trust, if there was such, was not caused by the individual respondents.

The importance of the trust relationship was highlighted in *Humphries & Jewell (Pty) Ltd v Federal Council of Retail & Allied Workers Union & others*\(^{88}\) were the Spoelstra J stated:

> The relationship of trust, mutual confidence and respect which is the very essence of a master-servant relationship cannot, under these circumstances, continue. In the absence of facts showing that this relationship was not detrimentally affected by the conduct of the employee it is unreasonable to compel either of the parties to continue with the relationship.'

When it comes to the situation of dismissing a driver (Category A employees and possibly Category B employees), the employer will argue that the repeated committal of infringements/offences has lead to a breakdown in the trust relationship between the employer and employee because in light of progressive discipline the employee had been disciplined for committing a transgression that has lead to the accumulation of demerit points.

The repeated commission of a traffic infringement or offence has led to the employee not correcting his/her behaviour and as such has led to the breakdown in the trust relationship.

The situation with Category C employees is conceivably different as the employee does not need a valid driver's licence to perform the functions for which he/she was employed. As long as the employee performs said

\(^{88}\) (1991) 12 ILJ 1032 (LAC)
functions, it is not envisaged that such a suspension and/or cancellation of a Category C employee’s licence would lead to a breakdown in trust.

The breakdown of trust with regard to Category C employees occurs in a situation where an employee arrives late for work as a result of not being able to drive. The appropriate action is taken and in the event of it occurring again, further action is taken in line with progressive discipline. If the situation continues, it would arguably lead to the employee’s dismissal. The dismissal and breach of trust is as a result of the employee continuing to arrive late at work.

The employee’s defence (if it can be called that) that his/her licence has been suspended would in all probability not be considered, as such suspension/cancellation is as a result of the employee’s own actions.

*De Beers Consolidated Mines Ltd v CCMA* stated the following with regards to dismissals:

“Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operation response to risk management in the particular enterprise. This is why shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society’s moral opprobrium of a minor theft; It has everything to do with the operational requirements of the employer’s enterprise.”

If the fairness of the sanction of dismissal is tested Zondo JP in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration & Others* highlights the following:

“the Constitutional Court decided in Sidumo that, when a commissioner of the CCMA is called upon to decide whether dismissal as a sanction is fair in a particular case he or she must not apply the reasonable employer test, must not in any way defer to the employer and must decide that issue on the basis of his or her own sense of fairness”

89 (2004) 21 ILJ 1051 (LAC) at 1058 F-G.
90 (2008) 29 ILJ 964 (LAC)
CHAPTER 5
FURTHER IMPACT OF AARTO

When one analyses the implications of the Act on the employment relationship and the possible termination thereof, a number of further questions arise.

5.1 INFRINGEMENTS/OFFENCES OUTSIDE OF WORK

An employer might be faced with a situation where a driver is extremely adept at driving a company vehicle during working hours and as such does not accumulate any demerit points.

The same employee however believes himself to be a “Michael Schumacher” during his time off and proceeds to take part in illegal drag racing, reckless and negligent driving and speeding over weekends.

Such behaviour leads to the accumulation of demerit points. The question then arises as to whether an employer can take action against the employee for actions (not specifically misconducts in the employer’s disciplinary code) that has happened outside working hours.

Case law has indicated that employees may be charged for misconducts happening outside working hours in so far as it relates to work. For example, one employee assaults a fellow employee after work away from the employer's premises.91 A further example is where a South African official on a consular or diplomatic mission (as a representative of South Africa) is discourteous to those he or she comes in contact with even outside the workplace or after working hours.92

The charges would range from assault to bringing the company’s name into disrepute. In light of a traffic infringement/offence the employee might then

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92 National Education Health and Allied Workers Union obo Barnes v Department of Foreign Affairs (2001) 22 ILJ 1292 (BCA).
argue that the infringements/offences were committed outside working hours
in his/her own vehicle which has no connection with the employer and further,
if applicable, that such transgressions occurred in another city or province.

Would the employer in those instances, in light of those defences, be able to
discipline the employee?

It is the writer’s view that in the case of an employee appointed as a driver,
such transgressions have a direct impact on the employee’s position and the
functions the employee performs for the employer. In short, the driver is
defined as such and driving is the “be all and end all” of such employment.

PAK Le Roux\textsuperscript{93} views the situation as follows:

‘As a general rule an employer has no right to institute disciplinary proceedings
unless it can be demonstrated that it has some interest in the conduct of the
employee. An interest would normally exist where some nexus exists between the
employee’s conduct and the employer’s business. In the absence of such a nexus,
the employee’s conduct is likely to be non-work related conduct or, as it is sometimes
termed, “off-the-job’ conduct. . . . It is for the employer to establish that it has a
legitimate interest in the matter which is sufficient to justify disciplinary action against
the employee.’

The employer can argue that as a result of a driver’s position with the
employer, there is a duty on such a driver to ensure that his actions outside
the workplace would not in any way hamper such an employee from fulfilling
the functions that he/she was employed for. The same rings true for an
attorney for example. A person can only practice if the courts deemed him/her
to be a “fit and proper person”. An attorney, who might be the most proficient
and dedicated representative of his clients, could still conceivably be deprived
of his right to practice law in light of the questionable actions committed by
himself over weekends.

\textsuperscript{93} P A K le Roux & Andre van Niekerk The SA Law of Unfair Dismissal 184
As discussed earlier with regard to the three identified categories of employees, the situation with Category B and C employees, i.e. employees who have to drive as part of their responsibilities or who make use of their own transport to attend to work would be different in this scenario. The impact on the employees in terms of the accumulation of demerit points does not go to the heart of the employment relationship as with a driver. A driver by its very definition has been employed to drive.

Category B and C employees need to drive as an auxiliary function and therefore the suspension of their licences will not have the same impact as a Category A employee. As such Category B and C employees can possibly raise in defence that transgressions happening outside of work do not have a direct bearing on the working relationship.

The impact of a suspended licence on category B and C employees will however lead to other forms of misconduct i.e. unauthorised absence or arriving late for work.

5.2 RECRUITMENT AND SELECTION

As stated previously, the provisions of AARTO will be implemented nationwide during the course of 2009.

All persons having a valid driver’s licence will start on zero points and as and when transgressions occur, points will be allocated to the person’s licence.

The question however arises as to what would happen if an employer was to employ an employee post implementation of AARTO and such an employee enters into the employment relationship with a number of points already. For example, an employee is employed during the course of 2009 and such employee has 10 points that have been added to his/her licence.
The employee is essentially then one or two transgressions away from having his/her licence suspended. If the situation does occur when an employee commits a transgression and his/her licence is suspended and the employer then wants to take action against such an employee, the employee could conceivably raise the defence of Estoppel, in terms of which the employer is barred from taking action against the employee as the employer knew or could have known about the state of the employee’s points standing.

It could be argued that the duty then rests with the employer to ascertain the standing of the employee’s points prior to employing such an employee. The argument can however be taken further to existing employees where an employer is aware that employees have committed traffic offences, with the consequent demerit points and does not take action to address the situation.

Once the employee’s licence is suspended, such employee can conceivably raise the defence of Estoppel in that the employers were aware of the accumulation of points by such employees. This is especially the case where employees are using company vehicles. It is therefore of the utmost importance for employers to take action against employees to prevent this situation.

In terms of Maluti Transport Corporation Ltd v Manufacturing Retail Transport & Allied Workers Union & Others\(^{94}\) the Labour Appeal Court, through Froneman DJP, does allow a defence against Estoppel and states the following:

> In my view the two basic requirements (there may be more) for a fair renunciation or retraction of an earlier election would be that (1) a good reason exists for the change, and (2) that the other party is given timeous notice of the change so as to prevent that party from being prejudiced thereby. Where either one of these two requirements are not capable of being met the change of heart will not be given legal effect to.

\(^{94}\) (1999) 20 ILJ 2531 (LAC)
It is clear however that were an Employer knew about the points standing and a employee is dismissed the above requirements are not met.

Where it comes to new employees however, the employer would have to decide on the amount of points an applicant for a position is allowed to have to make him/her eligible for the position.

A further issue that arises revolves around the duty of disclosure that is placed on a job applicant. It is evident that the number of points a job applicant has accumulated at the time of his/her application would play an important role with regards to the employee’s success in being appointed.

In *Laltoparsat and Webber Wentzel Bowens*\(^{95}\) the commissioner viewed non-disclosure as follows:

> Non-disclosure, as a ground for vitiating a contract, is a form of misrepresentation by silence or omission. It is a material misrepresentation if its omission reasonably induced the misled party to enter into the contract, which it would not have done but for the misrepresentation. Such non-disclosures, not being direct misrepresentation, only become misrepresentation where there is a duty on a party to make such disclosures.

As with other disclosures it is the writer’s view that an employer would be well advised to ask an applicant as it would be difficult for the employer to discipline the employee *post facto* if the employer did not specifically ask the question to a Category B and C employee. It is the writer’s view that there is not a duty on the employee to disclose if such an applicant is a category B or C employee in light of the *Mashava v Cuzen & Woods Attorneys*\(^{96}\) case.

A further question that that may have some relevance, is whether an employee would be able to claim some form of discrimination if he/she is not

\(^{95}\) (2004) 25 ILJ 371 (CCMA)
\(^{96}\) (2000) 21 ILJ 402 (LC).
short listed/employed in a certain position as a result of the points standing such an employee may have.

It is the writer’s view that even though the employee might be able to show that there is some differentiation between him/herself and employees with a lesser points standing, such differentiation does not amount to discrimination as it is not on a prohibited ground and in any event the employer would be able to argue that such differentiation is as a result of the inherent requirements of the job.

5.3 OPERATION OF LAW, STATE ACTION AND SUPERVENING IMPOSSIBILITY

A further possible implication of the accumulation of demerit points might be the situation where an employer terminates an employee’s (more especially Category A employees) contract of employment on the basis of operation of law or state action.

It will be the employer’s contention that as a result of the employee’s licence being suspended and/or cancelled, the employee cannot fulfil the function such an employee had been employed for.

Such a suspension/cancellation is as a result of the operation of AARTO as the employee had accumulated an excess of 12 points and the employee’s licence has been suspended. This suspension flows from the provisions as set out in AARTO. Therefore such a suspension of his/her licence is by the operation of law. The dismissal is however not by operation of law as AARTO does not address employment contracts.

It can be argued that such suspension is also as a result of state action. What this would mean is that the contract of employment comes to an end, but not by dismissal in terms of incapacity, misconduct or operational requirements, rather on a ground not necessarily covered in terms of the LRA.
As a result, there is no dismissal. As there is no dismissal, the Bargaining Council or CCMA would not have jurisdiction to determine the fairness in terms of substance and/or procedure.

An example of termination by the operation of law is the Public Service Act\textsuperscript{97} which provides that an employee is deemed to have been discharged if such an employee is absent from work without permission for a given period.

Again however, the termination does not take place by operation of law as AARTO is silent on the impact it has on employment contracts.

Case law has however dictated that the employer cannot just rely on this proviso to terminate the employee’s services unless the state has made certain attempts to ascertain the whereabouts of the employee.\textsuperscript{98}

The argument may be extended in terms of AARTO that an employer cannot simply wait for the employee’s licence to be suspended and then rely on the operation of law to terminate such an employee’s services without proactively dealing with the employee in light of the pending suspension/cancellation.

This is evident form the united association of SA on behalf of \textit{Fortuin and Golden Arrow Bus Services (Pty) Ltd}\textsuperscript{99} case where it was stated that there exists a duty on the employer to assist an employee who has been placed in a position where he is unable to fulfil his contractual obligations.

In this case the commissioner found that a situation where Mr Fourie did not have a professional driving permit (as the renewal of his permit was refused) amounted to a supervening impossibility of performance of which incapacity was a species\textsuperscript{100}.

\textsuperscript{97} Proc 103 of 1994, s 17(5)(a)(i).
\textsuperscript{98} HOSPERSA \textit{v} MEC for Health (2003) 24 ILJ 2320 (LC).
\textsuperscript{99} (2004) 25 ILJ 1142 (BCA)
\textsuperscript{100} See also Mhlungu \& Another \textit{v} Gremick Integrated Security Specialists (A Division of Servest (Pty) Ltd) (2001) 22 ILJ 1030 (CCMA)
The commissioner believed that there is a duty on the employer in this scenario to assist the employee to obtain his PRDT before determining that dismissal is the appropriate sanction. The employee was reinstated with no back pay and without pay but was given a reasonable opportunity to obtain the licence, failing which the reinstatement will fall away.

It is writer’s view that the same process cannot be used with regards to AARTO as the period of the employee’s licence being suspended will be 3 months where after the employee would be credited with one point, possibly paving the way for him or her to drive again. If the employee exceeds the permissible twelve points by more that one point his licence would be suspended by an additional three months for every point in excess. Employers cannot be expected to keep employees on their books for an excessive periods of time.

This is obviously different from the Fortuin case as Mr Fortuin might be able to petition the MEC to obtain these PRDP in able to fulfil his contractual obligations.

The argument is also coupled to the circumstances of the particular case wherein employers with only one or two category A employees can not afford to have employees unable to drive for a minimum period of three months. As discussed in the analysis of incapacity herein above it is still the writer’s view that the suspension of a employee’s licence is not a incapacity issue as the employee has committed a fault and as result the dismissal will not fall under a no fault dismissal.

The counter argument is quite simply that the employee is now in a position where the employee cannot fulfil his/her obligations in terms of the employment contract.

Once this is the situation, the employer will be left with no alternative but to terminate the employee’s services, as there is essentially non-compliance with the contract on the part of the employee.
It is the writer’s view that this approach (at least until such time as the courts have given judgement thereon) is the correct approach to follow in terms of your Category A and possibly Category B employees.

The employer would safeguard itself against possible claims in this regard by including a clause in the contract which reads as follows:

“The employee hereby agrees that it is an expressed provision of his/her contract of employment that an employee is in possession of a valid drivers licence.

The employee further agrees that in the event of the employee’s licence being suspended and/or cancelled in terms of the Administrative Adjudication of Road Traffic Offences Act and/or any other relevant legislation, the contract will come to an end.

The employee further agrees that it is his/her responsibility to ensure that the accumulation of demerits or any similar points in terms of the abovementioned legislation be kept to minimum and that any and all transgression, infringements/offences be brought to the employer’s attention.”

5.4 LEGALITY OF CONTRACTS

In light of the Discovery Health Ltd v CCMA\textsuperscript{101} and the Kylie v CCMA\textsuperscript{102} cases the legality of “unlawfull contracts” against the back drop of prevailing legislation was highlighted. In terms of Discovery Health it was found that a illegal immigrant enjoys the protection of the Labour Relations Act as everyone is guaranteed the right to fair labour practises under the constitution. Further, the court held that Discovery Health concluded a valid contract with the illegal immigrant. Therefore, the termination thereof constituted a dismissal.

\textsuperscript{101} (2008) 29 ILJ 1480 (LC)
\textsuperscript{102} (2008) 29 ILJ 1918 (LC)
In terms of the *Kylie* case the court ruled that as a result of public policy a contract for the performance of work prohibited by the Sexual Offences Act\(^{103}\) was invalid although sex workers would fall into the LRA definition of an employee\(^{104}\).

In light of AARTO, if a statute renders a specific species of contract illegal and a transgression is penalized by criminal sanction three possibilities arise\(^{105}\):

1. That the statutory provision absolutely prohibits the formation and the performance of that category of contract for example entering into the contract for the specific purpose of evading legislation or for criminal end.

2. That the provision does not render the formation of the contract invalid but merely prohibit its performance for example where an employee agrees not to join the trade union.

3. That the provision has no effect on the formation or the performance of the contract other that to visit either party with a criminal penalty. In the first scenario such a contract would be deemed void *ab initio* and there are no consequences that flow from its termination. In this second case the contract is voidable at the instance of the innocent party, and in the third case the contract is valid however the contravening party may be guilty of an offence.

Seen against the backdrop of AARTO it would seem that the contracts entered into once the employee is not allowed to drive as his/her licence has been suspended would fall within the third category. If the employer was unaware at the time of concluding the contract that the employees licence has been suspended, one could argue that the contract is voidable at the instance of the employer.

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\(^{103}\) 23 of 1957  
\(^{104}\) S 213 read with s 200A  
\(^{105}\) Grogan, Workplace Law,(2007) 9th ed 49
Further more, if the employer knowingly employs the employee to drive and the employee’s licence is suspended, the employer as well as the employee might be guilty of an offence. However it does not affect the validity of the contract.
CHAPTER 6
CONCLUSION

The intended and practical consequences of AARTO are vast. (some may say too vast) In light of the above, it is clear that there is not a single employer out there who will completely escape the potential effects of AARTO. This is so as there is not a single employer out there who does not rely on automotive transport directly or indirectly. There are only two questions that arise; when will the legislation impact on my business and what will be the extent of such impact.

It is obvious that employers employing drivers such as bus services or delivery services will be very hard hit in the event of their Category A employees not being able to perform the functions for which they were employed.

It is therefore clear that employers cannot adopt a “wait and see” approach as the distinct possibility exists of employees very quickly being placed in a position whereby they cannot fulfil the functions for which they were employed.

For the sake of business continuity alone it is of great importance to employers to adopt a proactive approach in terms of dealing with the implications of AARTO.

Policies need to be adopted and contracts of employment need to be updated.

Further, employees need to be made aware of AARTO as well as the possible consequences of non-compliance there with.

Over and above the legal imperative of having to comply with national legislation, employers should view this statutory threat as an opportunity to retain their staff. It is clearly not in the interest of the employer to lose its staff. Policies should be introduced to ensure compliance which will in turn make the roads of this country a safer place. Such policies will surely also act as a
deterrent and will blatantly set out the consequences of the breach thereof. By acting as a deterrent it would hopefully ensure that the employer does not have to prevent an employee from driving thereby having to source labour elsewhere.

It is a well known fact that it is incredibly difficult to find employees in the market with the requisite licenses. It is to be expected that employers would want to retain their appropriately licensed drivers for as long as possible.

It is expected that a number of trends may emerge as a result of the implementation of this legislation.

The policing of all policies and procedures that may be created may be a particularly onerous exercise, depending on the size and type of organization. It is fully expected then, that entire departments will come into being in order to maintain business continuity.

It was initially expected that there may be an increase in outsourcing under the circumstances. Employers have already indicated that this may not present them with the solutions initially anticipated. The reason for this comes down to practicalities. The fact remains that there are relatively few unemployed persons with the requisite public driver’s permits. One may find that labour brokers simply have no one to offer to existing or prospective clients. One might, therefore, find an increase in s197 transfers.

As a result of the shortage of licensed drivers, it is expected that institutions would emerge offering training to unemployed unlicensed drivers and ensuring that existing drivers are compliant with AARTO.

Unfortunately when it comes to the introduction of new legislation, one of its greatest challenges is ensuring its implementation and compliance. The implementation of AARTO rest squarely on the shoulders of the traffic officials. It is important that the conduct of traffic officials will have to be monitored more stringently to ensure that they do not succumb to corruption. Given the
potential dire consequences of AARTO, drivers who run the risk of not being legally allowed to drive may be inclined attempt to bribe officials to let them off from an offence.

It is imperative that before any organisation can even begin to grapple with the consequences of this legislation and prepare the requisite policy and procedure that they themselves are capacitated. Accordingly, it is strongly suggested that all employers be trained as to the consequences of the legislation. It will then be for the employer to determine what sort of policy would work best for their respective organisation.

Once such training has been completed and such policies introduced to the workplace, with due consideration being given to organised labour, it is strongly recommend that all staff be educated not only as to the policy, but also the consequences of the legislation. The intensity of the training would obviously differ and depend on the nature of employment with the employer.

Further regard must be had to the publishing of such policy in the workplace. To assist in creating general awareness amongst the employees it is also recommended that the employer include general information in the employee’s payslips.
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<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
<th>Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>A-B v SA Breweries Ltd</td>
<td>(2001) 22 ILJ 495 (CCMA)</td>
<td></td>
</tr>
<tr>
<td>Amalgamated Pharmaceuticals Ltd v Grobler NO &amp; Others</td>
<td>(2004) 25 ILJ 523 (LC)</td>
<td></td>
</tr>
<tr>
<td>Davies v Clean Deal CC</td>
<td>(1992) 13 ILJ 1230 (IC)</td>
<td></td>
</tr>
<tr>
<td>De Beers Consolidated Mines Ltd v CCMA</td>
<td>(2004) 21 ILJ 1051 (LAC)</td>
<td></td>
</tr>
<tr>
<td>Discovery Health Ltd v CCMA</td>
<td>(2008) 29 ILJ 1480 (LC)</td>
<td></td>
</tr>
<tr>
<td>Dube v Sandton Sun and Towers International [1997] 3 BLLR 302</td>
<td>(CCMA)</td>
<td></td>
</tr>
<tr>
<td>Eskom v Mokoena [1997] 8 BLLR 965</td>
<td>(LAC)</td>
<td></td>
</tr>
<tr>
<td>Eskom and National Union of Mine Workers on behalf of Fillisen</td>
<td>(2002) 23 ILJ 1666 (Arb)</td>
<td></td>
</tr>
<tr>
<td>Food and Allied Workers Union v SA Breweries Ltd</td>
<td>(2004) 25 ILJ 1971 (LC)</td>
<td></td>
</tr>
<tr>
<td>Hendry v Adcock Ingram</td>
<td>(1998) 19 ILJ 85 (LC)</td>
<td></td>
</tr>
<tr>
<td>HOSPERSA v MEC for Health</td>
<td>(2003) 24 ILJ 2320 (LC)</td>
<td></td>
</tr>
<tr>
<td>Humphries &amp; Jewell (Pty) Ltd v Federal Council of Retail &amp; Allied Workers Union &amp; others</td>
<td>(1991) 12 ILJ 1032 (LAC)</td>
<td></td>
</tr>
<tr>
<td>Kylie v CCMA</td>
<td>(2008) 29 ILJ 1918 (LC)</td>
<td></td>
</tr>
<tr>
<td>Maluti Transport Corporation Ltd v Manufacturing Retail Transport &amp; Allied Workers Union &amp; Others</td>
<td>(1999) 20 ILJ 2531 (LAC)</td>
<td></td>
</tr>
<tr>
<td>Mathatane v Shoprite Checkers (Pty) Ltd</td>
<td>(1996) 17 ILJ 964 (IC)</td>
<td></td>
</tr>
<tr>
<td>Metro Cash and Carry Ltd v Tshela</td>
<td>[1997] 1 BLLR 35 (LAC)</td>
<td></td>
</tr>
<tr>
<td>MTN Service Provider (Pty) Ltd v Matji NO</td>
<td>(2007) 28 ILJ 2279 (LC)</td>
<td></td>
</tr>
<tr>
<td>Mhlungu &amp; Another v Gremick Integrated Security Specialists (A Division of Servest (Pty) Ltd)</td>
<td>(2001) 22 ILJ 1030 (CCMA)</td>
<td></td>
</tr>
<tr>
<td>Naik v Telkom SA</td>
<td>(2000) 21 ILJ 1266 (CCMA)</td>
<td></td>
</tr>
<tr>
<td>National Education Health and Allied Workers Union obo Barnes</td>
<td>v Department of Foreign Affairs</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2001) 22 ILJ 1292 (BCA).</td>
<td></td>
</tr>
<tr>
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<td>[2002] 7 BLLR 600 (LAC)</td>
<td></td>
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</table>
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