THE ROLE OF REASONABLENESS IN THE REVIEW OF CCMA ARBITRATION AWARDS IN SOUTH AFRICA: AN ENGLISH LAW COMPARISON

C.H. BOTMA-KLEU

2013
THE ROLE OF REASONABLENESS IN THE REVIEW OF CCMA ARBITRATION AWARDS IN SOUTH AFRICA: AN ENGLISH LAW COMPARISON

By

Carli Helena Botma-Kleu

Submitted in fulfilment of the requirements for the degree of Doctor Legum (LLD) to be awarded at the Nelson Mandela Metropolitan University

December 2013

Promoter/Supervisor: Prof A Govindjee
Co-Promoters/Co-Supervisors: Mr E van der Berg & Prof C F Forsyth
ACKNOWLEDGEMENTS

I am extending a special thank you to my husband, Charl Kleu, and my parents, Carl and Lida Botma, for their continuous support throughout the duration of my research studies.
DECLARATION

I, Carli Helena Botma-Kleu, student number 203002350, hereby declare that the thesis for Doctor Legum to be awarded is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

…………………………
Carli Helena Botma-Kleu
# TABLE OF CONTENTS

ACKNOWLEDGEMENTS ........................................................................................................ iii
DECLARATION ......................................................................................................................... iv
TABLE OF CONTENTS .......................................................................................................... v
ABSTRACT .............................................................................................................................. x
KEY WORDS ........................................................................................................................ xii

CHAPTER 1: GENERAL INTRODUCTION ........................................................................... 1

1.1 BACKGROUND ............................................................................................................... 1
1.2 STATEMENT OF THE PROBLEM AND THE RATIONALE FOR THE STUDY ....4
1.3 AIMS AND OBJECTIVES OF THE STUDY ................................................................. 7
1.4 RESEARCH MOTIVATION AND SIGNIFICANCE OF THE STUDY ..................... 8
1.5 RESEARCH METHODOLOGY ..................................................................................... 9
1.6 JUSTIFICATIONS FOR COMPARISON ........................................................................ 10
1.7 LIMITATIONS OF THE STUDY .................................................................................. 15
1.8 BRIEF OUTLINE OF THE RESEARCH ...................................................................... 16

CHAPTER 2: THE NATURE AND SCOPE OF REVIEW DISTINGUISHED FROM APPEAL ................................................................................................................................. 20

2.1 INTRODUCTION .......................................................................................................... 20
2.2 THE ROLE OF JUDICIAL REVIEW IN THE SOUTH AFRICAN LEGAL SYSTEM ................................................................................................................................. 21
2.2.1 Administrative law and judicial review in context .................................................. 21
2.2.1.1 Judicial control under the common law dispensation ........................................ 22
2.2.1.2 Judicial control under the constitutional dispensation ..................................... 26
2.2.2 Common law or constitutional review .................................................................... 28
2.3 DEFINITION AND FUNCTION OF REVIEW DISTINGUISHED FROM APPEAL ................................................................................................................................. 30
2.4 FORMS OF REVIEW .................................................................................................... 33
2.4.1 Review of the proceedings of inferior courts .......................................................... 34
CHAPTER 3: JUDICIAL REVIEW AND THE ROLE OF REASONABLENESS IN ENGLISH ADMINISTRATIVE LAW

3 1 INTRODUCTION

3 2 SCOPE AND NATURE OF ADMINISTRATIVE LAW AND JUDICIAL REVIEW

3 2 1 Judicial review, the common law and the Senior Courts Act 1981

3 3 GROUNDS OF JUDICIAL REVIEW

3 3 1 Illegality

3 3 2 Procedural impropriety

3 3 3 Irrationality or unreasonableness

3 4 UNREASONABLENESS IN DIFFERENT CONTEXTS

3 4 1 Reasonableness and merit review

3 4 1 1 Unreasonable reasoning process

3 4 1 2 Reasonableness and errors of fact

3 5 POLICY DECISIONS, HUMAN RIGHTS AND SLIDING SCALE OF REASONABLENESS REVIEW

3 5 1 Policy decisions

3 5 2 Reasonableness and human rights

3 5 3 Sliding scale of reasonableness

3 6 SPECIAL STATUTORY REVIEW IN THE CONTEXT OF THE LRA

3 6 1 Section 145 grounds of review

3 7 CONCLUSION
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 2 2</td>
<td>Reasonableness is not encompassing.</td>
<td>174</td>
</tr>
<tr>
<td>6 2 3</td>
<td>Reasonableness of outcome or process</td>
<td>177</td>
</tr>
<tr>
<td>6 3</td>
<td>APPLYING REASONABLENESS IN VALUE JUDGEMENTS</td>
<td>187</td>
</tr>
<tr>
<td>6 3 1</td>
<td>Dismissal for misconduct: findings regarding sanction and penalty reviews</td>
<td>188</td>
</tr>
<tr>
<td>6 3 2</td>
<td>Findings in respect of relief</td>
<td>197</td>
</tr>
<tr>
<td>6 3 3</td>
<td>Findings of procedural unfairness</td>
<td>197</td>
</tr>
<tr>
<td>6 4</td>
<td>REVIEWING FINDINGS OF FACT AND LAW</td>
<td>198</td>
</tr>
<tr>
<td>6 4 1</td>
<td>Dismissal for misconduct: findings regarding guilt</td>
<td>198</td>
</tr>
<tr>
<td>6 4 2</td>
<td>Findings as to jurisdiction</td>
<td>201</td>
</tr>
<tr>
<td>6 5</td>
<td>CONCLUSION</td>
<td>206</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 7: A COMPARISON</strong></td>
<td></td>
</tr>
<tr>
<td>7 1</td>
<td>INTRODUCTION</td>
<td>211</td>
</tr>
<tr>
<td>7 2</td>
<td>THE ROLE OF JUDICIAL REVIEW IN THE SOUTH AFRICAN AND ENGLISH ADMINISTRATIVE LEGAL SYSTEM</td>
<td>211</td>
</tr>
<tr>
<td>7 3</td>
<td>JUDICIAL REVIEW DISTINGUISHED FROM APPEAL</td>
<td>214</td>
</tr>
<tr>
<td>7 4</td>
<td>REASONABLENESS IN ENGLISH ADMINISTRATIVE LAW</td>
<td>218</td>
</tr>
<tr>
<td>7 5</td>
<td>REASONABLENESS IN ENGLISH EMPLOYMENT LAW</td>
<td>224</td>
</tr>
<tr>
<td>7 6</td>
<td>REASONABLENESS IN SOUTH AFRICAN ADMINISTRATIVE LAW</td>
<td>227</td>
</tr>
<tr>
<td>7 7</td>
<td>REASONABLENESS IN SOUTH AFRICAN EMPLOYMENT LAW</td>
<td>230</td>
</tr>
<tr>
<td>7 8</td>
<td>COMPARISON: CONCLUDING REMARKS</td>
<td>237</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 8: CONCLUSION</strong></td>
<td></td>
</tr>
<tr>
<td>8 1</td>
<td>INTRODUCTION</td>
<td>249</td>
</tr>
<tr>
<td>8 2</td>
<td>REASONABLENESS AS A STANDARD, TEST AND/OR GROUND OF REVIEW</td>
<td>249</td>
</tr>
<tr>
<td>8 3</td>
<td>REASONABLENESS REVIEW IS NOT AN APPEAL ON THE MERITS</td>
<td>253</td>
</tr>
<tr>
<td>8 4</td>
<td>MEANING OF REASONABLENESS IN RELATION TO RATIONAL JUSTIFIABILITY</td>
<td>255</td>
</tr>
<tr>
<td>8 5</td>
<td>NATURE OF DECISIONS SUBJECT TO REASONABLENESS REVIEW</td>
<td>258</td>
</tr>
<tr>
<td>8 6</td>
<td>REASONABLENESS: THE APPROPRIATE TEST</td>
<td>260</td>
</tr>
</tbody>
</table>
9  BIBLIOGRAPHY ........................................................................................................267

10  TABLE OF STATUTES ............................................................................................279

11  TABLE OF CASES ..................................................................................................281
ABSTRACT

In South Africa, the Labour Courts have experienced an important and continuing controversy regarding the permissible scope of judicial review of arbitration awards of the Commission for Conciliation Mediation and Arbitration (“CCMA”) in terms of section 145 of the Labour Relations Act 66 of 1995 (“LRA”). Section 145(1) of the LRA specifically provides that arbitration awards, generally considered final and binding, can be reviewed and set aside by the Labour Court on the basis of a defect as defined in section 145(2)(a) and (b). These defects are not prescribed in an open-ended manner but limited to decisions involving allegations of misconduct by the commissioner in relation to his or her duties, a gross irregularity in the conduct of the proceedings and/or allegations that the commissioner exceeded his or her powers or that the award was improperly obtained. Unreasonableness and/or irrationality are not included within the scope of a defect as per section 145(2)(a) and (b).

Initially, Carephone (Pty) Ltd v Marcus NO & others 1998 11 BLLR 1093 (LAC) found that the interpretation of section 145 was influenced by rational justifiability in accordance with the right to just administrative action as provided for in section 33, read with item 23(2) of Schedule 6, of the Constitution of the Republic of South Africa, 1996 (‘the 1996 Constitution’). Today, leading precedent in the form of Sidumo & another v Rustenburg Platinum Mines Ltd & others 2007 12 BLLR 1097 (CC) dictates that section 145 of the LRA is suffused by reasonableness in accordance with the right to just administrative action as provided for in section 33 of the 1996 Constitution. The ultimate enquiry is whether the arbitration award is one that a reasonable decision-maker could reach as articulated in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others 2004 4 SA 490 (CC). However, the enquiry into the reasonableness of a decision is indistinct. As a result, the Labour Courts have struggled to apply the concept of reasonableness in a consistent manner. This thesis seeks to identify the proper role of reasonableness in the judicial review process, including identifying factors that would assist in recognising an unreasonable decision. Relevant principles of judicial review in South Africa in the general administrative law context are considered and distinguished from the process of appeal. An assessment of English case law and commentary in the field of both administrative and employment law is conducted. Finally an extensive examination of South African case law and commentary on
the subject, both pre- and post *Sidumo*, is undertaken. The English law approach is found to provide greater clarity to the interpretation of reasonableness in South African labour law in several respects.

The conclusion to this thesis proposes that reasonableness should not be regarded as a threshold test or standard to determine the reviewability of CCMA arbitration awards in terms of section 145(2)(a) and (b). In fact, unreasonableness should be expressly included as an independent ground of review in section 145(2) of the LRA. This approach would clarify that unreasonableness does not replace or override the existing section 145(2) grounds of review, but continues to find application in categories of defects that may be irrelevant to or distinct from the defects contemplated in unreasonableness review. Reasonableness applies in the context of matters of fact-finding, policy based determinations, the weighing of factors and the exercise of discretion where more than one conclusion is available in the circumstances, including jurisdictional facts left to the subjective determination of the commissioner. Reasonableness does involve the review court in the review of the substance of decisions, but establishes a margin or range of reasonable decisions within which decision-makers acting reasonably may reach different conclusions. As such, the standard of review applicable to reasonableness review is not one of correctness. Reasonableness review is therefore less exacting than an appeal on the merits. It is, however, more exacting than rational justifiability that focuses only on the rationality of the connection made by the commissioner between the material properly available to him or her and the decision that was reached rather than the reasonableness of the substantive decision itself. It is proposed that the reasonableness of a CCMA arbitration award be established by means of a two-pronged test in conformity with the approach in English administrative law. The reasonableness of a decision would then depend both on the outcome falling within a range of acceptable outcomes as well as on a line of analysis that reasonably supports the conclusion reached. This test for reasonableness is an objective test, established with reference to the result of the CCMA arbitration award and the reasons of the commissioner in support of the result. In conclusion, it is submitted that the application of this interpretation of reasonableness would give effect to *Bato Star Fishing’s* introduction of the English law interpretation of reasonableness into South African law.
KEYWORDS: Administrative Law; Judicial Review; CCMA; Labour Court; Arbitration Awards; Reasonableness; Rationality; Perversity; Sidumo; Ground; Test; England; South Africa
CHAPTER 1

GENERAL INTRODUCTION

1.1 BACKGROUND

Judicial review is a familiar court process in South African law. It has long since been recognised as a means to challenge the decisions or proceedings of inferior courts, both civil and criminal, as well as those of tribunals or boards whether it performs judicial, quasi-judicial or administrative functions. This is illustrated by, among others, section 24 of the Supreme Court Act 59 of 1959 and section 302 of the Criminal Procedure Act 51 of 1977.1 Where judicial review is the court procedure prescribed, the courts are generally not required to re-hear evidence or information previously before a lower court or tribunal to determine whether the findings of the court or tribunal was correct.2 The review court is required to determine whether the result was obtained by means of an acceptable process. The enquiry therefore focusses on the lawfulness of the decision-making process as opposed to the correctness of the decision. As such, judicial review potentially holds the following advantages to a dispute: 1) the limited scope of judicial review safeguards against the institution of unsubstantiated claims on the whims of prospective litigants; and 2) because it is limited to the record of proceedings, it is considered to be a more expeditious and less expensive mechanism for challenging unsatisfactory decisions or proceedings.3

With the enactment of the Labour Relations Act 66 of 1995 (the LRA) and the establishment of the Commission for Conciliation, Mediation and Arbitration (the CCMA), the legislature introduced mechanisms to ensure a quick, cost-effective and final resolution of labour disputes.4 The legislative intent is supported by the wording of several sections of the LRA. Section 1 identifies “the effective resolution of labour disputes” as one of the primary objectives of the LRA. Section 138 promotes informality and flexibility by specifying that a commissioner may

---

1 See chapter 2 para 2.4.1 and 2.4.2.
2 See chapter 2 para 2.2 and 2.3.
3 See chapters 2, 5 and 6.
4 The CCMA has been established as an independent juristic person with jurisdiction in all of the provinces to among others attempt to conciliate disputes referred to it in terms of the LRA and, if unsuccessful, to arbitrate disputes in a simple, inexpensive, expeditious and non-legalistic manner. See sections 112-114 of the LRA.
conduct an arbitration in such a manner considered appropriate to “determine the dispute fairly and quickly” as well as deal with the substantial merits of the dispute with “the minimum of legal formalities”. Also, in terms of section 143(1), an arbitration award is “final and binding and may be enforced as if it were an order of the labour court”.

Despite an intention to finally resolve disputes at arbitration, the legislature nevertheless saw it fit to provide for a mechanism to challenge defective arbitration awards. On the basis that an appeal process would inhibit the overall aim of a speedy and inexpensive resolution of disputes, the legislature opted for the less extensive and/or intrusive characteristics of judicial review. The Explanatory Memorandum to the draft Labour Relations Bill explains the rationale behind the introduction of the concept of judicial review to the Labour Court as follows:

“The absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter, particularly given the lack of prospects of alternative employment in the present economic climate. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business.”

As a result, section 145(1) of the LRA specifically provides that arbitration awards, generally considered final and binding, can only be reviewed by the Labour Court on the basis of a defect as defined in section 145(2). The defects are not prescribed in an open-ended manner but limited to decisions involving allegations of misconduct by the commissioner in relation to his or her

---

5 In terms of the Labour Relations Act 28 of 1956, parties who were dissatisfied with the decisions of the Industrial Court could appeal first to the Labour Appeal Court and then to the former Appellate Division. The Court had to determine whether, on the evidence, it would have come to the same conclusion. See J Grogan “Defective Decisions” (1998) 14(3) Employment Law 4.

6 The legislature replaced the right of appeal from judgments of the Industrial Court with the more limited right to take CCMA arbitration awards on review. See J Grogan “Now it’s rationality – Carephone survives the test” (2001) 17(5) Employment Law 9.

7 1995 16 ILJ 278-336. For a different perspective, see Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae) 2013 11 BLLR 1074 (SCA). The Court reasoned that an appeal process was rejected and the narrow grounds of review selected because it sets an extremely high standard for setting aside arbitration awards. According to the Court, costs and delays inherent in review serve as a deterrent to parties seeking to challenge arbitration awards; supporting the overall aim of a speedy and inexpensive resolution of disputes.

8 Section 143(1) of the LRA.
duties, a gross irregularity in the conduct of the proceedings and/or allegations that the commissioner exceeded his or her powers or that the award was improperly obtained. The statutorily recognised defects are the only grounds upon which CCMA arbitration awards may be reviewed by the Labour Court. Litigants who therefore wish to challenge CCMA arbitration awards must base their cause of action on one or more of the statutory grounds of review. Interestingly, unreasonableness and/or irrationality are not included within the scope of a defect as per section 145(2) of the LRA.

Whilst the LRA prescribes the grounds of review, it does not also prescribe the test that the review court must apply to establish whether the CCMA arbitration award meets the criteria of any one or more of the grounds that would render it reviewable. The test to be applied on review is however important because: 1) it affects the way parties present their cases; the procedure they follow; how commissioners reach their decisions and the way judges approach CCMA arbitration awards; and 2) the scope of the test may encourage or deter parties from challenging CCMA arbitration awards. In addition, despite judicial review generally being described as a process-related type of scrutiny, the courts have recognised that review proceedings cannot be conducted in isolation of the substantive merits of a decision. This has raised the question whether judicial review is in fact more restricted than an appeal or whether judicial review has been transformed into an appeal-like process.

In England, judicial review is also recognised as one of the primary means through which administrative law governs the making of decisions by public authorities and the application of decision-making procedures. Traditionally possible because of the courts’ inherent jurisdiction at common law to determine whether action was lawful or not, it has subsequently been entrenched in section 31(1) of the Senior Courts Act 1981. Read with Civil Procedure Rule 54.1(2)(a), judicial review involves a claim to review the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function. The Senior Courts Act 1981 and the Civil Procedure Rules do not specifically identify the grounds upon which a review application may be brought. The grounds of review have been developed by the English courts on a case by case basis.

10 Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and others 2007 1 All SA 164 (SCA) para 31.
case basis and rationalised into a threefold classification of illegality, procedural impropriety and irrationality. This is not an exhaustive categorisation and development on a case by case basis may lead to the recognition of further grounds of review in the future.\textsuperscript{11} Where the ground of unreasonableness is concerned, English administrative law accepts that it does not require a decision as to the correctness of one view over another and that a mere difference of opinion between administrative decision-makers and review courts do not justify interference on review. Traditionally, the review courts test whether a decision is unreasonable by enquiring whether the decision was so unreasonable that no reasonable decision-maker could ever have come to it.\textsuperscript{12} The review court effectively attempts a secondary, objective determination as to what a reasonable decision-maker could have determined in the circumstances.

From an employment law perspective, the Employment Tribunal (Tribunal) has been established to determine complaints in a relatively quick and inexpensive manner, with less formalities and technicalities than the ordinary courts of record and with finality. The only exception to the principle of achieving finality is contained in section 21(1) of the Employment Tribunals Act, 1996. Section 21(1) allows for an appeal against a Tribunal finding to the Employment Appeal Tribunal (Appeal Tribunal) on the basis of questions of law only. Questions of law have been classified into the following categories of grounds of appeal: 1) a misdirection, misunderstanding or misapplication of the law; 2) a misunderstanding or misapplication of relevant undisputed or indisputable facts that are material to the decision in question; and 3) “perverse” decisions. A decision is perverse if an overwhelming case is made out that the Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached.\textsuperscript{13} Again, the Appeal Tribunal does not make a decision as to the correctness of one view over another, but attempt a secondary, objective determination as to what a reasonable tribunal could have determined in the circumstances.

12 STATEMENT OF THE PROBLEM AND THE RATIONALE FOR THE STUDY

Due to the narrow confines suggested by a first reading of section 145(2), parties dissatisfied with

\begin{flushright}
\begin{footnotesize}
11 Council of Civil Service Unions v Minister for the Civil Service 1983 UKHL 6.
12 See chapter 3 para 3 3 3. Wednesbury unreasonableness was restated with reference to the term “irrationality”.
13 See chapter 4.
\end{footnotesize}
\end{flushright}
the outcome of CCMA arbitration awards for reasons not contemplated in the section have sought opportunities to circumvent the application, or expand the scope, of section 145(2).\textsuperscript{14} Initially, attempts were made to review CCMA arbitration awards in terms of section 158(1)(g) of the LRA. Opposed to the closed list of grounds provided for in section 145(2), section 158(1)(g) empowers the Labour Court to review the performance of any function provided for in the LRA on \textit{any} grounds that are permissible in law. For similar reasons, attempts have been made to broaden the grounds of review by alleging that commissioners engage in administrative action when making arbitration awards. This argument justified reliance on the justifiability and reasonableness principles as provided for in the Constitution of the Republic of South Africa Act 200 of 1993 (1993 Constitution) and the Constitution of the Republic of South Africa, 1996 (1996 Constitution) respectively and, since the introduction of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the open-ended grounds of review provided for in section 6(2).\textsuperscript{15}

In \textit{Sidumo & another v Rustenburg Platinum Mines Ltd & others},\textsuperscript{16} the Constitutional Court considered the desirability of applying a PAJA-type administrative review on substantive and procedural grounds to CCMA arbitration award reviews. The Court found that the labour law setting, requiring a speedy resolution of disputes with outcomes basically limited to dismissal or reinstatement, made it inappropriate to apply the full PAJA-type administrative review. The Court however also found that, although the language of section 145 did not make specific reference thereto, the section had to be read in a manner that ensured that commissioners would make arbitration awards that were lawful, reasonable and procedurally fair. According to the Court, the reasonableness standard accordingly suffused section 145 of the LRA and effectively required the review court to ask whether the decision, captured in the arbitration award, was one that a reasonable decision-maker could not reach.\textsuperscript{17} In the course of the judgment, the Court relied on an earlier decision in \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism}.\textsuperscript{18} In that case, the Court had referred to the English decision of \textit{Associated

\textsuperscript{14} Drafted in narrow, procedural terms, it does not traditionally find application where a commissioner chooses one remedy above another in a situation where a choice of remedies is given or the substantive outcome is undesirable. See \textit{Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others} 1997 12 BLLR 1632 (LC).

\textsuperscript{15} See chapters 5 and 6.

\textsuperscript{16} 2007 12 BLLR 1097 (CC).

\textsuperscript{17} Para 105 and 110.

\textsuperscript{18} 2000 2 SA 674 (CC).
Provincial Picture Houses Ltd v Wednesbury Corporation\(^{19}\) and had been guided by the subsequent English decision of Regina v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd\(^{20}\) in order to determine the proper meaning to be accorded to the unreasonableness ground of review contained in section 6(2)(h) of PAJA.\(^{21}\)

Briefly, in Wednesbury Corporation, the House of Lords had recognised unreasonableness as a ground of review and had confirmed that a review court was only entitled to interfere with a decision on this basis if the decision satisfied the threshold of being so unreasonable that no reasonable authority could ever have come to it.\(^{22}\) In International Trader’s Ferry Ltd, the House of Lords had subsequently criticised the Wednesbury formulation of unreasonableness as repetitious and needlessly complex and had preferred a reformulated test that enquired whether the decision was one which a reasonable authority could reach.\(^{23}\) In both the decisions of the House of Lords, the question of unreasonableness arose against the background of the exercise of an administrative, discretionary power.

The abovementioned judgements are important from a labour law perspective to the extent that the Constitutional Court in the labour law matter of Sidumo relied directly on the decision of Bato Star Fishing, and therefore indirectly also on International Trader’s Ferry Ltd, to determine that an arbitration award will be reviewable in terms of section 145 of the LRA if the decision is one that a reasonable decision-maker could not reach. The test of Sidumo unreasonableness, applicable to the review of CCMA arbitration awards, is therefore considered conceptually no different to that applied to the unreasonableness ground of review in terms of PAJA.

A perusal of the judgments of Bato Star Fishing and Sidumo however reveals that in neither case did the Constitutional Court expressly and/or comprehensively discuss the English legal position before adopting its interpretation of unreasonableness into South African law under the constitutional dispensation. The South African courts and labour practitioners have therefore engaged in extensive deliberations as to its meaning and scope and have produced a

---

\(^{19}\) 1948 1 KB 223.

\(^{20}\) 1999 2 AC 418.

\(^{21}\) Para 44.

\(^{22}\) 230.

\(^{23}\) 452.
jurisprudence that lacks the desired consistency and certainty. In the circumstances, it must be clarified whether *Sidumo* unreasonableness: 1) constitutes a standard, test and/or an independent ground of review; 2) replaces or overrides the section 145(2) grounds of review; 3) is substantive or dialectical in nature or both; 4) is similar to or distinct from an appeal on the merits; 5) is distinguished from or the equivalent of rational justifiability; and/or 6) is limited to a certain type and/or nature of decisions. Lastly, the appropriate test for establishing *Sidumo* unreasonableness needs to be identified, including its limitations or boundaries.

This thesis discusses the role of unreasonableness in the judicial review of administrative decisions in England and the role of perversity in an appeal from Tribunal findings. It then compares the English position with South African labour law to extract sound principles that should assist in the interpretation and application of unreasonableness in South African labour law in the future.

1 3 AIMS AND OBJECTIVES OF THE STUDY

This thesis sets out the legal principles applicable to the judicial review of CCMA arbitration awards in South Africa, as contained in section 145 of the LRA, and the jurisprudence that has arisen in relation thereto. The legal principles and jurisprudence is then compared to the legal principles applicable to the appeal process provided for in English employment law to challenge Tribunal findings. To the extent that the making of a CCMA arbitration award in South Africa is recognised as an administrative act, the thesis also considers the legal position in England for challenging administrative decisions in general and affords particular attention to the role of illegality, irrationality and procedural impropriety and the jurisprudence that has developed in relation thereto. This thesis further focuses on whether England’s approach to an appeal against a Tribunal finding or the judicial review of an administrative decision can inform South Africa’s jurisprudence on the interpretation, application and/or development of the judicial review remedy provided for in section 145 of the LRA. The specific objectives of this study are:

---

24 See chapter 5.
To examine the nature of an application to the Labour Court for the judicial review of a CCMA arbitration award in South Africa, including the grounds upon which the application may be brought, and with specific reference to the Constitutional Court’s approach to the concept of unreasonableness as provided for in Sidumo. To the extent that the approach was adopted from South African administrative law, reference is also made to the meaning attributed to unreasonableness in the administrative context.

To consider the judicial review of administrative decisions as applied in England, including the grounds upon which such an application may be brought, with particular reference to the role and interpretation of unreasonableness and/or irrationality therein.

To consider the right to appeal against a Tribunal finding in England, including the grounds upon which such an application may be brought, with specific reference to the role and interpretation afforded to the concept of perversity.

To analyse the South African courts’ approach to judicial review applications on the basis of unreasonableness as well as to consider how the equivalent concept has been interpreted and applied in England, to identify any errors in the interpretation and application and to propose effective means through which a review in South Africa can be better dealt with should the existing legal framework prove to be inadequate.

1.4 Research Motivation and Significance of the Study

During the first decade of the operation of the CCMA, roughly one in ten CCMA arbitration awards were taken on judicial review to the Labour Court; amounting to a total of 1700 review applications having being launched each year for that period. More recently, review proceedings have been instituted in respect of ten to fifteen percent of arbitration awards. The

---


26 A total of 2189 reviews were brought in 2010-2011; representing an increase of seven percent on the previous year despite a one percent decrease in total awards rendered. See P Benjamin “Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)” Dialogue Working Paper No. 47 International Labour
judicial review procedure is therefore a key part of the labour dispute resolution process in South Africa and its frequent utilisation indicates that the correct and consistent interpretation and application by prospective litigants, labour practitioners and the courts are critical for establishing an efficient, effective and consistent labour regulatory regime in South Africa. As mentioned above, a perusal of case law however demonstrates that different interpretations and applications of section 145 have arisen, both in relation to the recognised grounds of review and the standard and/or test applicable when reviewing decisions in terms of this section.

To date, a thorough comparative study of the role of unreasonableness in South African labour law as opposed to its role in English employment law and English administrative law as contemplated herein has not been conducted. This makes this study unique and of significance to scholars in both countries. As mentioned above, England utilises, in the employment context, the legal concept of “perversity” and, in the administrative law context, the concept of “unreasonableness”, that on first appearance are semantically similar to the standard of unreasonableness utilised in the review of CCMA arbitration awards in South Africa. In observing how matters have been dealt with in England, this study seeks to provide a better perspective of the South African position as well as enrich the approach to and understanding thereof. Lastly this study hopes to provide policy makers with a meaningful assessment of the remedies with the view of improving the interpretation and application of judicial review in South Africa and unreasonableness in particular.

15 RESEARCH METHODOLOGY

This study examines and compares the remedy for challenging CCMA arbitration awards in South Africa with the remedy for challenging Tribunal findings as well as administrative action in England. This is done by logically setting out the principles applicable in each system and identifying the similarities and differences between or among them.


This study uses both primary and secondary sources of data. The primary source of information comprises of legislative measures and/or important case law dealing with the section 145 remedy of review in South Africa, the corresponding remedy in England and the judicial review of administrative action. The aforementioned is examined and discussed for the purpose of analysing the respective system’s similarities and differences.

The secondary data which this study relies on include journal articles, law texts and other electronic sources. This data is subjected to a comparative and in-depth content analysis.

The comparative study is not merely undertaken for the purpose of juxtaposing two different systems and to list their similarities and differences. The systems are compared both with regard to structure and their respective substantive legal rules to establish whether there are principles, well-suited to the South African legal context, that South African law can draw from the foreign jurisdiction that would be beneficial to the interpretation, application and/or further development of South African law.

1.6 JUSTIFICATIONS FOR COMPARISON

This thesis examines the role of unreasonableness in the judicial review of CCMA arbitration awards in South African labour law against the background of a comparison with English law principles of judicial review and administrative law as well as the employment law dispute resolution process for challenging Tribunal findings.

English law is considered suitable for comparative purposes because it has influenced a variety of legal systems worldwide. This is largely due to the fact that such countries were once ruled by Britain. South Africa is no exception. While South Africa has a pluralistic legal system, compared to England’s common law jurisdiction, it continues to have strong connections to the British legal tradition - being a former British colony. The pluralistic nature of the South African legal system compared to England’s common law jurisdiction does not render the two countries’ legal systems incomparable because, in its current form, England’s employment law, like South Africa’s, is largely a creature of statute rather than common law.
In the employment law context specifically, similarities and differences between the CCMA and the Tribunal are identified upon comparison. Both are designed to provide accessible, inexpensive, efficient and relatively informal dispute resolution services in certain categories of disputes. Neither the CCMA nor the Tribunal follow a system of binding precedent. The Tribunal differs from the CCMA in so far as it is regarded as an independent judicial body compared to the CCMA as administrative tribunal. This does not, however, detract from the suitability of an English law comparator. There are several similarities between the CCMA in performing its arbitration role and a court of law: 1) the prescribed manner of adducing evidence, questioning witnesses and concluding arguments; 2) the powers of subpoena conferred on a CCMA commissioner; 3) the possibility of CCMA arbitration awards being enforced through contempt proceedings; 4) the finality and binding nature of CCMA arbitration awards; and 5) the power of the CCMA in arbitration proceedings to make orders for the payment of costs. Essentially, the CCMA is considered to not be a court of law because CCMA commissioners are empowered to conduct proceedings as they see fit, with the minimum of formalities, as long as disputes are disposed of fairly and quickly. The CCMA process has, however, become more formal and legalistic and the CCMA has been obliged to become a tribunal of record because of the required analysis of the link between the reasons for the decision and the evidence upon which the decision is based. On the other hand, the Tribunal, despite being classified as inferior court, has an objective similar to the CCMA. The Employment Tribunals Rules of Procedure 2013 specifies that Tribunal members have the overriding objective to handle cases fairly and justly by, so far as practicable: 1) ensuring that parties to the proceedings are on an equal footing; 2) that cases are dealt with in ways which are proportionate to the complexity and importance of

---

28 Throughout the existence of the CCMA, roughly eighty percent of referrals each year have been dismissal cases. See P Benjamin “Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)” International Labour Office, Industrial and Employment Relations Department Dialogue Working Paper No 47 April 2013 6.

29 The Tribunal is not considered to be an administrative tribunal because it decides “party and party” disputes and not “individual and state” disputes.

30 The CCMA is not a court. See Fredericks & others v MEC for Education and Training, Eastern Cape & others 2002 (2) SA 693 (CC) paras 30-31; Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC) para 80, 85 and 87.

31 For a contrary view, see E Fergus From Sidumo to Dunsmuir: The Test for Review of CCMA Arbitration Awards Doctor of Philosophy Thesis University of Cape Town (2013) 186-192. However, see also Daly P “Wednesbury’s Reason and Structure” (2011) PL 238. Daly argues that reasonableness as it operates in the United States and Canada as a standard of review for error of law bears the same meaning as reasonableness review applied in the United Kingdom for control of discretion.

32 J Murray “An Appeal for an Appeal” ILJ 2013 1. It was initially envisaged that arbitration hearings would not be recorded and reviews would be based on the commissioner’s notes and the parties’ submissions.
the issues; 3) avoiding unnecessary formality and seeking flexibility in the proceedings; 4) avoiding delay, so far as compatible with proper consideration of the issues; and 5) saving expense.33

The CCMA and the Tribunal also do not sit on the same point of the adversarial–inquisitorial spectrum. The Tribunal in England is described as more adversarial and court-like in nature whereas a CCMA commissioner may conduct an arbitration in an adversarial or inquisitorial form or in a form that combines these two approaches, provided that this is done in a manner that is fair to both parties.34 However, no statute explicitly enables the Tribunal to adopt either an adversarial or inquisitorial approach. The nearest instance is the Employment Tribunals Rules of Procedure 2013 which provides that the Tribunal may regulate its own procedure and shall conduct a hearing in the manner it considers fair, having regard to the principles contained in the overriding objective mentioned above. In addition thereto, the Tribunal must seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is also not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.35

Further, whilst the right to legal representation in CCMA arbitrations is restricted so that the majority of applicant employees is represented by trade union officials or represent themselves,36

33 Rule 2.
34 See CCMA Guidelines: Misconduct Arbitrations, GN 602 of 2011, GG 34573 of 2 September 2011. See also P Benjamin “Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)” International Labour Office, Industrial and Employment Relations Department Dialogue Working Paper No 47 April 2013. While the arbitration system initially envisaged a significant role for a more inquisitorial process, its use has been rare. The significance of the arbitrator’s discretion has tended to be misunderstood by the Labour Court. While some judgments reflect a view that arbitrations should be conducted as a less formal version of a civil trial, others emphasise that an arbitrator must at the outset of proceedings decide whether the arbitration will be conducted on an “adversarial” or “inquisitorial” basis.
35 Rule 41.
36 P Benjamin “Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)” International Labour Office, Industrial and Employment Relations Department Dialogue Working Paper No 47 April 2013 6. See Rule 25(1)(c) of the Rules for the Conduct of Proceedings before the CCMA, GN R1448, GG 25515 of 10 October 2003. Legal representation is not permitted in dismissal arbitrations unless the parties consent to it or the commissioner permits it due to the nature of the questions of law raised by the dispute, its complexity, the public interest and the comparative ability of the opposing parties to deal with the arbitration. See Law Society of the Northern Provinces v Minister of Labour and others 2013 1 All SA 688 (GNP). The High Court ruled that the prohibition of legal representation during CCMA arbitration proceedings was inconsistent with section 33 of the Constitution to the extent that it significantly abridged the discretion of the commissioner in a CCMA arbitration to afford the opportunity for legal representation in a serious but not complex case of dismissal for misconduct or incapacity. A declaration of constitutional invalidity was therefore issued. The
The Tribunal permits persons to have legal representation. Tribunal cases are also heard by a panel comprising of a legally qualified judge and two lay members compared to CCMA commissioners who need not have legal qualifications. That said, neither are protected from judicial oversight when falling into legal error. As mentioned above, both South Africa and England recognise a limited right to challenge unfair dismissal findings made by their respective tribunals to superior courts of record. In South Africa, a litigant on review has to establish the existence of a statutorily defined defect; whereas in England the litigant has to demonstrate an error of law. South Africa and England also apply standards of unreasonableness and perversity respectively that appear to share many common features. The two countries are also confronted with similar challenges when called upon to interpret and apply their review and appeal remedies in the employment law context respectively, especially attempts to review and/or appeal because the CCMA and/or Tribunal made wrong findings and/or arrived at the wrong conclusion. The Tribunal appeal process in England is, finally, an interesting comparator in so far as the Labour Appeal Court has suggested that the policy decision to permit reviews rather than appeals has not succeeded in promoting expedited dispute resolution. The argument is that South African employment law would be better served by a single right of appeal on the record in order to determine whether the commissioner made an incorrect decision on fairness.

Although one may therefore contend that the test for considering Tribunal decisions is less rigorous than that applicable to CCMA arbitration awards, submissions that they are not worthy of any comparison at all, calls to be rejected. At most, these differences will be a consideration to be taken into account when determining the appropriateness of the degree of unreasonableness that is fitting to apply in the South African context.

In the administrative law context, the English law influence is prominent. As part of its colonial heritage, the South African courts developed administrative law principles by relying on the

---

37 Section 6(1) of Employment Tribunals Act 1996.
English constitutional doctrines and ground of review.\(^{39}\) Although the common law grounds of review have subsequently been converted into legislation in terms of the constitutional mandate, the common law flavour of administrative law in South Africa have remained distinctive.\(^{40}\) Section 39(1)(c) and 39(2) of the 1996 Constitution also makes it clear that a court, tribunal or forum may consider foreign law when interpreting the Bill of Rights and must promote the spirit, purport, and objects of the Bill of Rights when interpreting any legislation and when developing the common law or customary law. A comparative study for the purpose of determining the proper role and meaning of unreasonableness is therefore not misplaced. As in South Africa, allegations of unreasonableness may arise in review proceedings in England. Moreover, England recognises a remedy of review for challenging a public authority’s decision with a standard very similar to South Africa’s test of unreasonableness being applied.

It must however be conceded that there are differences between the two countries in so far as England is not a constitutional state and given that it differs from South Africa in terms of political, social values, traditions, the economy as well as demographic factors. In terms thereof, it may therefore be contended that a less intensive measure of scrutiny is applied by the English courts than that prescribed by section 33 of the 1996 Constitution. On the other hand, both countries accept that there is a need for deference to administrative decisions and distinguish unreasonableness review from correctness review on the basis that a mere difference of opinion between decision-makers would not justify a review. In addition thereto, developments in England have led to criticism of *Wednesbury* unreasonableness and the application of a less strict standard of unreasonableness when assessing discretionary determinations. Whilst *Wednesbury* unreasonableness has been denounced by the Constitutional Court, the reformulated unreasonableness standard in *International Trader’s Ferry Ltd* was expressly adopted into South African law in *Bato Star Fishing*. As such, there is comparative value in English administrative law for the purpose of interpreting the meaning of unreasonableness suffusing the section 145 grounds of review.\(^{41}\)

---

\(^{39}\) Hoexter *Administrative Law* 13.

\(^{40}\) *Pharmaceutical Manufacturers Association of SA In Re: Ex Parte Application of President of the RSA* 2000 2 SA 674 (CC) paras 33–45; *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).

\(^{41}\) See section 39 of the 1996 Constitution.
Because South Africa is not unique in the challenges that it faces in respect of its review remedy, nor its grounds of review, this study will consider the jurisprudence that has arisen within England’s jurisdiction, which happened to be confronted with similar issues when interpreting and applying its remedy for challenging defective findings.

Bearing in mind that borrowing from foreign legal systems must be effected with caution, there is no reason why the general administrative law of England cannot be used to modernise South African administrative law. If the South African courts are to be guided by the English comparative jurisprudence, as they are invited to be by section 39(1) of the 1996 Constitution, it is contemplated that the challenges, arguments, patterns of change and development in England may introduce a way of thinking that will add value to any proposed interpretation and application of South Africa’s review remedy.

The differences and similarities make these two countries comparable.

17 LIMITATIONS OF THE STUDY

This study is restricted to the topic of CCMA arbitration award reviews in South Africa compared to the equivalent process conducted in England, both in the narrower employment law context and the wider administrative law context. It does not extend to a study of the role of unreasonableness in private arbitration award reviews in South Africa or the Acas arbitration scheme available as a voluntary alternative to Tribunal hearings in England for the resolution of unfair dismissal disputes. This study also does not include a chapter dedicated to unreasonableness in South African administrative law because: 1) South Africa traces its legal heritage to England as a former colony of the British Empire; 2) South African administrative law in particular is premised on English administrative law; and 3) unreasonableness was

\[\text{Sanderson v Attorney General (Eastern Cape) 1998 (2) SA 38 (CC) para 26.}\]

\[\text{See section 7 of the Employment Rights (Dispute Resolution) Act 1998. The scheme is a confidential, relatively fast, cost efficient, non-legalistic, informal and non-confrontational process. There is no cross-examination of witnesses by a party or representative or swearing of oaths. Entry to the scheme is voluntary and there must be agreement by both parties to the dispute to go to binding arbitration. The employees must have an existing application to the Tribunal pending or must have grounds to lodge an application. Entry to the Scheme is via an arbitration agreement reached with the assistance of an Acas conciliator or in the form of a compromise agreement drawn up by appropriate representatives. In South Africa it is accepted that the grounds of review for private arbitration award reviews is interpreted more strictly because of the voluntary nature of the process.}\]
introduced into South Africa employment law by means of a reliance on the Constitutional Court judgment in *Bato Star Fishing* which directly depended on an English administrative law decision of *International Trader’s Ferry Ltd*. In the English employment law context, reference is only made to the right not to be unfairly dismissed and the procedure to challenge unfair dismissals to explain the context within which a Tribunal finding is made and ultimately sought to be challenged. Where English administrative law judgments are discussed, this is only done for the purpose of extracting judicial review principles and not to conduct a detailed analysis of each and every particular area of law dealt with in the judgment. A brief description of the dispute and/or the legal question raised will therefore be presented concisely, and only to sketch the background to the courts’ findings in relation to the remedy of review. Analysis and observations arising from the research are applicable only within the defined parameters. The thesis addresses case law and material through to 31 August 2013 only. Related developments subsequent to 31 August 2013 are not referred to and/or discussed.

18  **BRIEF OUTLINE OF THE RESEARCH**

With the above as background, the exposition of the proper approach to a review for unreasonableness proceeds as follows: In chapter 2, the general role of judicial review in South African law is conceptualised and distinguished from the appeal process; having regard also to the distinction between jurisdictional and non-jurisdictional errors of law. In particular, consideration is afforded to the common law principles of review from which judicial review in the current constitutional dispensation has evolved. Judicial review in the present constitutional system is also examined and the role, if any, of unreasonableness in relation to both the common law and constitutional dispensation is explored. To the extent that judicial review in South African law was influenced by English law as part of its colonial heritage, foundational aspects of the concept of review in England is explained and distinguished from the English appeal process with reference to their identified differences in scope and content. The different categories of review is also identified and compared to those relevant to appeals. In conjunction herewith, judicial review in the context of the CCMA labour dispute resolution system is discussed, having regard to the LRA as source of the Labour Court’s powers of review, the dictates of section 145 of the LRA and the legislature’s intention when promulgating that section of the legislation.
In so far as both *Wednesbury Corporation* and *International Trader’s Ferry Ltd* were decided within the context of administrative law, the nature and conceptual basis of judicial review in this area of English law is discussed in chapter 3 having regard to both the position at common law and in terms of statute. Ancillary hereto, the special meaning afforded to “lawfulness” and/or “contraventions of the law” are considered, including its scope and/or limitations. The different categories of grounds of review of illegality, procedural impropriety and unreasonableness are also discussed and case law examined in order to distinguish unreasonableness review from the other types of review recognised in English law. In relation hereto, the standard or test of review of correctness and unreasonableness are considered as well as its application to each of the different grounds of review.

In particular, a discussion is undertaken of the meaning, role and/or impact of unreasonableness in the exercise of public discretionary powers and administrative decision-making in the substantive sense. It is considered whether unreasonableness serves as evidence of the presence of a vitiating factor on review or whether it constitutes a standalone ground for the setting aside of an administrative decision. The role, if any, of unreasonableness in the review of the merits of decisions is also explored having regard to the duty not to take account of irrelevant matters, to have regard to relevant considerations, to act in good faith and to not make decisions on the basis of an unfair balance of considerations, inadequate evidence and/or mistakes of fact. The question of different intensities of unreasonableness review in relation to different contextual decisions is also considered and discussed.

In chapter 4, the remedy of appeal from the Tribunal to the Appeal Tribunal and the Court of Appeal is discussed. The jurisdiction and constitution of the Appeal Tribunal and the scope and/or ambit of the permissible ground(s) for appeal is also considered. The difference between questions of law and questions of fact is then discussed. Consideration is afforded to the circumstances in which the Tribunal's failure to give adequate reasons for a decision, a breach by the Tribunal of the rules of natural justice or excessive delay in the Tribunal giving a decision, can amount to an error of law on the Tribunal's part. The circumstances in which the Tribunal's treatment of facts can amount to an error of law and cases where there is no evidence to support findings of fact are also considered. In addition it is considered on what basis the Tribunal's
decision can be appealed on grounds of perversity or on the basis that it reached a decision following an erroneous exercise of discretion. Such a study will be conducted for the purpose of establishing whether meaningful principles can be extracted that will contribute to the interpretation and application of the section 145 review remedy provided for in the LRA.

In Chapter 5, the historical debate related to the relationship between section 158(1)(g) and section 145 of the LRA is examined as well as the interaction between the constitutional right to justifiable administrative action and CCMA arbitration awards. In particular, it is considered how the courts have dealt with the allegation that CCMA arbitration awards should be reviewable in terms of section 158(1)(g) of the LRA, rather than section 145, mainly in those instances where the ground(s) of review identified in the application fall beyond the compass of section 145. Having regard to case law, it is also considered whether the CCMA function of making arbitration awards should be classified as administrative action that entitles the applicant on review to rely on the more extensive grounds for review contained in PAJA to review arbitration awards. Ancillary hereto, the courts’ approach to arbitration award reviews in light of the justifiability principle contained in the 1993 Constitution and the rationality principle enunciated in Pharmaceutical Manufacturers Association of SA and another In Re: Ex Parte Application of the President of the RSA is discussed. These discussions are undertaken for the purpose of better understanding the context within which section 145 operates as well as to extract principles to assist in the interpretation of the findings made in the precedent setting judgment handed down by the Constitutional Court in Sidumo.

In chapter 6, the key findings in Sidumo are set out with an emphasis on the relationship between unreasonableness and judicial review in terms of section 145 of the LRA for the purpose of establishing its implications for subsequent review proceedings. Case law that has sought to interpret and apply the principles established in Sidumo are discussed in order to contextualise the place of unreasonableness in the review of CCMA arbitration awards with a view to better understand its implications for the courts’ review function. More particularly, it is considered whether the courts have interpreted unreasonableness as a test or ground of review and whether unreasonableness, be that as a ground of review or a test on review, is result-based, outcome-
focussed or process-related. The impact of unreasonableness on value judgments, inclusive of findings of guilt, the appropriate sanction and procedural fairness, is also discussed. It is then considered whether a review court is entitled to rely on reasons other than those provided for by the commissioner in his or her award to determine the unreasonableness of his or her decision. Following a discussion of the duty to consider materially relevant factors when making value judgments, the influence of unreasonableness on jurisdictional reviews is also contemplated.

In chapter 7 the legal position in South African and English law is compared and proposals are made in respect of the interpretation and application of the unreasonableness principle for the purpose of assisting in future review proceedings.

Finally, in chapter 8, the legal position and findings that have been considered and made is summarised. Proposals are made in relation to the research questions that have been raised and the thesis is concluded.
CHAPTER 2

THE NATURE AND SCOPE OF REVIEW DISTINGUISHED FROM APPEAL

2.1 INTRODUCTION

Since Carephone (Pty) Ltd v Marcus NO & others,\(^\text{45}\) jurisprudence of the Labour Court and the Labour Appeal Court have been inundated with references to the distinction between appeal and review to delineate the proper scope of review.\(^\text{46}\) The common tread throughout the judgments has been an emphasis on the importance of maintaining the distinction when undertaking reviews in terms of section 145 of the LRA; even though instances may rise where the distinction is easily blurred. The judiciary’s confidence in the distinction between appeal and review maintaining court boundaries on review suggests that the distinction is important and will facilitate in defining the nature and scope of the review power of the Labour Court.\(^\text{47}\)

To determine the proper role of the Labour Court in the review of CCMA arbitration awards and to position a baseline for determining the role of unreasonableness in particular, it is therefore necessary to have an understanding of the role of judicial review in South African law in general and to distinguish it from the appeal process. The proposed point of departure for such a discussion is the common law principles of review from which judicial review in the current dispensation evolved. Thereafter, judicial review in the present constitutional system is examined. The role, if any, of unreasonableness in relation to both dispensations is also explored. To the extent that judicial review in South African law was influenced by English law as part of its colonial heritage, foundational aspects of judicial review in England are also referenced. This will assist in obtaining a general view of the appropriate levels of scrutiny, the intensity of review and/or the margins of deference or appreciation that are applied in South Africa and England respectively.

\(^{45}\) 1998 11 BLLR 1093 (LAC).
\(^{46}\) See International School of SA v Khabele 2002 9 BLLR 859 (LC) para 23-24; Toyota South Africa Motors (Pty) Ltd v Radebe 2000 3 BLLR 243 (LAC) para 33-37; Transnet Ltd v CCMA 2007 JOL 20974 (LC) para 29; JHB to Fresh Produce Market (Pty) Ltd v Hiemstra NO & others 2007 JOL 20596 (LC) para 24-25; Coetzee v Lebea NO 1998 JOL 3657 (LAC) para 10.
The traditional distinction between appeal and review is then discussed in relation to the scope and content thereof as well as the reasons for the distinction. The different categories of review are also identified and compared to those relevant to appeals. In conjunction herewith, it is determined whether the distinction assists in delineating the courts’ review powers or whether there are other means of identifying the nature and extent of the courts’ powers to conduct reviews proceedings in terms of the LRA and unreasonableness review in particular. Lastly, judicial review is discussed within the context of labour dispute resolution in South Africa. This is done having regard to the LRA as the source of the Labour Court’s powers of review and the legislature’s intention in promulgating section 145 of the LRA. Reference is also made to the dictates of section 145 of the LRA and the different grounds of review in particular.

2.2 THE ROLE OF JUDICIAL REVIEW IN THE SOUTH AFRICAN LEGAL SYSTEM

2.2.1 Administrative law and judicial review in context

Judicial review is primarily recognised as a form of legal redress against the ill use of administrative power in South Africa. It is therefore an important aspect of administrative law. Administrative law forms part of public law in so far as it governs the execution and performance of the functions and duties of the public administration. Baxter explains that the concept of administrative law consists of the general principles of law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction. As the description indicates, administrative law is a broader concept than judicial review. Administrative law deals with the legal rules relating to the control of administrative power and concerns judicial and non-judicial safeguards against poor decision-making. Judicial review is essentially concerned with the judicial detection and correction of maladministration.

In English administrative law, the position is similar. Judicial review is recognised as a means of legal control over the exercise of administrative functions. As a branch of English public law, English administrative law encompasses the law relating to the functions of administrative decision-makers, the judicial review of the exercise of those functions, the liability and legal protection of those purporting to exercise those functions and the means whereby extra-judicial redress may be obtainable at the instance of the person aggrieved.\(^{51}\)

Since the abovementioned definition of administrative law in South Africa has been formulated, the underpinnings of South Africa have changed significantly from a constitutional system based on parliamentary sovereignty to one of constitution supremacy.\(^{52}\) However, despite these developments, the common law position pre-democracy is important in so far as it continues to serve as the foundation of the new constitutionalised administrative law of the democratic era and can assist in understanding and giving meaning to the constitutional right to just administrative action. Judicial review as an aspect of administrative law in the pre- and post-democratic era in South Africa will be discussed in more detail below.

2211 Judicial control under the common law dispensation

In the previous dispensation, judicial review was a means of judicial supervision and control over administrative decision-making via the High Courts’ inherent power of judicial review.\(^{53}\) In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,\(^{54}\) Innes CJ described this common law review power as follows:

“Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity, or clear illegality in the performance of this duty, this Court may be asked to review the proceedings complained of and set aside or

---


\(^{53}\) Y Burns & M Wiechers “Administrative law” in *LAWSA* 1 ed (2003) para 71. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) para 23. The Court noted that, prior to the enactment of the 1993 Constitution, the superior courts had jurisdiction to review subordinate legislation and administrative and executive action based on the inherent jurisdiction of the courts.

\(^{54}\) 1903 TS 111 115.
correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court.”

The inherent review jurisdiction enabled the courts to develop administrative law principles. The courts also relied on English administrative law; causing its constitutional doctrines and grounds of review to strongly influence the development of administrative law principles in South Africa. These principles formed the basis upon which the principle of the legality of administrative action in South Africa rested. The reliance on English law was not surprising taking into consideration that the Cape of Good Hope, Natal, Orange River Colony and Transvaal were once British colonies and that England initially created the Union of South Africa; thereby embracing the English Westminster system into the South African constitutional institutions.

Parliamentary sovereignty was one of the English principles relied upon. As the highest legislative body, parliament was able to enact any law and the courts could not test the substance of the laws against standards such as fairness and equality. Inherited from English law, parliamentary sovereignty served as a significant restraint on the review power of the court; causing an inherent degree of judicial deference in the conduct of judicial review. While the principle of administrative legality empowered the court to review the legality of administrative conduct, the principle of parliamentary sovereignty effectively entitled Parliament to determine what would qualify as lawful. Chaskalson P explained this as follows in Pharmaceutical Manufacturers Association:

“The exercise of public power was regulated by the courts through the judicial review of legislative and executive action. This was done by applying constitutional principles of the

---

56 Burns & Wiechers “Administrative Law” in LAWSA 1 para 73.
57 South Africa Act 1909.
59 Burns & Wiechers “Administrative Law” in LAWSA 1 para 71.
common law, including the supremacy of Parliament and the rule of law. The latter had a substantive as well as a procedural content that gave rise to what courts referred to as fundamental rights, but because of the countervailing constitutional principle of the supremacy of Parliament, the fundamental rights could be, and frequently were, eroded or excluded by legislation.”

Another justification for review, also associated with parliamentary sovereignty and English law, the *ultra vires* doctrine, authorised court interference on the basis that the legislature conferred powers on decision-makers subject to statutory boundaries for the exercise of the powers. It was reasoned that it was the function of the court to see to it that the intention of the legislature was carried out and that decision-makers remained within the boundaries of the powers conferred upon them.63 Unfortunately the courts were often inclined to adopt a narrow view of *ultra vires*, similar to that of English law, by equating it with compliance with the requirements of the enabling statute only.64 As a result, other common law requirements, such as the requirement that administrative action must be clear and understandable and not vague and embarrassing, did not serve to invalidate the administrative act.65

In the pre-democratic era, a review application therefore involved a challenge of the validity of administrative acts by relying on one or more of the recognised common law grounds of review. To the extent that it is not apparent from the discussion above, the grounds of review were not encapsulated in any one statutory framework but were developed by the courts having regard to the rule of judicial precedent.

In *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*,66 Corbett CJ explained that the grounds of review were established when proof was presented of the administrator’s failure to apply his or her mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice. According to the Court, such a failure could be proved, amongst others, by evidence that: 1) the decision was arrived at arbitrarily, capriciously, *mala fide*, as a result of

63 Hoexter *Administrative Law* 111. I.e. only exercised powers for an authorised purpose.
65 Burns & Wiechers “Administrative Law” in LAWSA 1 para 95.
66 1988 3 SA 132 (A) 152C-D.
unwarranted adherence to a fixed principle or to further an ulterior or improper purpose; 2) the administrator misconceived the nature of the discretion conferred upon him or her and took into account irrelevant considerations or ignored relevant considerations; or 3) the decision was so grossly unreasonable as to warrant the inference that the administrator had failed to apply his or her mind to the matter in the proper manner.67

In terms of the traditional common law approach, unreasonableness was thus not recognised as an independent ground of review but its presence signalled *mala fides*, ulterior motive or the failure of an administrator to apply his or her mind to the matter concerned.68 As a result, it was not so much the unreasonable effect of the administrative action on the individual that was considered as opposed to the unreasonable disposition of the administrator.69 This approach was influenced by the English decision of *Wednesbury Corporation*.70 In that case it was contended that a condition - introduced in terms of a discretionary, statutory power – was *ultra vires* on the ground that it was unreasonable. The Court stated that it was entitled to interfere if a decision was “so unreasonable that no reasonable authority could ever have come to it”; thereby introducing the requirement of gross unreasonableness.71

Despite the courts’ recognition of grounds of review, as indicated above, the system of parliamentary sovereignty and the courts’ strict interpretation of *ultra vires* and unreasonableness contributed to the general perception that the ambit of review was too narrowly confined. In particular, individual protection was considered inadequate to the extent that Parliament was able to curtail judicial scrutiny by providing for open-ended or wide statutory powers for administrative acts or alternatively ousting the court’s jurisdiction by legislative enactments.72

---

67 See also *Hira and another v Booysen* 1992 (4) SA 69 (A) 93B-C.
68 See J Taitz “But ’Twas a Famous Victory” 1978 *Acta Juridica* 109 111. See also *The Administrator, Transvaal and the Firs Investment (Pty) v Johannesburg City Council* 1971 1 SA 56 (A); *Johannesburg City Council v The Administrator, Transvaal and Mayoffs* 1971 1 SA 87 (A); *National Transport Commission v Chetty’s Motor Transport (Pty) Ltd* 1972 3 SA 726 (A); *Johannesburg Local Road Transportation Board and others v David Morton Transport (Pty) Ltd* 1976 1 SA 887 (A).
69 See *Northwest Township (Pty) Ltd v The Administrator, Transvaal* 1975 4 SA 1 (T).
71 This judgment will be discussed in more detail in chapter 3.
72 See Burns & Wiechers “Administrative Law” in *LAWSA* 1 para 95. See *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A) and *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A).
The advent of the constitutional dispensation altered the nature, ambit and basis of judicial review. This was most notably recognised with the express rejection of parliamentary sovereignty and the inclusion of the rule of law as one of the founding values of the constitutional regime together with that of democratic governance aimed at ensuring accountability, responsiveness and openness. Rights that flow from and are a demonstration of the aforementioned values include provisions that: 1) the state must respect, protect, promote and fulfil the rights in the Bill of Rights; and 2) the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. In addition thereto, courts are expressly empowered to review legislation and conduct inconsistent with the 1996 Constitution in order to control the exercise of public power. Within the substantive provisions of the Bill of Rights, there is a right to administrative action that is lawful, reasonable and procedurally fair; a right to written reasons for administrative decisions; a right of access to information as well as a right of access to court.

Opposed to the common law dispensation, the inherent rationale for judicial review in the constitutional dispensation is therefore no longer in question. The power to judicially review administrative action is found within the values of constitutional supremacy and the doctrine of legality as an aspect of the rule of law; which is given specific form in the fundamental right to just administrative action. Whilst the doctrine of constitutional supremacy recognises that the exercise of legislative authority is subject to the prescripts of the 1996 Constitution, the doctrine of legality dictates that no power can be legitimately exercised if not conferred by law. Arbitrariness in the exercise of public power is considered inconsistent with the doctrine of legality and, to pass constitutional scrutiny, the exercise of public power must be rationally related to the purpose for which the power was given.
Thus, although Parliament is recognised as the highest legislative body in the constitutional supremacy system, it is no longer the highest organ of state which determines the existence of individual rights and the extent to which they may be curtailed.\textsuperscript{78} As the custodians of the fundamental rights entrenched in the 1996 Constitution,\textsuperscript{79} the courts’ role have also extended beyond that recognised under the common law dispensation to include giving content and meaning to the values and principles contained in the 1996 Constitution and to ensuring that the exercise of powers are authorised and comply with established law.

The courts are presently able to intervene in administrative matters mainly as a result of the right to administrative justice entrenched in section 33 of the 1996 Constitution. This section establishes reasonableness as one of the requirements for just administrative action and an independent basis for review.\textsuperscript{80} There is no express indication from the language of the 1996 Constitution that the drafters contemplated \textit{gross} unreasonableness as opposed to unreasonableness only.\textsuperscript{81} Although there is case law support for the continued recognition of so-called \textit{gross} unreasonableness,\textsuperscript{82} judgments like that of \textit{Roman v Williams\ NO}\textsuperscript{83} and \textit{Standard Bank of Bophuthatswana Ltd v Reynolds}\textsuperscript{84} make it clear that gross unreasonableness is no longer required for judicial review. On this basis, the principle of no reasonable evidence may be used as a test for resolving questions of fact.\textsuperscript{85} This section as well as section 6(2) of PAJA will be discussed in more detail at a later stage with reference to the different forms of judicial review.\textsuperscript{86}

A discussion of the continued role, if any, of the common law jurisprudence, including the English law influences, under the constitutional dispensation follows below.

\textsuperscript{78} Burns & Wiechers “Administrative Law” LAWSA 1 para 75.
\textsuperscript{79} Motala \textit{v University of Natal} 1995 3 BCLR 374 (D) 382; Hugo \textit{v President of the RSA} 1996 6 BCLR 876 (D).
\textsuperscript{80} See \textit{Roman v Williams\ NO} 1997 4 All SA 210 (C) 222. The Court recognised that the court in judicial review was no longer confined to the way in which an administrative decision was reached but extended to its substance and merits as well.
\textsuperscript{81} Albeit with reference to the 1993 Constitution, see comment in \textit{Standard Bank of Bophuthatswana Limited v Reynolds} 1995 3 SA 74 (B).
\textsuperscript{82} See Nel \textit{v Suid-Afrikaanse Geneeskundige Raad} 1996 4 SA 1120 (T) 1130G-H;\ Marais \textit{v Interim Nasionale Mediese en Tandheelkundige Raad van Suid-Afrika} 1997 4 ALL SA 260 (O) 265G-H.
\textsuperscript{83} \textit{Roman v Williams\ NO} 1997 4 All SA 210 (C) 222.
\textsuperscript{84} 1995 (3) BCLR 305 (B) 325.
\textsuperscript{85} See \textit{Standard Bank of Bophuthatswana Ltd v Reynolds\ NO} 1995 3 BCLR 305 (B).
\textsuperscript{86} See para 2 4 4 1.
2.2.2 Common law or constitutional review

As indicated above, the courts’ ability to scrutinise and set aside administrative decisions or rules in the pre-democratic era was based on the invocation of its inherent power of judicial review as provided for in terms of the common law.\(^{87}\) Parties dissatisfied with administrative action challenged administrative decisions on the basis of grounds of review recognised at common law, such as that decisions were arrived at arbitrarily, capriciously, \textit{mala fide} or for an ulterior or improper motive or because the decision-maker had not applied his or her mind to the matter or had misconceived the nature of the discretion conferred upon him and taken into account irrelevant considerations or ignored relevant ones.\(^{88}\) With the introduction of the constitutional dispensation, and the constitutional right to just administrative action in particular, the question arose whether the common-law grounds of review had been rendered redundant or whether they could still be relied upon. Initially, this was a matter of controversy. In \textit{Commissioner for Customs and Excise v Container Logistics (Pty) Ltd; Commissioner for Customs and Excise v Rennies Group Ltd t/a Renfreight},\(^{89}\) the Supreme Court of Appeal found that the entrenched right to administrative justice, as contained in section 24 of the 1993 Constitution, could not have been intended to do away with the common law approach to review and that administrative review in its common law guise continued to exist alongside the constitutional regime, enabling the court to set aside the administrative act concerned without reference to section 24. However, in \textit{Pharmaceutical Manufacturers Association},\(^{90}\) the Constitutional Court reached a conclusion opposite to that of the Supreme Court of Appeal. According to Chaskalson P, the common law principles that had previously provided the grounds for judicial review of public power have been subsumed under the 1996 Constitution. The Court reasoned that this development had the effect that common law review and constitutional review were intertwined and did not constitute separate concepts.\(^{91}\)

\(^{87}\) Burns & Beukes \textit{Administrative Law} 280; Hoexter \textit{Administrative Law} 109; see also Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111 115.
\(^{88}\) Burns & Beukes \textit{Administrative Law} 59. See also Northwest Township (Pty) Ltd v The Administrator, Transvaal 1975 4 SA 1 (T); Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 2 All SA 308 (A).
\(^{89}\) 1999 8 BCLR 833 (SCA).
\(^{90}\) 2000 JOL 6158 (CC) para 33 - 45.
\(^{91}\) See \textit{The President of the Republic of South Africa v South African Rugby Football Union} 1999 JOL 5301 (CC) para 135-136. According to the Court, the right to just administrative action is entrenched in the 1996 Constitution in recognition of the importance of the common law governing administrative review, but it is not correct to view
In *Bato Star Fishing*, O’Regan J referred to *Pharmaceutical Manufacturers Association* and confirmed that the *grundnorm* of administrative law was now to be found in the principles of the 1996 Constitution. According to the Constitutional Court, the common law only informed the provisions of PAJA and the 1996 Constitution and derived its force from the latter. The Court reasoned that the continued relevancy of the common law to administrative review would have to be developed on a case-by-case basis as the courts interpreted and applied the provisions of PAJA and the 1996 Constitution. The Court concluded that there was not a system of common law review which existed independently of constitutional judicial review, but a single system of judicial review which gained its force from the 1996 Constitution. Concepts such as “lawful administrative action,” “procedurally fair administrative action” and administrative action “justifiable in relation to the reasons given for it,” therefore have the same meaning under the 1996 Constitution and the common law.

As a consequence of this jurisprudence, the inherent common law review power of the court has been replaced by a constitutional right to review based on section 33 – the right to just administrative action. Effectively, challenges to the validity of administrative action must therefore involve the application of section 33 of the 1996 Constitution as given effect to by PAJA and not the former common law grounds of review. The common law principles retain relevance for the purpose of determining the meaning and scope of section 33 of the 1996 Constitution and supplement the provisions of the 1996 Constitution. As such, courts are not confined to the common law principles for administrative legality as developed by the courts but are entitled to develop and accommodate new principles to meet situations not previously dealt with under the common law. To the extent that it is not incompatible with the 1996 Constitution, the common law jurisprudence, and hence also the English law, remain relevant and still find application as an interpretative and supplementary resource for the purpose of informing the content, ambit and application of administrative law.

---

section 33 as a mere codification of common-law principles. Principles previously established by the common law will be important though not necessarily decisive, in determining the scope and content of section 33.

92 2004 4 SA 490 (CC).

93 Para 22.


95 See *Pharmaceutical Manufacturers Association of SA In Re: Ex Parte Application of President of the RSA* 2000 JOL 6158 (CC) para 49.

96 Burns & Wiechers “Administrative Law” *LAWSA* 1 para 94.
Whilst appeals and reviews are both ways of reconsidering a decision and the reason for seeking the one or the other are usually the same – dissatisfaction with the result - the two processes perform different functions. There are therefore certain generic characteristics attributable to appeals and reviews that, although they do not necessarily apply to all types of reviews and appeals, nevertheless can assist in understanding the courts’ retention of the two concepts’ distinctiveness.

In England, judicial review traditionally enabled the courts, whilst recognising the supremacy of Parliament, to place constraints upon the exercise of public power as part of its common law jurisdiction. Put differently, judicial review was recognised as a remedy of last resort to challenge the legality of decisions as opposed to the merits thereof. In exercising a supervisory jurisdiction, the review court therefore focused on the way the decision was made, rather than made the decision itself. Today, the primary difference between appeal and review - within the context of English administrative law - is explained as follows by Wade and Forsyth:

“The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is ‘right or wrong?’ On review the question is ‘lawful or unlawful?’”

That the same principle applies in South African law is made apparent in the decision of Lekota v

---

97 Hoexter Administrative Law 104.
98 Pharmaceutical Manufacturers Association of SA In Re: Ex Parte Application of President of the RSA 2000 JOL 6158 (CC) para 38.
99 R v Inland Revenue Commissioners, ex parte Preston 1985 AC 835 852.
100 Kemper Reinsurance Company v Minister of Finance 2001 1 AC 1 14-15.
First National Bank of SA Ltd. In that case, the Labour Court explained that it was not the function of the review court in a labour law dispute to decide whether the commissioner acted correctly or whether the decision by the commissioner was wrong. This was confirmed by the Labour Appeal Court in Coetzee v Lebea NO. In this case, the Court recognised that an appeal and review may on occasion be co-extensive, particularly if it was the process of reasoning that was the subject of the review, but held that this should not constitute a basis for blurring the essential differences between the two processes. According to the Court, the constitutional entrenchment of the right to administrative justice did not mandate a destruction of the common law distinction between appeal and review. The Court reasoned that a review was concerned with the manner in which the tribunal came to its conclusion and an appeal with the correctness of the result and different tests accordingly applied: on review the question was whether the outcome could be sustained by the facts found and the law applied with the emphasis being on a range of reasonable outcomes; on appeal, the question was whether another court could have come to a different conclusion.

Appeals are therefore appropriate where it is alleged that the decision-maker came to the wrong conclusion on the facts or the law. As the challenge concerns the merits of the matter, the appellate body is entitled to declare the original decision right or wrong. In contrast, reviews are not concerned with the merits of the decision, but whether the decision was reached in the appropriate manner. Accordingly, instead of asking whether the decision on the facts or the law was correctly found or interpreted, a review court will concern itself with issues such as the impartiality of the decision-maker or the admissibility of evidence that was taken into account; the focus being on procedural propriety. Significantly, a decision may not be set aside on review simply because the court is confident that it would have come to a different conclusion.

103 1998 10 BLLR 1021 (LC).
104 Para 16.
105 1998 JOL 3657 (LAC).
106 Para 10. The Court reasoned that the process of reasoning could not be attacked purely on the basis that a review court may have come to a different result if the matter had been brought on appeal.
107 See Burns & Beukes Administrative Law 279.
108 Hoexter Administrative law 104.
In addition to the principal difference mentioned above, other generic characteristics can be ascribed to the two proceedings respectively.\textsuperscript{110} Firstly, the right of appeal exists only where it is specifically provided for by statute. The scope of the right of appeal is dependent on the statutory provision and may include matters of fact or law or both.\textsuperscript{111} Secondly, appeals generally involve a rehearing of the merits as contained in the evidence and information before the court \textit{a quo}. In this sense, appeal hearings constitute hearings \textit{de novo}. Reviews on the other hand, involve only a limited examination of the merits and the grounds of review are generally restricted to alleged procedural irregularities. Thirdly, unlike an appeal, review proceedings do not necessarily automatically suspend the operation of the decision of an inferior court or tribunal until such time as the review is finalised. Fourthly, the remedies which may be granted by a review court are somewhat dissimilar to those which may be granted by an appellate court. A court tasked with determining an appeal may overturn the original decision and declare its own decision to be the decision of the court or tribunal of first instance.\textsuperscript{112} On review, the courts’ powers are more limited. Whilst a review court may set aside the original decision, it will generally not substitute its own decision for that of the court or tribunal of first instance. Instead, review courts are obliged, unless exceptional circumstances dictate otherwise, to refer the matter back to the court \textit{a quo} for a hearing \textit{de novo}, upon such directions as it deems fit.\textsuperscript{113} Lastly, time frames and \textit{locus standi} to bring the application may differ from the one process to the other.

Despite these theoretical differences detailed above, the terms “appeal” and “review” continue to be somewhat difficult to define. In practice, the focus of judicial review frequently falls on the decision itself as opposed to the decision-making process.\textsuperscript{114} In some matters it is impossible to separate the merits from the rest of the matter, since the court cannot effectively judge the legality

\begin{itemize}
\item \textsuperscript{110} See Fergus (2010) \textit{ILJ} 1558.
\item \textsuperscript{111} L G Baxter “Administrative Institutions and the Administrative Process” (1984) \textit{Annual Survey of SA Law} 32 33; Hoexter \textit{Administrative Law} 64.
\item \textsuperscript{112} See section 209 of the Criminal Procedure Act. The appellate court has the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence.
\item \textsuperscript{113} See for example section 8(1)(c)(ii) of PAJA. The court may substitute its own decision for that of the administrative decision-maker who is vested with a discretion, in exceptional circumstances only. See also \textit{Johannesburg City Council v Administrator, Tvl} 1969 2 SA 72 (T) 76. The court’s mandamus will usually extend only to directing the administrative decision-maker to comply with its duty of deciding the matter properly, but a court will depart from this general rule and substitute its opinion for that of the administrative decision-maker where the end result is a foregone conclusion and it would be a waste of time to order him or her to reconsider the matter.
\item \textsuperscript{114} Hoexter \textit{Administrative Law} 106.
\end{itemize}
of the decision without considering its merits as well. In attempting to clarify the boundaries between the two concepts, the courts have thus sought to categorise the different types of reviews and/or appeals which arise in practice. This will be discussed in more detail below.

2.4 FORMS OF REVIEW

In the South African legal system, various categories of review can be identified. In the authoritative and often quoted decision on the meaning of “review”, Johannesburg Consolidated Investment Co v Johannesburg Town Council, Innes CJ identified three distinct meanings according to the procedure applicable. This ranged from a narrow to a broad sense of review. Firstly, a “review” was found to denote the process by which the proceedings of inferior courts were brought before the court in respect of irregularities or illegalities during the course of the proceedings. At the time Johannesburg Consolidated Investment was decided, litigants were limited to instituting review proceedings by way of summons on the grounds provided for in the Administration of Justice Proclamation. The grounds could be summarised as incompetency of the court in respect of the cause or in respect of the judge; malice or corruption on the part of the judge; gross irregularity in the proceedings; the admission of illegal or incompetent evidence and/or the rejection of legal and competent evidence.

The second type of review identified concerned those instances where a public body failed to perform or wrongly performed a statutory duty, leading to a grievance or injury on the part of a third party. Reviews of this nature were not established by legislative intent but could be brought before a superior court by way of motion on the basis of the courts’ inherent jurisdiction to hear disputes within their territories.

The third species of review arose only where it was statutorily created. Innes CJ suggested that wider powers of supervision and a greater degree of authority could be conferred upon the courts

---

115 Hoexter Administrative Law 106.
116 1903 TS 111.
117 See also Stocks Civil Engineering (Pty) Ltd v Rip NO 2002 3 BLLR 189 (LAC) para 27.
118 114. Hereafter referred to as the review of the proceedings of inferior courts.
119 115.
120 116.
in this category than those enjoyed under either the first or second type of review; interpreting “review” to mean “examine” or “take into consideration”. Innis CJ reasoned that if a court was not restricted from examining or considering a matter already dealt with by an inferior court, it could enter upon and decide a matter de novo. When used in this sense, and to the extent to which the expressed intentions of the legislature supported such a conclusion, the Court concluded that the powers of a review court could extend to those generally attributed to appellate courts.\textsuperscript{121}

Hoexter subsequently paraphrased the three types of review identified in \textit{Johannesburg Consolidated Investment} as incorporating the review of the proceedings of inferior courts, the common law review of decisions of administrative authorities and a wider form of statutory review.\textsuperscript{122} Hoexter also opined that, although the abovementioned three types of review continued to play a role in post-constitutional South Africa, it only did so in a qualified form. Developments, in the form of the passing of new legislation and the promulgation of the 1996 Constitution, have had significant impact on the continued relevance of the reviews identified in \textit{Johannesburg Consolidated Investment} and the initial forms of review have been expanded to also incorporate automatic review and judicial review in the constitutional and administrative law sense.\textsuperscript{123} The types of review are briefly referred to herein in order to identify under which type the review of CCMA arbitration awards are to be classified.

\subsection*{2 4 1 Review of the proceedings of inferior courts}

Review of the proceedings of inferior courts resembles the first type of review identified in \textit{Johannesburg Consolidated Investment}, subject to the qualification that its grounds are currently prescribed by the Supreme Court Act 59 of 1959. Section 24(1) of the relevant Act enables the High Court, as a court of higher instance, to review the proceedings of the court \textit{a quo}, such as the Magistrates’ Court and Small Claims Court, on the following grounds:

- Absence of jurisdiction on the part of the court;
- Interest in the cause, bias, malice or corruption on the part of the presiding judicial officer,

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{121}]
\item\textsuperscript{117.}
\item Hoexter \textit{Administrative Law} 108.
\item Hoexter \textit{Administrative Law} 108.
\end{enumerate}
\end{footnotesize}
• Gross irregularity in the proceedings; and / or
• The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

2.4.2 Automatic review

Automatic review occurs only in specialised instances and in accordance with the tenets of a statute.124 This form of review obliges a superior court to automatically review the decision of a stipulated judicial officer. The process is accordingly initiated by a superior court rather than by a party aggrieved by an inferior court decision. Section 302 of the Criminal Procedure Act 51 of 1977 is an example of an automatic review. In terms of section 302, certain sentences of the Magistrates’ Courts must be reviewed by the provincial or local division of the High Courts “in the ordinary course of events”, without it being necessary for the accused to request it.

2.4.3 Judicial review in the constitutional sense

In terms of section 172(1)(a) of the 1996 Constitution, the courts are empowered to scrutinise law and conduct to establish whether it is consistent with its provisions and to declare it invalid to the extent of the inconsistency. As a result of the recognition of the right to just administrative action in section 33 of the 1996 Constitution, reviews within the administrative law sphere are largely regarded as a species of constitutional review.125

2.4.4 Judicial review in the administrative law sense

Judicial review in the administrative law sense is reminiscent of the second species of review identified in Johannesburg Consolidated Investment. As indicated above, in the pre-democratic era this was an inherent power of the court governed by the common law and there was no statutory basis or defined ambit. Under the present-day constitutional era, judicial review of this

125 See para 2.3.4.2 below.
nature however arises indirectly from section 33 of the 1996 Constitution and, as will be explained below, directly from the provisions of PAJA.

2 4 4 1 *Review in terms of PAJA*

Section 33(3)(a) of the 1996 Constitution specifically provides that national legislation must be enacted to give effect to the right to just administrative action and that it must provide for the review of administrative action by a court or independent and impartial tribunal. From the preamble of PAJA it can be deduced that PAJA is envisaged to be the “national legislation” referred to in section 33(3) of the 1996 Constitution and accordingly the primary or default pathway to the review of administrative action. That challenges to the validity of administrative action must be based on the statutory grounds of judicial review laid down in section 6(2) of PAJA, and not directly on section 33(1) of the 1996 Constitution, was confirmed by the Constitutional Court in *Bato Star Fishing*:  

“The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution.”

So construed, the constitutional right to just administrative action will mostly play an indirect role in judicial review, whilst direct constitutional review will be limited to instances not covered by PAJA or when PAJA, as ordinary legislation, is challenged on the basis that it limits the rights in section 33(1) unjustifiably.  

In setting out the grounds upon which administrative action may be reviewed, PAJA seeks to ensure that everyone has the right to challenge administrative action that is not lawful, reasonable or procedurally fair. In this endeavour, PAJA does not capture a closed list of grounds, but allows review courts, in the absence of one of the specified grounds of review, to review administrative

---

126 See also *PSA obo Haschke v MEC for Agriculture & others* 2004 8 BLLR 822 (LC) para 9.  
127 Para 25.  
128 This is an important consideration when discussing the review of arbitration awards in terms of the LRA and when establishing the role of unreasonableness in section 145 of the LRA.
action if it is otherwise unconstitutional or unlawful.\textsuperscript{129} The list of grounds does, however, include administrative action that is materially influenced by an error of law; indicating that a distinction is no longer to be drawn between jurisdictional and non-jurisdictional errors of law.\textsuperscript{130}

To avoid a usurpation of the powers of the administration, review courts are in principle not allowed to pronounce on the merits of administrative decisions.\textsuperscript{131} Whilst the issue of deference is not particularly troublesome within the context of lawful and procedurally fair administrative action, an examination as to the reasonableness of an administrative decision does contain a merits-based substantive element. This challenges the ambit of judicial review as distinguished from appeal. Although PAJA expressly recognises unreasonableness as a ground of review, it does not give clear guidance as to the appropriate level of engagement with the merits of administrative decisions or how the ground is to be applied in review proceedings.\textsuperscript{132} Section 6(2)(h) of PAJA dictates that a decision will be reviewable if it is so unreasonable that no reasonable person could have come to the same decision. The formulation of unreasonableness suggests a very stringent standard of unreasonableness review in terms of which very few decisions would be identified as unreasonable. On the other hand, a simpler standard of unreasonableness might apply which requires decisions that are justifiable, defensible or capable of reasonable explanation only.\textsuperscript{133} As a further alternative, unreasonableness might extend to review courts the power of preferring their own substantive conclusions to those of administrative decision-makers.\textsuperscript{134} This will be discussed in more detail in chapter 5.

\textbf{2 4 5 Special statutory review}

Special statutory review refers to the entitlement of the courts to review the decisions of inferior courts because of an express empowerment in terms of legislation. According to Hoexter, the special statutory power of review is to be distinguished from the “ordinary” judicial review as

\textsuperscript{129} Section 6(2)(i) of PAJA.
\textsuperscript{130} Section 6(2)(d) of PAJA.
\textsuperscript{131} R Stacey “Democratising review: Justifiability as the animating vision of administrative law” (2007) 22(1) \textit{SA Public Law} 79 80; See \textit{Bato Star Fishing} para 45.
\textsuperscript{132} Stacey (2007) \textit{SA Public Law} 80.
\textsuperscript{133} \textit{Carephone (Pty) Ltd v Marcus NO} 1998 11 BLLR 1093 (LAC); \textit{Roman v William NO} 1997 4 All SA 210 (C).
\textsuperscript{134} Stacey (2007) \textit{SA Public Law} 80.
governed by PAJA.135 Whereas the latter Act specifies its own grounds of review, the power to review and the extent thereof in terms of a special statutory review may be wider or narrower than PAJA and the procedure to be adopted and the remedies available may also be different.136 This depends on the dictates of the statute in question as well as the intention of the legislature.

Within the labour law context, the legislature, in an attempt to give effect to the constitutional obligations contained in section 27 of the 1993 Constitution,137 adopted section 145 of the LRA. Section 145 has been held to afford a special statutory power of review to the Labour Court to review compulsory arbitration awards. This classification has however subsequently become qualified in so far as the review grounds specified by the legislature within this statutory regime has been found to be suffused with the content of the rights to administrative justice provided for in section 33 of the 1996 Constitution.138 Section 145 of the LRA will be discussed in more detail later in this chapter. A discussion of the different forms of appeal follows below.

2.5 FORMS OF APPEAL

The concept of “appeal” also has different connotations that depend on the powers conferred in terms of statute.139 In the leading case of Tikly & others v Johannes NO,140 Trollip J identified an appeal as falling into one of three possible categories: an appeal “in the wide sense”; an appeal “in the ordinary strict sense” and a review.141 According to the Labour Appeal Court, an appeal in the wide sense involved a complete rehearing and redetermination on the merits of the case with or without additional evidence or information.142 On the other hand, an appeal in the ordinary strict sense required the appellate body to rehear the merits of the matter and determine whether the decision was right or wrong having regard only to the record of the body a quo. Interestingly, the Court included a review in its categorisation of the different categories of appeal. According

---

137 Section 23 of the 1996 Constitution.
138 C Hoexter Constitutional Court Review 215. See chapter 5 and 6.
139 See Fergus (2010) ILJ 1564. See also Tikly v Johannes NO 1963 (2) SA 588 (T); the scope of the appeal must, in each instance, be determined from the terms of the statute in question.
140 1963 (2) SA 588 (LAC) 590.
141 590F-591A.
142 I.e. the appellate body is not confined to the record of the body a quo.
to the Court, a review amounted to a limited rehearing with or without additional evidence or information to determine, not whether the decision in question was correct or not, but whether the decision-maker had exercised their powers and discretion honestly and properly.

In *Chevron Engineering (Pty) Ltd v Nkambule*,\(^{143}\) the Labour Appeal Court referred with approval to the categories of appeal recognised in *Tikly* to determine the nature and extent of the powers to hear appeals. This arose against the backdrop of a six month retrospective reinstatement ordered by the erstwhile Industrial Court as a result of the commission of an unfair labour practice by the employer in terms of the LRA. Having examined the applicable rules for appeals from the Industrial Court to the Labour Appeal Court, Nicholson JA noted that appellants were obliged to file notices of appeal, records of proceedings and heads of argument as well as clearly stipulate the grounds upon which the appeal was based. To the extent that the Court was further only afforded a limited right to hear appeals proceedings as a court of first instance, Nicholson JA concluded that the Court was limited to the evidence before the Court *a quo* and the law which applied to the Court *a quo* to determine whether the decision was correct.\(^{144}\)

Having regard to the categories of appeal and review that have been formulated by the courts, it is submitted that the terms do not always appear clearly distinguishable. This is no better illustrated than by Fergus’ contention that the Labour Appeal Court’s description of appeals “in the wide sense” echoes the description of the third species of review furnished in *Johannesburg Consolidated Investment*. Both concepts confer almost unlimited powers on the review - or appellate court, entitling it to scrutinise the merits of the matter in question on the basis of both the record of the tribunal - or inferior court proceedings as well as with reference to any new evidence which might be advanced.\(^{145}\) According to Fergus, the overlap as well as Nicholson JA’s categorisation of the concept of review within the three types of appeal, suggest that the terms “appeal” and “review” cannot on its own ascertain the nature and extent of the courts’ powers of review or appeal.\(^{146}\) It is accordingly not sufficient to label the Labour Court’s power to scrutinise arbitration awards as a species of special statutory review. To ascertain the nature

---

\(^{143}\) 2001 JOL 7890 (LAC) para 16.
\(^{144}\) Para 20.
\(^{145}\) Fergus (2010) *ILJ* 1566.
\(^{146}\) Fergus (2010) *ILJ* 1566.
and extent of the review powers, reference should also be made to the context within which the decision under review has been made and the review powers have been granted to the Labour Court as well as the nature of the rights affected by the decision forming the subject-matter of the review. The so-called contextual considerations may include the source of the Labour Court’s powers to conduct the review; the provisions of the deriving legislation; the legislature’s intention when promulgating the legislation as well as relevant constitutional considerations. This will be discussed in more detail below, having regard also to the reasons for the distinction between appeal and review within the context of labour dispute resolution specifically.

2.6 SPECIAL STATUTORY REVIEW IN THE CONTEXT OF THE LRA

In formulating the supervisory relationship between the Labour Court and the CCMA, the legislature chose to adopt a procedure already utilised in the Arbitration Act 42 of 1965 (“Arbitration Act”). The result was section 145 of the LRA. This section provides that CCMA awards, generally considered final and binding,\(^{147}\) can only be reviewed by the Labour Court on the basis of an alleged *defect* therewith. In defining this term, the legislature was also guided by the grounds of review recognised by the Arbitration Act in section 33(1).\(^{148}\) Consequently the review provisions of the LRA coincide with those in the Arbitration Act. According to section 145(2) of the LRA, a defect means:

“(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner’s powers; or

(b) that an award has been improperly obtained.”

\(^{147}\) Section 143(1) of the LRA.

\(^{148}\) Section 33(1) of the Arbitration Act provides that where (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or (c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.
The LRA, apart from listing the grounds of review, does not set out the test that the Labour Court must use in the review process. A study of case law however reveals that the Labour Court has been guided in its interpretation of section 145 of the LRA by the interpretations placed on the mirroring provisions of section 33 of the Arbitration Act. This is important because the latter section has been strictly interpreted by the judiciary to be limited to only the most flagrant miscarriages of justice.\textsuperscript{149} It may well be argued that, by replicating section 33 in section 145, the legislature intended the Labour Court to adopt the same strict approach when it came to reviewing CCMA arbitration awards. On the other hand, in \textit{Amalgamated Clothing & Textile Workers Union of SA v Veldspun},\textsuperscript{150} the Labour Court confirmed that the courts exercised greater judicial restraint in reviewing private arbitration decisions because the parties involved have agreed to the process for the benefit of among others speed and finality. It is generally accepted that the same principle may not necessarily apply to CCMA arbitrations because its processes are not characterised as being consensual by nature.\textsuperscript{151} Section 145(2) of the LRA is also considered to contain "wider" grounds of review than those provided for in section 33(1) of the Arbitration Act in so far as unreasonableness is inapplicable to private arbitration awards, but has been found to subsume the section 145(2) grounds of review.\textsuperscript{152} This question will be explored in more detail below with reference to the different statutory grounds of review recognised by the LRA.

2.6.1 Section 145 grounds of review

2.6.1.1 Misconduct in relation to the duties of an arbitrator

There have been relatively few judgments in which commissioners have been found to have


\textsuperscript{150} 1994 1 ALL SA 453 (A) 455.

\textsuperscript{151} \textit{See Sidumo & another v Rustenburg Platinum Mines Ltd & others} 2007 12 BLLR 1097 (CC) para 88; \textit{Pather v Kotecha & others} 2006 JOL 17164 (T); \textit{Shoprite Checkers (Pty) Ltd v Ramdaw NO and others} 2000 JOL 6430 (LC) para 64-67 and \textit{Reunert Industries (Pty) Ltd v Naicker & others} 1997 12 BLLR 1632 (LC).

\textsuperscript{152} \textit{See Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews & Another} 2009 (6) BCLR 527 (CC) and \textit{Telcordia Technologies Inc v Telkom SA Ltd} 2007 (2) ALL SA 243 (SCA). In the employment context, see \textit{Volkswagen SA (Pty) Ltd v Koorts NO & Others} 2011 6 BLLR 561 (LAC) and \textit{NUM obo 35 employees v Grogan NO & another} 2010 8 BLLR 799 (LAC).
committed misconduct. One such case is *Stocks Civil Engineering (Pty) Ltd v Rip NO & another*. In dealing with the meaning of “misconduct” in the context of a private arbitration award review, Van Dijkhorst AJA reasoned that it was implied in a commissioner’s appointment that he or she: 1) was fully cognisant of the extent and/or limit to any discretion or powers he or she may have; 2) will act honestly; 3) duly consider all the evidence before him or her; and 4) have due regard to the applicable legal principles. According to the Labour Appeal Court, a failure to comply with the foregoing principles in relation to a commissioner’s duties constituted a material malfunctioning which would render the award reviewable on the ground of misconduct whereas a wrong result by itself would not. 

In *Group Six Security Services (Pty) Ltd & Andrew Masters v R Moletsane, CCMA & Dean Weller*, Waglay JA also found that an arbitration award was reviewable on account of misconduct on the part of the commissioner due to a failure on the part of the commissioner to apply his mind to material aspects of the evidence properly before him and the issues of law.

An approach similar to that of the Labour Appeal Court and Labour Court in *Stocks Civil Engineering* and *Group Six* respectively was adopted in *Carter v CCMA*. The Labour Court was called upon to determine whether a commissioner had committed misconduct in failing to consider whether there was a conceivable non-racist meaning which could have been attributed to the applicant’s utterances of “lily white” and “monkey around”. In accepting that the commissioner had failed to apply her mind properly to the foregoing consideration, Lagrange AJ reasoned that this had prevented the commissioner from making a balanced evaluation of the applicant’s prospects of success in arbitration proceedings should condonation be granted. According to the Labour Court, the failure was of such a nature that the applicant was denied a fair hearing which constituted misconduct in the performance of her duties as a commissioner.

---

153 2002 3 BLLR 189 (LAC).
154 Para 52.
155 Unreported Labour Appeal Court judgment JA77/05 (26 February 2009).
156 Para 52.
157 *Carter v CCMA & others* 2010 31 ILJ 2876 (LC).
158 Para 37-38. There is a potential overlap between “misconduct” and “gross irregularity” as grounds of review in so far as a commissioner’s failure to apply his or her mind to material facts may constitute both misconduct and a gross irregularity.
That the terms of a commissioner’s award may also evidence “misconduct” on the part of the commissioner is evident from the decision in Lithotech Manufacturing v Cape, A division of Bidpaper Plus (Pty) Ltd v Statutory Council Printing, Newspaper & Packaging Industries. In that case, Basson J referenced Stocks Civil Engineering and reasoned that an award may be reviewable on the ground of misconduct where the reasoning adopted by a commissioner was so flawed that it could not be concluded that he properly acquitted himself as an arbitrator by taking due consideration of matters that were vital to the dispute. Similarly, in the matter of Mohlakoana v Commissioner, CCMA, Lagrange AJ found that the commissioner’s failure to provide reasons for only awarding the employee two months’ remuneration as compensation for a substantively and procedurally unfair dismissal amounted to misconduct in the performance of the commissioner’s duties. According to the Labour Court the reasons for an award needed to demonstrate that the commissioner exercised a proper judicial discretion in arriving at the order made and an obvious rationale in the findings for the relief granted.

2 6 1 2 Gross irregularity in the conduct of the arbitration proceedings

The courts have held in a number of decided cases that a gross irregularity concerns the conduct of the proceedings rather than the result thereof. In terms of this general principle, review proceedings therefore do not look at the ultimate outcome of the arbitration, but at the conduct of the commissioner who was presiding over the arbitration. Moreover, not every irregularity in the proceedings will constitute a ground for review: the irregularity must be material and of such a serious nature that it resulted in the aggrieved party not having his or her case fully and fairly determined. In general, examples include a commissioner: 1) not complying with the rules of

159 2010 6 BLLR 652 (LC) para 18.
160 2002 3 BLLR 189 (LAC).
161 2010 10 BLLR 1061 (LC) at para 17.
162 See Ellis v Morgan; Ellis v Desai 1909 TS 576 581; Goldfields Investment Limited v City Council Johannesburg 1938 TPD 551; R v Zuckey 1945 AD 505 509; Ventersdorp Town Council v President Industrial Court and Others 1992 13 ILJ 1465 (LAC) 1476 and Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae) 2013 11 BLLR 1074 (SCA).
163 See Woolworths (Pty) Ltd v CCMA 2010 5 BLLR 577 (LC) para 22.
164 Goldfields Investment Limited v City Council Johannesburg 560. See also Bester v Easigas (Pty) Ltd and another 1993 (1) SA 30 (C) where Brand AJ reviewed the authorities in relation to the meaning of the provisions of section 33(1)(b) of the Arbitration Act, which provides for the setting aside of an award where an arbitration tribunal “has committed any gross irregularity in the conduct of the arbitration proceedings”; Smith v CCMA 2004 6 BLLR 585 (LC) para 7.
natural justice; 2) failing to enquire into an issue before the commission; 3) misconstruing the nature of the dispute; 4) undertaking the wrong enquiry in relation to an issue; 5) failing to consider the credibility and reliability of witnesses or the inherent probabilities of the parties’ competing versions and/or 6) ignoring or improperly rejecting materially relevant evidence.165

The courts recognise two types of gross irregularities: patent irregularities which take place openly as part of the conduct of the trial166 and latent irregularities, which are not strictly speaking errors of a procedural nature,167 but which take place inside the mind of the commissioner and are only ascertainable from the reasons provided.168 The latter is evident where a commissioner for example determines an arbitration by taking into account a materially irrelevant factor, failing to take into account a material factor169 or failing to apply his or her mind to the issue before him or her.170 In none of these cases need there be intentional arbitrariness of conduct or any conscious denial of justice. The crucial question is whether the irregularity prevented a fair trial of the issues.171

The qualification to the general principle referred to above was demonstrated in Fipaza v Eskom Holdings Ltd.172 The Labour Court found that the commissioner had committed an error of law in finding that the employee had been under a contractual obligation to disclose that she had previously been dismissed by the company in the context of applying for a new job with it. As

165 See A Myburgh “Reviewing the Review Test: Recent Judgments and Developments” 2011 ILJ 1497. See also Reunert Industries (Pty) Ltd v Naicker 1997 ILJ 1393 (LC) and Ellerine Holdings Ltd v CCMA & others 2008 JOL 22087 (LAC).
166 Examples include bias; interference and a refusal to allow cross-examination or argument. See Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others 2002 6 BLLR 493 (LAC) para 59.
167 Mutual & Federal Insurance Co Ltd v CCMA & others 1997 12 BLLR 1610 (LC). The question is whether the commissioner’s award reveals errors of law or fact which are of such a nature that it warrants the inference that the commissioner has not applied his or her mind to the matter in accordance with the behest of the statute.
168 Goldfields Investment Ltd v City Council of Johannesburg 1938 TPD 551 560; Sidumo para 264. Examples include: failing to consider material facts or to properly resolve factual disputes; failing to enquire into an issue before the commission; misconstruing the nature of the dispute or undertaking the wrong enquiry in relation to an issue or errors of law. See also Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others 2002 6 BLLR 493 (LAC) para 59 where the Court, with reference to Toyota SA Motors (Pty) Ltd v Radebe & others 2000 21 ILJ 340 (LAC), described a latent irregularity as occurring where the reasoning is so flawed that one must conclude that there has not been a fair trial of the issues.
169 Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae) 2013 11 BLLR 1074 (SCA) para 16.
170 Abdull & another v Cloete NO & others 1998 3 BLLR 264 (LC). Commissioners are obliged to resolve apparent contradictions which are essential to their decision and reasons and to make findings thereon. The findings must be briefly reasoned.
171 Para 53.
172 2010 31 ILJ 2903 (LC).
regards the question when an error of law would warrant the setting aside of an award on review, Lagrange AJ held that it was well established that an arbitrator’s decision may be set aside where a mistake of law was such that it resulted in the arbitrator misconceiving the nature of the enquiry and addressing the wrong issue; provided that the arbitrator’s decision will stand if the result would have been the same had the arbitrator adopted the correct approach.\textsuperscript{173}

Applying this test in the context of the matter, the Labour Court held that, had the commissioner applied the correct legal test for determining the obligation to disclose, the outcome would necessarily have been different. In the result, the court held that the commissioner’s failure to apply the correct legal test led him to deny the employee a fair hearing in respect of the determination of the substantive fairness of her dismissal, which amounted to a reviewable irregularity.\textsuperscript{174} Although Lagrange AJ did not state as much, it is apparent from the authorities on which he relied upon that he considered the error of law in question to have given rise to a gross irregularity.\textsuperscript{175} The decision was upheld on appeal.\textsuperscript{176}

\textbf{2 6 1 3 The commissioner exceeded his or her powers}

This ground of review refers to the powers conferred by the LRA and includes the exercise of such discretionary powers as the law allows.\textsuperscript{177} In Reunert Industries t/a Reutech Defence Industries v Naicker,\textsuperscript{178} the Labour Court confirmed that a commissioner will exceed the powers of a commissioner if he or she strayed from the ambit of the commissioner’s jurisdiction or where he or she made a ruling or an award which went beyond the powers of the commissioner.\textsuperscript{179} A commissioner will, however, not exceed the commissioner’s jurisdiction or powers merely by

\textsuperscript{173} Para 56.
\textsuperscript{174} Para 58-59.
\textsuperscript{175} The Court relied (in fn 10) on the decision in Local Road Transportation Board & another v Durban City Council & another 1965 (1) SA 586 (A) at 597H-598C: “A mistake of law per se is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide, does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined.”
\textsuperscript{176} Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others 1997 12 BLLR 1632 (LC).
\textsuperscript{177} Eskom Holdings Ltd v Fipaza and others 2013 4 BLLR 327 (LAC). The Court found that the failure or omission to disclose the information in question did not, in the circumstances, amount to a misrepresentation and the commissioner’s contrary finding was based on a material mistake of law and constituted a gross irregularity.
\textsuperscript{179} 1997 8(6) SALLR 91 (LC).
choosing one remedy above another in a situation where a choice of remedies is given.\textsuperscript{180} Examples include purporting to determine a dispute in the absence of jurisdiction to do so\textsuperscript{181} and committing a material error of law, including misconstruing the appropriate statute and/or failing to follow the legal principles laid down in authoritative case law.\textsuperscript{182} There may be some overlap between this ground of review and the one of gross irregularity to the extent that a commissioner may have exceeded his or her jurisdiction due to misconceiving the nature of the process that should be followed or misunderstanding the legal principles applicable to the case.

2 6 1 4 \textit{The award was improperly obtained}

As in the Arbitration Act, this ground of review refers to impropriety by a \textit{party} to the arbitration as opposed to “misconduct” or “gross irregularity” on the part of the commissioner. Nevertheless, it also relates to the \textit{manner} in which the commissioner functioned. This was confirmed by the Labour Court in \textit{Stocks Civil Engineering v RIP NO}.\textsuperscript{183} In that case, the Labour Court ruled that, where false evidence was adduced or a bribe was taken, the award was reviewable because it detrimentally affected the arbitrator’s judicial functioning.\textsuperscript{184} This ground of review may nevertheless overlap with the misconduct ground of review in instances where a party is alleged to have bribed a commissioner.

2 6 2 \textbf{The role of the merits in statutory arbitration award reviews}

Earlier in this chapter it was established that it is not characteristic of review proceedings that the merits of the matter be entertained, but that review courts are focussed on determining whether the manner in which the decision was reached was appropriate. Having regard to case law and the writings of legal authors, however, this statement cannot be accepted without some further qualification. According to Cheadle, Davis and Haysom, judges are often influenced by the

\begin{flushleft} \textsuperscript{180} See \textit{National Entitlement Workers Union v John NO \& another 1997 12 BLLR 1623 (LC). Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker \& others 1997 12 BLLR 1632 (LC).} \textsuperscript{181} See for example, \textit{Chabeli v CCMA \& others 2010 4 BLLR 389 (LC) para 8-9; Transnet Ltd v CCMA 2001 6 BLLR 684 (LC).} \textsuperscript{182} \textit{Superstar Herbs v Director CCMA 1999 1 BLLR 58 (LC).} \textsuperscript{183} \textit{2002 3 BLLR 189 (LAC).} \textsuperscript{184} Para 51. \end{flushleft}
merits of a matter when deciding whether or not to exercise their power to review.\textsuperscript{185} Similarly, in \textit{Sidumo}, Cameron JA explained that the line between appeal and review was notoriously difficult to draw partly because process-related scrutiny could not blind itself to the substantive merits of the outcome.\textsuperscript{186} The traditional merits/process distinction between appeal and review respectively may therefore not necessarily be sufficient to portray the courts’ roles in the different proceedings.

Considering this critique with reference to review judgments delivered by the Labour Court, it is apparent that the distinction in the field of labour law is also not as clear. In particular, litigants often argue that an award is reviewable in so far as the commissioner’s finding was not rationally connected to the evidence or information before him or her or that the commissioner failed to apply his or her mind and consider the material evidence presented. \textit{Stocks Civil Engineering} is but one example wherein the Labour Appeal Court has held, within the context of a private arbitration, that in certain respects errors of law and fact are reviewable.\textsuperscript{187} Recognised reviewable errors of law include the arbitrator asking the wrong question, applying the wrong test, basing his or her decision on matters not prescribed for making the decision and failing to apply his or her mind to the relevant issues in accordance with the behest of the statute applicable.\textsuperscript{188} In \textit{Masstores (Pty) Ltd t/a Builders Warehouse v CCMA},\textsuperscript{189} the Labour Court also found that an arbitrator’s award, stating that the applicant employee had opposed a postponement application, while there never was such an opposition, constituted an error of fact, rendering the award reviewable as a procedural irregularity.\textsuperscript{190} Similarly, in \textit{Health & Hygiene (Pty) Ltd v YAWA NO},\textsuperscript{191} the Labour Court declined to review and set aside an arbitration award on the basis of an error of fact, not on the basis that an error of fact did not constitute a ground of review, but because there was, in the court’s opinion, no fact that the arbitrator overlooked or matter that, had the arbitrator known about it, would have caused him to act differently.\textsuperscript{192}

\textsuperscript{185} Cheadle, Davis & Haysom \textit{South African Constitutional Law} 27-16.
\textsuperscript{186} Para 31.
\textsuperscript{187} Para 37.
\textsuperscript{188} \textit{Hira and another v Booysen and another} 1992 4 SA 69 (A); see also \textit{Gray Security Services (WC) Pty Ltd v Cloete NO} 2000 JOL 5974 (LC).
\textsuperscript{189} 2006 6 BLLR 577 (LC).
\textsuperscript{190} Para 43.
\textsuperscript{191} 2000 JOL 7042 (LC).
\textsuperscript{192} Para 28.
At first glance, it appears as if the abovementioned cases have extended the remedy of review beyond its initially perceived procedural boundaries to include some measure of merit scrutiny. Hoexter acknowledges, within the context of administrative law review, that a scrutiny of the merits does threaten the distinction between appeal and review. Hoexter however also contends that, other than cases decided on the narrowest or most technical of grounds, it is quite impossible to judge whether a decision is within the limits of reason or defensible without looking closely at matters such as the information before the administrator, the weight given to various factors and the purpose sought to be achieved by the decision. Thus while absence of authority to take a decision would not ordinarily require a court to look at the merits, nor a breach of a clear legal obligation or the failure to observe a formal mandatory formality, it is difficult to determine whether sufficient weight was given to a relevant consideration or whether an ulterior motive was pursued by the decision-maker without also entering into the merits of the decision. A scrutiny of the merits does however not necessarily require the review court to assess the correctness of the decision itself and substitute it with the review court’s own views.

A study of case law reveals that the courts have also accepted that a scrutiny of the merits is unavoidable. In the context of a justifiability review, the Labour Appeal Court in Carephone accepted that value judgments almost inevitably involved a consideration of the merits of the matter in some way or another. According to the Court, the distinguishing factor was the reason for considering the merits: it was only permissible on review to determine whether the outcome was rationally justifiable and not to determine the correctness thereof. Similarly, in Stocks Civil Engineering supra Van Dijkhorst AJA confirmed that an error of law or fact rendered an award reviewable only if it could be attributed to one of the statutory grounds for review as opposed to a mere incorrect reasoning leading to an incorrect result. That this consideration of the merits does not abolish the distinction between review and appeal was

193 See chapter 1.
194 Hoexter Administrative Law 317.
197 Para 36.
198 Para 52.
confirmed in the matter of *Telcordia Technologies Inc v Telkom SA*. In that case, Harms JA explained that it was not an error of law *per se* which rendered an award reviewable:

> “Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telcordia posed the example where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. *Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law.* Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith.”

The same was confirmed by the Constitutional Court in *Sidumo*. In that case, the Court per Ngcobo J accepted that there was a fine line between a review and an appeal, in particular, where the review court considered the reasons given by a tribunal, not to determine whether the result was correct, but to determine whether a gross irregularity occurred in the proceedings. According to the Court there was however a line that needed to be maintained to secure a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissals.

It is submitted that the above cases clearly demonstrate that errors of fact or law are not *per se* grounds for taking an award on review. It is only when such an error of fact or law can be attributed to one or more of the statutory recognised grounds for review that an award would be reviewable. It would then however not be the error of fact or law that renders the award reviewable, but the procedural irregularity, misconduct or impropriety; with the error of fact or law merely serving as evidence of the former. Whether errors of fact or law may serve as evidence of an unreasonable decision will also be considered in the chapters that follow.

### 2.7 CONCLUSION

In this chapter it has been established that judicial review primarily existed as a form of legal redress against maladministration in terms of common law administrative law; that present day administrative law review is indirectly grounded in the 1996 Constitution and that the pre-

---

199 2007 2 All SA 243 (SCA).
200 Para 69; own emphasis added.
201 Para 244.
democratic common law, including the English law influences, continue to be relevant and applicable to this field of law as an interpretative and supplementary resource for the purpose of informing content, ambit and application.

In has further been established that the distinction between appeals and reviews may be a useful tool for encouraging the courts to temper their interventions to appropriate levels on review. The distinguishing characteristic is that, unlike an appeal where the overturning of a decision is sought because the court a quo came to the wrong conclusion on the facts or the law, a review focuses on the process and the way in which the commissioner came to his or her conclusions and asks whether it shows that the decision was arrived at in an unlawful manner. It has however also been established that the distinction between the two processes may not always be very clear and that a focus on this distinction should not form the only basis for the delineation of the courts’ powers on review. Not only do different forms of reviews and appeals also exist, but the characteristics of each are not necessarily the same and the merits do play a role in review proceedings. As an alternative, it is has been suggested that the appropriate role of the court in reviewing proceedings should be determined having regard also to contextual considerations. In the context of CCMA arbitration award reviews, this includes the background against which CCMA arbitration awards are issued and section 145 of the LRA, as the relevant legislative provision, as well as the legislative intent. Background considerations include the following: 1) commissioners, appointed to arbitrate disputes, may deal with arbitrations in a manner that they consider appropriate to determine the disputes fairly and quickly, but with the minimum of legal formalities; 2) a less time-consuming process is encouraged in so far as commissioners are only required to provide brief reasons for their decisions; and 3) arbitration awards are final and binding and can only be challenged by means of review.

In addition thereto, section 145 of the LRA provides for the review of arbitration awards on grounds identical to that of the Arbitration Act. The latter section has been strictly interpreted by the courts and the same interpretations borrowed when interpreting the coinciding section 145(2) grounds of review. Also, when reading section 1(d)(iv) of the LRA and the Explanatory Memorandum thereto, it is clear that the legislature were mindful of the legalism that tended to

---

accompany appeal proceedings\(^{203}\) and sought to ensure that labour disputes were both expeditiously and efficiently resolved by means of a narrow species of review. It is submitted that this rationale is an important consideration when determining the scope of the Labour Court’s powers under section 145 and in particular the role of unreasonableness on review. The fact that the review court is charged with determining whether a section 145 ground for review has occurred and not with the correctness of the outcome, does, however, not have the effect that the review court may not have regard to the merits of the matter. The case law referred to above makes it apparent that a contemplation of the merits is unavoidable on review. The only difficulty lies in determining to what extent and in what manner the merits of a particular case should be scrutinised. The courts seem to agree that the answer to this question also lies in the distinction between an appeal and review or, put differently, in the purpose for which the merits are considered. It has been established that, whereas on appeal the merits or reasons are considered to determine whether the finding is right or wrong, it is considered on review to determine whether one or more of the section 145 grounds of review can be identified as having occurred. When considering whether judicial intervention is appropriate in a given case the court should thus ask itself whether it wishes to interfere with the award because the merits, after scrutiny, reveal that the arbitration proceedings were defective on one or more of the recognised grounds for review or because it is of the opinion that it was the incorrect decision.\(^{204}\) In the first instance, the court will be entitled to review and set aside the award; in the latter not.

It has finally been established that challenges to the validity of administrative action must in general be based on the grounds of judicial review laid down in section 6(2) of PAJA, and not directly on section 33 of the 1996 Constitution or in terms of the courts’ inherent common law power of review. The review of arbitration awards fall within the confines of special statutory review as opposed to judicial review in the administrative law sense and must continue to be dealt with in terms of the LRA. This suggests that even if the making of an arbitration award does constitute administrative action, the provisions of PAJA would not necessarily be applicable to the review thereof.


\(^{204}\) See C Botma & A van der Walt “The role of reasonableness in the review of labour arbitration awards (Part 1)” 2009 *Obiter* 546, 561-562.
CHAPTER 3

JUDICIAL REVIEW AND THE ROLE OF REASONABLENESS IN ENGLISH ADMINISTRATIVE LAW

3.1 INTRODUCTION

In chapter 2 it was established that: 1) the development of common law administrative law in South Africa was strongly influenced by English administrative law and 2) in the context of judicial review in particular, the English doctrines and/or grounds of review formed a basis upon which the validity of administrative action in South Africa was interpreted and applied by the courts. For example, under the influence of the English symptomatic unreasonableness test, the South African courts were inclined not to recognise unreasonableness as an independent ground of review but rather that its presence served as an indication of mala fides, ulterior motive or the failure of an administrator to apply his or her mind to the matter concerned. 205 In addition, a decision had to be grossly unreasonable to be reviewable. 206

With the advent of the constitutional dispensation, the common law principles of administrative law were entrenched in section 33 of the 1996 Constitution and reasonableness expressly recognised as a requirement for just administrative action. Whilst the review power of the court was thus no longer grounded in the common law and subservient to the authority of the legislature, the common law principles that previously provided the grounds for judicial review were subsumed under the 1996 Constitution in so far as it was not inconsistent with it. 207 Incomprehensibilities aside, it followed that the English law influences were not eradicated per se but that it could continue to inform and find application as an interpretative and supplementary resource for the purpose of informing the content, ambit and application of administrative law in

205 See A Pillay “Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction” (2005) 122(2) SALJ 419. See also The Administrator, Transvaal and the Firs Investment (Pty) v Johannesburg City Council 1971 1 SA 56 (A); Johannesburg City Council v The Administrator, Transvaal and Mayofis 1971 1 SA 87 (A); National Transport Commission v Chetty’s Motor Transport (Pty) Ltd 1972 3 SA 726 (A); Johannesburg Local Road Transportation Board and others v David Morton Transport (Pty) Ltd 1976 1 SA 887 (A).
206 Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948 1 KB 223. From a South African perspective, see National Transport Commission v Chetty’s Motor Transport (Pty) Ltd 1972 (3) SA 726 (A).
207 See the discussion in Chapter 5.
South Africa. This was no better illustrated than in *Bato Star Fishing*; a case involving a challenge to the discretionary allocation of fishing quotas. In this case, the Constitutional Court referred to the English decisions of *Wednesbury Corporation* and *International Trader’s Ferry Ltd*\(^\text{208}\) to determine the proper meaning of unreasonableness as provided for in section 6(2)(h) of PAJA.\(^\text{209}\) The Court accepted that the subsection drew directly on the language of *Wednesbury Corporation* and that a literal interpretation thereof could set such a standard that decisions would rarely be found unreasonable. The Court however reasoned that the subsection had to be construed consistently with the 1996 Constitution and in particular section 33 which required administrative action to be “reasonable” only. The Court then opted to be guided by the interpretation of unreasonableness in *International Trader’s Ferry Ltd* namely, that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. According to the Court, an unreasonableness review would not succeed if the decision-maker took into account the range of relevant and/or competing factors, struck a reasonable equilibrium between these different factors and made a decision which amounted to a reasonable equilibrium in the circumstances.\(^\text{210}\) The above decisions are important to South Africa from a labour law perspective to the extent that the Constitutional Court in the labour law matter of *Sidumo* relied directly on its decision in *Bato Star Fishing*, and indirectly on the House of Lords’ decision in *International Trader’s Ferry Ltd*,\(^\text{211}\) to determine that a compulsory arbitration award will be reviewable in terms of section 145 of the LRA if the decision was so unreasonable that no reasonable decision-maker could have made that decision.

A perusal of *Bato Star Fishing* and *Sidumo* however reveals that in neither case did the Constitutional Court comprehensively discuss the English legal position before approving the adoption of its unreasonableness interpretation into South African law under the constitutional dispensation. In so far as both *Wednesbury Corporation* and *International Trader’s Ferry Ltd* were decided within the context of English administrative law, this chapter remedies the omission of the Court by discussing the nature and conceptual basis of judicial review in this area of law in

\(^{208}\) 1999 2 AC 418.
\(^{209}\) Para 44.
\(^{210}\) Para 49-50.
\(^{211}\) I.e. to the extent that the Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 4 SA 490 (CC) adopted the findings in *Regina v Chief Constable of Sussex, ex parte International Trader’s Ferry Ltd* 1999 2 AC 418 into South African administrative law.
general and the role of unreasonableness in these proceedings in particular, having regard to both the position at common law and in terms of statute. Ancillary hereto, the courts’ interpretation of the terms “lawfulness” and/or “contraventions of the law” is considered. The different categories of grounds of review are also discussed and case law examined to distinguish unreasonableness review from the other types of review recognised in English administrative law. In relation hereto, consideration is afforded to the standard or test of review applicable to each of those grounds of review.

As recognised in chapter 2, the English courts have traditionally focused on the manner in which a decision was reached and have been reluctant to review a decision on any basis resembling substance review. An unreasonableness interpretation that stipulates that a decision will be reviewable if “it is one that a reasonable decision-maker could not reach” has however threatened to upset the distinction between merits and process having regard to the interplay that such an enquiry poses between facts, evidence and the conclusion arrived at. Unreasonableness is therefore discussed having regard to the meaning, role and impact thereof in the exercise of public powers and administrative decision-making in the substantive sense. It is considered whether unreasonableness has continued to serve merely as evidence of other grounds of review or whether it has developed into a standalone ground for setting aside administrative decisions. The role, if any, of unreasonableness in the review of the merits of decisions is also explored having regard to the duty to disregard irrelevant matters, consider relevant considerations, act in good faith and not make decisions on the basis of an unfair balance of considerations, inadequate evidence and/or mistakes of fact. Lastly the question of different intensities of unreasonableness review in relation to different contextual decisions is also considered and discussed.

3 2  SCOPE AND NATURE OF ADMINISTRATIVE LAW AND JUDICIAL REVIEW

3 2 1  Judicial review, the common law and the Senior Courts Act 1981

“Administrative law” is the branch of law which governs public bodies in the exercise of public functions. It encompasses various aspects of the legal regulation of government power and

212 Originally named the Supreme Court Act 1981.
discretion. In contrast, judicial review refers to the limited supervisory jurisdiction of the courts in particular to ensure that administrative decision-makers do not exceed or abuse the powers that have directly or indirectly been conferred on them by Parliament. Traditionally possible because of the courts’ inherent jurisdiction at common law to determine whether action was lawful, the courts safeguarded the efficacy of the rule of law by developing doctrines to verify whether public authorities have acted within the boundaries of the law. This enabled the courts to interfere with administrative acts where authorities had exceeded their jurisdiction by for instance exercising powers contrary to the promotion of the policy and object for which the powers were afforded. Authorities exceeded their jurisdiction and acted unlawful or illegal if, having the power to adjudicate upon a dispute; they abused their power, acted in a procedurally irregular or unreasonable manner or committed any other error of law. If authorities arrived at decisions which were within their jurisdiction to make and did not commit any error which went to jurisdiction as just mentioned, it was generally accepted that the decisions would not be quashed on judicial review even if the decisions were considered incorrect. Opposed to an appeal on the merits that questioned the correctness of the decision itself, judicial review was focused on the legality of the decision-making process. As such, the question on review was whether decision-makers had exceeded or abused their powers and/or whether decision-makers had acted outside their discretionary limits. The question was not whether decision-makers’

218 Padfield v Minister of Agriculture, Fisheries and Food 1968 AC 997 1030.
219 See Anisminic Ltd v Foreign Compensation Commission 1969 2 AC 147; R v Lord President of the Privy Council, ex parte Page 1993 AC 682.
220 See Anisminic Ltd v Foreign Compensation Commission 1969 2 AC 147 171, per Lord Reid, explaining his dictum in Armah v Government of Ghana 1968 AC 192 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong provided it does not err in law.
221 Regina v Entry Clearance Officer, Bombay, Ex parte Amin 1983 2 AC 818 829.
222 R v Secretary of State for the Home Department, ex parte Brind 1991 1 All ER 720 737.
decisions on the facts were correct. As such, review courts were not required to re-examine the factual basis of a decision, weigh in the balance the particular merits of a case and/or substitute their own decision on the merits of the case for that of the administrative authority that was constituted by law to decide the matter in question.\textsuperscript{223}

Whilst South Africa has a relatively comprehensive judicial review statute to cover most aspects of review of actions that fall within its ambit,\textsuperscript{224} legislation in England, in contrast, only provides a framework for judicial review applications and by extension, to a lesser degree, for the remedies that may be granted.\textsuperscript{225} In particular, section 31(1) of the Senior Courts Act 1981 provides that applications for a mandatory, prohibiting or quashing order or a declaration or injunction in an issue of public law must be made by way of an application for judicial review.\textsuperscript{226} The Rules of the Supreme Court Order 53, which used to contain the rules of procedure for judicial review, has been abolished and replaced by Part 54 of the Civil Procedure Rules.\textsuperscript{227} In terms of Civil Procedure Rule 54.1(2)(a), a judicial review claim refers to a claim to review the “lawfulness” of an enactment or a decision, action or failure to act in relation to the exercise of a public function. Lawfulness is not defined therein, but in terms of its ordinary dictionary meaning it refers to “the quality of conforming to law”\textsuperscript{228} and “lawful” means “allowed or recognised by law; legal”\textsuperscript{229}. In the ordinary use of the English language, “lawful” and “legal” can be used interchangeably. The Civil Procedure Rules further provides that the judicial review procedure must be used when seeking a mandatory,\textsuperscript{230} prohibitory\textsuperscript{231} or quashing order\textsuperscript{232} and may be used when seeking a declaration or injunction.\textsuperscript{233}

\begin{thebibliography}{99}
\item[224] See PAJA.
\item[225] See section 31(2). Where such an application has been made, the court has a discretion to make a declaration or grant an injunction if just and convenient. See section 31(4). The court may also award damages if it is sought and the court is satisfied that it would have been awarded in an action for this purpose.
\item[226] See Hornby Oxford Advanced Learner’s Dictionary 6 ed (2001) 670 where it is stated that “Lawful and legal can both mean ‘allowed by law’”.
\item[228] I.e. an order requiring the public body to do something. Formerly known as an order of mandamus.
\item[229] I.e. an order preventing the public body from doing something. Formerly known as an order of prohibition.
\item[230] I.e. an order quashing the public body’s decision. Formerly known as an order of certiorari.
\item[231] Civil Procedure Rules 54(2) and (3).
\end{thebibliography}
Although the Senior Courts Act 1981 and Part 54 of the Civil Procedure Rules address the procedure and remedies of judicial review, neither mention the grounds upon which such an application may be brought. The Senior Courts Act 1981 only indicates by implication in section 31(5A) that a decision can be quashed on the ground that there has been an “error of law”. Section 31(5A) concerns the power of the High Court to substitute its own decision for the decision forming the subject of the judicial review application and provides that such power can only be exercised if the decision in question was made by a court or tribunal, the decision is quashed on the ground that there has been an error of law, and without the error, there would have been only one decision which the court or tribunal could have reached. What constitutes an error of law has therefore been developed by the courts on a case by case basis.

3.3 GROUNDS OF JUDICIAL REVIEW

Although there is no statutory classification of the grounds of review, the House of Lords in Council of Civil Service Unions and others v Minister for the Civil Service categorised the common law grounds of review into the three classes of illegality, irrationality and procedural impropriety. According to the Court, “illegality” required a decision-maker to correctly understand the law that regulates his or her decision-making power and to give effect to it. “Irrationality” on the other hand was held to apply to a decision which was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his or her mind to the question to be decided could have arrived at it. Lastly, the Court sought to include under the head of “procedural impropriety” a failure to observe the basic rules of natural justice; to act with procedural fairness towards a person who would be affected by the decision in question and/or to observe procedural rules that were expressly laid down in statute, even if such failure did not involve a denial of natural justice. This threefold classification has assisted in clarifying the principles underlying administrative law, but it has not rigidly set the grounds of judicial review. In CCSU, the Court accepted that further developments on a case by case basis

---

236 1984 3 All ER 935 950-951. Hereafter referred to as “CCSU”.
237 950.
238 951.
239 951.
could over time add further grounds like “proportionality”. The grounds are also not strictly compartmentalised, but may overlap and cause uncertainty as to the exact scope of each one’s application.⁴⁰ For example, a decision-maker may exercise powers for an improper purpose by considering irrelevant considerations or failing to consider relevant considerations and, depending on the extent of the considerations, either occurrence could also lead to an irrational result.⁴¹ Since CCSU, incompatibility with obligations arising out of the Human Rights Act 1998 has also been recognised as a ground for review.⁴² To clarify the role of unreasonableness on review and to delineate its scope, the meaning, scope and content of the “illegality” and “procedural impropriety” grounds are discussed below.

3.3.1 Illegality

“Illegality” arises as a ground of review if decision-makers fail to correctly give effect to the law that regulates their decision-making powers. This includes decision-makers exceeding the limits of their prescribed powers by embarking upon an unauthorised inquiry as well as acting within the scope of their powers but then exercising the prescribed power in an unauthorised manner by asking themselves the wrong questions, failing to deal with the questions submitted to them or failing to take account of relevant considerations.⁴³ Examples of sub-grounds of illegality include errors of law, errors of fact, exercising a power for an improper purpose, taking irrelevant considerations into account or disregarding relevant considerations, fettering of discretion and unauthorised delegation.⁴⁴ In Stewart v Perth and Kinross Council, for example,⁴⁵ the House of

---


⁴² See S Galera Judicial Review: A Comparative Analysis inside the European Legal System (2010) 165. Section 6 of the Human Rights Act 1998 recognises that public authorities have a duty to act in accordance with the fundamental rights set out in the European Convention on Human Rights. Public authorities may be subject to judicial review on the ground that they have unlawfully breached convention rights. The grounds of review are therefore considered to encompass fundamental rights in addition to the orthodox process-oriented rights.

⁴³ See Anisminic Limited v Foreign Compensation Commission 1969 2 AC 147 171; R v Lord President of the Privy Council ex parte Page 1993 AC 682. The English courts recognise as a general principle that no distinction is to be drawn between jurisdictional and non-jurisdictional errors of law to determine its scope for review, but that all errors of law are generally “jurisdictional” and hence reviewable.

⁴⁴ R v Secretary of State for the Home Department ex parte Thompson and Venables 1998 AC 407; R v Secretary of State for the Home Department, ex parte Khavaja 1984 AC 74; Magill v Porter 2001 UKHL 67; R v Lewisham London Borough Council, ex parte Shell UK Ltd 1988 1 ALL ER 938; Wheeler v Leicester City Council 1985
Lords considered whether the licencing authority had acted *ultra vires* the Civic Government (Scotland) Act 1982 when it subjected a second-hand car dealer’s licence to trade to a condition to make copies of inspection reports and information sheets available to prospective customers.\(^{246}\) The Court found that the licensing authority’s discretion to impose conditions did not go as far as to allow the authority to use it for the ulterior purpose of protecting consumers.\(^{247}\) According to the Court, the licence condition was incompatible with Parliament’s intention and hence *ultra vires*.\(^{248}\) The appeal was dismissed.

*Bromley LBC v Greater London Council* illustrates the reviewability of a decision based on a failure to take account of relevant considerations.\(^{249}\) The House of Lords considered whether the Council was entitled to instruct London boroughs to levy a supplementary rate to finance by grant the cost of reducing bus and tube fares. Turning to the Transport (London) Act 1969, the Court accepted that the Council was empowered to make grants for revenue and capital purposes. The Court however also found that, on a proper construction of the Act, this power was circumscribed by an obligation to conduct the transport services on business principles that attempted to avoid a deficit and that ensured as far as practicable that expenditure were met by revenue. Not having considered these restrictions and failing to have held the balance between the transport users and the ratepayers, the Court, similarly to the *Stewart* matter, concluded that the Council’s instruction was *ultra vires* the powers conferred in terms of the relevant Act and dismissed the appeal.\(^{250}\)

“Illegality” is, however, not confined to matters of law, but may extend to certain errors of *fact* as well. By way of illustration, in *Secretary of State for Education and Science v Tameside*...
the Court accepted that a decision may be susceptible to challenge if: 1) precedent facts did not exist; 2) precedent facts have not been taken into account; 3) the decision has been made upon an improper self-direction as to the facts; and/or 4) the decision has been made upon facts which ought not to have been taken into account. The interplay between error of fact and illegality is demonstrated in *R (March) v Secretary of State for Health*. In this case, the secretary of state had declined to increase *ex gratia* payments to contaminated blood patients in line with the equivalent scheme in Ireland on the basis that the higher payments under the Irish scheme were due to the culpability of their blood transfusion service. Although resource allocation was a government matter, the Court found that the Irish scheme had not been established because the government was legally liable to sufferers and quashed the decision due to a material error of fact that undermined the reasoning process.

The test for illegality on review is therefore not that of unreasonableness and reasonableness is no defence in this respect. The test is whether the decision-maker strayed outside the terms or authorised purposes of the governing law. Important to the illegality ground of review, English administrative law no longer distinguishes between jurisdictional and non-jurisdictional error of law. In *R v Lord President of the Privy Council, ex parte Page*, the Court referred to *Anisminic Limited v Foreign Compensation Commission* and held that generally any error of law made by an administrative tribunal or inferior court in reaching its decision could be quashed for error of law. According to the Court, Parliament had conferred the decision making power on the premise that it will be exercised on the correct legal basis and any misdirection in law in making the decision rendered the decision *ultra vires* and subject to review. This “no deference approach” to illegality was further illustrated in *Pearlman v Keepers & Governors of Harrow...*
Considering the different court interpretations afforded to the statutory provision “improvement made by the execution of works amounting to structural alteration, extension or addition” as contained in the Housing Act 1974, the Court of Appeal commented that it would be intolerable, when an ordinary word came to be applied to similar facts, in one case after another, that different interpretations should all be considered reasonable. The Court reasoned that, in such circumstances, it was not required to show deference to any interpretation of the law that appeared to be reasonable, but that it was a matter of law which required the Court to give a definite ruling. As a result, the Court concluded that the installation of a full central heating system was a “structural alteration or addition” as contemplated by the Housing Act 1974.

The above cases make it clear that, however unlimited or unfettered a decision-making power may appear to be, there are legal limits to the exercise of the power. At a minimum, decision-makers must ensure decisions are compatible with the relevant higher legal authority and not made for a purpose that is foreign to the purpose for which the decision-making authority was granted. This includes disregarding irrelevant factors and taking into account factors which administrative decision-makers are obliged to consider. If not, it can be contended that the decisions are *ultra vires* and the decision will be reviewable based on illegality as a ground of review. The courts’ judicial capacity however also extends beyond that which is generally regarded as a legal error, to encapsulate decisions which demonstrate that the decision-maker has failed to establish a "precedent fact" that justifies the conclusion reached. In these instances, the court is also entitled to set the decision aside and remit the matter back to the decision-maker for reconsideration. As regards the test for illegality, no decision-maker has any jurisdiction to make an error of law on which the decision in the case depends and any such error implies that the decision-maker has gone outside its jurisdiction and that the decision is reviewable. Therefore, although the exercise of administrative decision-making powers involves questions which administrators themselves have to decide, the legal limits to the exercise of those decision-making powers are matters for the objective judgment of the court and, absent materiality or discretion, administrators are not allowed to make incorrect decisions in this regard.

---

261 1979 QB 56; 1979 1 All ER 365.
262 See *R v Secretary of State for the Home Department ex parte Thompson and Venables* 1998 AC 407.
263 I.e. error of fact.
264 I.e. there is no room for legitimate disagreement.
3.3.2 Procedural impropriety

As per CCSU, procedural impropriety involves both a failure to comply with express, statutory procedural requirements as well as the common law rules of natural justice encapsulated in the principle of hearing both sides in the absence of apparent bias. In the past, there was judicial support for the view that the requirements of natural justice applied to judicial or quasi-judicial functions only, with the duty to act “judicially” only inferred if there was an express obligation to follow a judicial-type procedure in arriving at the decision. In Ridge v Baldwin, the House of Lords however found that the term “judicial” had been misinterpreted and the mere fact that the power affected some person’s rights or interests made it "judicial" and subject to the natural justice procedures. Since Ridge, procedural propriety has developed so that the review courts now require all administrative functions, whether judicial or not, to be carried out fairly.

Fairness is a flexible concept that essentially requires an intuitive judgment, taking into consideration that: 1) there is a presumption that a statutory, administrative power will be exercised in a manner which is fair in all the circumstances; 2) the standards of fairness are flexible and can change with time; generally and in its application to decisions of a particular type; 3) the fairness principles applicable depended on the context of the decision, especially the language of the statute and the shape of the legal and administrative system within which the decision was taken; and 4) fairness generally requires that persons who might be adversely affected by a decision be informed of the essence of the case which he or she has to answer and have an opportunity to make representations on his or her own behalf.

Procedural impropriety covers a broad range of issues including non-compliance with statutory

---

265 See Cooper v Wandsworth Board of Works 143 ER 414 Court of Common Pleas (England).
267 1963 UKHL 2; 1964 AC 40 HL (United Kingdom).
269 It may differ depending on the character of the decision-maker, the kind of decision that has to be made and the statutory or other framework in which the decision-maker operates. See Lloyd v McMahon 1987 AC 625 at 702-703 found at http://www.bailii.org/uk/cases/UKHL/1987/5.html on 10 December 2011. See also Woolf H “The Role of the English Judiciary in Developing Public Law” 676.
270 R v Secretary of State for the Home Department ex parte Doody 1994 1 AC 531 560 D-G.
procedural requirements, non-adherence to the rule against bias, failure to consult and/or provide a fair hearing, and a failure to provide reasons for the decision taken. A successful challenge based on the latter is found in R v Secretary of State for the Home Department ex parte Al Fayed. In terms of section 6(2) of the British Nationality Act 1981, the secretary of state could grant an applicant a certificate of naturalisation as a British citizen if he was satisfied of his or her good character. In this case, the secretary of state declined to provide reasons for not granting a certificate; nor was there any process of consultation or representations. There were no procedural requirements in the Act and section 44(2) provided that the secretary of state was not "required to assign any reason for the grant or refusal of any application". Nevertheless, the Court held that fairness obliged the secretary of state to notify the applicant of the areas of concern on which his refusal to grant naturalisation was based so that the applicant may have an opportunity to allay such concerns.

Similar to illegality, the test for procedural impropriety on review is therefore not that of unreasonableness. In dealing with the question whether a decision-maker had acted in breach of the rules of fairness or natural justice, the Court in R (Mahfouz) v General Medical Council confirmed that it was not confined to reviewing the reasoning of the decision-maker on Wednesbury principles, but that it had to make its own independent judgment in accordance with

---

271 See R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) 1999 UKHL 52. In an appeal to the House of Lords, the Crown Prosecution Service sought to overturn a quashing order regarding extradition warrants made against an ex-Chilean dictator. Amnesty International was given leave to intervene in the proceedings. However, one of the judges of the case, Lord Hoffmann, was a director and chairperson of Amnesty International Charity Ltd, a company under the control of Amnesty International, and failed to disclose the same. The Court found that the close connection between Amnesty International Charity Ltd and Amnesty International presented Lord Hoffmann with an interest in the outcome of the litigation. Even though it was non-pecuniary, the Court took the view that the interest was sufficient to warrant Lord Hoffmann's automatic disqualification from hearing the case. As a result, the outcome of the proceedings was set aside.

272 See Agricultural Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd 1972 1 All ER 280. In that case, delegated legislation required the minister to consult with organisations that appeared to him to be representative of a substantial number of employers engaging in the activity concerned about the establishment of a training board. The minister failed to consult an association, which represented about eight-five percent of all mushroom growers, and as a result the delegated legislation was declared to be ultra vires on procedural grounds.

273 Ridge v Baldwin 1963 UKHL 2. Kanda v Government of Malaya 1962 AC 322; R v Secretary of State for the Home Department, ex parte Doody 1994 1 AC 531; North Range Shipping Ltd v Seatrans Shipping Corp 2002 EWCA Civ 405; 2002 1 WLR 2397; R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) 1999 UKHL 52; Luton Borough Council and others v Secretary of State for Education 2011 EWHC 217.

274 1998 1 WLR 763 CA; 1996 EWCA Civ 946.

275 See also Baruwa, R (on the application of) v London Borough of Brent 1997 29 HLR 915 929. Reasons must be proper, adequate, and intelligible and enable the person affected to know why they have won or lost.
the principles of a fair procedure developed by the courts.\textsuperscript{276} Similarly, in \textit{R (Medway Council) v Secretary of State for Transport}, the Court asserted that it was its task to decide what was fair and that it was not for the public authority to contend that it had a discretion to adopt a certain procedure.\textsuperscript{277} Legislation and/or the common law can therefore impose procedural conditions or requirements which must be satisfied before a power may be exercised. Depending on the requirements imposed in a particular instance, the review court will be entitled to query for example whether: 1) the person affected by the decision was afforded a proper opportunity to state his case;\textsuperscript{278} 2) the reasoning process was adequately expressed in the decision;\textsuperscript{279} and/or 3) the decision-maker was unbiased and objective.\textsuperscript{280} If an administrative decision-maker proceeds to make a decision without having regard to the procedural principles imposed in any particular instance, whether in terms of statute or general requirements of fairness, such a decision will be unlawful and subject to review on the ground of procedural impropriety without a need for reference to unreasonableness.

3 3 3 Irrationality or unreasonableness

A logical point of departure for ascertaining the meaning of unreasonableness is the well-known 1948 \textit{Wednesbury Corporation} judgment in which the concept of “unreasonableness” was recognised as a ground of review.\textsuperscript{281} This case concerned a licensing authority’s power in terms of the Sunday Entertainments Act 1932 to impose conditions upon cinemas opening on Sundays and its resultant decision to allow the same on condition that children under the age of fifteen were not admitted for reasons relating to their moral and physical health.

In seeking to establish whether the licensing authority had exercised its power \textit{unreasonably}, the Court of Appeal conceptualised the following three principles: first, the matter concerned an executive act as opposed to a judicial one; secondly, the conditions that could be imposed by the licensing authority were within its discretion without limitation; and thirdly, the statute provided

\textsuperscript{276} 2004 EWCA Civ 233. See also \textit{R v Panel on Takeovers and Mergers ex p Guinness plc} 1991 QB 146 184.
\textsuperscript{277} 2002 EWHC 2516.
\textsuperscript{278} See also \textit{R v Deputy Industrial Injuries Commissioner, ex p Moore} 1965 1 QB 456.
\textsuperscript{279} See also \textit{R v Ministry of Defence, ex parte Murray} 1998 COD 134.
\textsuperscript{280} See for example \textit{R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign Ltd} 1996 3 All ER 304 and \textit{Magill v Porter} 2001 UKHL 67.
\textsuperscript{281} 1948 1 KB 223.
no appeal from the decision of the licensing authority.\textsuperscript{282} Against this background, the Court found that its right of interference was limited to contraventions of the law and that the onus of proving that proposition rested upon the party who asserted it.

Although in the present case the condition appeared to be lawful,\textsuperscript{283} the Court accepted that there was a strictly limited class of case in terms of which a discretionary decision could amount to a contravention of the law due to unreasonableness. According to the Court, decision-makers entrusted with a discretionary power were required to: 1) direct themselves properly in law; 2) call their attention to matters which they were bound to consider; 3) exclude from their consideration irrelevant considerations; and 4) generally not do something so absurd that no sensible person could dream that it laid within their powers.\textsuperscript{284} Having said this, the Court accepted that it was not the plaintiff’s case that the licensing authority had unreasonably considered extraneous and irrelevant matters, but that they had acted unreasonably \textit{per se} in imposing the condition. In this regard, the Court reasoned that the licensing authority had been entrusted with the decision and that, absent the \textit{relevance} of the subject-matter of the condition, the Court could not find the decision \textit{wrong} because it was \textit{unreasonable}. According to the Court, unreasonableness as an independent ground of review had a special and limited meaning that only applied to decisions that were so unreasonable that no reasonable \textit{authority} could ever have come to it.\textsuperscript{285} The Court made it clear that the reasonableness of the condition did not depend on what it regarded as reasonable, but that the licensing authority was the arbiter of the correctness thereof. Having satisfied itself that the discretionary decision in this case was not so unreasonable that no reasonable authority could ever have come to it, the Court dismissed the appeal.

Although unreasonableness was recognised as the yardstick for the exercise of administrative discretion prior to \textit{Wednesbury},\textsuperscript{286} this case was significant in three respects. Firstly, it confirmed

\textsuperscript{282} 228.
\textsuperscript{283} I.e. the decision-maker was able in terms of statute to in principle use its powers to reach a certain end.
\textsuperscript{284} 229. In \textit{Short v Poole Corporation} 1926 Ch 66, the Court referred to the example of the red-haired teacher, dismissed because she had red hair. This decision can be described as unreasonable or taking into consideration extraneous matters.
the non-existence of an \textit{unfettered} public discretionary power.\footnote{J Laws The Golden Metwand and the Crooked Cord (1998) 191.} Secondly, it recognised \textit{substantive} unreasonableness in administrative decision-making; challenging the dividing line between merits and legality on review. Inherent herein, was the fact that it exemplified the rule of reason as a fundamental principle of the law.\footnote{J Laws The Golden Metwand and the Crooked Cord (1998) 185.} Thirdly, it acknowledged that reasonableness was a wide concept in so far as different persons could reasonably hold different views on what was reasonable in a given context.\footnote{B J Narain \textit{Essays in Administrative Law – A study in rational principles} (1996) 31.}

The above principles are important from a South African perspective to the extent that it clarifies the type of decisions typically subjected to an unreasonableness query as well as confirms that unreasonableness is a substantive ground of review as opposed to a test for some other review grounds.\footnote{See Chapter 5 and 6.} However, criticisms levelled against \textit{Wednesbury} unreasonableness indicate the difficulties often associated with identifying an unreasonable decision. Firstly, \textit{Wednesbury} unreasonableness has been described as an imprecise, tautological formula that fails to guide legal practitioners with certainty.\footnote{See R \textit{v IRC ex p Taylor} (No 2) 1989 3 ALL ER 353. See also J Powell and A Lester \textit{“Beyond Wednesbury: Towards Substantive Standards of Judicial Review”} 1987 \textit{PL} 368.} Secondly, it has been condemned for not providing sufficient justification for judicial intervention or the reasons why decisions are considered unreasonable.\footnote{P Daly “Wednesbury’s Reason and Structure” (2011) \textit{PL} 238.} Thirdly, \textit{Wednesbury} unreasonableness has been called unrealistic because so-called unreasonable decisions often follow a rational decision-making process.\footnote{See R \textit{v Lord Saville of Newdigate, ex parte A} 1994 4 All ER 860 para 33. P Daly (2011) \textit{PL} 239. It has been contended that \textit{Wednesbury} unreasonableness confuses irrationality with the ground of illegality and, that in borderline cases; it will be difficult to identify whether it is an illegal decision because of irrelevant reasons or whether the decision is irrational because the reasons are so irrelevant that they become absurd or irrational.} Lastly, it has been criticised for depicting a requirement of particularly extreme behaviour – like bad faith and perverse or absurd decisions - denoting a very low level of judicial scrutiny and very high standard for invalidation.\footnote{See R \textit{v Lord Chancellor Ex p Maxwell} 1997 1 WLR 104. See H Woolf, S A De Smith, J L Jowell, A P Le Sueur & C M Donnelly \textit{De Smith’s Judicial Review} 6 ed (2007) 553 and T Barclay \textit{“The proportionality test in UK Administrative Law – a new ground of review, or a fading exception?”} (2012) 3 \textit{SJOL} 1 found at http://www.sjol.co.uk/issue-3 on 19 February 2013 at 19h31.}
Despite these objections, it is possible to extract some guiding principles from case law on how to proceed in the identification of unreasonable decisions. In *Tameside Metropolitan Borough Council*, for example, the House of Lords considered whether the secretary of state had exceeded his powers when he directed a newly elected local education authority to implement their predecessors’ proposals for the re-organisation of secondary education. The direction was made in circumstances where the secretary of state was statutorily entitled to give such direction as appeared to him to be expedient *provided* he was satisfied that the authority had or will act *unreasonably*. The Court recognised that an administrative discretion inevitably involved a right to choose between more than one possible course of action whereupon there was room for reasonable people to hold different opinions as to which was to be preferred. Taking this into consideration, the Court found that it was not the Court’s role to substitute its own opinion for that of the decision-maker, but to determine whether the decision-maker, in reaching its decision, had directed itself properly in law and had taken into consideration relevant matters and excluded from its consideration irrelevant matters. According to the Court, “unreasonableness” was not a synonym for “wrong” and a decision was only unreasonable if objectively speaking no reasonable decision-maker would act in the way in which the decision-maker concerned had acted or was proposing to act. Applying these principles to the facts of the matter, the Court reasoned that it was for the secretary of state to decide whether the authority’s proposal involved such interference with efficient instruction and training in secondary schools that no sensible authority acting with due appreciation of its statutory responsibilities could have decided to adopt the course which they proposed. In applying this test of unreasonableness, the Court found that there was no evidence on which the secretary of state could properly have decided that the council had proposed to act unreasonably and the appeal was dismissed.

---


296 Section 68 of the Education Act 1944. Significantly, the secretary of state was expected to apply the same principle with regard to his powers over the exercise of powers or performance of duties by the authority as the courts were with regard to judicial review of exercise of powers by him.

297 1064. See also *In re W. (An Infant)* 1971 AC 682 where it was reasoned that not every reasonable exercise of judgment is right and not every mistaken exercise of judgment is unreasonable.

298 I.e. did the decision-maker ask itself the right question and take reasonable steps to get acquainted with the relevant information in order to answer the question correctly?

299 1070 and 1074-1075.

300 1064-1065.
A decision is also unreasonable if it defies comprehension\textsuperscript{301} or if the decision itself is preceded by flawed logic.\textsuperscript{302} This was confirmed in \textit{CCSU}. The Court reiterated that it was no longer required to treat \textit{irrationality} as evidence that a decision-maker had misunderstood the law or overlooked a critical requirement, but that it was a separate ground for challenging a decision on review. Restating \textit{Wednesbury} unreasonableness with reference to the term “irrationality”, the Court held that judicial interference was permissible if a decision had no rational basis or the decision was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his or her mind to the question to be decided could have arrived at it.\textsuperscript{303} Although the Court acknowledged that it could employ logic and accepted moral standards as criteria by which to assess decisions under unreasonableness review, it did not divulge more specific categories of substantive decisions that would be legally acceptable. This interchangeable reference to unreasonableness and irrationality brings into question the South African argument that unreasonableness means something different from, and arguably more than, irrationality.\textsuperscript{304}

An example of a strict approach to unreasonableness can be found in \textit{Nottinghamshire County Council v Secretary of State for the Environment; City of Bradford Metropolitan Council v Secretary of State for the Environment}.\textsuperscript{305} In this case, the Court considered whether expenditure guidelines imposed on the authorities were so disadvantageous when compared with its effect upon others that it constituted a \textit{perverse} exercise of power. The Court held that the law had developed beyond the limits applied by the review courts as provided for in \textit{Wednesbury Corporation}. With reference to \textit{CCSU}, the Court then found that a discretionary decision was now reviewable on the ground of unreasonableness if the decision-maker had abused his or her power.\textsuperscript{306} According to the Court, this could be attributed to: 1) a misconstruction of the limits

\textsuperscript{301} I.e. the outcome is just not reasonable.

\textsuperscript{302} I.e. the process in arriving at the decision is not reasonable. See para 4 1. \textit{R v North and East Devon Health Authority; Ex parte Coughlan} 2001 QB 213.

\textsuperscript{303} \textit{R v North and East Devon Health Authority; Ex parte Coughlan} 2001 QB 213. See also H Barnett \textit{Understanding Public Law} 2010 196. In \textit{R v Devon County Council, ex parte George} 1989 AC 573 577, the Court again preferred reasonableness on the basis that irrationality was misunderstood to cast doubt on the mental capacity of the decision-maker.

\textsuperscript{304} See A Pillay “Reviewing Reasonableness: An appropriate standard for evaluating state action and inaction?” (122) 2 (2005) \textit{SALJ} 419 427. See also H Barnett \textit{Understanding Public Law} 2010 196. In \textit{R v Devon County Council, ex parte George} 1989 AC 573 577, the Court again preferred reasonableness on the basis that irrationality was misunderstood to cast doubt on the mental capacity of the decision-maker.

\textsuperscript{305} 1986 1 ALL ER 199.

\textsuperscript{306} 203.
imposed upon the scope of the power; 2) procedural irregularities; 3) *Wednesbury* unreasonableness; or 4) bad faith and/or an improper motive in the exercise of the power.

Turning to the facts, the Court confirmed that court interference with a political matter\(^{307}\) was only justified if a *prima facie* case demonstrated that the secretary of state had acted in bad faith, for an improper motive or that the consequences of his guidance were so absurd that he must have taken leave of his senses. As the guidance complied with the statutory terms, the Court explained that the principles had to demonstrate a *perversity* pattern or an absurdity of such proportions that the Court could conclude that the guidance could not have been framed by a *bona fide* exercise of political judgment on the part of the secretary of state. Not having been established on the evidence, the Court dismissed the appeal.\(^{308}\)

A reformulated *Wednesbury* unreasonableness was introduced in *R v Minister of Defence ex parte Smith*\(^ {309}\) in the context of an irrationality challenge to a policy that did not permit homosexual persons to serve in the armed forces. The Court confirmed that the unreasonableness test only permitted interference with an administrative discretion on substantive grounds if the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker.\(^ {310}\) On the facts, the Court found that not only was the policy supported by both Houses of Parliament and by those to whom the Ministry looked for professional advice, but there was no evidence before the Ministry which plainly invalidated that advice.\(^ {311}\) The Court accordingly dismissed the matter on the basis that the threshold of irrationality was not met.

Reasonableness should however not be equalled to proportionality unreservedly. This was confirmed in *R v Secretary of State for the Home Department, ex parte Brind*.\(^ {312}\) In this case, the House of Lords had to determine whether the minister had unreasonably exercised his discretion in terms of the Broadcasting Act 1981 to issue directives when he prohibited the IBA and BBC

\(^{307}\) It concerned the limits of public expenditure by local authorities and the incidence of the tax burden as between taxpayers and ratepayers.

\(^{308}\) 247.

\(^{309}\) 1996 1 All ER 257.

\(^{310}\) 263.

\(^{311}\) 266.

from broadcasting the voices of members of proscribed organisations to combat terrorism. The House of Lords rejected the proposition that proportionality was applicable in domestic English law, but confirmed that reasonableness required decision-makers to call their attention to mandatory considerations and to identify the factors which had motivated their decision to ensure that they had not overlooked that which a reasonable decision-maker should have considered.\(^{313}\) If the conditions were satisfied on the evidence, the Court held that the only other possible basis for court interference was irrationality or perversity.\(^{314}\) Having regard to the facts of the case, the Court noted that, save in one respect, no suggestion was made that the minister had ignored relevant considerations or that he considered irrelevant considerations.\(^{315}\) According to the Court, it could therefore only quash the decision if no reasonable minister properly directing himself would have reached the impugned decision and not if the correct or objectively reasonable decision was other than the one the minister had made.\(^{316}\) With reference to *Tameside Metropolitan Borough Council*, the Court concluded that, irrespective of whether the minister was right or wrong in deciding to issue the directives, a reasonable minister could hold that the appearance of terrorists on programmes increased their standing and provided them with political legitimacy. In making this determination, the Court weighed the considerations relevant to the outcome of the case and found that it was relatively modest restrictions imposed to protect the public interest of combating terrorism and hence not unreasonable. The appeal was dismissed.

In *R v Secretary of State for the Home Department, ex parte Daly*,\(^{317}\) the Court clarified the reasonableness/proportionality distinction when it accepted that there was an overlap between reasonableness and proportionality, but held that the intensity of review was slightly greater under the proportionality approach in that: 1) proportionality could require the review court to assess the balance which the decision-maker had struck and not merely whether it was within the range of reasonable decisions; 2) the proportionality query could go further than that of reasonableness as it could require a consideration of the relative weight accorded to interests and considerations; and 3) even the anxious scrutiny test of reasonableness was not necessarily

---

\(^{313}\) If these conditions are satisfied on the evidence, court interference is still possible on the basis of irrationality or perversity – that is, if the impugned decision is one no reasonable minister properly directing himself would have reached. See also *R v North and East Devon Health Authority; Ex parte Coughlan* 2001 QB 213 244.

\(^{314}\) 4.

\(^{315}\) 10.

\(^{316}\) 11.

\(^{317}\) 2001 UKHL 26.
appropriate to the protection of human rights with reasonableness and proportionality sometimes yielding different results.\textsuperscript{318} According to the Court, proportionally – as opposed to reasonableness – was to be used in matters involving a human rights element.\textsuperscript{319}

Having regard to the foregoing case law, it is evident that unreasonableness requires the courts to engage in the review of the \textit{substance} of a decision or its \textit{justification}. As part of substantive review, the court has to ask itself whether the power under which the decision-maker acts has been improperly exercised\textsuperscript{320} or insufficiently justified.\textsuperscript{321} In practice, this query may unfold in two parts. In the first place, a court may conclude that whatever considerations may appear to have been taken into account, the decision is so unreasonable in relation to those considerations that the decision maker must have failed to properly consider the relevant considerations and was influenced by other considerations. Alternatively, a decision-maker may have regard to all the right considerations and disregard all the wrong considerations, but nevertheless reach a conclusion that bears no reasonable relation to the considerations which it had in mind.\textsuperscript{322}

The courts’ hesitation in finding a particular decision reviewable on unreasonableness grounds may also essentially be twofold. Firstly, where broad discretionary powers have been conferred on a decision-maker, the courts recognise that there is a range of decisions that may all qualify as reasonable. Secondly, there is a presumption that the decision in question is within the range of that discretion and the onus is on the party asserting the unreasonableness of that decision to demonstrate the contrary. The court therefore needs to be satisfied that the decision in question is so unreasonable that no reasonable authority could ever have come to it. Put differently, unreasonableness review will be available where it is apparent that, rather than falling within a

\begin{itemize}
  \item Para 27. See also \textit{R v Secretary of State for the Environment, Ex Parte Alconbury} 2001 UKHL 23.
  \item See \textit{Smith and Grady v United Kingdom} 1999 29 EHRR 493. The European Court of Human Rights found that the English unreasonableness test, even upon applying “anxious scrutiny”, was insufficient. According to the Court, it effectively excluded any consideration by the domestic courts of the question whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued.
  \item I.e. unreasonableness demarcates the scope of the decision-maker’s competence. See M Bobek \textit{Reasonableness and Law} 316.
  \item I.e. unreasonableness demarcates in what way a discretion can be exercised within the decision-maker’s competence. See also S Rose-Ackerman & P L Lindseth \textit{Comparative Administrative Law} (2010) 142. I.e. substantive versus procedural unreasonableness.
\end{itemize}
range of possible, acceptable outcomes which are defensible in respect of the facts and the law, the decision is of such a nature that no reasonable decision-maker could have come to that decision. As the language of the formulation suggests, the court is not required to imagine itself in the position of the decision-maker when the decision was taken and to then test the unreasonableness of that decision against the decision they would have taken. In doing so, the court would become involved in a merits review; as if the court itself was the recipient of the power. Reasonableness does also not require the court to engage in a proportionality exercise. Whereas reasonableness simply requires the court to maintain a check on excesses in the exercise of discretion ary powers by determining whether other decision-makers could have made the same decision, proportionality necessarily requires an assessment of the balance that has been struck between interests and objectives. As a ground of review, unreasonableness is therefore of limited application - in a sense a safety mechanism to cater for those decisions that are obviously irrational or perverse but may escape being set aside on review on the other recognised grounds of review. To objectively determine the presence of unreasonableness in a substance review, and to avoid so-called “palm tree justice”, the interaction between reasonableness and decisions of merit, policy and human rights, including intensity of review, will be considered below.

---

323 See Re W (An Infant) 1971 AC 682 700. Two reasonable persons can come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. Not every reasonable exercise of judgment was right and not every mistaken exercise of judgment was unreasonable. See also Kruse v Johnson 1898 2 QB 91. A decision is not unreasonable just because the Court thought it went further than was prudent or because it did not have some desirable qualification.

324 The review courts: 1) set a high threshold for interference; 2) exercise a secondary judgment only; and 3) vary the intensity of judicial scrutiny and the deference due to the decision-maker depending on the subject-matter and the context within which the decision was made. R v Minister of Defence ex parte Smith 1996 1 All ER 257; 1996 QB 517; Nottinghamshire County Council v Secretary of State for the Environment; City of Bradford Metropolitan Council v Secretary of State for the Environment 1986 1 ALL ER 199; 1986 AC 240; 1985 UKHL 8. Compare this with R v Secretary of State for the Home Department, ex parte Bugdaycay 1987 AC 514.

325 The two standards co-exist with reasonableness being applied to alleged domestic law violations and proportionality where fundamental rights are involved. See De Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing 1999 1 AC 69. See also Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department 2007 UKHL 11 where the Court emphasised that proportionality involves balancing the interest of the individual and the interests of the community. The Association of British Civilian Internees – Far East Region v Secretary of State for Defence 2003 EWCA Civ 473; 2003 QB 1397.


327 In R v Department for Education & Employment ex parte Begbie 1999 All ER (D) 983, the Court explained that fairness and reasonableness were objective concepts, otherwise there would be palm tree justice.
34  UNREASONABLENESS IN DIFFERENT CONTEXTS\textsuperscript{328}

34 1  Reasonableness and merit review

Review courts are reluctant to interfere with decision-makers’ assessment of evidence or facts.\textsuperscript{329} There are various reasons for this: 1) a distinction is drawn between appeal and review;\textsuperscript{330} 2) original decision-makers hear and see evidence firsthand and have the necessary expertise to best evaluate it; and 3) judicial review proceedings are considered unsuitable for making determination on facts.\textsuperscript{331} Opposed to a review based on a consideration of irrelevant matters and/or a failure to consider relevant matters, unreasonableness review \textit{per se} does however have a tendency to threaten the maintenance of the distinction between the legality and the merits of decision-making.\textsuperscript{332} Firstly, reasonableness seeks to limit the width of the substantive exercise of a discretionary power whilst keeping the original decision-maker responsible for the decision on the merits within those limitations. Secondly, the substantive limitations to the exercise of a discretionary power are often unclear because the courts are able to determine whether a decision-maker has gone beyond the limits of reasonableness without defining the same with precision. This will be explored in more detail below.

34 1 1 Unreasonable reasoning process

A decision may be unreasonable because of a defect in the decision-making process either as a

\textsuperscript{328} See J Laws \textit{The Golden Metwand and the Crooked Cord} 187, 201. Reasonableness is not monolithic but depends on the context.

\textsuperscript{329} See \textit{Adan v Newham London Borough Council} 2001 EWCA Civ 1916.

\textsuperscript{330} See \textit{Re Amin} 1983 2 ALL ER 864. Judicial review is primarily concerned with the decision-making process as opposed to the substance of the decision.

\textsuperscript{331} C Forsyth and E Dring “The Final Frontier: The Emergence of Material Error of Fact as a Ground of Judicial Review” in Forsyth \textit{et al}, Effective Judicial Review: A Cornerstone of Good Governance (2010) 246-250. It is argued that it would breach the separation of powers which exists between government and the judiciary if the latter were to substitute its own views for those of the public body responsible for the decision. See D Oliver “The Judge Over Your Shoulder” Parliam Aff (1989) 42(3): 309. Downloaded from http://pa.oxfordjournals.org/ at University of London Senate House on 3 May 2012. Administrative law developed primarily to redress the balance of power and to safeguard the interests and rights of citizens. See D Stott & A Felix \textit{Principles of Administrative Law} 2-3.

\textsuperscript{332} See para 3.3.
result of the way the decision was reached or the manner in which it was justified. The application of the latter principle was demonstrated in *Secretary of State for Trade and Industry Ex p BT3G Ltd.* In this case, the Court *a quo* had determined that the secretary of state had acted rationally in allowing associated bidders at the pre-qualification stage of a government auction provided they cease their association before the final granting of licences. This decision caused licences to be granted and licence fees to be paid at different times under the auction rules and let to accusations of state aid to those licensees benefiting from the later payment date. On appeal, the Court agreed with the Court *a quo* that the secretary of state's refusal to exercise his discretion was not irrational but objectively justifiable having regard to the considerations that: 1) the auction rules safeguarded competition by ensuring that no entity had more than one licence and that associated bidders divested themselves as soon as possible; 2) the auction rules provided for circumstances where licences would be granted at different times; 3) the auction rules were accepted without objection by the auction participants; 4) changes to the payment regime at the grant stage could lead to legal challenge; 5) the precondition had potentially adverse consequences and the benefit of deferred payment; 6) the benefit of deferred payment was not great when considering the price differences in different auctions for identical licences; and 7) no effective, alternative course of action had been suggested. The appeal was dismissed.

In *West Glamorgan County Council v Rafferty and others*, the Court again considered whether the council had unreasonably balanced relevant considerations when it evicted gypsies that had moved onto a site in the council's area without its consent or licence. Considering the facts, the Court found that the council had wrongly concluded that it had done all it could to discharge its duty to provide accommodation to the gypsies in terms of the Caravan Sites Act 1968. According to the Court, the council could have provided temporary accommodation. In the circumstances, the Court concluded that the decision was unreasonable when weighing the council’s interest as landowner and their continued breach of duty against the decision to evict the gypsies in the absence of providing alternative accommodation. The appeal was dismissed.

---

333 The focus is on the factors taken into account by the decision-maker in making the decision, the evidence by which the decision was influenced and/or the quality of its justification. See H Woolf, S A De Smith, J L Jowell, A P Le Sueur & C M Donnelly *De Smith's Judicial Review* 6 ed (2007) 556- 557.

334 2001 EWCA Civ 1448.

335 The benefit of deferred payment was no more than about 2% of the licence price.

Opposed thereto, *International Trader’s Ferry Ltd* serves as an example of a case where the court assessed the balance struck by the decision-maker between competing considerations and found that they have been reasonably balanced.\(^\text{337}\) In this case, the Court considered whether the police had unreasonably decided, in the face of disruptive demonstrations, to withdraw protection from animal exporters for certain days of the week. The Court accepted that the police were required to balance the danger to the rule of law flowing from the withdrawal of protection against pressures on police protection elsewhere when confronted with a situation involving conflicting rights and the police’s duty to uphold the law. Considering the police’s balancing exercise in the present instance, the Court was satisfied that the police had not ignored relevant facts or taken account of irrelevant factors in a way which vitiated the overall decision, but had allocated resources on a carefully considered basis that was not unreasonable.

A decision may also be reviewable for lack of reasonableness if an error of reasoning deprives it of logic or comprehensible justification.\(^\text{338}\) In *The Association of British Civilian Internees – Far East Region v Secretary of State for Defence*,\(^\text{339}\) the Court of Appeal for example considered whether a non-statutory compensation scheme was irrational in denying British civilians compensation if neither they, nor their parents or grandparents, were born in the United Kingdom. Introduced to pay the debt of honour owed by the United Kingdom to British civilians interned by the Japanese during the Second World War, the Court accepted that reasonableness required a rational connection between the objective and the measures designed to further the objective. According to the Court, large numbers of British subjects had no birth link with the United Kingdom at the time of internment save for being British subjects by reason of statute and the United Kingdom was now a medium-sized European country compared to the empire controlled by it at the time of the War. Taking this into consideration, the Court found that the evidence presented rational reasons for the Government’s distinction between those that had a close connection with the United Kingdom at the time of internment and those that did not. Whilst the Government could have decided to include in the scheme all those who were British

---

\(^\text{337}\) See para 1.


\(^\text{339}\) 2003 EWCA Civ 473; 2003 QB 1397.
subjects at the time of their internment, the Court concluded that it its failure to do so was not irrational.

A similar approach was followed in *Fawcett Properties Ltd v Buckingham County Council*. In this case, the local planning authority had granted a licence to build two cottages on condition that their occupation was to be limited to persons connected with agriculture. The Court accepted that the condition was lawful if it was fairly and reasonably related to the implementation of the planning policy and not imposed for an ulterior objective. Imposed to control urban growth, the Court found that the condition’s failure to achieve its object was not so great that it could not reasonably be expected to carry out the local planning authority’s policy. A rational connection test was therefore applied to ensure that there was not such a departure from logic that the means chosen by the decision-maker to achieve a particular aim were not apt to achieve the aim. In such instances, the inaptness may have pointed towards the decision being unreasonable.

By contrast, in *R (Rogers) v Swindon NHS Primary Care Trust*, the Court found that the defendant had irrationally refused Herceptin funding for an early stage breast cancer patient because she could not demonstrate “exceptional personal or clinical circumstances”. Not only was there no evidence before the Court that such a distinction could be made between patients within the same eligible group, but having stated that financial considerations were irrelevant, the Court found that the only reasonable approach was to consider the patient's clinical needs and to fund treatment for all patients within the eligible group provided they had been properly prescribed Herceptin by their doctors.

These judgments demonstrate that a decision does not have to be perfect in all respects to qualify as reasonable, but that the quality of reasoning underlying or supporting the decision, the weight attached and the balance ascribed to the range of relevant and/or competing factors taken into account to reach the decision and/or the justifications offered for the decision will play a role in determining the reasonableness of that decision in the circumstances. In these instances, the

---

340 1961 AC 636.
341 674.
344 2006 EWCA Civ 392.
review court does not substitute decisions on issues of weight, but analysis weight in deciding whether the requisite irrationality exists.\textsuperscript{345}

3 4 1 2 \textit{Reasonableness and errors of fact}

In has already been established that the courts can review errors of fact in circumstances involving: 1) precedent facts,\textsuperscript{346} 2) evidentiary findings\textsuperscript{347} and/or 3) a misunderstanding of an established and relevant fact.\textsuperscript{348} In \textit{E v Secretary of State for the Home Department},\textsuperscript{349} the Court found that the third category of error of fact would constitute a ground of review if: 1) there has been a mistake as to an existing fact, including a mistake as to the availability of evidence; 2) the fact or evidence was uncontentious and objectively verifiable; 3) the appellant or his advisers have not been responsible for the mistake; 4) the mistake has played a material, though not necessarily decisive, part in the decision-maker’s reasoning; and 5) the statutory context is one “where the parties share an interest in co-operating to achieve the correct result”.

Within the context of these material errors of fact, Williams contends that there is a potential distinction to be drawn between factual findings that are objectively verifiable and those that require the exercise of a discretion and for which there is strictly speaking no correct answer. In support of the distinction, she specifically refers to the example of a decision-maker failing to provide a grant because it wrongly assessed a person’s age compared to the meaning of an “illegal entrant”. This distinction is important because, depending on the classification, the finding of fact in question will either be substituted with the objectively correct answer automatically\textsuperscript{350} or be subjected to a rationality review in the same way as the substantive outcome to the exercise of a discretionary power would have been.\textsuperscript{351} \textit{Pulhofer v Hillington London Borough Council} is a case in point.\textsuperscript{352} In this case, a couple’s application for assistance under the Housing (Homeless Persons) Act 1977 was refused because they were not considered

\begin{footnotes}
\textsuperscript{345} P P Craig “Nature of Reasonableness Review” 7.
\textsuperscript{346} See \textit{R v Secretary of State for the Home Department, ex parte Khawaja} 1984 AC 74.
\textsuperscript{348} See \textit{Secretary of State for Education and Science v Tameside Metropolitan Borough Council} 1977 AC 1014.
\textsuperscript{349} 2004 EWCA Civ 49.
\textsuperscript{350} I.e. whether or not the decision is correct is not dependent on the reviewing court.
\textsuperscript{352} 1986 UKHL 1; 1986 AC 484.
\end{footnotes}
homeless when accommodation was available to them in the form of a room at a guest house on a bed-and-breakfast basis. On review, the applicants convinced the Court that this room was not accommodation which answered the statutory duty of the council under the Act, but this decision was overturned on an appeal to the Court of Appeal.

On a further appeal to the House of Lords, the Court found that the council could conclude, as a matter of fact, that the couple was not homeless for purposes of the Act because they had accommodation within the ordinary meaning of the word. The Court reasoned that, where the existence of a fact was left to the judgment and discretion of a public body and that fact involved a broad spectrum ranging from the obvious to the debatable to the just conceivable, it was its duty to leave the decision of that fact to the public body to whom Parliament had entrusted the decision-making power. According to the Court, the only exception was where it was obvious that the decision-maker, consciously or unconsciously, had acted perversely. In dismissing the appeal, the Court did therefore not comment on the objective and correct meaning of “accommodation”, but rather engaged in an assessment of the reasonableness of the initial decision-maker’s exercise of jurisdictional discretion in defining the term as it did.

This same approach was followed in R v Monopolies and Mergers Commission, ex p South Yorkshire Transport.\(^\text{353}\) In this case, the question arose whether the Commission was entitled to investigate a merger, allegedly only affecting a small part of the country, when its powers were limited to mergers affecting a “substantial” part of the United Kingdom. The Court confirmed that size, character and importance were relevant criteria in determining whether a merger was “worthy of consideration for the purpose of the Act” and hence “substantial”, but qualified this criteria on the basis that the meaning of “substantial” was broad enough to call for the exercise of judgment rather than an exact quantitative measurement. According to the Court, the conclusion of the Commission was therefore not irrational, but within the permissible field of judgment.\(^\text{354}\)

While courts do therefore rely on the fact/law distinction to determine whether to intervene on review, it is clear that the courts do not decline to review all errors of fact. On the contrary, case

\(^{353}\) 1993 1 WLR 23.
\(^{354}\) 32-33. See also Puhlhofer v Hillingdon London Borough Council 1986 AC 484; 1986 UKHL 1.
law demonstrates that there have been instances where the review courts have considered the reviewability of errors of fact relating to precedent facts, evidentiary findings and/or a misunderstanding of established and relevant facts. Reasonableness plays a role in the review of these errors of fact when the facts in question are not objectively verifiable by requiring decision-makers to rationally relate the evidence and their reasoning to the decision which they have made. Within the context of the discretionary power that has been conferred, reasonableness therefore requires a logical connection between the reasons for the decision and the merits of the matter. As such, a disproportion between the facts and their legal application and/or a mistake of fact in and of itself may render a decision unreasonable. Viewed in this manner, it is evidently difficult to determine the reasonableness of a decision without at the same time considering the merits of the decision. This does however not necessarily mean that the courts engage in a so-called merits review; nor does it have the effect that there are two kinds of review—review of process and review of merits. A consideration of the merits is not the same as a decision on the merits. In a reasonableness review, the test is that of the reasonableness, as opposed to the correctness, of the findings of fact. As such, the question remains whether the evidence is such that a reasonable person, acting reasonably, could have reached the decision from the evidence and the inferences. In making the determination, the courts do not leave the weighing of competing values to the decision-maker without satisfying itself that due weight has been accorded to relevant interests and factors, but consider whether or not the decision is supported by factors, values and/or standards that reasonable persons would recognise as legitimate.

Downes distinguishes reasonableness review from a complete merits review; holding that the latter does not only involve a consideration of the merits of the original decision, but also a substitution of the decision under review if it is not the correct decision. Although

355 See M Supperstone, J Goudie & P Walker Judicial Review 213. In the event of objectively verifiable jurisdictional facts, the question is whether the determination that the matter is within the decision-maker’s jurisdiction is correct. See R (on the application of ProLife Alliance) v British Broadcasting Corporation 2003 2 All ER 977 997.
reasonableness review does therefore tend to go beyond a pure consideration of legal error to include a consideration of the merits of the matter, the courts’ power to act as the ultimate decision-maker and substitute that decision with the courts’ perception of the correct one is restricted and the primary remedy is the setting aside of the decision and its remittal to the primary decision-maker for reconsideration.\textsuperscript{360} It is only where a decision-maker, without the reviewable error, would have reached one decision only that the reviewing court may substitute its own decision for the decision in question.\textsuperscript{361} The power to make the substitute decision in this limited class of case is considered to be a time saving departure from the accepted doctrine that the review court is not concerned with the merits of decisions.\textsuperscript{362}

3.5 POLICY DECISIONS, HUMAN RIGHTS AND SLIDING SCALE OF REASONABLENESS REVIEW

It has now been established that the exercise of a discretionary power may be subject to judicial review on the basis of unreasonableness in the substantive sense if a decision-maker has made a decision that is alleged to be arbitrary, capricious or incapable of logical justification. It has also been established that the success of the unreasonableness review will depend on whether the court finds that the original decision-maker’s scrutiny and evaluation of the facts, reasoning and/or conclusions was so unreasonable that no reasonable authority could ever have come to it.\textsuperscript{363} This formulation advocates a relatively high threshold for court interference that, if adhered

\textsuperscript{360} S 31(5) of the Senior Courts Act 1981 - “If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition - (a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or (b) substitute its own decision for the decision in question.”

\textsuperscript{361} S 31(5A) of the Senior Courts Act 1981 - “But the power conferred by subsection (5)(b) is exercisable only if - (a) the decision in question was made by a court or tribunal, (b) the decision is quashed on the ground that there has been an error of law, and (c) without the error, there would have been only one decision which the court or tribunal could have reached. See also CPR 54.19(2)(b) - “The court may – (a)(i) remit the matter to the decision-maker; and (ii) direct it to reconsider the matter and reach a decision in accordance with the judgment of the court; or (b) in so far as any enactment permits, substitute its own decision for the decision to which the claim relates.”


\textsuperscript{363} Although the test was slightly reformulated in subsequent cases, the focus has remained on the nature of the impugned decision. In \textsc{CCSU}, the Court required a decision which was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. In \textit{R v Devon CC ex p George} 1989 AC 573, the Court explained that unreasonableness should provoke an exclamation that the decision must certainly be wrong.
to, may effectively render very few decisions reviewable on the basis of unreasonableness.\textsuperscript{364} Increasingly dissatisfied with the narrow scope of reasonableness, especially where constitutional rights or policy decisions are concerned,\textsuperscript{365} the courts have found that a “one size fits all” formulation of reasonableness is not possible, but that a more contextually sensitive approach is required.\textsuperscript{366} A variable intensity of unreasonableness review has therefore developed that has a more or less intrusive quality having regard to the nature and gravity of the matter concerned.\textsuperscript{367} To determine the appropriate measure of court deference, respect or restraint when carrying out a substantive reasonableness review, consideration must therefore be afforded to the intensity of reasonableness review applied by the courts in the context of merits-, policy- and/or human rights’ decisions respectively.

3 5 1 Policy decisions

In the administrative law context, it is recognised that decisions often involve interacting interests and repercussions which are not easily accommodated within the adjudicative model of the courts, but are better left to the decision-maker to make a value judgment by properly weighing those competing claims which the decision-maker considers relevant.\textsuperscript{368} In \textit{R v Criminal Injuries Compensation Board ex parte P}, for example, the Court acknowledged that the judiciary process was not best-suited to deal with decisions involving a balance of competing claims on government funds, but also accepted that these types of decisions should not be excluded altogether from the scope of judicial review.\textsuperscript{369} The Court accordingly adopted a restrictive interpretation of reasonableness whereby intervention would only be possible in cases of

\textsuperscript{364} See \textit{R v Secretary of State for the Home Department ex parte Daly} 2001 UKHL 26 para 32. The Court followed the determination of the European Court of Human Rights in \textit{Lustig-Prean and Beckett v United Kingdom} (1999) 29 EHRR 548 to hold that even a lowered threshold of unreasonableness in human right cases (i.e. anxious scrutiny) was insufficient to protect human rights upon judicial review.

\textsuperscript{365} See \textit{R v Secretary of State for the Home Department ex parte Daly} 2001 UKHL 26. In this case, it was argued that the depth of judicial review and the deference due to administrative discretion should vary with the subject matter of the case, viewed in its statutory context.

\textsuperscript{366} See \textit{R (Pro-life Alliance) v BBC} 2003 UKHL 23.

\textsuperscript{367} I.e. a sliding scale of reasonableness review ranging from a light-touch unreasonableness review to one of anxious scrutiny. See J Laws \textit{The Golden Metwand and the Crooked Cord} 187, 196. See also D R Knight “A Murky Methodology: Standards of Review in Administrative Law” 2008 6 NZJPIL 117.

\textsuperscript{368} K Syrett “Of resources, rationality and rights: emerging trends in the judicial review of allocative decisions” 2000 1 Web ICLI.

\textsuperscript{369} 1995 1 WLR 845 857.
irrationality, where, for example, a scheme for criminal injuries compensation excluded all of those with red hair.

Similarly, in the matter of *Nottinghamshire County Council v Secretary of State for the Environment, Transport and the Regions*, the Court held that judicial interference would only be justified if the evidence supported a *prima facie* case of bad faith, improper motive or consequences that were so absurd that the decision-maker must have taken leave of his or her senses.\(^{370}\) According to the Court, it preferred such a strict scrutiny where matters of public expenditure or government policy were involved.

In *International Trader’s Ferry Ltd*, a case concerning the disposition of police resources during a period of protests at live animal exports, the Court conducted a more comprehensive examination of the test.\(^{371}\) The House of Lords commented that *Wednesbury Corporation* was a briefly-considered case which might no longer be decided in the same way: its unreasonableness formulation was "tautologous" and amounted to an "admonitory circumlocution" which was not necessary to prevent judges from infringing the separation of powers. The Court proposed a reformulated test: "whether the decision in question was one which a reasonable authority could reach". Turning to the facts, the Court accepted that there was no absolute duty to protect the exporter’s activities, but that this was a matter of discretion. In exercising this discretion, the Court found that the decision-maker had balanced the various competing interests, had regard to the priorities identified by the police authority as he was statutorily obliged to do, had not ignored other relevant factors or taken account of those which were irrelevant and had allocated his men on a carefully considered basis. The Court was accordingly unable to accept that the decision was unreasonable.

The cases discussed above make it clear that policy decisions typically involve the exercise of a lawful discretion which is not rule-bound and does not require a dispositive, right-or-wrong answer. As such, the nature of the problem posed may render the review court unsuitable to make a determination. As the “red hair” illustration in *ex parte P* suggested, the courts in these policy-

---

\(^{370}\) 1986 AC 240; 1985 UKHL 8.

\(^{371}\) See para 3 1 and 3 4 1 1.
type decisions therefore apply a strict formulation of unreasonableness that will rarely be satisfied.\footnote{I.e. light touch unreasonableness review. See H Woolf, S A De Smith, J L Jowell, A P Le Sueur & C M Donnelly \textit{De Smith's Judicial Review} 6 ed (2007) 592. See also \textit{City of Bradford Metropolitan Council v Secretary of State for the Environment} 1986 AC 240; \textit{R (Rogers) v Swindon NHS Primary Care Trust} 2006 EWCA Civ 392.} On the one hand, this formulation provides the courts with the means to justify judicial self-restraint \textit{vis-à-vis} the decision-maker whilst stopping short of holding that the decision is not amendable to judicial review at all. On the other hand, it also enables the courts to avoid involvement in polycentric questions whilst leaving open the possibility of intervention in noticeably bad or offensive cases.

\subsection*{3.5.2 Fundamental rights}

In England, there is a growing realisation that the traditional \textit{Wednesbury} test is inappropriate where a decision is alleged to interfere with fundamental rights or important interests.\footnote{H Woolf, S A De Smith, J L Jowell, A P Le Sueur & C M Donnelly \textit{De Smith's Judicial Review} 6 ed (2007) 594. 1987 AC 514. See A Le Sueur “The Rise and Ruin of Unreasonableness?” (2005) 10 \textit{JR} 32-51.} This was first propounded in \textit{R v Secretary of State for the Home Department Ex p Bugdaycay}.\footnote{1987 AC 514. See A Le Sueur “The Rise and Ruin of Unreasonableness?” (2005) 10 \textit{JR} 32-51.} In this case, the secretary of state had refused to grant an asylum application on the ground that the appellant was not a genuine refugee despite indications that he was unlikely to be allowed re-entry into Kenya and that he would be returned to Uganda where persecution was likely. An application for the judicial review of the decision was dismissed and an appeal against that refusal was also unsuccessful. On a further appeal to the House of Lords, Lord Bridge accepted that the question whether the appellant was a refugee was to be determined exclusively by the officials acting for the secretary of state and only open to challenge on \textit{Wednesbury} principles. The Court however also reasoned that, within the limitations of the court’s power of review, it was entitled to subject an administrative decision to more rigorous examination to ensure that it was not flawed according to the gravity of the issue which the decision determined. In the present instance, the Court found that anxious scrutiny was warranted in so far as the administrative decision under challenge was one which had the potential to imperil life or liberty.

Turning to the facts, the Court noted that the secretary of state's decision was taken on the basis of a confidence in Kenya's performance of its obligations under the Geneva Convention Relating to the Status of Refugees. However, based on the evidence available, the Court found that the
Dangers and doubts involved in sending the appellant back to Kenya had not been adequately considered and resolved. In consequence of this anxious scrutiny of reasonableness, the appeal was allowed.

A clearer indication of the potential impact of the different approaches to reasonableness is to be found in the Court of Appeal’s decision in *ex parte Smith*. In this case, the applicants contended for an anxious scrutiny application of reasonableness, whilst the Ministry of Defence supported a strict application of the *Wednesbury* test. In determining the appropriate application in the present instance, the Court commented that the greater the policy content of a decision and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the Court should necessarily be in holding a decision to be irrational. According to the Court, the reasonableness test was sufficiently flexible to cover all situations, but greater caution was required where decisions of a policy-laden, esoteric or security-based nature were in issue. In this instance, the Court opted for a more stringent level of scrutiny because the policy did not depend essentially on political judgment and the human rights dimension was considered prominent. The Court nevertheless decided, partly also because the policy was supported by Parliament, that the practice could not be determined to have the requisite degree of unreasonableness.

Similarly, in *R (Mahmood) v Secretary of State* the Court confirmed that there were different approaches to the correct standard of review; suggesting that the varying degrees of intensity should be regarded as points along a spectrum. Referring to the *Smith* formula, the Court commented that the different approaches were not hermetically sealed from one another, but that a sliding scale of review meant that the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that would be required. In the context of human rights, the Court commented that an intensity of review would generally be

---

375 1996 1 All ER 257.
376 264.
377 *R v Ministry of Defence, ex parte Smith* 1995 4 All ER 427 448d-452d. The Queen’s Bench Divisional Court had rejected a challenge to the policy of the Ministry which prohibited homosexuals from the armed forces on the basis of irrationality because reasons had been given and had held that ordinary *Wednesbury* should govern the situation. In the Court of Appeal all were in agreement that the anxious scrutiny approach applied.
378 2001 1 WLR 840. See also Begbie 2000 1 WLR 1115 1130: “But each is a spectrum, not a single point, and they shade into one another. It is now well established that the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake.”
followed which required the decision-maker to demonstrate either that its decision did not in truth interfere with the right or, if it did, that there existed considerations which could reasonably be accepted as amounting to a substantial objective justification for the interference.\footnote{852.}

In \textit{Brind} the majority of the Court also indicated that a decision-maker who exercises broad discretion must show that an infringement of the right to expression can only be justified by an ‘‘important competing public interest’’.\footnote{1991 1 All ER 720 749-751.}

This test was reformulated in a fractionally more stringent way in \textit{R v Lord Saville of Newdigate ex p A.}\footnote{2000 1 WLR 1855.} The Court confirmed that were fundamental rights were concerned; the options available to a reasonable decision-maker were curtailed. According to the Court, it was unreasonable to reach a decision that contravenes or could contravene human rights unless there were significant countervailing considerations justifying interference with the human rights. The latter was to be determined having regard to the strength of the countervailing circumstances and the degree of the interference with the right involved.\footnote{1867 para 37.}

Whilst the concept of anxiously or heightened scrutiny is difficult to define, case law does serve to provide some guiding principles. For example in \textit{R (Sarkisian) v Immigration Appeal Tribunal}, the Court confirmed that anxious scrutiny did not require the Court to strive by “tortuous mental gymnastics” to find error in the decision under review when in truth there has been none.\footnote{2001 EWHC Admin 486.} According to the Court, its concern ought to be focused on substance not semantics. Similarly, in \textit{R (Puspalatha) v Immigration Appeal Tribunal}, the Court confirmed that decisions must be read as a whole in a common sense way.\footnote{2001 EWHC Admin 333.} In this regard, the Court explained that it was not appropriate for the Court to focus on particular sentences and to subject them to the kind of legalistic scrutiny that might perhaps be appropriate in the case of statutory instruments. More recently, this stricter application of unreasonableness has not been confined to human right cases. For example, when seeking to reject an ombudsmen decision, it was held that the secretary of

\footnotesize{
\begin{itemize}
\item \footnote{852.} 852.
\item \footnote{1991 1 All ER 720 749-751.} 1991 1 All ER 720 749-751.
\item \footnote{2000 1 WLR 1855.} 2000 1 WLR 1855.
\item \footnote{1867 para 37.} 1867 para 37.
\item \footnote{2001 EWHC Admin 486.} 2001 EWHC Admin 486.
\item \footnote{2001 EWHC Admin 333.} 2001 EWHC Admin 333.
\end{itemize}
}
state must have cogent reasons for doing so. The principle of a sliding scale of scrutiny therefore demonstrates that there are different shades and degrees of unreasonableness and that the unreasonableness standard applied should be commensurate with the seriousness of the subject-matter. The more the challenged decision lies in what may conveniently be called the political field, the less intrusive court supervision will be. On the other hand, interference with fundamental or constitutional rights will be subjected to more intrusive scrutiny with the public authority having the obligation to produce a justification for the decision as well as specify the considerations involved in the weighing exercise prior to the decision-making. In principle, however, the sliding scale of reasonableness requires the review court to examine the decision-making process and to articulate clearly the basis of judicial scrutiny and the importance of the subject-matter.

3.6 CONCLUSION

In this chapter it was established that review is the primary mechanism for judicial supervision over the exercise of public power in English administrative law. Opposed to an appeal on the merits, the right of interference on review is limited to unlawful or illegal decisions. The challenge is not focussed on the correctness of the decision itself, but on the manner in which the decision was made. As a result, the courts scrutinise the lawfulness of decisions, in substance and procedure, taking into consideration the material available, the reasons afforded for the decision by the primary decision-maker and the law as it stood at the time the decision was made. Judicial review does not require the courts to perform the decision-making process.

---

385 R (Bradley and others) v Secretary of State for Work and Pensions 2008 EWCA Civ 36. The Court held that where the Parliamentary Commissioner had found maladministration in a ministerial department, the Secretary of State, although not bound by the Commissioner’s decision, was not entitled to reject the Commissioner’s finding on the basis that he preferred another view which could not be categorised as irrational. R (Equitable Life Members Action Group) v HM Treasury 2009 EWHC 2495 (Admin). The Court held that the Government had failed to produce cogent reasons for rejecting a number of the Ombudsman’s findings of maladministration and injustice, and quashed its decision to do so.

386 See J Chan Comparing Administrative Justice Across the Commonwealth 255.


388 See para 2 1.

389 See Chief Constable of the North Wales Police v Evans 1982 3 ALL ER 141 in para 3 2 1.

390 E.g. has the decision-maker taken irrelevant considerations into account or failed to take relevant considerations into account?

391 E.g. has the decision-maker afforded the parties a reasonable opportunity to be heard and/or has the decision been made by a decision-maker who is free from actual bias or the appearance of bias?
task properly allocated to the relevant authority by law. By curtailing judicial control in this manner, it is reasoned that courts are able to preserve the position that they only fulfill the legislative will and not dictate the results that should be reached. This view is merely strengthened by the fact that the typical judicial review remedy is setting aside and remitting the decision to the original decision-maker as opposed to the court varying the decision and making a substitute decision.

Reviewable decisions have conveniently been grouped by the CCSU case into three classes of grounds of review: illegality, procedural impropriety and unreasonableness. The Senior Courts Act 1981 has not confirmed these common law grounds of review, but it is generally accepted that they are reconcilable with the statutory application for judicial review based on the requirement of lawfulness. In consequence, a decision would qualify as unlawful as envisaged by the Senior Courts Act 1981 if the decision is considered illegal, procedurally improper and/or unreasonable as contemplated in CCSU. This threefold classification does not rigidly set the grounds of judicial review; nor are the grounds strictly compartmentalised. Since CCSU, incompatibility with obligations arising out of the Human Rights Act 1998 has also been recognised as a ground for review in addition to proportionality in the fundamental rights’ context.

The principle of legality requires a decision-maker to correctly understand the law that regulates his or her decision-making power and to give effect to it. In these instances, there is no question of decision-makers having a discretion to interpret the law or any jurisdiction to interpret the law incorrectly. If a decision-maker misdirected himself or herself in law and asked the wrong question, the courts are entitled to find that decision unlawful, correcting the misconstructions of the law to ensure that such decision-makers act within the confines of their allocated powers. Examples include decision-makers: 1) acting outside the scope of their powers; 2) exercising powers for improper purposes; 3) erroneously interpreting and/or applying principle

---

392 See Chief Constable of the North Wales Police v Evans 1982 3 ALL ER 141 in para 3 2 1 as well as Brind and others v Secretary of State for the Home Department 1991 UKHL 4 in para 3 3.
393 P P Craig Administrative Law 537.
394 See s 31(1) of the Senior Courts Act 1981 in para 2 2.
395 See para 3.
396 See para 2 2 and 3.
397 See para 3 1.
of laws; and/or 4) not taking precedent facts into account or taking into account facts which ought not to have been taken into account.

Procedural impropriety as a ground of review implies that decision-makers are required to observe the basic rules of natural justice and/or act with procedural fairness towards the person who will be affected by the decision.398 Again, a standard of correctness will apply to the extent that non-compliance with procedural requirements lead to a decision being set aside for procedural impropriety.

Therefore, where the focus is on the procedure by which the decision was arrived at or the legal basis on which it was founded, decision-makers do not have a right to choose between more than one possible course of action. In fact, decision-makers’ failure to adopt the right course of action, having regard to the legality and procedural principles imposed in any particular instance, would render the decision unlawful. In these instances, review courts thus require compliance with a correctness standard with no question of deference to the decision of the administrative authority.

Opposed thereto, unreasonableness as a ground of review is focused on the discretionary decision forming the subject matter of the review proceedings; that is, the substance of a decision or its justification. It requires decision-makers to apply logical or rational principles in their decision-making process so as to make a competent decision based on the facts available.399 As part of substantive review, the courts ask whether the discretionary power under which the decision-maker has acted has been improperly exercised or insufficiently justified. In this regard, the courts consider decisions for evidence of: 1) a failure to identify relevant considerations, 2) the placement of manifestly undue or inadequate weight to relevant considerations; 3) irrelevant considerations having been taken into account; 4) an error of reasoning which deprives the decision of logic or comprehensible justification; 5) error of fact that is significant in the decision-making process or may have been material to the decision and/or 6) inferential unreasonableness. In the latter instance, the courts presume that, because the decision in question appears unreasonable, the decision-maker must have been influenced by irrelevant considerations.

398 See para 3.2.
399 See para 3.3.
or had acted with bias or in some other improper way despite the fact that the decision appears to have been made within the four corners of the decision-maker’s powers. Unlike an illegality and/or procedural impropriety challenge, an unreasonableness allegation can therefore not be tested against a correctness standard. Because the decision in question follows an administrative discretion, the decision cannot be determined to be right or wrong in any objective way. It is the very nature of an administrative discretion that there is a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. 400

To ensure some measure of control over the rationality of decisions, the courts have thus approved a measuring stick which requires the decision to be so unreasonable that no reasonable authority could ever have come to it. Other formulations of the same test have required decisions that: 1) have no rational basis or are so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it; 2) are beyond the range of responses open to a reasonable decision-maker; and/or 3) demonstrate that, in reaching its decision, the decision-maker had directed itself improperly in law and had taken into consideration irrelevant matters and included in its consideration irrelevant matters.

Although an unreasonableness review will inevitably involve a review court in a consideration of the merits of the impugned decision, it does not necessarily have the effect that the courts engage in a full scale merits review or that there are two kinds of review—review of process and review of merits. 401 When courts find a decision to be reasonable, they are inevitably commenting on the reasonable or logical connection between the evidence thought by the court to be true and the reasoning or purposes supporting the decision that was made. Such a value determination cannot be made in isolation of the evidence and/or facts of the matter. In reviewing factual findings, the test however remains whether the evidence is such that a reasonable person, acting reasonably, could have reached the decision from the evidence and the inferences. The question is not whether the finding as such is right or wrong; the courts will simply hold that a decision-maker

400 See Secretary of State for Education and Science v Tameside Metropolitan Borough Council 1977 AC 1014.
has acted unlawfully if they have breached any of the reasonableness principles without also substituting the decision under review if it is not the correct decision. Framing the test in this manner is considered to legitimise judicial supervision in administrative decisions and to defend the courts from the allegation that they are overstepping their boundaries and intervening too greatly in the merits of the matter. Although there is an overlap between proportionality and unreasonableness, the concept of “proportionality” is accepted to advocate a more stringent scrutiny and has been adopted as the appropriate test for review of European Community law and Convention rights (under the Human Rights Act 1998) only. In contrast, unreasonableness continues to apply to domestic law.

The unreasonableness test is also not cast in stone but may have a more or less intrusive quality based on the nature and gravity of the matter concerned. Evidence of light-touch review and anxious scrutiny is particularly prominent in decisions involving policy and fundamental rights respectively. Whereas the courts are hesitant to scrutinise polycentric decisions, the courts are more willing to engage in deeper scrutiny when fundamental rights are in issue. This approach requires decision-makers to articulate its weighing process and enables the court to enter into a more in-depth reasonableness debate. In determining whether the decision-maker has exceeded the reasonableness margin of appreciation in a particular case, context is therefore important.

In essence, unreasonableness concerns the decision that a decision-maker could not reasonably, in all the circumstances of the case, have reached. It is to be determined objectively having regard to the substantive principles of judicial review. Unreasonableness does not enable a review court to strike down a decision because that particular court considered the decision to be wrong and hence subjectively considered it to be an “unreasonable” decision. On the contrary, rather than focusing on issues of jurisdiction or procedural prerequisites for reaching a decision, unreasonableness addresses the mental processes involved in making the decision. Put differently, unreasonableness as a ground of review deals with those decisions that do not sit comfortably in any of the other recognised grounds of review, but nevertheless require intervention because it is obviously a very bad decision. The test for unreasonableness makes it

---

402 I.e. in the sense of achieving a fair balance between factors that have been or can be deemed relevant.
403 I.e. illegality.
404 I.e. procedural impropriety.
abundantly clear that the courts are required to make a secondary decision, with the primary decision about the merits of the matter being left to the public authorities. As such, the test for unreasonableness lies at the heart of the judicial review process, the control of the exercise of administrative discretion and the supervision of judicial decision making.\textsuperscript{405}

CHAPTER 4

THE ROLE OF PERVERSITY IN CHALLENGING TRIBUNAL FINDINGS IN ENGLAND

4.1 INTRODUCTION

In English employment law, employees after one year of continuous service with the same employer have the statutory right not to be unfairly dismissed and to enforce this right, if it has been encroached upon, or to obtain a remedy for a breach of this right, by presenting unfair dismissal complaints to the Tribunal within three months from the date of termination.\textsuperscript{406} The Tribunal is an independent judicial body\textsuperscript{407} with jurisdiction in terms of the Employment Tribunals Act 1996 to determine unfair dismissal disputes as well as all other employment complaints as may be conferred upon it by statute.\textsuperscript{408} Generally having exclusive jurisdiction in respect of the complaints falling within its jurisdiction,\textsuperscript{409} the Tribunal is envisioned to be an easily accessible body for determining complaints in a relatively quick and less expensive manner and with fewer formalities and technicalities than the ordinary courts.\textsuperscript{410} With some minor exceptions, its decisions are also generally final and binding.\textsuperscript{411} Whilst a claimant before the Tribunal may therefore seek to challenge the outcome of the proceedings before a higher authority simply because a finding was not made in his or her favour, this will not be sufficient. Section 21(1) of the Employment Tribunals Act 1996 only allows an appeal against a Tribunal finding to the Appeal Tribunal on the basis of a question of law. Issues of fact are considered to fall within the exclusive jurisdiction of the Tribunal acting as an industrial jury.\textsuperscript{412}

\begin{footnotes}
\footnotetext[406]{Section 94(1) read with sections 108(1), 111(1) and 111(2)(a) of the Employment Rights Act 1996.}
\footnotetext[408]{See section 2 of the Employment Tribunals Act 1996.}
\footnotetext[409]{See section 205(1) of the Employment Rights Act.}
\footnotetext[410]{See \textit{Hardy Labour Law and Industrial Relations in Great Britain} 3 ed (2007) 70. See also the aims, standards and targets of the Employment Tribunal at http://www.employmenttribunals.gov.uk/AboutUs/charter Statement.htm#l1 found on 21 February 2011 at 10h07.}
\footnotetext[411]{See para 4 2 2.}
\end{footnotes}
The Employment Tribunals Act 1996 does not define what constitutes a “question of law”. Its meaning and scope is however important to all parties involved in appeal hearings before the Appeal Tribunal to establish whether the decision or conclusion in question warrants court scrutiny and interference. Mechanisms put in place to safeguard the proper application of jurisdiction and the fact/law distinction include the initial vetting of prospective appeals by the registrar of the Appeal Tribunal and the listing of appeals for preliminary hearings for directions as to whether they should proceed to full hearings. To satisfy the Appeal Tribunal that there are reasonable grounds for an appeal, a claimant must be able to clearly identify in his or her papers the point(s) of law on which the appeal is based as well as properly substantiate the reasoning underlying the points.

The treatment in English law of certain errors of fact as errors of law further complicates delineating the scope of an appeal on a point of law. In Neale v Hereford and Worcester County Council, the Court of Appeal held that an appellate court could interfere with a finding of fact if it was evident that the finding was certainly wrong. In Piggott Brothers & Co. Ltd v Jackson, the Court of Appeal accepted that the absence of evidence to support a finding of fact was an appealable question of law. In British Telecommunications Plc v Sheridan the Court of Appeal also confirmed that a misunderstanding and/or misapplication of the facts may amount to a question of law if the Tribunal had made a wrong finding on a relevant undisputed or indisputable fact and that error was the basis of further conclusions of fact.

In this chapter, the remedy of appeal from the Tribunal to the Appeal Tribunal is discussed with specific reference to the jurisdiction and constitution of the Appeal Tribunal and the scope and/or ambit of the permissible ground(s) of appeal. The differences between questions of law and questions of fact are also discussed. Consideration is then afforded to the circumstances in which the Tribunal’s failure to give adequate reasons for its decision, a breach by the Tribunal of the rules of natural justice and/or excessive delay on the part of the Tribunal in giving its decision,

413 See para 4.3.
415 1986 IRLR 168 174.
416 1991 IRLR 309 312.
417 1990 IRLR 27 30.
can amount to an error of law. The circumstances in which the Tribunal's treatment of facts can amount to an error of law and cases where there is no evidence to support its findings of fact is also considered. In addition it is considered in what circumstances Tribunal decisions can be appealed against on the basis of perversity or because the Tribunal reached its decision following an erroneous exercise of discretion. This study is conducted for the purpose of extracting meaningful principles to contribute to the interpretation and application of the review remedy provided for in section 145 of the LRA.

4.2 THE EMPLOYMENT TRIBUNAL

In England, employment disputes are not dealt with by the ordinary courts but by a specialist Tribunal. Initially referred to as the “Industrial Tribunal”, it was renamed the “Employment Tribunal” in the Employment Rights (Dispute Resolution) Act 1998. From inauspicious beginnings under section 12 of the Industrial Training Act 1964, the Tribunal’s jurisdiction has been extended under section 2 of the Employment Tribunals Act 1996 to cover the greater part of the statutory, individual employment rights. The Tribunal has, for example, jurisdiction in respect of complaints of unfair dismissal; breach of contract of employment; redundancy payments; unauthorised deduction from wages; discrimination in the employment context and unequal pay. The Tribunal is generally constituted by an employment judge and two members. They participate equally in decision-making and use their employment and/or

---

418 S Hardy Labour Law in Great Britain 4 ed (2011) 68.
419 See section 1 of the Act. The Industrial Tribunals Act 1996 was renamed the Employment Tribunals Act 1996. All references to the “Industrial Tribunal” in pre-1998 case law must thereto be understood to be references to the “Tribunal”. For simplicity, the Employment Tribunal and/or Industrial Tribunal will herein both be referred to as “the Tribunal”.
420 I.e. the Tribunal initially only dealt with appeals from employers against levies imposed upon them by industrial training boards.
422 Section 111(1) of the Employment Rights Act 1996.
423 Section 3(2) of the Employment Tribunals Act 1996.
424 Section 163(1) of the Employment Rights Act.
425 Section 23 of the Employment Rights Act.
426 Section 120 of the Equality Act 2010. For the nature of discrimination contemplated, see Part 5 (Work) of the Equality Act 2010.
427 Section 2 of the Equal Pay Act 1970.
428 One member is selected from the panel of persons appointed by the Lord Chancellor after consultation with organisations or associations representative of employees and the other member from the organisations or associations representative of employers. See Rule 8(2)(a)-(c) and Rule 9(1)(a) and (b).
industrial experience and expertise to adopt a common sense approach to decision-making rather than make determinations in a legalistic manner.\textsuperscript{430} The Employment Tribunals Rules of Procedure also makes it clear that the Tribunal members must handle cases fairly and justly.\textsuperscript{431} This includes: 1) ensuring that parties to the proceedings are on an equal footing; 2) avoiding unnecessary formality and seeking flexibility in the proceedings; 3) dealing with cases in ways which are proportionate to the complexity and importance of the issues; 4) avoiding delay so far as is compatible with a proper consideration of the issues; and 5) saving expense.\textsuperscript{432} The Tribunal, however, deals with a great number of disputes which turn heavily on the facts of the particular case involved and often require the application of complex law.\textsuperscript{433} The Tribunal’s challenge lies in reconciling the duties to hear the respective parties’ cases, make factual findings, apply the relevant law and reach a conclusion to which its findings and experience lead it with the objective of resolving disputes in an expeditious and cost-effective manner.

43 THE APPEAL TRIBUNAL

The Employment Tribunals Act 1996 recognises that Tribunal judgments, decisions, directions or orders may be challenged on appeal to the Appeal Tribunal established under section 87 of the Employment Protection Act 1975 and continued in existence under section 20(1) of the Employment Tribunals Act 1996.\textsuperscript{434} The Appeal Tribunal is a superior court of record\textsuperscript{435} that retains the Tribunal’s character as a quick, fair, inexpensive and accessible means for individuals

---


\textsuperscript{431} Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

\textsuperscript{432} Rule 2(a)-(e). See also A Sinclair, N Botten & S Cahill “Unfair Dismissal, Representation and Compensation” 2000 5 Web JCLI found at http://webjcli.ncl.ac.uk/2000/issue5/sinclair5.html on 28 October 2012 at 10h13.

\textsuperscript{433} See D Lockton Q&A Employment Law 2011-2012 7 ed (2011) 12. See also Meek v Birmingham District Council 1987 IRLR 250. See also Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Tribunal’s decision must: identify the issues which the Tribunal has identified as relevant to the claim; if some identified issues were not determined, what those issues were and why they were not determined; findings of fact relevant to the issues which have been determined; a concise statement of the applicable law; how the relevant findings of fact and applicable law have been applied to determine the issues; and where the judgment includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been calculated or a description of the manner in which it has been calculated.

\textsuperscript{434} See section 21 of the Employment Tribunals Act 1996 as well as definition of “Appeal Tribunal” in Rule 2(1) of the Employment Appeal Tribunal Rules 1993 as amended.

\textsuperscript{435} Section 20(3) of the Employment Tribunals Act 1996.
to seek remedies for alleged infringements of their statutory employment rights.\textsuperscript{436} It is composed of a High Court judge and two or four appointed members with special knowledge or experience of industrial relations and that equally represents both sides of industry.\textsuperscript{437} These lay members are not assessors or side members, but function as independent, uncommitted lay judges with equal voting powers.\textsuperscript{438}

Similar to the limited review jurisdiction of the Labour Court in South Africa, appeals from the Tribunal to the Appeal Tribunal have traditionally only been available on a question of law arising from the Tribunal’s originating jurisdiction under the specified employment protection legislation referred to in section 88(1) of the Employment Protection Act 1975. This jurisdiction has since been expanded to take account of increases in employment legislation,\textsuperscript{439} but, as part of a continued policy to minimise appeals, section 21(1) of the Employment Tribunals Act 1996 with one exception (relating to appeals against a decision of a certification officer) continues to only allow appeals on points of law arising from any decision of, or any proceedings before, the Tribunal in respect of a designated list of statutes.

Broadly and in general, a question of law concerns the interpretation of the law and its application to the facts of the matter only.\textsuperscript{440} Appellants must therefore seek to identify flaws in the legal reasoning of the original decision.\textsuperscript{441} The Appeal Tribunal is not entitled to substitute its own interpretation of the facts for that of the Tribunal and afford second chances to parties who have not properly and fully argued their facts before the Tribunal.\textsuperscript{442} In those instances where the Appeal Tribunal does allow an appeal, it may substitute its own decision for that of the Tribunal


\textsuperscript{437} I.e. employers and workers. Section 28(2) of the Employment Tribunals Act 1996. See I T Smith & G Thomas \textit{Smith and Wood’s Employment Law} 27.


\textsuperscript{440} See chapter 3.


or remit the case to the same Tribunal or a differently constituted Tribunal for a complete rehearing or the reconsideration of a particular point only.\footnote{97} The Appeal Tribunal will only substitute a decision with its own view if no further investigation is required to determine that the Tribunal’s decision is plainly and unarguably wrong on the facts as a result of a misdirection in law and it is equally clear what the correct decision is.\footnote{444} However, irrespective of the direction taken, the written determinations of the Appeal Tribunal are final and conclusive, subject only to the appropriate avenue of appeal to the Court of Appeal and ultimately to the Supreme Court, provided the leave of either the Appeal Tribunal or the Court of Appeal has been obtained.\footnote{445}

4 4  GROUNDS OF APPEAL: QUESTION OF LAW

The Employment Tribunals Act 1996 does not define what constitutes a “question of law”. The Appeal Tribunal and the Courts have therefore applied their own minds to this question. In certain categories of cases this has proven to be relatively easy. A question concerning the construction of a statute must, for example, be a question of law.\footnote{446} In other cases it has been more difficult; requiring the appellate body to engage in an exercise of statutory interpretation to determine its meaning and scope.\footnote{447} However, as the Court of Appeal has emphasised, the difference between legal questions and findings of fact and inferences is important.\footnote{448} Appellate bodies must therefore be able clearly to identify the difference between questions of law and challenges to primary findings of fact disguised as questions of law. On the other hand, care must be taken not to follow a “too narrow” or “too broad” approach to its interpretation and application.\footnote{449} A broad interpretation would defeat the legislature’s objective to establish the Tribunal as a quick, accessible, less expensive and more informal means of resolving

\begin{footnotes}
\footnotetext[97]{35(1) and (2) of the Employment Tribunals Act 1996. See also G Mansfield, J Bowers QC, D Brown, S Forshaw, A Korn, J Palca & D Reade QC Blackstone’s Employment Law Practice 2012 para 18.187.}
\footnotetext[444]{I.e. the Tribunal will not substitute its view unless there is only one possible conclusion that could have been reached by the Tribunal. See Morgan v Electrolux Ltd 1991 ICR 369; O’Kelly v Trusthouse Forte plc 1983 ICR 728. See also G Mansfield, J Bowers QC, D Brown, S Forshaw, A Korn, J Palca & D Reade QC Blackstone’s Employment Law Practice 2012 para 18.187 as well as The City Law School Employment Law in Practice 8 ed (2008) 71.}
\footnotetext[446]{37(1) and (2) of the Employment Tribunals Act 1996.}
\footnotetext[447]{See Phillips (1978) Industrial Law Journal 138.}
\footnotetext[449]{Para 28-30.}
\end{footnotes}
employment disputes. However, a very restrictive interpretation could possibly deprive a party of justice in a situation that would otherwise have warranted interference. This raises the question whether the Appeal Tribunal, in circumstances where it strongly disagrees with the Tribunal, can rule that the decision is wrong in law.\footnote{J Wood “The Employment Appeal Tribunal as it Enters the 1990s” (1990) 19(3) \textit{Industrial Law Journal} 133-141; downloaded from http://ilj.oxfordjournals.org/ at University of London Senate House on 3 May 2012.}

Although the facts of \textit{Watling v William Bird & Son (Contractors) Ltd} are not directly relevant to the present discussion, the Queen’s Bench Division, hearing the appeal because the Appeal Tribunal had not yet been established, made an important ruling regarding the manner in which Tribunal decisions should be challenged as wrong in law.\footnote{1976 ITR 70. I.e. in this case the Court recognised the Tribunal’s misunderstanding and/or misapplication of the facts as a ground of appeal.} According to the Court, an appellant who claimed the commission of an error of law had to establish one of three things on the part of the Tribunal: 1) that it misdirected itself in law, misunderstood the law or misapplied the law; 2) that it misunderstood the facts or misapplied the facts; or 3) that, although it apparently directed itself properly in law and did not misstate, misunderstand or misapply the facts, the decision was perverse or there was no evidence to justify the conclusion which was reached.\footnote{71.} In respect of the third point of perversity, the Court referred to \textit{Cooper v British Steel Corporation}. In that case, it was held that the Court would not interfere with a decision unless it appeared from the primary facts that the decision on a point of fact was plainly wrong.\footnote{1975 ICR 454.} According to the Court, “plainly wrong” went beyond a mere matter of opinion or approach, but required the Court to deduce from looking at all the facts that, although the Tribunal had not expressed a wrong approach, it must in fact have followed one because the decision was clearly wrong.

In \textit{Melon v Hector Powe Ltd}, the House of Lords also accepted that interference on the basis of a question of law was only warranted if the appellant could demonstrate that the Tribunal had misdirected itself in law or reached a decision which no reasonable tribunal, directing itself properly on the law, could have reached.\footnote{1981 ICR 43.} According to the House of Lords, the fact that the appellate tribunal would have reached a different conclusion on the facts was not a sufficient ground for allowing an appeal.
In *Dobie v Burns International Security*, the Court of Appeal clarified the appellate courts’ role by dividing the appeal query into two separate questions.\(^{455}\) According to the Court, it was first required to establish whether there had been an error of law on one of two alternative bases: either the Tribunal’s direction on the law was wrong or the conclusion was one that no reasonable tribunal could have reached on the evidence. In the latter instance, the Court commented that, since all Tribunals were supposedly reasonable tribunals, it had to follow that there had been a misdirection in law *despite the Court’s inability to detect what it was*.\(^{456}\) Once such a misdirection of law had been detected, the Court held that it was obliged to move to the second part of the enquiry and ask whether the conclusion of the Tribunal was plainly and unarguably correct notwithstanding that misdirection. According to the Court, it was only if the decision was plainly and unarguably correct notwithstanding the misdirection that it should not be set aside. If the conclusion was wrong or might have been wrong, the Court reasoned that it was for the Court to remit the case back to the Tribunal which was charged with making the findings of fact.\(^{457}\)

In *Gilham v Kent County Council (No.2)*, the Court of Appeal accepted that it was in the nature of questions of fact that different people, looking at the same set of circumstances, may reasonably come to different conclusions.\(^{458}\) According to the Court, it was common in a system where there was no appeal on fact that different Tribunals would from time to time give different answers to broadly similar situations and that neither decision could be challenged on appeal. For these reasons, the Court cautioned that it was important to resist the temptation to overturn a factual decision with which it might not agree by searching for a “shadowy point of law on which to hang its hat for the purpose of bringing uniformity to the differing decisions”.\(^{459}\) The Court reasoned that such an approach would have the undesirable effect of encouraging appeals which raised no point of law, but depended upon comparative findings of fact.\(^{460}\)

\(^{455}\) 1984 IRLR 329.
\(^{456}\) Para 17.
\(^{457}\) Para 18.
\(^{458}\) 1985 IRLR 18.
\(^{459}\) 22.
\(^{460}\) 22.
In *British Telecommunications Plc v Sheridan*, the Court of Appeal also cautioned against scrutinising matters of fact. The Court accepted that any court with the experience of the Appeal Tribunal would from time to time disagree with or have doubts about Tribunal decisions, but warned that the Appeal Tribunal should proceed with great care in such circumstances. According to the Court, the Appeal Tribunal did not have the benefit of seeing and hearing the witnesses and Parliament had given the Appeal Tribunal a role limited to questions of law only. The Court then referred to *Watling v William Bird & Son (Contractors) Ltd* and accepted that an error of law would comprise of: 1) a misdirection, misunderstanding and/or misapplication of the law and 2) a perverse decision. The Court, through Lord Justice McCowan, was, however, not convinced that an error of law would also include a misunderstanding and/or misapplication of the facts. According to the Court, a misunderstanding and/or misapplication of the facts should only be appealable as a perverse decision where there was no evidence to support the conclusion that was reached. The Court doubted whether a different approach would be correct; since this would suggest that the Appeal Tribunal was entitled to allow an appeal simply on the basis that it took a different view of the facts from that of the Tribunal; effectively entitling it to substitute the decision with its own view of the evidence.

Lord Justice Gibson agreed that an appellate body should not interfere with the Tribunal’s factual conclusions simply because it disagreed with it. According to the Court, a misunderstanding or misapplication of facts could amount to an error of law only where the Tribunal had wrongly decided upon a relevant, undisputed or indisputable fact and had then proceeded to consider the evidence and reach further conclusions of fact based upon that demonstrable initial error. The Court reasoned that such a decision could amount to an error of law because the Tribunal was required by law to consider the case in accordance with agreed or undisputed facts. On the other hand, where the alleged misunderstanding of fact depended upon a decision of fact that the

---

461 1990 IRLR 27.
462 A perversity appeal would not apply where it is alleged that: 1) the overall decision is perverse because the findings of fact on specific issues on which there was a conflict of oral evidence are perverse; 2) the chairman’s decision is silent or incomplete on factual points and have therefore been overlooked or the resultant findings of fact are therefore not supported by the evidence or; 462 or 3) the Tribunal has reached different conclusions in cases based on similar facts. It is also not enough that the Appeal Tribunal would, on the basis of the merits and the oral evidence, have decided the matter differently than the Tribunal or feels strongly that the result is unfair. See *Retarded Children’s Aid Society Ltd v Day* 1978 IRLR 128 130.
463 Para 34.
Tribunal was entitled to make, and which it did make, the Court reasoned that an attack on that finding could not be converted into an error of law unless it could be shown that there was no evidence to support it or that the conclusion was perverse.\textsuperscript{465}

In \textit{East Berkshire Health Authority v Matadeen},\textsuperscript{466} the Appeal Tribunal made reference to \textit{Watling v William Bird & Son (Contractors) Ltd},\textsuperscript{467} \textit{Melon v Hector Powe Ltd}\textsuperscript{468} and \textit{British Telecommunications Plc v Sheridan}\textsuperscript{469} and likewise accepted that it could only interfere with a decision of the Tribunal if it fell within the ambit of a question of law. According to the Appeal Tribunal, this entailed: 1) a misdirection and/or a misapplication of the law; 2) a material finding of fact which was unsupported by any evidence or contrary to the evidence before the Tribunal; and 3) a finding of perversity.\textsuperscript{470} In the latter respect, the Appeal Tribunal commented that although perversity operated as a free-standing basis in law, interference on this basis should not amount to a mere substitution of the Appeal Tribunal’s view for that of the Tribunal because the Appeal Tribunal disagreed therewith or felt strongly that the result was unjust. According to the Appeal Tribunal, it was to be limited to those qualified occasions where the Appeal Tribunal found that: 1) it was completely satisfied in the light of its own experience and of the sound practices in the industrial field that the decision was not a permissible option; 2) the conclusion offended reason or was one to which no reasonable Tribunal could have come to; 3) the decision was so very clearly wrong that it just could not stand; and/or 4) the decision was so outrageous in its defiance of logic or of accepted standards of industrial relations that no sensible person who had applied his or her mind to the question, and with the necessary experience, could have arrived at it.\textsuperscript{471} Although the Appeal Tribunal did not claim that the foregoing constituted a definition, it referred to it as the legal principles applicable in so-called perversity cases.\textsuperscript{472}

\begin{footnotes}
\item[465] Para 30-31.
\item[466] 1992 IRLR 336.
\item[467] Para 40.
\item[468] Para 54.
\item[469] Para 40.
\item[470] Para 53.
\item[471] Para 55-56.
\item[472] Para 39.
\end{footnotes}
Perversity was discussed further in the matter of *County Council of Hereford and Worcester v Neale*. 473 In this case, the Court of Appeal accepted that, where the Tribunal had found the facts, applied the relevant law and had reached a conclusion to which its findings and experience have led it, it would not often be that one could legitimately say that the conclusion “offended reason” or that the conclusion was one to which no reasonable tribunal could have come. According to the Court, factual matters were the function of the Tribunal and when it had not erred in law; neither the Appeal Tribunal nor the Court was to disturb the decision unless one could effectively say: “My goodness that was certainly wrong”. 474

The practical distinction between questions of fact and law was illustrated in *Nethermere (St Neots) Ltd v Taverna and Gardiner*. 475 In this instance, the two respondents were engaged by the company as part-time homeworkers to sew trouser flaps and pockets using company sewing machines. Following a dispute which led to the termination of this arrangement, the Tribunal determined, as a preliminary finding to an unfair dismissal dispute, that the respondents were employees within the meaning of section 153(1) of the Employment Protection (Consolidation) Act and were not self-employed under a contract for services. 476 In a subsequent appeal, the Appeal Tribunal held that the question whether a person worked under a contract of service or a contract for services was a question of law, not fact, which required the Appeal Tribunal to reach its own view on the facts. The Appeal Tribunal, however, dismissed the appeal holding that, since the particular circumstances of the case supported the view that the respondents were not in business for themselves, the Tribunal had correctly concluded that they were employed under contracts of service. 477 However, in a further appeal, the Court of Appeal held that the Appeal Tribunal had erred in identifying as a question of law the question whether the respondents worked under a contract of service. According to the Court, whether there was a contract of service was a question of law but the answer to it included questions of degree and fact which the Tribunal had to determine. With reference to *Edwards v Bairstow*, 478 the Court therefore determined that the decision could only be interfered with if it was shown that the Tribunal had

---

473 1986 IRLR 168.
474 Para 45.
475 1984 IRLR 240.
476 Para 1-4 and 7.
477 Para 10.
misdirected itself in law or the decision was one which no tribunal, properly directing itself on the relevant facts, could have reached. Having regard to the evidence, the Court found that there was just enough material to make a contract of service a reasonably possible inference. The Tribunal decision was accordingly upheld and the appeal dismissed.\footnote{Para 30. Findings of fact also include the questions whether a person’s services is engaged in the capacity of an employee or as an independent contractor; whether an employee resigned or was dismissed; whether taking part in an overtime ban amounted to taking part in a strike or other industrial action; whether there was a constructive dismissal; and whether the employer’s decision to dismiss was within a range of reasonable responses. See \textit{O’Kelly & others v Trust House Forte PLC} 1984 1QB 90; \textit{Woods v W M Car Services (Peterborough) Ltd} 1981 IRLR 347; 1982 IRLR 27 EAT.}

In \textit{Tameside Hospital NHS Foundation Trust v Mr M Mylott},\footnote{2010 UKEAT 0399_10_1304 found at http://www.bailii.org/uk/cases/UKEAT/2011/0399_10_1304.html on 19 March 2011 at 08h36.} the Court of Appeal classified findings as to the credibility of witnesses as a question of fact. In \textit{Eclipse Blinds Ltd v Wright},\footnote{1992 IRLR 133.} the Appeal Tribunal also refused to entertain an appeal concerning the adequacy or otherwise of weight to be attached to evidence. According to the Appeal Tribunal, the weight to be attached to evidence in any case was a matter for the Tribunal determining the facts. The Appeal Tribunal reasoned that it was not for an appellate body concerned only with errors of law, to take upon itself the task of deciding what weight should be attached to particular facts. Having found that the judgment in question was one which the Tribunal was entitled to make on the facts, the Appeal Tribunal ruled that it could not displace that judgment of fact with its own view.\footnote{Para 14.}

Although the greater part of the cases discussed above were decided before the legislature extended the gateway to an appeal through section 21(1) of the Employment Tribunals Act 1996, the Appeal Tribunal’s interpretation of its jurisdiction has not changed subsequent thereto. In \textit{Stanley v Capital Law LLP},\footnote{UKEAT/0417/08/LA found at http://www.employmentappeals.gov.uk/Public/results.aspx on 6 November 2012.} the Appeal Tribunal referred to \textit{Lewis v Motor World Garages Ltd}\footnote{1985 IRLR 465.} and accepted that it was settled law that an appellate court may only overrule a decision if the Tribunal had misdirected itself as to the relevant law or had made a finding of fact with no supporting evidence or which no reasonable tribunal could have make.\footnote{Para 13.} Likewise, in \textit{Yeboah v
Crofton, the Court of Appeal reiterated its reluctance to interfere with matters of fact.\textsuperscript{486} According to the Court, only the Tribunal heard evidence firsthand and the evidence available to the Appeal Tribunal and the Court of Appeal on an appeal on a question of law was seriously and incurably incomplete. Although an appeal from the Tribunal was not a re-trial of the case, the Court accepted that the legal points had to be considered in the context of the entire proceedings and the decision as a whole, but with an awareness of the limitations on the Court's competence to question the evidential basis for findings of fact by the Tribunal. In this regard the Court reasoned that, if the Tribunal conducted proceedings and delivered a decision in accordance with the law, neither the Appeal Tribunal nor the Court of Appeal were entitled to interfere with that decision even if they might have conducted and decided the case differently.\textsuperscript{487}

Broadbent, in an article entitled \textit{Fact and Law in the Casual Inquiry}, explains that there are good reasons for legal process to distinguish between questions of fact and law including clarity of reasoning, justice and common sense.\textsuperscript{488} Central to the deployment of juries and the jurisdiction of appellate courts, this distinction suggests that questions of fact are to be answered by evidence and sound inferences from that evidence. On the other hand, questions of law are to be answered by statute, precedent and policy, to the satisfaction of an expert in those things – which usually means a judge. The article however also acknowledges that it is not always possible to entirely separate questions of fact from questions of law because several legal tests tend to mix the two questions in complex ways. Reasonable foreseeability is mentioned as one example of this. As a legal doctrine which aims to capture an objective fact about what a reasonable person would foresee; it is contended that a legal professional will be more able to predict what a court will consider reasonably foreseeable than the average, ordinary person. For another example, Broadbent contends that what courts call findings of fact are governed by admissibility and relevance of evidence, as well as standards of proof and inference, which are all matters of law.\textsuperscript{489}

Taking this into consideration, it is evident that there are three stages to the decision-making process, namely fact-finding (questions of fact), stating the applicable legal rule (questions of

\begin{itemize}
\item \textsuperscript{486} 2002 IRLR 634.
\item \textsuperscript{487} Para 12.
\item \textsuperscript{488} A Broadbent “Fact and Law in the Casual Inquiry” (2009) 15(3) \textit{Legal Theory} 173-191.
\item \textsuperscript{489} See discussion in para 1.
\end{itemize}
law) and applying the legal rule to the facts (mixed questions of fact and law) and that this distinction is of great importance in the English appeal context. In essence, questions of law involve the scope, effect and/or application of a rule of law which is usually of general application and applied by the courts in determining the rights of parties. Opposed thereto, questions of fact involve an inquiry into the conflicting views of the factual circumstances of the particular case concerned and are material to its outcome. The task of determining the primary facts may be shaped by legal requirements as to procedural fairness or evidence, but on the assumption that those requirements have been adhered to; the Tribunal will not commit an appealable error of law simply by misunderstanding or misapplying the facts. There are exceptions, as will be explained in more detail below, but they are limited. Mixed questions of fact and law comprise a combination of questions of fact and law. The question is whether the facts found satisfy the legal test determined to be applicable. Mixed questions of fact and law produce questions of law for appeal purposes when the result reached is beyond a tolerable margin. The definition of that margin will be discussed further below.

The justification for this distinction is premised on the basis that the trier of fact is in a better position to make factual findings because it, among others, observed the witnesses’ demeanour and heard their testimony first hand. This distinction is strengthened by the fact that England is well acquainted with the jury system. It is considered the chief function of a jury to see, hear and interpret or evaluate the circumstances surrounding a particular case or to resolve questions of fact arising therefrom. Questions of law on the other hand are left for the decision making of the court, including the overseeing of points of law in the presentation of the evidence and the

492 See discussion at http://legal-dictionary.thefreedictionary.com/Error+of+fact found on 3 October 2012 at 09h05.
493 See discussion at http://legal-dictionary.thefreedictionary.com/Question+of+Law found on 26 February 2011 at 10h14. See also Woods v W M Car Services (Peterborough) Ltd 1981 IRLR 347. In that case, the question whether there has been a breach of contract and, if so, whether such breach was fundamental were considered mixed questions of fact and law.
494 See references to a “plainly wrong decision” in Watling v William Bird & Son (Contractors) Ltd, an “impermissible option” in East Berkshire Health Authority v Matadeen and a decision that “offends reason” in County Council of Hereford and Worcester v Neale above. See also para 19 of White v Burton’s Foods Ltd UKEAT/0514/09/LA, referring to the threshold required for a claim of perversity to succeed, found at http://www.employmentappeals.gov.uk/Public/results.aspx on 6 November 2012 at 20h00.
process observed by the parties to the litigation. The fact that the Tribunal has a tripartite structure, consisting of an employment judge and lay members with employment and/or industrial experience, and is often described as an “industrial jury” by the Appeal Tribunal and Court of Appeal is therefore very significant; as is the statement in *UCATT v Brain* that the Tribunal has to look at questions of fact “…in the round and without regard to the lawyers’ technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane*. Unlike the Tribunal, the Appeal Tribunal and the Court of Appeal are declared by statute to be superior courts of record and are unable to completely draw back from a more formal approach. This further explains why it is considered improper to allow an appeal based on questions of fact to the appellate bodies. In using an unfair dismissal dispute as an example, it would, therefore, be for the employer to decide to dismiss an employee; for the Tribunal to make findings of facts and decide whether, on an objective basis, the dismissal was fair or unfair and for the Appeal Tribunal to decide whether a question of law arose from the proceedings in the Tribunal. As appellant courts and tribunals are confined to questions of law they ought not, in the absence of an error of law, to take over the Tribunal’s role as an industrial jury and decide whether or not such a dismissal was fair.

Having regard to the case law discussed, it is clear that one is able to classify the categories of appeal upon a point of law as follows: 1) the Tribunal has misdirected itself in law or misunderstood or misapplied the law; 2) the Tribunal has reached findings of primary fact without evidence to support it; and 3) the finding is perverse. This ground includes instances where the Tribunal has reached findings of primary fact without evidence to support it and such fact forms part of the reasoning. An appeal on a point of law also resembles judicial review in terms of the *grounds* of challenge. The grounds of appeal will be discussed in more detail below.

---

496 1981 ICR 542.
497 550A-D.
498 The Tribunal’s decisions of fact are decisive and an error of law is present if: 1) the decision contains a misinterpretation or misapplication of the law; 2) the decision is supported by no evidence; 3) there has been a breach of natural justice or the procedure followed led to unfairness; 4) there is no proper findings of fact or adequate reasons for the decision; and/or 5) the facts found are such that no person acting judicially and properly instructed as to the evidence and relevant law could reasonably have come to the determination in question (a perverse decision).
441 Misdirection, misunderstanding and/or misapplication of the law

In *Paw v HMRC*, the Appeal Tribunal accepted that the question of an error of law in the decision of, or in the proceedings before, the Tribunal was wide enough to include: 1) an appeal against an omission; 2) an unreasonable delay where by definition there was no judicial decision; 3) an allegation of actual or apparent bias; and 4) an automatic disqualification for having an interest in imminent or current proceedings before any adverse decision was made.

In *Lodwick v Southwark London Borough Council*, the point of bias and/or procedural impropriety received attention when the Appeal Tribunal declined jurisdiction on the basis that it raised no question of law. This decision was made against the background of a request that the Tribunal chairperson recuse himself because he had previously presided over a case in which the appellant had acted as representative. Although no copy of the decision was available, the appellant submitted that the written decision of the earlier case contained adverse comments about his conduct of the hearing and costs were awarded against the party whom he represented.

The Court of Appeal accepted that the Appeal Tribunal would have jurisdiction unless the allegation of bias was on its face so lacking in substance that it could not be said to amount to a real challenge to the decision. Having considered the material before the Appeal Tribunal, the Court was not convinced that the Appeal Tribunal was entitled to hold, as a matter of jurisdiction, that the bias allegation had passed this test. On the contrary, the Court was satisfied that the Appeal Tribunal’s reasoning raised a question of law upon the test to be applied when bias was alleged. According to the Court, had jurisdiction been accepted, the Appeal Tribunal would have been required to consider the Tribunal proceedings as a whole and decide whether a perception of bias had arisen by asking whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased. The Court

---


500 Para 20.

501 2004 EWCA Civ 306.

502 Para 15.

503 Para 18.
therefore allowed the appeal against the Appeal Tribunal’s decision and remitted the case to the Appeal Tribunal to determine the issue of bias.

_Stanley Cole (Wainfleet) v Sheridan_ illustrates the operation of the right to a fair hearing as a question of law. In this case, the appellant contended that the chairperson’s failure to allow the parties an opportunity to consider and make representations in relation to certain case law subsequently referenced in the ruling had deprived it of its absolute right to a fair trial in breach of article 6 of the European Convention on Human Rights. Although the Court of Appeal accepted that the absence of a fair hearing would be a serious procedural irregularity sufficient to allow an appeal, it held that an appeal on this basis would not be allowed simply because a tribunal judgment cited authority which had not been referred to in the hearing. According to the Court, judicial research would be stultified if parties had to be given an opportunity to address all cases eventually set out in a judgment. The Court reasoned that it was its task to determine whether the Tribunal had altered or affected the way the issues had been addressed to such an extent that it could be said by a fair-minded observer that the case was decided in a way which could not have been anticipated by a party fixed with such knowledge of the law and procedure as it would be reasonable to attribute to him or her in all the circumstances. The Court accepted that this was not intended to be an all-encompassing test, but that everything depended on the subject matter and the facts and circumstances of each case. Not having been persuaded that the authorities were central to the Tribunal decision, the Court was however satisfied that the manner in which the judgment had been delivered did not constitute a serious irregularity or a denial of the right to a fair hearing. The appeal was according dismissed.

Unreasonable delay as a ground of appeal was discussed in _Bangs v Connex South Eastern Ltd_. In this case, a ticket inspector had referred a complaint to the Tribunal, alleging unfair dismissal and direct race discrimination, after he was dismissed for misappropriating company monies.

---

505 Para 29.
506 Para 32.
507 Para 33. According to the Court, it was impossible to lay down a rigid rule as to where the boundaries of procedural irregularity lied, when the principles of natural justice applied or what made a hearing unfair.
508 Para 44.
509 2005 EWCA Civ 14.
following an excessive number of credit/debit card chargebacks.\textsuperscript{510} The matter was duly heard, but the Tribunal only promulgated a decision in favour of the complainant more than a year later.\textsuperscript{511} The appellant subsequently appealed to the Appeal Tribunal and was successful on the ground of unreasonable delay because material errors or omissions in the decision showed a real risk that the decision was unsafe by virtue of the delay.\textsuperscript{512}

On a further appeal, the Court of Appeal held that there were serious objections to transplanting the "wrong/unsafe decision" approach from an ordinary civil appeal to an appeal from the decision of the Tribunal, where the right to appeal was confined by statute to questions of law. According to the Court, this would enable appellants to challenge findings of fact, not characterised as perverse, and circumvent the provisions of 21(1) of the Employment Tribunals Act 1996.\textsuperscript{513} The Court preferred to hold that unreasonable delay was a matter of fact, not a question of law, and did not constitute an independent ground of appeal. According to the Court, a question of law did not arise and no independent ground of appeal existed simply because, by virtue of material factual errors and omissions resulting from delay, the decision was considered "unsafe". The Court reasoned that, within the confines of section 21(1), a challenge to the tribunal's findings of fact was not, in the absence of perversity, a valid ground of appeal and there was no jurisdiction under section 21(1) of the Act to entertain it.\textsuperscript{514} The Court accepted that there may be exceptional cases in which unreasonable delay by the Tribunal in promulgating its decision could properly be treated as a serious procedural error or material irregularity giving rise to a question of law in the "proceedings before the tribunal". According to the Court, such an

\textsuperscript{510} Para 25-26. The complainant alleged that: 1) in the disciplinary enquiry, he had been asked whether he was Nigerian and was accused of getting his "brothers" to help him defraud the company; 2) the insufficient record of debit/credit card numbers occurred because he had used a short cut method for completing debit card details in imitation of what was done by another employee; 3) other employees had been issuing tickets in the same way without being disciplined.

\textsuperscript{511} The Tribunal found that the appellant had discriminated against the complainant on racial grounds in subjecting him to a disciplinary process, in the manner in which it conducted the disciplinary investigation and disciplinary procedure and in dismissing him from his job. Para 28.

\textsuperscript{512} In this regard, the Appeal Tribunal accepted the contentions that the Tribunal: 1) in making a credibility finding in favour of the complainant, had failed to take into consideration that the complainant has initially omitted to address the issue of racist remarks with the appellant or in his application to the Tribunal; 2) with the passage of time, had overlooked or forgotten the evidence as to which chargebacks were subject to the disciplinary proceedings; and 3) omitted to deal with the evidence of one Mr Osborne, which conflicted with the evidence of the complainant, and was relevant to the question of consistency, credibility and whether the Tribunal's assessment was flawed by the delay.

\textsuperscript{513} Para 42.

\textsuperscript{514} Para 43(3).
argument would fall within the scope of section 21(1), which was not confined to questions of law to be found in the substantive decision itself.\textsuperscript{515} The Court reasoned that this could occur if the appellant for example established that the failure to promulgate the decision within a reasonable time had given rise to a real risk that, due to the delayed decision, the party complaining was deprived of the substance of his guaranteed right to a fair trial under article 6(1).\textsuperscript{516} According to the Court, the question whether a person had been afforded a fair trial in the Tribunal was capable of giving rise to a question of law. In this regard, the Court explained that section 21(1) did not expressly or impliedly exclude a right of appeal where, due to excessive delay, there was a real risk that the litigant had been denied or deprived of the benefit of a fair trial of the proceedings and where it would be unfair to allow the delayed decision to stand.\textsuperscript{517}

Turning to the present appeal, the Court summarised that the key question was whether, due to the unreasonable delay, there was a real risk that the appellant had in substance been deprived of the article 6 right to a fair trial in respect of the race discrimination claim and whether in the circumstances it was unfair to allow the delayed decision to stand.\textsuperscript{518} According to the Court, this test was, on the one hand, less stringent than the perversity ground of appeal, but also on the other hand more stringent than the "unsafe" decision test formulated and applied by the Appeal Tribunal, as it excluded an appeal on fact and insisted on the existence of a question of law in accordance with the requirements of section 21(1) of the 1996 Act.\textsuperscript{519} In the circumstances, the Court concluded that the errors and omissions relied upon by the Appeal Tribunal to rule that the decision was unsafe did not satisfy the stringent test for raising a question of law. Reading the decision as a whole in the light of the specific criticisms made of it, the Court was satisfied that the delay in promulgating it did not create a real risk that the appellant was deprived of the benefit of a full and fair trial. According to the Court, it was therefore fair and just to allow the decision to stand rather than to order a new hearing by a different tribunal.\textsuperscript{520}

\textsuperscript{515} Para 6 and 43(7).
\textsuperscript{516} Para 43(7).
\textsuperscript{517} Para 43(7).
\textsuperscript{518} Para 44.
\textsuperscript{519} Para 44-45.
\textsuperscript{520} Para 52.
Vento v Chief Constable of West Yorkshire Police demonstrates that the Tribunal’s assessment of compensation may also amount to an error of law.\textsuperscript{521} In this case, the Court of Appeal considered the reviewability of a compensation award for injured feelings in circumstances where the Appeal Tribunal had reduced the Tribunal’s award of £74 000 substantially on the basis that it lacked sound reasons to support its size.\textsuperscript{522} The Court accepted that an appellate body was not entitled to interfere with the Tribunal’s assessment simply because it would have awarded more or less than the Tribunal. According to the Court, it had to be established that the Tribunal had acted on a wrong principle of law or had misapprehended the facts or made a wholly erroneous estimate of the loss suffered.\textsuperscript{523} Considering the argument before it, the Court found that the totality of the award for non-pecuniary loss was seriously out of line with: 1) the majority of those types of awards made and approved on appeal in reported Appeal Tribunal cases; 2) the guidelines compiled for the Judicial Studies Board; and 3) with reported cases in the personal injury field where general damages have been awarded for pain, suffering, disability and loss of amenity.\textsuperscript{524} The Court accordingly allowed the cross-appeal and reduced the compensation for hurt feelings and personal injury to a total amount of £32 000.\textsuperscript{525}

In Cancer Research UK v Harding, a decision was also set aside on appeal because of a misapplication of the law when the Tribunal erroneously held that the burden of proof rested on the employer, not only to establish the reason for the dismissal, but also to show reasonable grounds for its belief in the claimant’s misconduct based on a reasonable investigation.\textsuperscript{526} According to the Appeal Tribunal, the Tribunal had failed to note that under section 98(4) of the Employment Rights Act 1996 the burden of proof on the issue of the reasonableness of the dismissal was neutral. The Appeal Tribunal was satisfied that this misdirection in law had infected the totality of the Tribunal judgment and allowed the appeal.\textsuperscript{527}

\textsuperscript{521} 2002 EWCA Civ 1871.
\textsuperscript{522} Para 2, 5 and 8. The Tribunal reasoned that the appellant’s treatment had been less favourable than a hypothetical male officer in the same circumstances and that the respondent was vicariously liable for acts of sex discrimination leading to the termination of the appellant’s services.
\textsuperscript{523} Para 51.
\textsuperscript{524} Para 61.
\textsuperscript{525} Para 62.
\textsuperscript{527} Para 14.
Similarly, in *Dobie v Burns International Security*, the Court of Appeal accepted that, in determining whether an employer had acted unreasonably in terms of section 57(3) of the Employment Protection Act 1978 as amended, it was important to take into account the injustice suffered by the employee and the extent thereof.\(^528\) According to the Court, the Tribunal had misdirected itself when it adverted to section 57(3) in terms excluding injustice to the employee. Accepting that there had been an express misdirection of law, the Court then asked whether the conclusion of the Tribunal was plainly and unarguably right notwithstanding that misdirection.\(^529\) Not satisfied that the decision had passed this test, the Court remitted the case to the Tribunal.\(^530\)

A Tribunal decision will therefore be appealable as an error of law if the Tribunal wrongly understood and/or applied a principle of law. This includes a compensation award in circumstances where its calculation is in conflict with reported case law and any guidelines that may have been compiled.\(^531\) In these circumstances, the decisive question is whether the Tribunal’s conclusion is plainly and unarguably right notwithstanding the misdirection or misapplication of the law\(^532\) and not whether the decision falls within a range of reasonable responses. It is further apparent that errors of law as per section 21(1) of the Employment Tribunals Act 1996 are not confined to the substantive decision itself, but that allegations of bias or procedural impropriety on the part of the Tribunal may also be appealable as an error of law from a procedural perspective. In the case of bias, the Appeal Tribunal must consider the proceedings before the Tribunal as a whole and determine whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias on the part of the Tribunal.\(^533\) In the case of procedural impropriety, the pertinent question is again whether the decision evidences the absence of a fair hearing. Excessive delay on the part of the Tribunal in promulgating a decision is a further sub-category of appeal on the basis of an error of

\(^{528}\) 1984 ICR 812.
\(^{529}\) 818.
\(^{530}\) The Appeal Tribunal recognised that the Tribunal’s approach amounted to a misdirection, but nevertheless affirmed its unanimous decision that the employee had not been unfairly dismissed. the Court reversed the decision of the Appeal Tribunal.
\(^{531}\) See earlier discussion of *Vento v Chief Constable of West Yorkshire Police*.
\(^{532}\) See earlier discussion of *Dobie v Burns International Security*.
\(^{533}\) See earlier discussion of *Lodwick v Southwark London Borough Council*. 
law. It is considered unfair to uphold this decision in circumstances where there is a real risk from the lapse of time that the applicant had not received a fair trial of the proceedings.534

4.4.2 Material finding of fact without supporting evidence or despite contrary evidence

In Yeboah v Crofton,535 the Court of Appeal accepted that an appeal will generally succeed if the Tribunal had misunderstood the evidence; leading to a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence.536 This principle was demonstrated in Francis v Cleveland Police Authority537 in circumstances where the claimant had resigned from her position and referred an unfair dismissal complaint following a period of alleged bullying and isolation. The Tribunal accepted that the claimant had been constructively and unfairly dismissed, but limited the compensation for loss of earnings to the date on which the claimant resigned from her new job because there were no medical records supporting the claimant’s claim that she was still suffering from work-related stress when she resigned from her new post approximately three months later.538

On appeal, the Appeal Tribunal referred to Yeboah v Crofton539 and accepted that the significance of an individual finding of fact, unsupported by evidence or contrary to uncontradicted evidence, must be assessed in the context of the decision as a whole. According to the Appeal Tribunal, if a finding was of no real significance – because the conclusions of the Tribunal had been reached for reasons which were demonstrably independent of the finding – the appeal would not be allowed. On the other hand, the Appeal Tribunal accepted that, if a finding was of real significance - in that an important conclusion of the Tribunal rested wholly or mainly on the finding – the appeal would generally succeed.540

534 See earlier discussion of Bangs v Connex South Eastern Ltd.
535 2002 IRLR 634.
536 Para 95.
537 UKEAT/0335/10/ZT found at http://www.employmentcasesupdate.co.uk/site.aspx?i=ed8361 on 7 November 2012 at 10h44.
538 Para 19.
539 2002 IRLR 634.
540 Para 45.
On the facts of the present matter, the Appeal Tribunal found that the Tribunal was wrong to have proceeded on the basis that there was no relevant reference in the claimant’s medical records at the time she left her new post.\footnote{Para 46.} According to the Appeal Tribunal, the Tribunal should have checked with the claimant and her doctor whether there were in fact recorded visits to the doctor at the relevant time.\footnote{Para 49.} In the circumstances, the Appeal Tribunal concluded that the Tribunal had proceeded on an assumption or finding of fact concerning the absence of recorded visits to the doctor which no reasonable Tribunal, on a proper appreciation of the law and the evidence, could have proceeded.\footnote{Para 50.} The appeal was accordingly allowed.\footnote{Para 55.}

4 4 3 \textbf{Perversity of the decision}

It is difficult to formulate with clarify the meaning of a “perverse” decision. However, in general, it refers to a decision that no reasonable tribunal, on a proper appreciation of the evidence and the law, could have reached. This class of case raises complications because the appellant is essentially arguing that the decision is so unreasonable that it must be wrong. Perversity appeals challenge the dividing line between merits and legality because its trigger is the poor quality of the Tribunal decision.\footnote{See Phillips (1978) \textit{Industrial Law Journal} 138.} This is difficult to explain or justify in an appeal system that consistently denies appeal on the merits; insisting that it is a matter left for the judgment or discretion of the Tribunal concerned. The challenge in such cases lie in formulating the correct legal approach to the question whether and in what circumstances there has been an error of law and where the line should properly be drawn. On the one hand, too great a readiness to interfere would involve an assumption of jurisdiction not provided for by statute, but on the other hand, too great a reluctance would cause the Appeal Tribunal to serve no useful purpose.\footnote{See Phillips (1978) \textit{Industrial Law Journal} 138-139.}

In terms of its ordinary dictionary meaning, the adjective “perverse” refers to “showing a deliberate and obstinate desire to behave in a way that is unreasonable or unacceptable” and
behaving “contrary to the accepted or expected standard or practice”.

“Perversity” as a ground of appeal is not defined in statute. The Practice Direction (Employment Appeal Tribunal - Procedure) 2008, handed down by the Appeal Tribunal in the exercise of its power to regulate its own procedures, only stipulates that an appellant may not state as a ground of appeal simply words to the effect that “the judgment or order was contrary to the evidence”, that “there was no evidence to support the judgment or order” or that “the judgment or order was one which no reasonable Tribunal could have reached and was perverse”. The notice of appeal must also set out full particulars of the matters relied on in support of those general grounds.

Case law does not only demonstrate that general allegations of perversity without substantiation are not accepted by the courts, but also that perversity is a difficult ground to establish because of the strict test that has to be satisfied. The reasoning behind such a strict approach is evident from Royal Society for the Protection of Birds v Croucher. In this case, the Appeal Tribunal reminded itself that the Tribunal had the advantage of seeing the witnesses, sensing the atmosphere in the particular workplace, gauging the qualities of the different personalities and weighing the impact of their effect upon the other. Taking this into consideration, the Appeal Tribunal confirmed that it was its duty and function to follow the factual findings of the Tribunal loyally, unless the decision was not tenable by any reasonable tribunal properly directed in law.

This narrow approach to perversity as a ground of appeal was approved by the Court of Appeal in Neale v Hereford and Worcester County Council. In this case, a music teacher was dismissed following an incident which occurred whilst he was invigilating pupils sitting an A levels examination. The Tribunal initially dismissed the unfair dismissal complaint, but the Appeal Tribunal reversed the decision on the basis that it was one which no reasonable tribunal could have reached. On a further appeal to the Court of Appeal, the Court found that the Appeal

---

547 http://oxforddictionaries.com/definition/english/perverse found on 31 July 2012 at 19h05.
548 See par 1.3 and 1.4 of the Practice Direction available at http://www.employmentappeals.gov.uk/FormsGuidance/practiceDirection.htm#link1 and accessed on 19 March 2011 at 07h41.
549 See para 2.6 of the Practice Direction available at http://www.employmentappeals.gov.uk/FormsGuidance/practiceDirection.htm#link1 and accessed on 19 March 2011 at 07h41.
550 1984 ICR 604.
551 609.
552 1986 IRLR 168.
553 Para 4-9.
554 Para 2.
Tribunal had erred in overruling the Tribunal's decision that it was within the band of reasonable response of a reasonable employer in the circumstances of the case to dismiss the respondent teacher on grounds of misconduct, notwithstanding some procedural deficiencies.\textsuperscript{555} According to the Court, the Appeal Tribunal had substituted its own view for that of the Tribunal in finding that: 1) there was too much haste, stubbornness and secrecy and too little concern for the appearance of fairness and its substance when considering the employer's response to the employee's misconduct; and 2) the employer’s reaction could not be seen in the eyes of any reasonable tribunal as conduct which would have commended itself to a reasonable employer in that position.\textsuperscript{556}

The Court held that it was the function of the Tribunal to find the facts, apply the relevant law and to reach the conclusion to which its findings and the experience of its members lead.\textsuperscript{557} The Court confirmed that when a Tribunal had complied with the foregoing principles, it would not be often that it could legitimately be said that its conclusion offended reason or was one to which no reasonable tribunal could have come. According to the Court, if the Tribunal had not erred in law, its decision should not be disturbed by an appellate body unless it could be said in effect: “My goodness, that was certainly wrong!”.\textsuperscript{558} In the present case, the Court found that the reasoning of the Tribunal had not led it to the conclusion that there was an express misdirection or that the decision must be wrong. In reaching its decision, the Court reasoned that the Tribunal had well in mind the matters relied upon by the Appeal Tribunal. Given the teacher's serious misconduct on the evidence and findings of the Tribunal, the Court concluded that those matters could not adequately sustain the Appeal Tribunal's disagreement with the Tribunal’s conclusion that in the circumstances the dismissal was fair.\textsuperscript{559}

A similar approach was followed in Yeboah v Crofton.\textsuperscript{560} In this instance, the Tribunal had found that the appellant, Mr Crofton, had directly discriminated against the claimant, one Mr Yeboah,
on the basis of race, contrary to the Race Relations Act 1976.\textsuperscript{561} On appeal, the Appeal Tribunal disagreed, finding that the Tribunal’s decision was perverse, and remitted the matter to a fresh Tribunal for re-hearing.\textsuperscript{562} On a further appeal to the Court of Appeal, the Court rejected Mr Yeboah’s contention that its role was limited to considering whether there was an error of law in the decision of the Appeal Tribunal and not to consider the correctness of the decision of the Tribunal. According to the Court, its function was to \textit{review} the proceedings in, and the decision of, the Tribunal to determine whether a question of law arose from them.\textsuperscript{563} The Court held that if the Tribunal had conducted the proceedings and delivered decisions in accordance with the law, no questions of law would arise for correction by the Court: neither the Appeal Tribunal nor the Court of Appeal would be entitled to interfere with the original decisions, even if they concluded that they might have conducted and decided the cases differently.\textsuperscript{564}

The Court acknowledged that where the perversity of the decision of the Tribunal was the main ground of appeal, there was an increased risk that the appellate body's close examination of the evidence and factual findings by the Tribunal may lead it to substitute its own assessment of the evidence and to overturn factual findings made by the Tribunal.\textsuperscript{565} The Court made specific reference to litigants’ frequent attempts to present appeals on fact as questions of law by trawling through the reasons of an Tribunal, selecting adverse findings of fact on specific issues on which there was a conflict of oral evidence, and alleging, without adequate particulars, supporting material or proper grounds, that the particular findings of fact are perverse and that therefore the overall decision is perverse.\textsuperscript{566} The Court, however, also accepted that it was inevitable that there would from time to time be cases in which a Tribunal had erred by misunderstanding the evidence, leading it to make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence.\textsuperscript{567} Although the Court confirmed that the foregoing cases would usually

\textsuperscript{561} Para 32, 42 and 47. The essence of the finding was that Mr Crofton had repeatedly made untrue accusations against Mr Yeboah on no basis other than that his ethnic origins as West African. Specifically, these findings related to allegations that: 1) Mr Yeboah had covered up fraud in respect of recruitment allegedly committed by a black African redeployee of the council; 2) Mr Yeboah had as a reward arranged sabbatical leave for an employee of the council who had signed his naturalisation papers and 3) investigations were required regarding Mr Yeboah’s immigration status and his criminal background.

\textsuperscript{562} Para 7.

\textsuperscript{563} Para 9-11.

\textsuperscript{564} Para 11.

\textsuperscript{565} Para 12.

\textsuperscript{566} Para 94.

\textsuperscript{567} Para 95.
succeed on appeal, the Court also warned that no appeal on a question of law should be allowed to be turned into a rehearing of parts of the evidence by the Appeal Tribunal.\textsuperscript{568}

In the present instance, the Court of Appeal found that the Appeal Tribunal had erred in allowing the respondent's appeals against the Tribunal's decisions that he had racially discriminated against the appellant on grounds that the decisions were perverse. According to the Court, the conclusions in all three applications were permissible options on the evidence before the Tribunal. The Court of Appeal accordingly allowed the appeals, set aside the order of the Appeal Tribunal and restored the decisions of the Tribunal.\textsuperscript{569}

The formulation of perversity as expressed in \textit{Neale v Hereford and Worcester County Council} is however not universally accepted. In \textit{Piggott Brothers and Jackson}, three employees were dismissed following their continued refusal to resume work after unusual fumes of a consignment of PVC-coated material caused them to be booked off sick.\textsuperscript{570} Their refusal persisted despite the employer having taken steps to minimise the effect of the problem and despite Health and Safety Executive inspectors confirming that there was no continuing danger.\textsuperscript{571} In dealing with the subsequent unfair dismissal challenge, the Tribunal summarised that it was required to decide whether the employer had taken reasonable steps to deal with the problem created by the materials and whether the employees had acted reasonably in refusing to work with such materials.\textsuperscript{572} The Tribunal accepted that the employer had taken some steps to deal with the matter, but noted that it had never received a definitive answer from anyone as to the cause of the employees’ symptoms. Not having discovered the cause of the symptoms, the Tribunal concluded that the employer had failed to take a reasonable step and that it was reasonable for the employees to refuse to work with the relevant materials.\textsuperscript{573} The Tribunal reasoned that, as long as the cause was unknown, it could not be confirmed that no harmful, secret, long-term adverse

\textsuperscript{568} Par 94-95.
\textsuperscript{569} Para 69.
\textsuperscript{570} 1991 IRLR 309.
\textsuperscript{571} Para 4-5.
\textsuperscript{572} Para 10.
\textsuperscript{573} Para 10.
effects on the employees’ health were inherent in the use of the materials. The dismissals were accordingly found unfair.\textsuperscript{574}

On appeal, and only having regard to the notes of evidence of the expert witnesses, the Appeal Tribunal reasoned that it could not be unreasonable for the employer to fail to take steps if the Health and Safety Executive itself had been unable to identify the cause and take action and for which there was no evidence to show it was possible.\textsuperscript{575} On this basis, the Appeal Tribunal concluded that the Tribunal had asked itself the wrong question and had fallen into an error which led to a perverse decision on the facts. The Appeal Tribunal accordingly allowed the appeal on the basis that it was certainly wrong and perverse.\textsuperscript{576}

On a further appeal to the Court of Appeal, the Court referred to the decision in \textit{Neale v Hereford and Worcester County Council} and accepted that the Appeal Tribunal was entitled to interfere with the Tribunal’s decision if it was certainly wrong.\textsuperscript{577} The Court however also warned that the perversity formulation in \textit{Neale v Hereford and Worcester County Council} could cause appellate bodies to fall into error by deciding that, because it would have come to a different conclusion, the Tribunal was certainly wrong. According to the Court, a decision was not perverse merely because an appellate body would have come to a different conclusion.\textsuperscript{578} In consequence, the Court proposed the application of a stricter test. In terms thereof, a Tribunal decision could only be characterised as perverse if it was not a permissible option. To recognise a decision as not being a permissible option, the Court held that the Appeal Tribunal would have to identify a finding of fact which was unsupported by \textit{any} evidence or a clear self-misdirection in law by the Tribunal.\textsuperscript{579} If it could not do that, the Court cautioned the Appeal Tribunal to carefully re-examine its preliminary conclusion that the decision under appeal was not a permissible option and was therefore perverse. According to the Court, although reasonableness was to be characterised as a mixed issue of fact and law, its factual element predominated.\textsuperscript{580}

\textsuperscript{574} Para 10.
\textsuperscript{575} Para 22 and 25.
\textsuperscript{576} Para 15.
\textsuperscript{577} Para 16.
\textsuperscript{578} Para 17.
\textsuperscript{579} Para 17.
\textsuperscript{580} Para 8.
In the present case, the Court found that the Tribunal had not misdirected itself or erred in law in holding that the employer could reasonably have been expected to do more than it did to obtain a definitive answer as to the cause of the symptoms suffered by the employees.\textsuperscript{581} The Court went further and held that, even if the Appeal Tribunal had been correct in concluding that the Tribunal’s decision was flawed, the proper course would have been to remit the case to the Tribunal.\textsuperscript{582} The Court reasoned that, having directed that only the evidence notes of the expert witnesses be transcribed for the appeal, the Appeal Tribunal had reached its decision without having before it all the relevant evidence. The Court explained that, although it was important that Tribunal’s should not be burdened with transcribing notes of evidence which were irrelevant to an appeal on a question of law, if an appeal was based upon or included an allegation that the Tribunal’s decision was perverse, it was impossible to contemplate allowing that appeal without having access to all the evidence bearing on the alleged perversity.\textsuperscript{583} In the present case, the Court accepted that the relevant evidence included not only that of the expert witnesses but also the evidence of the employees and the employer, in particular how it viewed the employees' conduct and the problems which it faced in the situation as it developed.\textsuperscript{584} In light of the above, the Court concluded that there were no grounds for the Appeal Tribunal to hold that no reasonable tribunal properly directing itself could have reached that conclusion. The appeal was allowed and the decision of the Tribunal restored.\textsuperscript{585}

In \textit{Stewart v Cleveland Guest (Engineering) Ltd},\textsuperscript{586} the Appeal Tribunal considered a perversity appeal against the backdrop of a constructive dismissal complaint. In this instance, the applicant had been part of a minority group of women employed at a factory and had objected to male employees being allowed to display pictures of nude women in the manufacturing area.\textsuperscript{587} The company initially took the view that the pictures did not warrant action,\textsuperscript{588} but after further complaints from the applicant through the union, issued instructions that the pictures be removed. Subsequently, a delegation of women employees told the company that they did not agree with

\textsuperscript{581} Para 30.  
\textsuperscript{582} Para 33.  
\textsuperscript{583} Para 13.  
\textsuperscript{584} Para 13.  
\textsuperscript{585} Para 34.  
\textsuperscript{586} 1994 IRLR 440.  
\textsuperscript{587} Para 17.  
\textsuperscript{588} Para 19.
the applicant and that they had no objection to the picture display. When the applicant learned that everyone knew that the pictures had been removed because of her complaint, she felt that she could not return to work because she had no confidence that the company would protect her from the embarrassment and distress caused by the other employees’ attitude. The applicant accordingly resigned and claimed that she had been constructively dismissed and discriminated against on grounds of sex. 589

The Tribunal accepted that the company, through its male employees, had subjected the applicant to detriment within the meaning of section 6(2)(b) of the Sex Discrimination Act 1975. The Tribunal reasoned that, not only had the company failed to deal with the complaint properly or within a reasonable time, but it had also not addressed the hostility and ridicule directed towards the applicant by the other employees when they knew about her complaint. 590 On the other hand, the Tribunal found that the display of pictures was not aimed at women and that no man had complained of the display. The Tribunal accordingly ruled that the company had not treated the applicant less favourably than they would a man in the same circumstances within the meaning of section 1(1)(a) and proceeded to reject the applicant’s discrimination complaint. 591

On appeal, the applicant argued that the Tribunal had perversely concluded that the picture display was not aimed at women and was sexually neutral: 592 1) the pictures displayed women in a sexually explicit fashion in a workplace where most of the workers were men and where the prevalent attitude of the men was characterized by remarks and conduct which treated women as sex objects; 593 and 2) a man would not object to such a display on the ground of his sex. 594

In considering the appeal, the Appeal Tribunal emphasised that the decision in every case of this kind had to turn on its particular circumstances. The Appeal Tribunal also confirmed that, whenever an appeal was based on the perversity ground, it had to be extremely cautious not to conclude that the decision of the Tribunal was flawed because it would have reached a different

589 Para 22.
590 Para 23.
591 Para 18, 20, 24 and 25.
592 Para 18.
593 Para 26.
594 Para 27.
conclusion on the evidence or thought that another Tribunal would have reached a different conclusion on the evidence. According to the Appeal Tribunal, an appeal was likewise not to be allowed on perversity simply because the Appeal Tribunal disagreed with the Tribunal as to the justice of the result, the merits of the case or the interpretation of the facts.\footnote{Para 33.} The Appeal Tribunal reasoned that it should only interfere with the decision of the Tribunal where the conclusion of that Tribunal on the evidence before it was “irrational”, “offended reason”, “was certainly wrong”, “was very clearly wrong”, “had to be wrong”, “was plainly wrong”, “was not a permissible option”, “was fundamentally wrong”, “was outrageous”, “made absolutely no sense” or “flied in the face of properly informed logic”.\footnote{Para 33.} According to the Appeal Tribunal, this characterisation of perversity had the result that it would only be in rare or exceptional instances that an appeal would succeed on the grounds of perversity.\footnote{Para 33.}

The Appeal Tribunal explained the reasoning behind this heavy burden of discharge as follows: 1) it had been recognised by those with wide experience and practical wisdom that there were many factual situations arising in the field of industrial relations in which different conclusions could be reached by different tribunals, all within the realm of reasonableness; 2) it was an area in which there could be no "right answer".\footnote{Para 33.}

In terms of this approach, the Appeal Tribunal found that it was not appropriate or fruitful to subject the language of the decision of the Tribunal to "meticulous criticism" or "detailed analysis" or to trawl through it with a "fine tooth comb". The Appeal Tribunal reasoned that it had to consider the substance of the Tribunal’s decision "broadly and fairly" to see if the reasons given for the decision were sufficiently expressed to inform the parties as to why they won or lost the case and to enable their advisers to identify an error of law that may have occurred in reaching the conclusion.\footnote{Para 33.} According to the Appeal Tribunal, no one in this instance was better placed to make a decision on the facts of the case than the Tribunal: it heard evidence from the witnesses, saw the material which the applicant found to be offensive and considered the detailed arguments on the law and the facts. The Appeal Tribunal accepted also that there was, of course,
room for disagreement among different groups of people, such as Tribunals, as to what was or was not less favourable treatment and as to the extent to which women in the workplace were vulnerable to such treatment. Viewed in this way, the Appeal Tribunal concluded that the decision of the Tribunal was not perverse.

In *East Berkshire Health Authority v Matadeen*, the employee, a male night charge-nurse at a hospital which predominantly provided residential care for mentally ill patients, complained of an unfair dismissal after admittedly having made nuisance calls to other nursing staff on the internal house telephone when staff members at the hospital were engaged in industrial action. The Tribunal found that the employer’s decision to dismiss was unfair because it was not within the band of reasonable responses in the circumstances. According to the Tribunal, the employer was not entitled to regard the conduct in question as gross misconduct and therefore grounds for dismissal.

On appeal, the Appeal Tribunal disagreed. According to the Appeal Tribunal, the Tribunal had erred in law in: 1) failing to find that the conduct of the employee amounted to gross misconduct; and 2) substituting its own view for that of the employer in finding that the decision to dismiss was not within the band of reasonable response for the employer in the circumstances. The Appeal Tribunal then held that, even if the Tribunal's decision had not disclosed the foregoing errors of law, the appeal would have been allowed on the ground of perversity. According to the Appeal Tribunal, the latter ground allowed interference with factual findings of the Tribunal if the industrial members of the Appeal Tribunal were satisfied in the light of their own experience and of the sound practices in the industrial field that the decision was not a permissible option and hence viewed as unreasonable and erroneous in law.

Considering the factual findings against this criteria, the industrial members of the Appeal Tribunal were satisfied that the decision to dismiss a senior nurse, holding managerial and

---

600 Para 34.
602 Para 25.
603 Para 57.
604 Para 58.
605 Para 55.
supervisory responsibility in a mental hospital, for gross misconduct and who had previously received a final warning, had to fall within the band of reasonable response of the employer. According to the Appeal Tribunal, a decision to the contrary would have made no sense in an industrial relations context.\textsuperscript{606} The appeal was accordingly allowed and substituted with a finding that the dismissal was fair.\textsuperscript{607}

The courts have, however, emphasized that not all factual findings can be scrutinised and set aside for perversity reasons. In \textit{Bowater v Northwest London Hospitals NHS Trust}, the Court of Appeal reminded the Appeal Tribunal that it had to pay proper respect to the decision of the Tribunal.\textsuperscript{608} The Court reasoned that Parliament had entrusted the Tribunal with the responsibility of making the sometimes difficult and borderline decisions in relation to the fairness of dismissal and that the Appeal Tribunal could not, under the guise of a charge of perversity, substitute its own judgment for that of the Tribunal.\textsuperscript{609}

Phillips contends that, in the context of unfair dismissal appeals, particularly the question whether or not an employer has shown a dismissal to be fair, it is possible to say that the question is one of fact rather than law.\textsuperscript{610} According to him, the Appeal Tribunal has however not adopted that approach, but because dismissal cases can be categorised and the controversial questions become familiar, it has made it its task to improve the standard of industrial relations by establishing a coherent body of practice prescribing the correct approach in standard situations and ensuring as far as possible some degree of uniformity so as to prevent each Tribunal from being a law unto itself.\textsuperscript{611} As a formula for perversity, Phillips then contends that a decision will be wrong in law if the Appeal Tribunal is individually and collectively satisfied that the decision was wrong judged by the standards of good industrial practice.\textsuperscript{612}
The interaction between perversity and mistakes of fact was demonstrated in *Parfums Givenchy v Tabaquin Finch.*\(^{613}\) In this case, the appellant was dismissed in a redundancy situation where vacancies were available elsewhere within the same group of companies, but the appellant was rejected for all of them following interviews by the respective line managers. The appellant concluded that there was collusion among the human resources department to unfairly disadvantage her because the human resources functions for all three perfume divisions were presided over by the same person, namely Sophy Brown.\(^{614}\) An unfairly dismissal dispute was successfully referred to the Tribunal.\(^{615}\)

On appeal, the employer contended that the Tribunal had made two mistakes of fact which made the Tribunal decision perverse: 1) the Tribunal wrongly recorded the decision-makers in the interview process as human resources managers when they were line managers from separate companies; and 2) the Tribunal failed to make a finding consistent with the employer’s evidence that one company did not have the power to allocate a redundant employee to another company within the group, but that each one operated autonomously.\(^{616}\)

The Appeal Tribunal agreed that misunderstanding the facts was a basis for setting aside a decision on the ground of perversity. In wrongly forming the view that decision-making was done by human resources managers, as opposed to line management detached from human resources, the Appeal Tribunal accepted that the perception was created that Sophy Brown was able to influence the selection or non-selection of the appellant by one of the other companies in the group. As a result of this error, the Appeal Tribunal was not convinced that the decision was unarguably correct, notwithstanding the misappropriation of functions. The appeal was accordingly allowed and the claim remitted to a fresh Tribunal.\(^{617}\)

Whilst the fact-finding function has been entrusted to the Tribunal and appeals are limited to questions of law, the latter term has therefore specifically been interpreted by the courts to

---

\(^{613}\) UKEAT/0517/09/RN found at http://www.employmentappeals.gov.uk/Public/results.aspx on 4 November 2012 at 13h11.
\(^{614}\) Para 10.
\(^{615}\) Para 11.
\(^{616}\) Para 11.
\(^{617}\) Para 17 and 29.
include perverse decisions. Because the presence or otherwise of perverse decisions are identified by examining the evidence and the findings of fact and therefore turn on the particular circumstances of the case, perversity has a predominately factual element. As defined, it includes a misunderstanding of the evidence, leading to a crucial finding of fact that is unsupported by evidence or that is contrary to uncontradicted evidence. This does not mean, however, that the appellate body may weigh the evidence and assess its importance with a view to substitute the decision with its own assessment of the evidence and overturn findings of fact made by the Tribunal because it disagrees with the Tribunal as to the justice of the result, the merits of the case or the interpretation of the facts. The substitution of a decision in this manner will in itself constitute an error of law that it capable of being taken on appeal. The appellate bodies accept that the Tribunals are the final arbiter of facts in so far as they have had the advantage of seeing and hearing the witnesses, sensing the atmosphere in the particular workplace, gauging the qualities of the different personalities and weighing the impact of their effect upon the other. 

Likewise, appellate bodies accept that there are many factual situations in the field of industrial relations in which different conclusions could be reached by different tribunals, all within the realm of reasonableness, and where there is no right or wrong answer.

As such, the scope for an appeal which effectively challenges factual conclusions is limited. Appellate bodies will not interfere with the original decisions, even if they reason that they might have conducted and decided the cases differently, unless it is able to identify a finding of fact which was unsupported by any evidence or demonstrates a clear self-misdirection in law by the Tribunal. It is not enough that the finding was contrary to the weight of the evidence or that the Tribunal heard evidence that was hard to believe. The question remains whether an overwhelming case has been made out that the Tribunal concerned reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. In determining whether or not this threshold has been surpassed for a claim of perversity to succeed, the appellate bodies also do not subject Tribunal decisions to microscopic analysis, but consider the substance of the Tribunal’s decision broadly and fairly to see if the reasons given for the

---

618 See earlier discussion of Royal Society for the Protection of Birds v Croucher.
619 See earlier discussion of Stewart v Cleveland Guest (Engineering) Ltd.
620 See earlier discussion of Piggott Brothers and Jackson.
decision were sufficiently expressed to inform the parties as to why they won or lost the case and to enable their advisers to identify errors of law that may have occurred in reaching the conclusion.\textsuperscript{622} Perversity is therefore established with reference to the outcome and the reasons for the outcome.\textsuperscript{623} The Appeal Tribunal is entitled to invite the Tribunal to amplify the reasons for the decision where the reasons are inadequate.\textsuperscript{624} It is not considered appropriate where the inadequacy of reasoning is on its face so fundamental that there is a real risk that supplementary reasons will be reconstructions of proper reasons.

4.5 CONCLUSION

In this chapter it has been established that the Appeal Tribunal hears appeals from the Tribunal on questions of law arising out of proceedings in respect of a designated list of statutes only. What constitutes a question of law has not been statutorily defined, but the Appeal Tribunal and the appellate courts have accepted that its meaning is tightly circumscribed and that it specifically excludes questions of fact. Questions of fact are considered to fall within the exclusive domain of the Tribunal and the Appeal Tribunal is required to show considerable self-restraint in those instances where it strongly disagrees with the Tribunal’s decision on the facts but can identity no error of law. The reasoning is essentially two-fold: 1) the Tribunal has the overriding objective to deal with cases justly by ensuring that they are dealt with proportionately, expeditiously, fairly and in a cost effective manner; and 2) in contrast to appellate bodies, the Tribunal with its lay members sit as an “industrial jury” when it hears firsthand and in full the evidence and submissions of the parties involved, find the facts, apply the relevant law and reach the conclusion to which their findings and their experience lead them.

Contrary to a question of fact, a question of law concerns the identification and interpretation of norms which are typically of general application and to be answered to the satisfaction of a court with reference to statute, precedent and/or policy. On appeal, an appellant would therefore be

\textsuperscript{622} See earlier discussion of \textit{Stewart v Cleveland Guest (Engineering) Ltd.}

\textsuperscript{623} See \textit{Harrod v Ministry of Defence} 1981 ICR 8. It is not permissible to appeal where the sole purpose is to challenge the reasons for the decision or a particular finding of fact. The outcome must also be challenged.

\textsuperscript{624} \textit{Barke v SEETEC Business Technology Centre Ltd} 2005 IRLR 633, CA. Prior to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 coming into effect, the power to ask for amplified reasons stemmed from rule 30(3)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 and/or section 30(3) of the Employment Tribunals Act 1996.
required to identify any flaws in the legal reasoning of the original decision with reference to the recognised norms and not urge the Appeal Tribunal to substitute its own interpretation of the facts for that of the Tribunal. From the case law discussed, it is evident that the courts have readily accepted that a question of law includes an allegation concerning the misinterpretation of a statute, the misapplication of case law, a finding made in the absence of any evidence to support it; a failure to resolve a conflict of evidence or opinion central to a case; a failure to comply with the rules of natural justice and/or a perverse decision. These questions of law have been classified by the courts into the following categories of grounds for appeal: 1) a misdirection, misunderstanding and/or misapplication of the law; 2) the absence of any evidence to support material findings of fact and/or material findings of fact that are contrary to the evidence before the Tribunal and 3) a perverse decision.

Firstly, a decision may amount to a misdirection, misunderstanding and/or misapplication of the law, if there is for example an allegation of: 1) actual or apparent bias; 2) the absence of a fair hearing; 3) an unreasonable delay in promulgating the decision; 4) an error in the assessment of compensation; and/or 5) the wrong application or understanding of a principle of law. In these instances, the test is whether the conclusion of the tribunal is plainly and unarguably right notwithstanding the misdirection or misapplication of the law.

Secondly, a decision may be appealable because of a misunderstanding or a misapplication of the evidence leading to a material finding of fact unsupported by evidence or contrary to uncontradicted evidence. In this instance, the significance of the misunderstanding or misapplication of the evidence is assessed within the context of the decision as a whole. If the misunderstanding or misapplication of the evidence is demonstrably independent of the ultimate finding that has been reached, the appeal would not be allowed. However, if the Tribunal had made a wrong determination on a relevant undisputed or indisputable fact and had then proceeded to consider the evidence and reach its ultimate conclusions of fact based wholly or mainly upon that demonstrable initial error, the appeal would generally succeed. Again, the

---

625 See discussion in para 6.3 above.
626 See discussion in para 6.3 above.
question is therefore whether or not the decision is unarguably correct, notwithstanding the misappreciation of a primary fact.

Thirdly, a decision may be appealable on the basis of perversity if the decision is so defective that no reasonable tribunal could have arrived at that decision. This ground of appeal may potentially \emph{even} apply where the decision under appeal involves: 1) no question of statutory construction; 2) no misapplication of case law; 3) no contention that the primary facts were found upon non-existing evidence; and 4) no contention that wrong inferences of fact were drawn from the primary facts.627

From this classification, it is apparent that there is thus an exception to this fact/law distinction on an appeal of law. An appeal on a question of fact would be permissible as a question of law if the Appeal Tribunal is able to conclude that the Tribunal's finding was perverse in the sense that it was one which no reasonable tribunal could have come to on the evidence. Similar to “questions of law”, “perversity” is not statutorily defined. The courts have, however, determined that perversity does not entail overturning a decision on appeal merely because the appellate body does not agree with the decision of the initial decision-maker or because it is possible that a differently constituted Tribunal might have come to a different conclusion. The substitution of a decision in this manner will in itself constitute an error of law that is capable of being taken on appeal. Nor can an appellant simply refer to an adverse finding of fact on a specific issue and allege that because that particular finding was perverse, the overall decision of the Tribunal was also perverse. As per the courts’ definition, an appeal brought on the ground of perversity will succeed only if an overwhelming case is made out that, although the Tribunal apparently directed itself properly in law and did not misstate, misunderstand or misapply the facts, the decision was perverse or there was no evidence to justify the conclusion which was reached. In terms hereof, it is presumed that, although the Tribunal had not expressed a wrong approach that the court is able to detect, it must in fact have followed one because the decision is plainly wrong. This test requires the Appeal Tribunal and the Court of Appeal to consider the Tribunal’s findings overall and ask whether, with reference to the evidence before it, it was entitled to draw the conclusions

it did from the facts it had found. In making this determination, the question remains whether or not the Appeal Tribunal can conclude that: 1) it is completely satisfied in the light of its own experience and of the sound practices in the industrial field that the decision was not a permissible option; 2) the decision offended reason or was one to which no reasonable tribunal could have come to; 3) the decision was so very clearly wrong that it just could not stand; and/or 4) the decision was so outrageous in its defiance of logic or of accepted standards of industrial relations that no sensible person who had applied his mind to the question and with the necessary experience could have arrived at it. Perversity appeals in the context of error of law are typically used to determine whether the Tribunal’s interpretation of a term such as employee is legally sustainable and hence whether the Tribunal has authority to determine the matter at all. Because it involves matters of fact, degree and/or inferences, the appellate body does not substitute judgment on the legal meaning of the disputed term on a correctness standard, but accord the Tribunal a measure of latitude through perversity appeal. However, from the manner in which the test has been formulated by the courts, it is clear that it is difficult to bring a successful appeal against the decision of the Tribunal that initially heard a case on the basis of the substantive perversity ground of appeal.
CHAPTER 5

JUSTIFIABILITY, REASONABLENESS AND CCMA ARBITRATION AWARD REVIEWS IN SOUTH AFRICA

5.1 INTRODUCTION

As is characteristic of special statutory reviews,\textsuperscript{628} the LRA makes specific provision for the review of compulsory arbitration awards. However, as will be noted from the discussions below, the statutory grounds of review are prescribed in a manner that limits considerably the scope within which these arbitration awards may be reviewed.\textsuperscript{629} This poses a challenge to any potential litigant that is dissatisfied with the decision recorded in an arbitration award and seeks to launch review proceedings, but is unable to attribute this dissatisfaction to any one or more of the specific and limited grounds of review listed in section 145(2) of the LRA. Consequently, the courts have in the past been confronted with innovative arguments designed to circumvent or expand upon the grounds of review sanctioned by the LRA in order to secure the review of an award that would otherwise have fallen beyond the statutory limits of the Labour Court’s review powers. These included submissions that arbitration awards should be reviewable in terms of the broader common law and/or constitutional grounds of review provisions by virtue of section 158(1)(g) of the LRA or in terms of the justifiability concept found in the 1993 Constitution.\textsuperscript{630} In terms of the latter contention, the making of an arbitration award was an administrative act to which the provisions of the right to lawful, procedurally fair and justifiable administrative action as contained in the 1993 Constitution applied. In an attempt to provide an answer to these questions, the courts have engaged in various legal discussions, which included weighing the making of CCMA arbitration awards against the definition of administrative action and considering whether the CCMA could be described as an organ of state. Although it can retrospectively be said that the aspects referred to above have largely been resolved by the leading case of Carephone and that the principles established therein have become academic in

\textsuperscript{628} See chapter 2 para 2 4 5.
\textsuperscript{629} See chapter 2 para 2 6.
\textsuperscript{630} See para 5 3 and 5 4 below.
light of the introduction of the 1996 Constitution, it is submitted that it remains relevant for interpretation purposes, especially when the findings made in *Sidumo* are considered.

The historical developments are also important for comparative purposes. Different to *Sidumo*, *Carephone* was decided on the basis of the wording of the administrative justice provision as contained in section 33 read with item 23(2) of schedule 6 of the 1996 Constitution, namely that administrative action should be *justifiable* in relation to the reasons given for it. The 1996 Constitution does not, however, refer to justifiability, but in section 33(1) rather provides that administrative action should be lawful, *reasonable* and procedurally fair. Despite this different choice in wording, the Labour Appeal Court in *Carephone* gave the impression that justifiability and reasonableness were to be regarded as one and the same when it held that:

> “Many formulations have been suggested for this kind of substantive rationality required of administrative decision-makers, such as ‘reasonableness’, ‘rationality’, ‘proportionality’ and the like (cf eg Craig Administrative Law above at 337 – 3349; Schwarze European Administrative Law 1992 at 677). Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of ‘justifiability’ itself.”

Similarly, in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* the Court expressed a willingness to view justifiability and rationality as similar, if not synonymous, concepts. Also, in *Roman v Williams NO* it was held that administrative action must meet the requirements of suitability, necessity and *proportionality* in order to qualify as justifiable in relation to the reasons given for it. The latter requirements was held to involve a test of reasonableness.

However, in *Sidumo*, the Constitutional Court for the first time considered whether the change in wording from “justifiability” in the 1993 Constitution to “reasonableness” in the 1996 Constitution materially impacted the interpretation afforded to section 145 of the LRA. In the process, the Court did not confine itself to such a determination, but also set out the standard to

---

631 Section 24(d) of the 1993 Constitution. *Carephone* was determined under item 23(2) of Schedule 6 of the 1996 Constitution. The provisions are identical.
632 Para 37.
633 2001 9 BLLR 1011 (LAC) para 25.
634 1998 JOL 1514 (C). See also *Heyneke v Unhlatuze Municipality* 2010 JOL 25625 (LC) para 60. Reasonableness was held to import elements of rationality and proportionality.
be applied in the review of arbitration awards in terms of section 145 of the LRA. These matters will all be discussed in more detail below, including the findings of the Constitutional Court in *Sidumo* in order to establish the content of reasonableness.

### 5.2 THE ADMINISTRATIVE NATURE OF CCMA ARBITRATIONS

In *Carephone*, the Labour Appeal Court had to determine whether the making of arbitration awards in terms of compulsory arbitration proceedings constituted administrative action as contemplated by the administrative justice provision contained in section 33 read with item 23(2) of schedule 6 of the 1996 Constitution. The Court rejected the contention that the judicial nature of CCMA arbitrations rendered it incapable of being classified as administrative action. According to the Court administrative action could take many forms, even if judicial in nature, but the action remained administrative. The Court therefore concluded that the CCMA was an organ of state that was subject to the basic values and principles governing public administration. The Court reasoned that the CCMA exercised a public power and function when it resolved disputes between parties in terms of the LRA without needing the consent of the parties.

Similarly, in *Mkhize v CCMA*, the Labour Court held that the CCMA was a tribunal as envisaged in section 39 of the 1996 Constitution and that, in so far as it exercised public power and performed public function in terms of legislation, it was an organ of state as defined in section 239(b)(ii) of the 1996 Constitution.

The Labour Court and the Labour Appeal Court have therefore confirmed that the compulsory arbitration function of the CCMA constitutes administrative action as provided for in section 33(1) of the 1996 Constitution. As a result of this, the question that then arose was whether the review of CCMA arbitration awards could be influenced by the terms of the constitutional administrative justice provision and, upon the enactment of PAJA, be reviewable in terms of the

---

636 Section 33 read with item 23(2) of schedule 6 of the 1996 Constitution was an interim measure.
637 Para 19.
638 Para 11-12.
grounds of review identified in PAJA. A potential for conflict hence existed in so far as the legislature, in an attempt to give effect to the constitutional obligations contained in section 27 of the 1993 Constitution, adopted the LRA and more particularly section 145 to establish a special statutory review in terms of the LRA rather than the 1996 Constitution and/or PAJA. These arguments will be addressed below when this matter is discussed in more detail in light of the 1996 Constitution and the findings made by the Constitutional Court in Sidumo.

5 3 RELATIONSHIP BETWEEN SECTION 145 AND SECTION 158(1)(g)

Section 145(1) of the LRA provides that any party to a dispute who alleges that a defect exists in arbitration proceedings may apply to the Labour Court for an order setting aside the arbitration award. As was established in chapter 2, a defect means that the commissioner committed misconduct in relation to the duties of the commissioner as arbitrator; that the commissioner committed a gross irregularity in the conduct of the arbitration proceedings; that the commissioner exceeded his powers; and/or that the award was improperly obtained.

Section 145 is, however, not the only section in the LRA making provision for the remedy of review. In the context of listing the powers of the Labour Court, section 158(1)(h) provides for the review of actions of the state as employer, whilst section 158(1)(g), prior to its amendment, provided that:

“The Labour Court may, despite section 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law.”

Taking into consideration that arbitration by the CCMA is a function provided for in the LRA, and that section 158(1)(g) was introduced with the words “despite section 145”, it was contended that section 158(1)(g), with its wider scope of review, should subsume the more restricted review

640 See discussion in chapter 2 para 2.4.4.1.
641 See section 1(a) of the LRA.
642 See chapter 2 para 2.6.
643 Own emphasis added.
provided for in terms of section 145. This argument was attractive, not only because section 158(1)(g) review applications could be brought within a “reasonable” time as opposed to the six week time limit in terms of section 145, but also due to a common perception that section 145 provided for a more restricted kind of review than that allowed for by the 1996 Constitution.

On the other hand, it was countered that this interpretation would render section 145 ineffective, contrary to the intention of the legislature. The ensuing debate over whether CCMA arbitration awards were reviewable in terms of section 145 or section 158(1)(g) is evident from the case law. Revelas J first held in Edgars Stores (Pty) Ltd v Director, CCMA & others that the review of CCMA arbitration awards should take place on the basis of the narrow grounds provided for in section 145(2) of the LRA and that section 158(1)(g) was not applicable. Then, in Kynoch Feeds (Pty) Ltd v CCMA & others, Revelas J conceded that Edgars Stores was wrongly decided and found that arbitration awards could be reviewed on the wider grounds for review contained in section 158(1)(g).

In Ntshangane v Speciality Metals CC, the Labour Court again ascribed the formulation of section 158(1)(g) to inelegant draftmanship. According to Mlambo J, the appropriate interpretation of section 158(1)(g) meant that, in addition to the court’s power to review CCMA arbitration awards, the court was also empowered to review any other function performed in terms of the LRA.

The uncertainty sparked by the foregoing judgments was finally resolved in Carephone. The Court considered the impact of the two contradictory interpretations: on the one hand, if it was found that the provisions of sections 145, 158(1)(g) and 158(1)(h) applied to distinct and different forms of administrative action, the sections would not overlap; on the other hand, if the

---

645 J Grogan “Untimely reviews Unresolved issues after Carephone” 1999 Employment Law 17. It was contended that the six week time limit was aimed at preventing the CCMA from being encumbered by queues of applications stretching back into the distant past.
646 Carephone (Pty) Ltd v Marcus NO & others 1998 11 BLLR 1093 (LAC) para 7.
647 Carephone (Pty) Ltd v Marcus NO & others 1998 8 BLLR 872 (LC) para 12. According to the Court, section 158(1)(g) had the potential to cause the courts to be seen to be interfering too much in the discretionary arena of commissioners by enticing the courts to embark on a reconsideration of the merits and the conclusion reached by commissioners.
648 1998 1 BLLR 34 (LC).
649 41G–I.
650 1998 4 BLLR 384 (LC).
651 Para 46.
652 1998 3 BLLR 305 (LC).
653 Para 41.
application field of sections 145 and 158(1)(g) were found to overlap it would have the result that the provisions of section 145 were superfluous. Taking this into consideration, Froneman DJP, in a reasoning process similar to Mlambo J’s in *Ntshangane*, confirmed that the review of arbitration proceedings must proceed under section 145 of the LRA and that it was not necessary to resort to section 158(1)(g).\(^{655}\) According to the Court, section 158(1)(g) was intended to provide for the court’s residual powers of review for administrative functions not defined specifically in sections 145 and 158(1)(h). The Court did however acknowledge that the use of the word “despite” in section 158(1)(g) was undesirable in so far as it allowed for an interpretation of section 158(1)(g) that granted a general review power to the Labour Court over any function, act or omission.\(^{656}\) In order to attempt an interpretation of section 145 that was consistent with the 1996 Constitution, the Court thus proposed that the word “despite” in section 158(1)(g) should be read as “subject to”.\(^{657}\) The legislature took note of this recommendation and, through the 2002 amendments to the LRA, replaced “despite” with “subject to” in section 158(1)(g).\(^{658}\) This made it clear that section 145 and section 158(1)(g) apply to distinct and different forms of administrative action that do not overlap and that proceedings for the review of arbitration awards must be instituted in terms of the limited grounds of review contained in section 145 of the LRA. Since this amendment, the interpretation and application of section 145 has however sparked another debate relating to the role and/or impact of the constitutional right to just administrative action on the interpretation of section 145.

### 5.4 CONSTITUTIONAL JUSTIFIABILITY AND SECTION 145(2)

It has already been established that case law supported the proposition that the compulsory arbitration function of the CCMA constitutes administrative action. It was as a result of this determination that the argument was subsequently raised that the restrictive grounds of review provided for in section 145 failed to give expression to the requirements of the constitutional administrative justice right.\(^{659}\) In *Speciality Metals*, Mlambo J however disagreed and held that, although section 145 of the LRA did amount to a statutory limitation of the constitutional right to

---

\(^{655}\) Para 24.  
\(^{656}\) Para 26.  
\(^{657}\) Para 28.  
\(^{658}\) Substituted by s 36(b) of Act 12 of 2002.  
\(^{659}\) Para 25.
administrative justice, it was a reasonable and justifiable limitation that did not negate the right to administrative justice. Similarly, in Carephone the Court accepted that section 145 was not in conflict with the constitutional administrative justice right, but that the interpretation of section 145 was simply frustrated as a result of reliance on decisions interpreting a corresponding section in the Arbitration Act. According to the Court, such reliance was misplaced because there were material differences between section 145 and its equivalent section in the Arbitration Act: 1) section 146 of the LRA expressly excluded the operation of the Arbitration Act in respect of CCMA arbitrations; 2) the Arbitration Act applied to private, consensual arbitrations in contrast to the compulsory arbitrations under the LRA; 3) its provisions were assessed and interpreted in a different constitutional context; and 4) even under the Arbitration Act, an award could be reviewed and set aside if the arbitrator exceeded his or her powers by making a determination outside the terms of the submission.

According to the Court, the grounds of review under section 145 of the LRA further did give expression to what the 1996 Constitution required. The Court reasoned that there were no express or implied provisions in the LRA that suggested that the powers of a commissioner in compulsory arbitration under the LRA could exceed the constitutional constraints on those powers or could be given in conflict with constitutional values:

“The constitutional imperatives for compulsory arbitration under the LRA are thus that the process must be fair and equitable, that the arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicly and in writing, that the award must be justifiable in terms of those reasons and that it must be consistent with the fundamental right to fair labour practices. The provisions of the LRA dealing with arbitration proceedings are not in conflict with these constitutional requirements.”

However, despite finding that section 145 was not in conflict with the 1996 Constitution, the Court held that the administrative justice section in the Bill of Rights had broadened the scope of judicial review in so far as administrative action was required to be justifiable in relation to the

---

\(^{660}\) Para 37.  
\(^{661}\) Para 25.  
\(^{662}\) Para 20.  
\(^{663}\) Para 27.
reasons given for it.\textsuperscript{664} This, according to the Court, was due to the fact that administrative justice required a kind of substantive \textit{rationality} from administrative decision-makers\textsuperscript{665} in the \textit{merit} or \textit{outcome} of the decisions concerned.\textsuperscript{666} According to the Court, the concept of justifiability gave expression to the fundamental values of accountability, responsiveness and openness without purporting to give courts the power to perform the administrative function themselves.\textsuperscript{667} Opposed to a correctness question, the court therefore proposed testing for justifiability by asking whether there was a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him or her and the conclusion he or she eventually arrived at.\textsuperscript{668} In doing so, the Court did not specify whether a rational connection between the reasons and the arbitration award was required in addition to the rational connection between the evidence and reasons.

It is unfortunately also not clear from \textit{Carephone} whether the Court regarded the constitutional imperatives as establishing an independent ground of review in addition to those grounds already provided for in section 145(2) of the LRA. It is submitted that such a submission can be deduced from the following held by the Court:\textsuperscript{669}

> “Accordingly, the only bases for review are (1), that the facts amount to misconduct or gross irregularity or impropriety under section 145(2)(a)(i) to (ii) and section 145(2)(b) of the LRA, or (2), that his actions are not justifiable in terms of the reasons given for them and that he has accordingly exceeded his constitutionally constrained powers under section 145(2)(a)(iii) of the Act.”

Read within the context of the judgment as a whole, an argument can however be made that the Court only “extended” the grounds of review in section 145 to the extent of finding that the Labour Court could review an award in terms of section 145(2)(a)(iii) because the award was not justifiable in terms of the reasons given. Ancillary to this, the Court did not hold that justifiability

\textsuperscript{664} Para 30-31. This suggests that the constitutional imperative of “justifiable” administrative action was read into section 145.
\textsuperscript{665} Para 37.
\textsuperscript{666} Para 31.
\textsuperscript{667} Para 35.
\textsuperscript{668} Para 37.
\textsuperscript{669} Para 53. Own emphasis added.
was a separate ground for review, but deduced that the commissioner had exceeded his powers because the award was not justifiable in terms of the reasons given. Justifiability was thus considered a measure or test to determine whether the commissioner had exceeded his powers in terms of section 145(2)(a)(iii). Such a submission is supported by the following:670

“Once again [the commissioner’s] reasoning was rationally connected to the material before him. His decision and the reasons he gave for it do not support an inference of misconduct, irregularity or impropriety. The decision not to postpone and to continue the proceedings are rationally justifiable in terms of the reasons given for the decision by the commissioner. He thus did not exceed the substantive constitutional limits to the exercise of his powers in arbitration under the LRA.”

In County Fair Foods (Pty) Ltd v CCMA & others,671 a differently-constituted Labour Appeal Court referred to Carephone672 and agreed that a commissioner would exceed his or her powers if the award was not justifiable in terms of the reasons given. The Court however also held that it was not restricted to applying the provisions of section 145(2)(a)(iii) when reviewing an arbitration award, but that in appropriate circumstances non-compliance with the constitutional imperatives referenced in Carephone could also amount to misconduct in terms of section 145(2)(a)(i) or a procedural irregularity in terms of section 145(2)(a)(ii). 673

The Court was not convinced that the introduction of the constitutional prescript of justifiability distorted the distinction between appeal and review. Per Ngcobo J the Court held that justifiability meant no more than that the decision of the commissioner must be supported by the facts and the applicable law.674 Conradie J noted that the test for altering a sanction imposed by a CCMA commissioner was similar to the test applied to the alteration of a sentence in a criminal appeal.675

670 Para 57; own emphasis added.
671 1999 11 BLLR 1117 (LAC).
672 See para 6-7.
673 Para 8.
674 Para 27. The Court reasoned that if an award could be sustained by the facts and the law, interference with the award was not warranted, but if it could not, interference was warranted.
675 Para 43. See DPP, KwaZulu-Natal v P 2006 1 All SA 446 (SCA) para 10. In this case, the Court held that the test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate. See also S v Malgas 2001 (2) SA 1222 (SCA) para 12. In this case,
“A result which a court of appeal considers to be incorrect may nevertheless be justifiable. It is not justifiable if it is dramatically wrong. Where the result is, for some reason or other, perverse, one would quite naturally say ‘I cannot allow this to happen’. There is no real difficulty with cases of that kind. But where the result diverges from the result which one would like to have seen, interference is not justified. The test for altering a sanction imposed by a CCMA commissioner is not so far removed from the one applied to the alteration of a sentence in a criminal appeal. If you look at the sentence and you say to yourself ‘this sentence is so excessive (or so lenient) that I cannot in all good conscience allow it to stand’, it is open to interference. If you think merely that you would not have imposed the same sentence, it is not. Unless the sentence makes you whistle, it must stand. The general principle underlying this approach is that a court is reluctant to interfere on appeal in the exercise of discretion if the only ground for the suggested interference is its unreasonableness. The reluctance of a court to interfere on review (on the grounds of its unreasonableness) with the exercise of a discretion must therefore be at least as strong, if not stronger.”

In Toyota South Africa Motors (Pty) Ltd v Radebe, the Labour Appeal Court (per Nicholson JA) also referred to Carephone and accepted that section 145 was the relevant section for the review of arbitration awards. The Court was however not convinced that justifiability constituted an independent ground upon which an arbitration award could be attacked. Firstly, justifiability was not part of the wording of section 145. Secondly, there was a difference between appeals and reviews. According to the Court, justifiability appeared to be very similar to the test on an appeal of fact that allowed the court to interfere if there were misdirections of fact including the overlooking of other facts and probabilities. The Court reasoned that, by referring to a gross irregularity in section 145, the legislature was contemplating a more serious ground for interference than mere mistakes of fact and law. Thirdly, the Court queried the constitutional implications of section 145 should it be determined that the grounds set out in section 145 were not the only avenues open to a party to challenge an arbitration award, but that an arbitration award that was unjustifiable as to the reasons given was reviewable on this basis as an

---

676 2000 3 BLLR 243 (LAC).
677 Para 39. The Court held that a court of appeal or a review court will not lightly overturn a finding of fact made by a trier of fact who has had the benefit of hearing and seeing witnesses in the witness box except in certain defined cases. One of such cases is where the probabilities clearly point the other way. See para 18.
independent ground of review. Although the Court accepted that it was not required to determine this issue for purposes of its judgment, it was of the opinion that, failing a successful constitutionality challenge, section 145 was fully operative and the constitutional provision of justifiability had to be seen in the context of the specific grounds for review in section 145 and not as an independent ground of review. In the circumstances, the Court chose to deal with the challenge posed to the commissioner’s sanction by asking whether there was such a yawning chasm between the sanction which the court would have imposed and that which the commissioner imposed then it would seem to be that a gross irregularity had been committed.

From the above it is evident that the Labour Appeal Court (in County Fair Foods and Radebe respectively) preferred to support an interpretation of Carephone that did not hold justifiability as an independent ground of review. Support for such an interpretation is also found in the generally accepted principle that litigants cannot bypass ordinary legislation and rely directly on a constitutional provision in the absence of a constitutional challenge to that ordinary legislation.

On the application of this principle it is noted that applicants on review cannot challenge the justifiability of decisions based on the constitutional right to administrative justice, but must seek to review arbitration awards with reference to section 145 of the LRA – from which justifiability as an independent justifiability ground of review is notably absent. Alternatively, adopting an interpretation of justifiability that recognises it as an independent ground of review would mean that the courts are required to read justifiability into the section 145(2) grounds of review – a seemingly strained interpretation of that section.

The reasoning applied in Carephone was subsequently challenged by the Labour Court in Shoprite Checkers (Pty) Ltd v Ramdaw & others. Wallis AJ noted that in Carephone, the

---

678 Para 33 and 40.
679 Para 40; see also Cadema (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration (Western Cape Region) and others 2000 JOL 7425 (LC) para 17.
680 Para 53-54. The Court was satisfied that the sanction imposed by the commissioner was so egregious and so out of kilter with what the Labour Appeal Court would have imposed, that it constituted a gross irregularity.
682 The concept of “justifiability” derives from the 1993 Constitution.
683 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 2 SA 1 (CC) para 21; Ex Parte Minister of Safety and Security: in re S v Walters 2002 4 SA 613 (CC) para 64.
Labour Appeal Court had concluded that a CCMA arbitration constituted administrative action simply because the CCMA was considered to be an organ of state. According to the Court, this reasoning was in conflict with the approach subsequently adopted by the Constitutional Court in *FedSure Life Assurance Ltd v Greater Johannesburg Transitional Local Metropolitan Council & others* that not every action by an organ of state constituted administrative action for the purposes of constitutional review. Wallis AJ relied on this judgment to determine that, although the CCMA was an organ of state acting in terms of statutory authority and exercising statutory powers, the issuing of an arbitration award by a CCMA commissioner did not constitute administrative action and was therefore not reviewable on the constitutional ground that the award must be justifiable in relation to the reasons given. According to the Court, *Carephone* could no longer be regarded as authoritative and the only available grounds of review were those set out in section 145.

On appeal, the Labour Appeal Court referred to *Carephone* and in particular the finding that the ground for review contained in section 145(2)(a)(iii) incorporated the constitutional requirement that administrative action must be justifiable in relation to the reasons given for it. The Court accepted that *Carephone* had erroneously decided that the classification of state actions into administrative, judicial and quasi-judicial acts was outmoded. According to the Court, this classification was sometimes necessary under the constitutional order so as to give effect to constitutional provisions. However, the Court also noted that the Constitutional Court in *Pharmaceutical Manufacturers Association* had subsequently decided that all public power must be exercised rationally and that it was hence no longer of consequence whether *Carephone* was correct in concluding that the issuing of an arbitration award by a CCMA commissioner was justifiable in relation to the reasons given.

---

685 1998 (12) BCLR 1458 (CC). In this case, the Constitutional Court had to consider whether the passing of resolutions relating to rates by a local council constituted an administrative action as contemplated in s 24 of the 1993 Constitution.
686 2001 9 BLLR 1011 (LAC).
687 Para 8.
688 Para 14.
689 2000 JOL 6158 (CC) para 85, 86 and 90. The principles of rationality are as follows: 1) decisions that are the result of an exercise of public power can be set aside by a court if it is irrational; 2) the *bona fides* of the person who made the decision do not by themselves put such a person’s decision beyond the scrutiny of the court; 3) the rationality of a decision made in the exercise of public power must be determined objectively; 4) a court cannot interfere with a decision simply because it disagrees with it or it considers that the power was exercised inappropriately; 5) a decision that is objectively irrational is likely to be made only rarely; 6) decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the requirement of the rule of law that the exercise of public power should not be arbitrary.
constituted administrative action. According to the Court, there was no doubt that the CCMA exercised a public power when it arbitrated under the LRA and CCMA arbitration awards could accordingly be reviewed and set aside by the Labour Court if they were irrational.\textsuperscript{690}

Zondo JP then raised the question whether “rationality” and “justifiability” bore the same meaning, reasoning that if it did, it would not serve much purpose for the court to come to the conclusion that Carephone was wrongly decided. According to the Court, justifiability, in so far as it fell within the ambit of the rationality ground of review as it emanated from Pharmaceutical Manufacturers Association, would still be applicable to CCMA arbitration awards.\textsuperscript{691} Zondo JP then turned to Carephone and noted that the Court in that case had viewed the concept of justifiability as related, at least to some extent, to the concept of rationality. Zondo JP accordingly found that, although the term “justifiable” and “rational” may not, strictly speaking, be synonymous, they bore a sufficiently similar meaning to justify the conclusion that rationality could be said to be accommodated within the concept of justifiability as used in Carephone.\textsuperscript{692}

However, despite finding that a justifiable decision cannot be said to be irrational and an irrational decision cannot be said to be justifiable, leading to the inference that there should be no departure from Carephone, the Court found that the issuing of an arbitration award by a CCMA commissioner under the LRA was an exercise of public power that could be set aside if it failed to meet the constitutional requirement of rationality.\textsuperscript{693} On this reading, the Court seemingly adopted rationality as a ground of review that was severable from the grounds specifically mentioned in section 145(2). On the other hand, Zondo JA also held that there were sound policy considerations which justified that Carephone remain as is.\textsuperscript{694}

\textsuperscript{690} Para 21.
\textsuperscript{691} Para 21.
\textsuperscript{692} Para 25. See Niewoudt v Chairman, Amnesty Subcommittee, TRC, Du Toit v Chairman, Amnesty Subcommittee, TRC; Ras v Chairman, Amnesty Subcommittee, TRC 2002 3 SA 143 (C). Rationality requires that a decision must not be arbitrary; but that there must be a rational connection between the decision, the information relied upon to form the factual basis of the decision and the reasoning provided for in the decision
\textsuperscript{693} Para 26.
\textsuperscript{694} Para 33.
“This appeal can, therefore, be considered on the basis that, as was decided by this Court in Carephone, CCMA awards can be reviewed and set aside if they are not justifiable in relation to the reasons given for them.”

In particular, the Court noted that, in determining that the ground of review of justifiability fell within section 145(2)(a)(iii) of the LRA, Carephone in effect held that the time limit set out in section 145 for the bringing of review applications against CCMA awards would apply to that ground of review as well.695 In this regard the Court pointed out that, if the ground of review relied upon was not under section 145, the period within which a review on such ground must be launched is a reasonable time from the day of the issuing of the award and not six weeks as prescribed by section 145.

In terms of this judgment, CCMA arbitration awards can be set aside on review if they fail to meet the objective standard of rationality. Judicial review has therefore become an opportunity for the courts to scrutinise arbitration awards to determine whether the decision was rationally related to the purpose for which the power was given.696 This means that the review court is not obliged to allow a defective award to stand merely because the award was not irrational enough to warrant the inference that the commissioner has committed one or more of the section 145(2) grounds of review. On the other hand, the judgment has not prescribed a conclusive test. The Court simply considered that, in determining whether a commissioner’s award falls to be set aside on the ground that it is not justifiable in relation to the reasons given for it, one must have regard to the material that was properly available to the commissioner, the decision of the commissioner and the reasons that the commissioner gave for such a decision.697 It therefore continues to leave a considerable discretion to the review court to decide, on the facts of each case, whether awards were rational enough to pass scrutiny.

In Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others,698 the Court seemingly accepted irrational unjustifiability as a separate round for review. It was the Court’s

695 Par 32.
697 Para 82.
698 2002 6 BLLR 493 (LAC) para 58. The Court was of the view that the award was not rational or justifiable as to the reasons given because the commissioner had failed to properly consider the evidence. According to the Court,
understanding that the CCMA arbitration award must not be arbitrary, but must be arrived at in a manner which demonstrates that the commissioner has applied his or her mind seriously to the issues at hand and has reasoned his or her way to the conclusion.699 According to the Court, the conclusion was justifiable as to the reasons given if it was defensible as regards the important logical steps on the road to the conclusion.700 Referring to this decision in JHB to Fresh Produce Market (Pty) Ltd v Hiemstra NO & others,701 the Labour Court confirmed that it was trite that a CCMA arbitration award does not have to be defensible in all respects, but that it must meet the objectionable standard of rationality in that it must reflect an attempt by the commissioner to consider the evidence before him or her, and to arrive at a conclusion which is rationally connected to the evidence which was before him or her.702

In Sidumo, the judgments of County Fair Foods, Toyota South Africa Motors, Shoprite Checkers and Crown Chickens proved to be fertile ground for the Constitutional Court from which to commence an investigation into the role of justifiability, rationality and/or reasonableness and provide direction to legal practitioners that were divided on the matter.

5.5 **SIDUMO, THE REVIEW OF CCMA ARBITRATION AWARDS AND THE CONSTITUTIONAL COURT**

The facts of Sidumo were not very complex. After noticing a marked drop in production at its Waterval Redressing Section, the employer conducted an investigation which revealed that Mr Sidumo, a security officer tasked with guarding a high risk security point, had repeatedly neglected to search, either properly or at all, employees exiting that particular security point. As a result, Mr Sidumo was brought before a disciplinary enquiry to answer to charges of negligence

---

699 To prevent arbitrariness in the decision-making process, it is focused on whether there is a *rationale* for the decision. A Price “The Content and Justification of Rationality Review” in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 51. See also M Bishop “Rationality is dead! Long live rationality! Saving rational basis review” in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 7.

700 Para 58. The award must not be based on conjecture, fantasy, guesswork or hallucination.

701 2007 JOL 20596 (LC).

702 Para 36. See also Federated Timbers (Pty) Ltd v Lallie NO & others 1999 20 ILJ 348 (LC).
and a failure to follow established company procedures. At the conclusion of these proceedings, Mr Sidumo was found guilty of both charges and dismissed. In mitigation of sanction, the chairperson of the enquiry accepted and took into account that no theft or loss could be proven to have resulted from Mr Sidumo’s misconduct as well as Mr Sidumo’s clean disciplinary record of fifteen years. The internal appeal hearing also confirmed the sanction of dismissal; considering it significant that although Mr Sidumo’s misconduct was not known to have caused any losses to the employer, such losses could indeed have been suffered. Failing attempts at conciliation, Mr Sidumo subsequently referred an unfair dismissal dispute to the CCMA for arbitration; contending among others that the employer had not managed to prove that he had violated its search procedures and that dismissal was in any event an inappropriate sanction for the type of offense involved.703

After analysing the evidence and argument presented, the commissioner ruled that, although Mr Sidumo was guilty of misconduct, it was not of such a nature that it rendered the continuation of the employment relationship intolerable and dismissal was accordingly not an appropriate or fair sanction.704 The commissioner reasoned that there had been no “proven” losses suffered by the employer; the violation by Mr Sidumo had been unintentional and a mistake and Mr Sidumo had not been dishonest. Mr Sidumo’s unblemished service record also weighed in significantly with the commissioner’s decision that Mr Sidumo’s dismissal was unfair.705

The mine’s subsequent review to the Labour Court and appeal to the Labour Appeal Court was unsuccessful. The Labour Court dismissed the application; concluding, with reference to the grounds of review set out in section 145 of the LRA and the test in Carephone that it could find no reason to interfere with the commissioner’s application of the principle of progressive discipline. The court considered Mr Sidumo’s service record an overwhelming factor in his favour, noting that honest employees should not automatically face dismissal. In the Labour Court’s view, there was no evidence that theft had occurred during Mr Sidumo’s shift.706

---

703 Sidumo v RPMR Security (Amplats) & another 2001 2 BALR 197 (CCMA).
704 201.
705 The commissioner reinstated Mr Sidumo and awarded him compensation equal to three months’ salary.
706 J Partington J & A van der Walt “Re(viewing) the Constitutional Court’s Decision in Sidumo” 2008 Obiter 209 213-214.
On appeal, the Labour Appeal Court was critical of the commissioner’s findings and rejected the notion that no losses had been suffered by the employer.\textsuperscript{707} The Court held that the possibility that precious metals had been stolen whilst Mr Sidumo was on guard was a possibility that could not be discounted. The Court also had the following to say:\textsuperscript{708}

“It is not clear what the [Commissioner] meant when he said that the violation of the rule by [Mr Sidumo] was unintentional or a ‘mistake’. He might have been referring to the fact that one of the offences that [Mr Sidumo] was found guilty of was based on negligent conduct as opposed to intentional conduct. He did not elaborate on this but, even if that were the position, that would have to be taken into account in light of all the circumstances. Quite frankly, how the third factor, namely, honesty, came into the picture in this case, is baffling. No dishonesty by [Mr Sidumo] was alleged.”

Notwithstanding its criticism of the commissioner’s findings, the Labour Appeal Court dismissed the employer’s appeal. Since the employer had not attacked the commissioner’s finding that Mr Sidumo’s service record was a significant consideration on sanction, in the court’s view, the commissioner’s award could not be set aside because the unchallenged finding was in itself capable of sustaining the commissioner’s award.\textsuperscript{709}

A further appeal to the Supreme Court of Appeal resulted in the overturning of both the decisions of the Labour Court and Labour Appeal Court and the commissioner’s finding being replaced with a ruling that the dismissal had been fair.\textsuperscript{710} More particularly, in applying the rationality test to the facts before it, the Court noted and endorsed the Labour Appeal Court’s criticism of the commissioner’s findings. Nevertheless, the court considered Mr Sidumo’s misconduct to go to the heart of the employment relationship and the trust the employer placed in him. The Court did not allow a consideration of other legitimate reasons that were capable of sustaining the outcome, but limited the enquiry to the question whether the commissioner’s reasons as a whole could provide a rational connection to a sustainable outcome. In its view, the bad reasons considered by

\textsuperscript{707} \textit{Rustenburg Platinum Mines Ltd v CCMA & others} 2004 1 BLLR 34 (LAC).
\textsuperscript{708} Para 12.
\textsuperscript{709} Para 15.
\textsuperscript{710} \textit{Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and others} 2007 1 All SA 164 (SCA). The Supreme Court of Appeal found that the commissioner’s decision to reinstate Mr Sidumo had not been rationally connected to the information before him.
the commissioner in deciding that the dismissal was too harsh played too much of an appreciable or significant role in the outcome of the decision for it to be considered a rational one.\footnote{Para 34 and 51.}

In reaching such a conclusion, the Court made two important findings: firstly, it held that a commissioner was required to show a measure of deference to the sanction imposed by the employer provided it was a fair sanction;\footnote{Para 48. The Supreme Court of Appeal reasoned that it was primarily the function of the employer to decide on the proper sanction.} and secondly, it held that CCMA arbitrations undertaken in terms of the LRA constituted administrative action as defined in section 1 of PAJA and that the broader review grounds of PAJA, as general legislation relating to administrative action, accordingly subsumed the grounds of review in section 145(2) of the LRA; superseding the specialised enactment of the LRA.\footnote{Para 25.} According to the Court, the review criterion was thus whether or not the decision was rationally connected with the information before the commissioner and the reasons for it.\footnote{See J Grogan “Back to Basics The SCA revisits review” (2006) 22(6) Employment Law 11.} On a subsequent appeal to the Constitutional Court, the latter disagreed with the findings of the Supreme Court of Appeal and adopted a different approach, which will be discussed in more detail below.

5 5 1 PAJA or the LRA

Earlier in this chapter, reference was made to the case of Carephone wherein the Labour Appeal Court confirmed that the right to just administrative action in the Bill of Rights (section 33 read with item 23(2) of schedule 6 of the 1996 Constitution) applied to CCMA arbitrations.

However, subsequent to Carephone, PAJA was enacted for the purpose of giving effect to the constitutional right to administrative action that is lawful, reasonable and procedurally fair.\footnote{See preamble to the PAJA.} In the process, administrative action was statutorily defined,\footnote{Section 1.} confining its operation, and the question arose whether PAJA would henceforth apply to statutory arbitrations and in particular the grounds of review for administrative action as provided for in section 6(2).
In addressing this question, the courts were required to ask, this time with reference to the statutory administrative action definition, whether the nature of CCMA arbitration proceedings was such that it constituted a decision taken by an organ of state exercising a public power or performing a public function in terms of legislation. The premise was that if arbitration amounted to judicial conduct, the powers of review would be limited to the relatively narrow confines established by the LRA, but, should it be regarded as administrative action, a review court could exercise the relatively wide powers granted by section 33 of the Constitution and PAJA.

As mentioned above, it has already been established in Carephone and Mkhize that the CCMA constitutes an organ of state for purposes of the 1993 and 1996 Constitution respectively.717 This is important because PAJA has adopted the same definition of “organ of state” as provided for in section 239 of the 1996 Constitution. Moreover, not only is the CCMA also recognised as a public institution created by statute,718 but its compulsory arbitration power is also generally considered to involve the exercise of public power and functions.719 In this regard, Currie and De Waal explains that the arbitration power is designed to promote labour peace by the effective settlement of disputes by means of an element of compulsion, corresponding to the traditional government or governed relationship.720 The CCMA thus performs a public function by, among other things, providing an infrastructure for resolving labour disputes.

On the face of it, the CCMA thus for all intent and purposes appear to engage in administrative action and should be subject to PAJA. In fact, the only item counting against compulsory arbitration being classified as administrative action appears to be the requirement that the “decision” must be “of an administrative nature”.721 Establishing the meaning of this phrase has proven to be somewhat of a challenge.722 Hoexter suggest that parties should resist any interpretation that attempts to re-introduce the classification of administrative functions as “judicial”, “quasi-judicial”, “legislative” and “purely administrative”:723

---

717 See para 52 above.
718 Section 112 of the LRA.
719 See Hoexter Administrative Law 52.
720 Currie and De Waal The Bill of Rights Handbook 5 ed (Juta & Co Ltd, Wetton 2005) at 651, fn 34.
721 See section 1 of PAJA.
722 President of the Republic of South Africa v South African Rugby Football Union 1999 JOL 5301 (CC); De Lange v Smuts NO and others 1998 (3) SA 785 (CC); and Nel v Le Roux NO and others 1996 (3) SA 562 (CC).
723 Hoexter Administrative Law 191. See also Sidumo par 135.
“Given that the classification of functions has been discredited in our system, and given the courts’ deliberate efforts to root it out of our common law, it would be perverse to read this conceptual approach into the Act on such flimsy evidence. There is even less justification for asserting that the effect of the phrase is to exclude ‘legislative’ (or, for that matter, ‘judicial’) administrative conduct from the PAJA since the New Clicks case, where Chaskalson CJ regarded the phrase ‘of an administrative nature’ as bringing regulation making within the scope of the definition of ‘decision’.”

The diverse opinions expressed in relation to this question, however, gives rise to the inference that the courts were not equally convinced as to the administrative nature of the compulsory arbitration function. In Ramdaw, Zondo JP, albeit obiter, held that the definitions of “administrative action” and of “decision” in section 1 of PAJA may be wide enough to include the making of an arbitration award by a CCMA commissioner as administrative action.  

On the other hand, in PSA obo Haschke v MEC for Agriculture & others, Pillay J held that the essential character of arbitration was not altered simply because the arbitrator acted under the auspices of an administrative organ. According to the Labour Court, arbitration was distinct from an administrative process, even though it shared features common with adjudicative administrative acts, and PAJA could accordingly not apply to arbitration proceedings, but such had to be reviewed under section 145 of the LRA.

Taking into account the conflicting court opinions, the finding of the Supreme Court of Appeal in Sidumo was an interesting one indeed. In this case, the Court compared the grounds of review provided for in section 145 of the LRA with the more extensive provisions of section 6(2) of PAJA and decided that PAJA extended the available remedies to parties to CCMA arbitrations; superseding the specialised enactment of the LRA. The Court explained its finding as follows:

“At the time the LRA was enacted, the interim Constitution required that administrative action be ‘justifiable in relation to the reasons given for it’. For the reasons set out in Carephone, this right suffused the interpretation of s 145(2). When the administrative-justice provisions of the

---

724 Para 29.
725 2004 8 BLLR 822 (LC) para 20.
726 Para 26.
Constitution, as embodied in PAJA, superseded those of the interim Constitution, it could not have been intended that parties to CCMA arbitrations should enjoy a lesser right of administrative review than that afforded under the interim Constitution. The repeal of the interim Constitution and its replacement by the Constitution did, in other words, not diminish the review entitlement under s 145(2). Section 6(2) of PAJA is the legislative embodiment of the grounds of review to which arbitration parties became entitled under the Constitution.”

Had this been the end of the matter, the Supreme Court of Appeal judgment would have had the effect that CCMA arbitrations would henceforth be subject to the PAJA grounds of review, including being reviewable if not rationally connected to the information before the commissioner and the reasons for it. This was however not the end of the matter and in a further appeal to the Constitutional Court, that court was called upon to establish the correctness or otherwise of the Supreme Court of Appeal’s decision.

In its reasoning process, the majority of the Constitutional Court (per Navsa AJ) agreed with the Supreme Court of Appeal that the CCMA was not a court of law and that a commissioner, conducting a CCMA arbitration, was performing an administrative function. The Court reasoned that CCMA commissioners, when adjudicating dismissal disputes in terms of the LRA, exercised public power impacting on the parties to an arbitration, and the CCMA could therefore properly be described as an administrative body exercising a quasi-judicial function. The Court however also reasoned that PAJA was not the exclusive legislative basis for administrative review and that section 145 of the LRA constituted national legislation in respect of administrative action within the specialised labour law sphere; alongside general legislation in the form of PAJA. The Court also found it significant that the legislature clearly intended that the Labour Court should, subject to the 1996 Constitution, have exclusive jurisdiction in respect of labour matters and that, if PAJA were to apply to the review of CCMA decisions, section 6 of

---

727 Para 1.
728 Para 88. See also the concurring judgement of O’Regan J par 135-139. The court reasoned that the CCMA is not a court of law and should not be treated as one amongst others because: 1) a commissioner is empowered in terms of section 138(1) of the LRA to conduct an arbitration in any manner that he or she considers appropriate to determine the dispute fairly and quickly, with the minimum legal formalities; 2) there is no blanket right to legal representation before the CCMA; 3) the CCMA does not follow a system of binding precedents; and 4) commissioners do not have the same security of tenure as judicial officers.
729 Para 88.
730 Para 91-92.
731 Para 89-90.
PAJA would not allow for the intended exclusivity of the Labour Court, but enable the High Courts to review CCMA arbitrations.\textsuperscript{732}

The Constitutional Court then referred to \textit{R v Gwantshu},\textsuperscript{733} which approved of the approach adopted by the English Privy Council in \textit{Barker v Edger and others},\textsuperscript{734} and confirmed the principle that general legislation, unless specifically indicated, did not derogate from special legislation.\textsuperscript{735} According to the Court, this conclusion was further supported by section 210 of the LRA, which confirmed the applicability of this Act in the case of a conflict between its provisions and that of any other piece of legislation. It is submitted that such reasoning is above reproach; taken into consideration also what was contended before in respect of special statutory review.\textsuperscript{736} In the circumstances, the Constitutional Court found that the Supreme Court of Appeal had erred in holding that PAJA was applicable to the review of CCMA arbitration awards. The Constitutional Court did however acknowledge that any specialised legislative regulation of administrative action had to comply with the prescripts of section 33(1) of the 1996 Constitution.\textsuperscript{737} This was accordingly not the end of the enquiry and the Constitutional Court also explored the proper standard of review to be applied under the LRA.

\textbf{5.5.2 Justifiability or reasonableness}

In determining whether section 145 of the LRA was constitutionally compliant, the Constitutional Court indicated that it was not oblivious to the undesirability of having extensive grounds of review. In a separate judgment, Sachs J specifically commented that, in an open and democratic society based on human dignity, equality and freedom, it would be inappropriate to restrict the review of a commissioner’s decision to the narrow grounds of procedural misconduct that a first reading of section 145(2) would suggest.\textsuperscript{738} At the same time, Sachs J acknowledged that the labour-law setting, requiring a speedy resolution of disputes with the outcome basically

\textsuperscript{732} Para 96-97. See section 157(1) which provides: “Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.”

\textsuperscript{733} 1931 EDL 29 at 31.

\textsuperscript{734} 1898 AC 748 754.

\textsuperscript{735} Para 102.

\textsuperscript{736} See para 5 3 5 above.

\textsuperscript{737} Para 89.

\textsuperscript{738} Para 158.
limited to dismissal or reinstatement, made it inappropriate to apply the full PAJA-type administrative review on substantive as well as procedural grounds.

In seeking to read section 145 in a manner that took into consideration the requirements of section 33(1) of the 1996 Constitution, the Court in the majority judgment referred to the pre-PAJA case of Carephone. The Court noted that the justifiability test adopted in Carephone was substantive, involved greater scrutiny than the rationality test set out in Pharmaceutical Manufacturers Association and was formulated on the basis of the wording of the administrative justice provisions of the 1993 Constitution, namely that an award must be justifiable in relation to the reasons given for it.

The Court next noted that, as opposed to the 1993 Constitution, applicable at the time of Carephone, the 1996 Constitution required administrative action that was lawful, reasonable and procedurally fair. The Court accordingly drew a distinction between the justifiability test as enunciated in Carephone and that of reasonableness:

“Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

Bato Star Fishing, relied on by the Court in Sidumo in the above extract, was a case that previously served before the Constitutional Court in relation to the lawfulness of administrative action in the allocation of fishing quotas within the context of section 6(2)(h) of PAJA. That section provided that a decision was reviewable “if it was so unreasonable that no reasonable person could have exercised the power”. In that case, the Constitutional Court had found that the wording of section 6(2)(h) drew directly on the language of the well-known decision of the

---

739 Para 105.
740 Para 106.
741 Para 105-106.
742 Para 110.
743 See chapter 2 para 2 2 2 and 2 4 4 1.
English Court of Appeal in *Wednesbury Corporation*.\(^{744}\) *Bato Star Fishing* was a landmark decision in South Africa which laid down the standard of unreasonableness required of public body decisions in order for it to be quashed on judicial review.\(^{745}\)

With reference to this decision, the Court accordingly found that section 6(2)(h) of PAJA had to be construed consistently with the 1996 Constitution and in particular section 33 which required administrative action to be “reasonable”.\(^{746}\) On this basis, the Court held an administrative decision would be reviewable in terms of section 6(2)(h) if it was one that a reasonable decision-maker could not reach. Whether the decision indeed “was one that a reasonable decision-maker could not reach” was the *test* used to establish whether or not the decision was reviewable for lack of reasonableness as contemplated in *section 6(2)(h)*.

The Constitutional Court in *Sidumo* in other words relied directly on *Bato Star Fishing*, and indirectly also on *Wednesbury Corporation*, in order to conclude that unreasonableness in relation to section 145 of the LRA entailed asking whether the decision reached by the commissioner was one that a reasonable decision-maker could not reach.

The Court then proceeded to give content to this concept of reasonableness in two ways. First it recognised that, in so far as it was impossible to separate the merits from the remainder of the enquiry, the scrutiny of an administrative decision based on reasonableness introduced a substantive ingredient into review proceedings.\(^{747}\) According to the Court such scrutiny was qualified by the fact that administrative decision-makers acting reasonably could reach different conclusions\(^{748}\) and that a review court was tasked with ensuring only that the decisions taken by such decision-makers fell within the bounds of reasonableness as required by the 1996 Constitution.\(^{749}\) The Court secondly identified factors that could assist in any enquiry seeking to

\(^{744}\) 1948 1 KB 223 (CA). Discussed in chapter 3.

\(^{745}\) In that case, the Constitutional Court acknowledged that a reasonable decision required an equilibrium to be struck between a range of competing interests or considerations. These included the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.

\(^{746}\) Para 44.

\(^{747}\) Para 108.

\(^{748}\) The LRA has given that decision-making power to a commissioner.

\(^{749}\) Para 109 and 119.
determine whether or not a decision was one made by a “reasonable decision-maker”. These factors included among others considering the impartiality of the decision-maker, the validity or reasonableness of the rule alleged to be breached, the importance of the rule alleged to be breached, the totality of the circumstances, the reasons for imposing a particular sanction, the harm caused by the employee’s conduct and the basis of any challenge to an employer’s decision. Although specifically mentioned in the context of a sanction review in an unfair dismissal dispute, it is submitted that these guidelines of the Constitutional Court could nevertheless serve as an indication of what the word “reasonable” would mean within the context of review applications in general. The Court furthermore identified other more general considerations pertaining to the method or conduct of the proceedings, including whether the outcome of the arbitration process fell outside the bounds of reason and whether the decision-maker applied his or her mind to the material merits and dealt with the substantial merits of the dispute – the rationale being that there must be a reasonably sustainable fit between the evidence and the outcome. It is an interesting observation that several of these guidelines as to unreasonableness bear a striking resemblance to the grounds of review of misconduct, gross irregularity and excess of power; suggesting that there might be a connection or interplay between the section 145 grounds of review and the concept of unreasonableness.

However, as was done in Carephone with justifiability, the Constitutional Court in Sidumo did not venture as far as to hold expressly that unreasonableness was an independent ground of review. It is submitted that it is clear from the discussion above that the Constitutional Court, as in Bato Star Fishing, construed section 145 consistently with the 1996 Constitution, and section 33(1) in particular, in holding that “section 145 is now suffused by the constitutional standard of reasonableness”. According to the ordinary dictionary meaning of “suffuse”, reasonableness is “spread over” or “covering” the section 145 grounds for review. Lending support to such an

750 Para 61.
751 Para 62.
752 Para 78.
753 Para 78.
754 Para 78.
755 Para 158.
756 Para 265 and 267.
757 Para 106.
interpretation is the Constitutional Court’s continuous referral to the “standard for review” rather than the “ground of review”.

Further support for this contention is found in the concurring judgment of Sachs J. Sachs J did not hold that unreasonableness was an independent ground of review but interpreted Navsa AJ’s finding in relation to unreasonableness as a reading of section 145 of the LRA “…in a broad manner…”, holding further that:

“[T]he key to the present case is to interpret and apply section 145 in a manner that is compatible with the values of reasonableness and fair dealing that an open and democratic society demands.”

Ngcobo J did not agree with the majority of the Constitutional Court that the conduct of CCMA arbitration proceedings constitute administrative action within the meaning of section 33 of the 1996 Constitution. Albeit in a minority judgment, Ngcobo J nevertheless made some interesting observations in relation to an interpretative construction of section 145 of the LRA in conformity with the 1996 Constitution. According to him, any such action did not require the courts to sideline the section 145(2) grounds of review and introduce an additional, constitutional basis for review. According to Ngcobo J, this was one of the “unintended consequences” of Carephone and the proper approach (absent a constitutionality challenge) required respecting and giving effect to the legislature’s choice to permit reviews on the grounds in section 145(2)(a).

As a result, Ngcobo J considered it prudent to deal with the review application in Sidumo having regard to the three grounds of review provided for in section 145(2)(a) and alleged by the employer to be applicable in its review papers. Ngcobo J was not persuaded by the argument raised in court that unjustifiability, alternatively irrationality, would find application without reference to any of the specific grounds of review set out in section 145(2)(a). Having done so, Ngcoco J concluded:

\[\text{Para 144.}\]
\[\text{Para 158.}\]
\[\text{Para 247.}\]
\[\text{Para 256.}\]
\[\text{Para 289.}\]
“I am unable to find that the commissioner ignored any material factor in evaluating the fairness or otherwise of the sanction imposed by the employer. In the result I cannot say that the employer did not have a fair trial before the commissioner with the result that a gross irregularity in the proceedings occurred. Nor can I, in all the circumstances of this case, conclude that the award made by the commissioner was manifestly unfair to the employer. It follows from these conclusions that the commissioner did not exceed his powers under the LRA. Nor can I say that the commissioner committed a misconduct.

In the event none of the grounds of review have been established. For these reasons I concur in the order proposed in the judgment of Navsa AJ.”

It is submitted that such an interpretation ought to be accepted as correct in law. If the section 145(2) grounds of review were read so as to conform to the constitutional right to reasonable administrative action, it would amount to an indirect application of the 1996 Constitution. In terms of section 39(2) of the 1996 Constitution, courts are specifically required to promote the spirit, purport and objects of the Bill of Rights. This does however not mean that the LRA and section 145 are allowed to be circumvented by virtue of a direct reliance on the 1996 Constitution. Ngcobo J acknowledged this when he held that:

“[W]here the legislation which is enacted to give effect to a constitutional right specifies the grounds upon which decisions of tribunals giving effect to that legislation may be reviewed, a court reviewing the decision of that tribunal should start with the interpretation of the statutory provision in question. And of course the provision under consideration must be construed in conformity with the Constitution.”

Accordingly, it is submitted that the Constitutional Court only deviated from Carephone in so far as it held that the test or judicial threshold for interference on review was now reasonableness rather than justifiability. However, other than holding that section 145 was suffused by reasonableness, the court omitted to express an opinion as to how reasonableness was to be practically applied in relation to the section 145(2) grounds of review. Unlike in Carephone, the

---

764 Para 249; Own emphasis added.
Constitutional Court did not hold that reasonableness was capable of being deduced from section 145(2)(a)(iii).

5 5 3  **Standard of reasonableness applied**

Another question that arose in *Sidumo* was whether an arbitration award was reviewable because of a defective process of reasoning if the conclusions reached by the commissioner were nevertheless reasonable in relation to the evidentiary material before him as demonstrated from reasons other than those relied on by him. The Supreme Court of Appeal answered this question in the positive. According to the Supreme Court of Appeal the question on review was not whether the record revealed relevant considerations that were capable of justifying the outcome, but whether the decision maker properly exercised the powers entrusted to him or her. In this regard the Supreme Court of Appeal confirmed that the focus was on the process and the way in which the decision maker came to the challenged conclusion rather than on whether the decision was right or wrong.\(^\text{765}\)

A study of the subsequent Constitutional Court judgment in *Sidumo* shows that, although the court did not expressly approve of the approach of the Supreme Court of Appeal, it also did not summarily reject it. It is submitted that such a conclusion is supported by the following: The Constitutional Court noted that the commissioner had basically advanced three reasons why the sanction of dismissal was unfair: firstly, no losses were sustained, secondly, the misconduct was unintentional or a mistake and lastly, there was no dishonesty.\(^\text{766}\) However, although the Constitutional Court accepted that there was no evidence that losses had flowed from Mr Sidumo’s neglect and that the commissioner was accordingly correct in his conclusion in that regard, the Constitutional Court found that the commissioner had erred in his remaining two reasons for finding the sanction of dismissal unfair. More particularly, Navsa AJ held that:\(^\text{767}\)

“In respect of the commissioner’s finding that that the misconduct was unintentional or a mistake, it was correctly pointed out on behalf of Mr Sidumo that it was Mr Botes, in his

\(^{765}\) Para 30-31.  
\(^{766}\) Para 113.  
\(^{767}\) Para 116; own emphasis added.
evidence before the commissioner, who characterised his misconduct as ‘mistakes’. It is true that Mr Sidumo did not conduct individual searches which were his main task. Therefore, to describe his conduct as a ‘mistake’ or ‘unintentional’ is confusing and, in this regard, the commissioner erred.”

Likewise, Navsa AJ held that:768

“In respect of the absence of dishonesty, the Labour Appeal Court found the commissioner’s statement in this regard ‘baffling’. In my view, the commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct. However, the commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the Mine’s valuable property which he did not do. However, this is not the end of the inquiry. It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach.”

Despite the erroneous findings made by the commissioner, the Constitutional Court concluded that it could not be said that his conclusion was one that a reasonable decision-maker could not reach. According to the Court, Mr Sidumo’s case was one of those where different decision-makers acting reasonably may reach different conclusions.769 The Court based this conclusion on the fact that the commissioner carefully and thoroughly considered the different elements of the Code and properly applied his mind to the question of the appropriateness of the sanction. In this regard, the Court specifically agreed with the commissioner that the absence of dishonesty, the employee’s clean and lengthy service and the fact that no losses were suffered were significant factors in favour of the application of progressive discipline rather than dismissal.770

From the Constitutional Court’s judgment it can be deduced that when a commissioner makes a value judgment as to whether dismissal is unfair or too harsh a sanction in the circumstances, he or she must consider all materially relevant factors. It is further submitted that the value judgment will be considered reasonable where the materially relevant considerations in favour of the decision outweigh the materially relevant considerations against the decision. Ray-Howett

---

768 Para 116; Own emphasis added.
769 Para 119; Own emphasis added.
770 Para 117; Own emphasis added.
 contends that, by the Constitutional Court so applying the reasonableness test to the facts, the Constitutional Court actually adopted the approach of the Supreme Court of Appeal:771

“If one reads the judgment, it becomes evident that in assessing whether the commissioner’s decision was reasonable, the court analysed the reasoning process followed by the commissioner and decided that it was not unreasonable primarily on the basis that while the commissioner’s reasoning process was defective in one or two instances, these defects were not sufficiently serious to warrant a review of the ultimate decision.”

Having regard to the above, it can thus be submitted that, because the erroneous reasons of the commissioner did not amount to a defect in terms of section 145(2), the decision was not reviewable. In this sense, Sidumo can accordingly be described as authority for the view that an award would not be reviewable merely because a commissioner advanced erroneous reasons for his finding; at best the erroneous reasons will serve as evidence of a reviewable ground that will in conjunction with other considerations have to be sufficiently compelling to justify an inference that the decision is unreasonable.772

On the other hand, a commissioner’s failure to consider all materially relevant factors can result in his decision being set aside on review, not because the decision itself is unreasonable, but because it does not reflect the outcome of a weighing-up of all of the materially relevant factors – the focus always being on the way in which the commissioner came to his decision.

While it may thus be inferred from the Constitutional Court judgment in Sidumo that review courts should confine themselves to examining the record of the arbitration proceedings and the outcome of the arbitration, the judgment did not limit review courts to this approach. Section 145 of the LRA and reasonableness also invites scrutiny of the process by which commissioners make their findings and reach their conclusions. This means that review courts must satisfy themselves that commissioners have applied their minds to the evidence before them and have drawn rational

772 See RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan & others 2008 2 BLLR 184 (LC) para 50; Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd 2002 4 SA 661 (SCA).
conclusions from that evidence. If they have not, the award is liable to be set aside regardless of the outcome of the arbitration process.

5.6 CONCLUSION

In this chapter it has been established that before and after the landmark decision in Carephone there was much controversy as to whether or not the issuing of an arbitration award by a commissioner in terms of the LRA constitutes administrative action, subject to a concept of rationality or justifiability review. This included the questions whether rationality or justifiability was an independent ground of review or whether it was subsumed within the section 145(2) grounds themselves and whether a rational connection was required between the evidence and the reasons as well as the reasons and the award.

In the context of an appeal against a discretionary condonation ruling, the Labour Appeal Court in Carephone found that the CCMA was an organ of state and that the making of an arbitration award was as an administrative act, subject to the constitutional imperatives of the administrative justice provision contained in the 1993 Constitution. The latter provision required administrative decisions to be justifiable, coherent and capable of being reasonably sustained, having due regard to the reasons for the decisions. On this interpretation, it was obligatory for arbitration awards to comply with the requirement of justifiability. Although the section 145(2) grounds of review did not make express reference to substantive justifiability or irrationality in the merit or outcome constituting a defect in arbitration awards which would render it reviewable, the Court found that the restrictive scope of section 145 did not fall foul of this constitutional right. Rather, the Court reasoned that, when reading section 145 in light of the constitutional right to administrative justice, the alleged misconduct, gross irregularity, exceeding of powers or impropriety as the case may be need to be measured against the constitutional imperatives of the administrative justice right in order to ensure constitutional consistency; justifiability or rationality in particular. So construed, the Labour Appeal Court extended the grounds of review by holding that an arbitration award would be reviewable if the reviewing court is able to conclude that the commissioner has exceeded his or her powers in terms of section 145(2)(iii) of the LRA because

773 I.e. there must be a rational link between the decision and the reasons given.
there was no rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him or her and the conclusion he or she eventually arrived at.

Subsequent to Carephone, case law dealing with the review of discretionary decisions was not consistent. The Labour Appeal Court initially appeared to prefer supporting an interpretation of Carephone that did not hold justifiability as an independent ground of review: In County Fair Foods, the Court found that non-compliance with the constitutional imperative of justifiability referenced in Carephone could amount to misconduct in terms of section 145(2)(a)(i) or a procedural irregularity in terms of section 145(2)(a)(ii) in addition to an excess of power as per Carephone;\textsuperscript{774} and in Radebe, the Court expressed doubts as to whether justifiability constituted an independent ground upon which an award could be set aside on review; considering this for all intent and purposes to amount to an appeal.\textsuperscript{775} However, in Ramdaw,\textsuperscript{776} the Labour Appeal Court again appeared to adopt rationality as a ground of review that was severable from the grounds specifically mentioned in section 145(2); reasoning that Carephone found justifiability to fall within section 145(2)(a)(iii) of the LRA for purposes of the time limit set out in section 145 only.

Despite their differences as to the proper position of justifiability or rationality, the courts were however all in agreement that the distinction between appeals and reviews remained intact: reviews were primarily concerned with the manner in which the CCMA came to its conclusion as opposed to the result itself; whereas appeals were concerned with the correctness of the result. Whilst the constitutional prescript that administrative action must be justifiable in relation to the reasons given for it introduced a requirement of rationality in the merit or outcome of the administrative action, it was not considered to disturb this essential distinction because it simply required that the commissioner’s decision must be supported by the facts and the applicable law and did not also require that the decision must be correct. The approach of the review and appellate courts in dealing with challenges relating to the exercise of discretionary powers by original decision-makers does however appear fairly similar. In both instances, it is accepted that the court cannot interfere simply because it would have made a different decision. The test is not

\textsuperscript{774} 1999 11 BLLR 1117 (LAC).
\textsuperscript{775} 2000 3 BLLR 243 (LAC) para 34.
\textsuperscript{776} 2001 9 BLLR 1011 (LAC).
whether the exercise of a discretionary power is correct, but whether it is so inappropriate or unjustifiable that the inference can be drawn that the decision-maker has not properly and judiciously exercised his or her discretion. In relation to findings of fact, the test for interference is also stricter because it is accepted that the original decision-maker has had the advantage of seeing and hearing the witnesses and in being steeped in the atmosphere of the proceedings; placing him or her in a better position than the review or appeal court to estimate what is probable or improbable in relation to the particular people whom he or she has observed during the proceedings.\textsuperscript{777}

Against this background, the Constitutional Court in \textit{Sidumo} was subsequently called upon to adjudicate whether reasonableness, as part of the right to just administrative action as prescribed in the 1996 Constitution, was in some form or another applicable to arbitration award reviews. In doing so, the Court confirmed that CCMA arbitration proceedings constitute administrative action. The Court however also confirmed that PAJA was not the exclusive legislative basis for administrative review\textsuperscript{778} and that section 145 of the LRA constituted national legislation in respect of administrative action within the specialised labour law sphere.\textsuperscript{779} As a result of such an interpretation, the LRA, and section 145 in particular, was found to be applicable to arbitration award reviews and not PAJA. The Court did however acknowledge that any specialised legislative regulation of administrative action (like the LRA) had to comply with the prescripts of section 33(1) of the 1996 Constitution. In establishing how, the Court referred to \textit{Bato Star Fishing}, which dealt with the reasonableness requirement in administrative law, and confirmed that a review court was required to determine whether the administrative decision was one that a reasonable decision-maker could not reach. In engaging in such an exercise, it was established that the review court had to take into account that different administrative decision-makers acting reasonably could reach different conclusions and that the decision under review only had to fall within the boundaries of what was required by the concept of reasonableness. According to the Court, this constitutional standard of reasonableness so introduced to arbitration award reviews informed and suffused the ambit of the grounds of review under section 145(2) of the LRA\textsuperscript{780} and

\textsuperscript{777} 2000 3 BLLR 243 (LAC) para 38.
\textsuperscript{778} Para 91-92.
\textsuperscript{779} Para 89-90.
\textsuperscript{780} Para 162.
introduced a *substantive* (as opposed to procedural) reasonableness requirement from administrative decision-makers in the merit or outcome of the decisions concerned.

It was also established that the Constitutional Court has given further content to the concept of reasonableness by identifying indicators of unreasonableness that could assist in any enquiry seeking to determine whether or not a decision was one made by a “reasonable decision-maker”. These factors include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision of the lives and well-being of those affected. Although questions as to the applicability of proportionality to arbitration award reviews has not been raised, factors like that pertaining to the “impact of the decision”, “the range of factors relevant to the decision” and “the nature of the competing factors involved” do appear to invite some form of a proportionality inquiry into the reasonableness question. It was also established that reasonableness requires not only a consideration of all materially relevant factors, but that the materially relevant considerations in favour of the decision must outweigh the materially relevant considerations against the decision.

The Constitutional Court did however not go as far as to hold that unreasonableness was an independent ground of review in addition to those listed in section 145(2) of the LRA. The Court described reasonableness as a standard against which the reviewability of a decision was to be tested. In applying the standard of reasonableness, the Court directed review courts to pose the question whether the decision, alleged to have been made by the commissioner as a result of the occurrence of one or more of the section 145 grounds of review, was one that a reasonable decision-maker could not reach.

In giving content to this concept of reasonableness, the Constitutional Court further confirmed that erroneous reasons for decisions did not *per se* render awards reviewable. According to the Court, the focus was always to be on the manner in which the commissioner came to the decision and whether the erroneous reasons were materially relevant thereto. In other words, the question was not whether the reason was satisfactory or correct but whether it served as evidence of a

---

781 Para 45.
reviewable ground that would alone or in conjunction with other considerations be sufficiently compelling to justify an inference that the decision was unreasonable.

To this end, it was found that the nature of the erroneous reasons would have to be scrutinised by have regarding to the award and the record of the arbitration proceedings. Likewise, the party launching the review application would be able to substantiate his allegation that an award is reviewable with reference to the award and the record of the arbitration proceedings. It is however not the result of the award *per se* that should be challenged on review.

How the Constitutional Court’s exposition of the content of the reasonableness standard is to be applied remains to be seen from the judgements of the courts charged with interpreting and applying *Sidumo*. It can however be deducted from the Constitutional Court’s judgment, and more particularly its referral to a “range of reasonableness”, that various findings made by a commissioner can and will fall with the ambit of what is to be perceived as reasonable; reducing the possibility of awards being set aside on review. This more than anything else confirms that the focus on review will remain on the manner in which the commissioner arrived at the decision and not the correctness of the outcome of the award, cementing the distinction between an appeal and review.

However, as a result of the Constitutional Court’s reliance on English administrative law, and *International Trader’s Ferry Ltd* in particular, to introduce reasonableness to arbitration award reviews, it is proposed that the role of reasonableness in English administrative law should be examined, and the courts’ interpretation discussed, in more detail in order to determine whether the Constitutional Court’s interpretation of it is correct and whether such reliance is warranted. This will follow after an exposition of the interpretation and application of *Sidumo* by South African courts in subsequent cases.
CHAPTER 6

SIDUMO REASONABLENESS IN SOUTH AFRICA: A CASE LAW ANALYSIS

6.1 INTRODUCTION

Since the judgement in Sidumo was handed down in October 2007, questions and differences of opinion have arisen in relation to its interpretation and application for the purpose of future review applications. Labour practitioners have in consequence turned to the courts for direction. Prominent in its emphasis, was the question pertaining to the bounds of reasonableness applicable to the review of CCMA arbitration awards. This has resulted in case law which reflects developments in the South African review jurisprudence and serves to illustrate and clarify the operation of the various grounds of review in different contexts.

This chapter will in the main focus on certain key judgments which have interpreted and applied Sidumo. In doing so, specific questions that have arisen in the judgments will be highlighted and discussed. Firstly, it will be established whether the courts have interpreted unreasonableness as a test or ground of review. Secondly, it will be considered whether the reasonableness concept is result-based, outcome-focused or process-related. The impact of reasonableness on value judgments, inclusive of findings of guilt, the appropriate sanction and procedural fairness, will also be discussed. Special consideration will then be afforded to the question whether review courts are entitled to rely on reasons other than those provided for by commissioners in their awards to determine the reasonableness of their decisions. In addition, it will be considered whether the answer to the previous question is influenced by the classification of review proceedings as process or outcome focused. Finally, following a discussion of the duty to consider materially relevant factors when making value judgments, the influence of reasonableness on jurisdictional reviews will be contemplated.

782 See J Grogan “Groping for a reasonable standard” (2008) 24(6) Employment Law 2; J Grogan “In the shadow of Sidumo: applying the ‘reasonable commissioner’ test” (2008) 24(6) Employment Law 3. These articles mention that, although the Sidumo judgement was a defining moment in South African labour law, early indicators are that the Labour Court and Labour Appeal Court have subsequent thereto encountered difficulties in constructing the standard of “reasonableness” that can serve as a yardstick for employers, employees and commissioners.
6.2 REASONABLENESS: TEST OR GROUND

6.2.1 Recapping Sidumo with reference to subsequent case law

In chapter 5, the Sidumo judgment was discussed in detail. A repeat of the discussion is not intended, but it is prudent for the purpose of this section to once more emphasis the following important findings of the Constitutional Court: 1) that section 145 must be read to ensure that administrative action by the CCMA, including the making of arbitration awards, is lawful, reasonable and procedurally fair; 2) that the constitutional standard of reasonableness should suffuse section 145 of the LRA; and 3) that the reasonableness enquiry requires the applicant on review to establish that the result of the arbitration award falls outside of a range of reasonableness, having regard to the reasoning of the commissioner and the material before him or her, rather than requiring a correct decision. 783

In chapter 5 it was also reasoned that the above-mentioned findings of the Constitutional Court suggested a preference for reasonableness as a test on review. 784 It was submitted that, although Sidumo did not explicitly apply a reasonableness test to any particular statutory ground of review, the Court seemingly contemplated this when it held that the reasonableness standard should suffuse section 145 of the LRA. This interpretation is supported by the Court’s reliance on Carephone. In that case, the Labour Appeal Court had held that commissioners would exceed their powers in terms of section 145(2)(a)(iii) if their actions were not justifiable in terms of the reasons given. Sidumo consistently describe reasonableness as a standard rather than a ground of review and also made it clear that it was only deviating from Carephone to the extent that “justifiability” was replaced by “reasonableness”. 785 Sidumo did however not expressly and conclusively determine that the concept of justifiability, as it was then, and reasonableness as it is now, should constitute a “test” on review as opposed to an independent “ground” of review. 786 In seeking to clarify the situation, a discussion of case law, purporting to interpret and apply Sidumo

783 Para 119.
784 See Chapter 5. See also Myburgh A “Sidumo v Rustplats: How Have the Courts Dealt with It” (2009) 30 ILJ 1.
785 Para 110. “To summarise, Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness.”
786 See chapter 5.
reasonableness, is therefore warranted.

The proposed starting point is the Labour Appeal Court’s exposition of *Sidumo* in *Fidelity Cash Management Services v CCMA & others*. This judgment followed shortly after *Sidumo*, but rather than having clarified the position, it caused greater confusion. Referring to *Sidumo*, Zondo JP noted that Carephone’s rational justifiability no longer found application, suggesting that there is a difference between that and reasonableness, and described the latter as a “ground for review” and a “test on review” interchangeably. On the one hand, Zondo JP explained that CCMA awards were required to be reasonable, as opposed to grossly unreasonable, and that non-compliance would entitle the court to review and set it aside as a *ground of review*. On the other hand, Zondo JP described reasonableness as the “test on review” and a “stringent test” that precluded too much court interference by requiring the outcome of the award to be incapable of reasonable justification (even for reasons not relied on by the commissioner). In this regard, the Court emphasised that the reasonableness of a decision did not depend solely on the reasons given, but that other reasons, not relied upon, could assist in determining the reasonableness of a decision – suggesting that both the reasons and the result had to be challenged on review.

The Labour Court engaged in similar conduct when, in *Value Logistics Ltd v Basson & others*, it described reasonableness as a “threshold” and “standard” on review. It first held that *Sidumo* confirmed that an award, reviewed under section 145 of the LRA, had to meet the reasonableness standard as set out in section 33 of the 1996 Constitution. However, subsequently the Court concluded, similar to *Fidelity Cash Management Services*, that the award was to be reviewed and set aside “on the basis of the first ground”, that is that a reasonable commissioner could not have found that there was a constructive dismissal at all.

---

787 2008 3 BLLR 197 (LAC).
788 Para 92 and 102. The Court indicated that there was a difference between the Carephone approach and the approach enunciated in *Sidumo*.
789 Para 92, 99 and 102.
790 Para 99-100. The Court did not explain how this the balance was to be struck when applying this test.
791 Para 86 and 102. According to the Court, the review court is entitled to take alternative reasons into account when assessing the reasonableness of CCMA arbitration awards.
792 See Myburgh “*Sidumo v Rustplats*” 2.
793 2011 10 BLLR 1024 (LC).
794 Para 38-39.
795 Para 52, 54 and 55.
In another judgment of the Labour Appeal Court, namely that of *Ellerine Holding Limited v Commission for Conciliation, Mediation and Arbitration*, the Court reasoned that *Carephone* had given broad content to section 145(2)(a)(iii) by reading into the provision an administrative law test of *reasonableness*. The Court then examined the *Sidumo* judgment; holding that it was obliged to adopt a *Carephone* type test when dealing with the question whether the commissioner had *exceeded her powers* as contemplated in section 145(2). Described as an *outcome* based enquiry, the Court did however not contemplate reasonableness to be a fourth *ground* of review. Rather, the Court examined whether the commissioner had perpetrated a defect in terms of section 145 of the LRA; accepting that one could distinguish between the process by which a decision was taken and the content of the decision itself. Seemingly in line with *Fidelity Cash Management Services*, the Court agreed with submissions to the effect that a court should avoid formalistically passing through an award and sustaining a review application simply because an irregularity was found to be present. The Court was in favour of a more substantive overall framework to review, having regard to the nature and role of the CCMA within the broad framework of labour relations, the role played by commissioners and the substance of decisions, both in terms of the conclusions and the reasoning which underpinned it. In the present case, the Court found that, whilst irregularities in the commissioner’s decision were identified, it was not of such a gross nature that it prevented the aggrieved party from having its case fully and fairly determined. Strangely, the Court then stated that, as the award did not reveal a gross irregularity, assessing its substantive reasonableness would not assist the respondents.

This judicial inconsistency is further demonstrated in *Fidelity Supercare Cleaning (Pty) Ltd v Busakwe NO & others*. In this case, the Labour Court considered whether the commissioner

---

796 2008 JOL 22087 (LAC). Per Davis JA.
797 Para 9. See also *Woolworths (Pty) Ltd v CCMA & others* 2010 5 BLLR 577 (LC).
798 Misconduct, gross irregularity and exceeding of commissioner’s powers.
799 This echoes the *Carephone* decision. In *Fidelity Cash Management Services*, the Court however found that *Carephone* was no longer applicable.
800 Para 11.
801 Para 11. With reference to the reasonableness test in *Sidumo*, the Court determined that it was not unfair to refuse compensation to an employee on the *Johnson* formula where that employee had been found guilty of theft.
802 Para 11.
803 Para 11.
804 2010 3 BLLR 260 (LC).
had acted *unreasonably* in finding that the third respondent’s employment contract had not terminated by operation of law, but that she was dismissed for operational reasons; entitling her to severance pay. In dismissing the review application, the Court appeared to treat reasonableness as a ground of review. The Court held that it could not find that the commissioner had committed a gross irregularity in determining that the employee was not employed on a fixed-term contract or that the decision was not one a reasonable decision-maker could have reached.\(^{805}\) The Court reasoned that the commissioner’s award was not unreasonable in the light of the material before him and that the outcome and the process of the arbitration could not be faulted. Similarly, in *Super Group Autoparts t/a Autozone v Hlongwane NO & others*,\(^{806}\) the Labour Court held that the permissible grounds of review were wider than the grounds provided for in section 145(2) of the LRA.\(^{807}\) The Court suggested that, for a review application to succeed, the decision must be shown to be irrational, in the sense that it does not accord with the premised reasoning or the reasoning is so flawed as to elicit a sense of incredulity, *and* unjustifiable in relation to the reasons given for it.\(^{808}\) Then, describing *Sidumo* reasonableness as the “better approach”, the Court proposed testing whether, in the light of the evidence advanced and having due regard to considerations of equity, the commissioner's decision was one that could properly be said to be reasonable.\(^{809}\)

*Sidumo* reasonableness was subsequently also considered by the Supreme Court of Appeal in *NUM & another v Samancor Ltd (Tubatse Ferrochrome) & others*\(^{810}\) and *Herholdt v Nedbank Ltd*.\(^{811}\) In overruling the Labour Appeal Court judgment that the award was reviewable,\(^{812}\) the Court (per Nugent JA) in *Samancor* referred to *Sidumo* and accepted that an award may be set aside on review for one or other defect stated in section 145(2) *and* if the award is one that a

\(^{805}\) Para 26 and 28.

\(^{806}\) 2010 JOL 24895 (LC).

\(^{807}\) Para 7.

\(^{808}\) See para 10. The Court referred to reasonableness, rationality and justifiability interchangeably.

\(^{809}\) Para 11. To Court was of the opinion that this construction of reasonableness would avoid blurring the line between reviews and appeals.

\(^{810}\) 2011 11 BLLR 1041 (SCA). In the present case, the employee was dismissed for incapacity after he had been incarcerated for ten days.

\(^{811}\) *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* 2013 11 BLLR 1074 (SCA).

\(^{812}\) *Samancor Tubatse Ferrochrome v MEIBC & others* 2010 8 BLLR 824 (LAC).
reasonable decision-maker could not reach.\textsuperscript{813} As in \textit{Fidelity Supercare Cleaning}, the Court in \textit{Samancor} equated reasonableness with the review grounds contained in section 145(2). The Court therefore accepted that reasonableness was a defect in the same manner than the section 145(2) grounds of review constituted defects, albeit introduced by the Constitutional Court and not the LRA. Then, in considering whether the award was so defective that a reasonable decision-maker could not reach it, the Court commented that error was not by itself a proper basis for reconsidering an award.\textsuperscript{814} Thus, whilst the Labour Appeal Court construed the commissioner’s erroneous categorisation of the reason for the dismissal as sufficient ground to interfere with the award, the Court did not consider this sufficient material to find that “no reasonable arbitrator” could have made the award. According to the Court, the commissioner’s reasoning showed that he would have reached the same conclusion however the dismissal was categorised.\textsuperscript{815} In \textit{Herholdt}, the Court also confirmed the availability of the review remedy in terms of the section 145(2) grounds of review and the unreasonable test; concluding that a commissioner must misconceive the nature of the inquiry or arrive at an unreasonable result for a defect in the conduct of the proceedings to amount to a gross irregularity.\textsuperscript{816}

That an award will only fall short of the reasonableness requirement if it is truly incapable of being justified was well expressed by the Labour Appeal Court in \textit{Bestel v Astral Operations Ltd & others}.\textsuperscript{817} Although the Court acknowledged that \textit{Sidumo} reasonableness superseded Carephone’s rational justifiability, it nevertheless found its test helpful to illustrate the nature of the test.\textsuperscript{818} The Court then emphasised that the ultimate principle upon which a review was based was the justification for the decision. According to the Court, whatever it might have considered to be the correct decision was irrelevant to a review as opposed to an appeal.\textsuperscript{819}

\textsuperscript{813} Para 5. According to the Court, the question before the Labour Court – and subsequently before the Labour Appeal Court – was whether the award was so defective as to fall within the category of an award that a reasonable decision-maker could not reach.

\textsuperscript{814} Para 8.

\textsuperscript{815} Para 12.

\textsuperscript{816} Para 14 and 25.

\textsuperscript{817} 2011 2 BLLR 129 (LAC) para 18. In this case it was contended that the decision was not supported by evidence that could reasonably justify the decision or, alternatively, that the finding was made in ignorance of evidence that remained uncontradicted.

\textsuperscript{818} Para 17.

\textsuperscript{819} In doing so, the Court referred to Bernard Schwartz \textit{Lions over the Throne: The Judicial Revolution in English Administrative Law} (1987) at 133. In the context of a review, a court deals with a test of: “reasonableness, not the rightness of agency findings of fact. The question under it is whether the evidence is such that the reasonable
Having regard to the above-mentioned cases, it is submitted that the term “ground” and “test” should not be used interchangeably. On the contrary, it should be established whether Sidumo reasonableness is intended to be the one or the other. In addition to inconsistencies in case law, this submission is also founded on the ordinary English language precept that “ground” and “test” have different meanings. Specifically focusing on its meaning for purpose of review applications, it is submitted that, as a “ground” of review, reasonableness would constitute a reference to the reason for the review application.\(^\text{820}\) In other words, parties to a dispute will launch a review application on the basis of an allegation that the award is unreasonable \emph{per se}, which may by implication extend the scope of review. On the other hand, as a “test” on review, reasonableness may not necessarily extend the section 145(2) grounds for review, but would rather be a measure employed to examine whether the ground for interference on review, as captured in section 145(2), exists.\(^\text{821}\) Moreover, to the extent that section 145(2) of the LRA prescribes the \emph{statutory} grounds of review without specific reference to unreasonableness, it is submitted that it is not for the courts to introduce unreasonableness as an independent (statutory) ground of review. To position such a development, the legislature would need to amend section 145. Alternatively, it is submitted that litigants will have to challenge the constitutionality of section 145 of the LRA by alleging that the review remedy as provided for therein is inadequate\(^\text{822}\) or does not give proper effect to the constitutional right to just administrative action. The court will then be called upon to determine whether section 145 infringes the constitutional right to just administrative action and, if so, whether such infringement can be justified as a permissible limitation in terms of section 36 of the 1996 Constitution, failing which section 145 would be capable of being declared unconstitutional.\(^\text{823}\) It is important to note that the constitutionality of section 145 was not challenged in \emph{Sidumo} and that this aspect was accordingly not considered by the Constitutional Court in its judgment.\(^\text{824}\)

\(^\text{820}\) Waite \emph{The Oxford Paperback Thesaurus} 2 ed (2001) 383.

\(^\text{821}\) Waite \emph{Thesaurus} 870.

\(^\text{822}\) Currie & De Waal \emph{The Bill of Rights Handbook} 32.


\(^\text{824}\) See C Botma & A van der Walt “The role of reasonableness in the review of labour arbitration awards (Part 2)” 2009 \emph{Obiter} 530 535.
Unfortunately, the case law referred to above demonstrates that the courts have relied on both interpretations of reasonableness to dispose of review applications. In addition, for purposes of review at least, the terms rationality, justifiability and reasonableness appear to be used interchangeably. Whilst rationality and justifiability have been described as sufficiently similar in meaning; Sidumo reasonableness has also been described as essentially and conceptually no different from Carephone’s rational justifiability. Whether all three terms have the same meaning is however questionable. In Minister of Health v New Clicks South Africa (Pty) Ltd, the Court held that the right to reasonable administrative action is a variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions than would have been competent under the 1993 Constitution. As such, the threshold of reasonableness incorporates and expands upon rationality. It is clear from the aforementioned that, whatever future direction is taken by the courts in this regard, it will have important implications for the review of CCMA arbitration awards. As indicated from the outset, this partly serves to justify the need for a comparative study of English law.

825 Shoprite Checkers (Pty) Ltd v Rdawwo NO and others 2001 9 BLLR 1011 (LAC). See also United National Breweries (SA) v CCMA & others 2006 JOL 17485 (LC) where the Court described the Carephone test as a rationality test and UASA v Impala Platinum Ltd & others 2010 9 BLLR 986 (LC) para 45 where the Court again described Sidumo reasonableness as a rationality test. See Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and others 2007 1 All SA 164 (SCA) para 32. The Court equated Carephone’s justifiability with PAJA’s formulation whether the connection made is rational.

826 See Edcon Ltd v Pillemer NO and others 2010 1 BLLR 1 (SCA) para 16 also referenced in Matsekoleng v Shoprite Checkers (Pty) Ltd 2013 JOL 29789 (LAC) para 36. In Afrox Healthcare Limited v CCMA & others 2012 JOL 28779 (LAC) the Sidumo reasonable decision-maker test was described as being none other than that rational justifiability. Also consider Trinity Broadcasting, Ciskei v Independent Communications Authority of SA 2003 4 All SA 589 (SCA) para 19-21, where the Court approved and applied Carephone’s justifiability test in the light of PAJA’s formulation whether the connection made is rational. The Court however distinguished rationality from substantive reasonableness, but commented that the test of perversity or utter irrationality may be appropriate to the standard set by section 6(2)(h) of PAJA. See also Bel Porto School Governing Body and others v Premier, Western Cape and Another 2002 (3) SA 265 (CC) at 282-283. The same factual considerations which were fully canvassed in respect of the argument relating to irrationality are foundational to the question of justifiability. The requirement that a decision must be justifiable in relation to the reasons given as per the 1993 Constitution in substance sets rationality as the review standard. In Commercial Workers Union of SA v Tao Ying Metal Industries & others 2009 1 BLLR 1 (CC) para 150, the court referred to Sidumo, but found that the award was deprived of rationality. Likewise in Afrox Healthcare Limited v CCMA & others 2012 JOL 28779 (LAC) the Sidumo reasonable decision-maker test was described as being none other than that rational justifiability.

827 The Court in Sidumo & another v Rustenburg Platinum Mines Ltd & others 2007 12 BLLR 1097 (CC) para 106 described the Carephone test as substantive and involving greater scrutiny than the rationality test set out in Pharmaceutical Manufacturers Association of SA & another In Re: Ex Parte Application of President of the RSA 2000 JOL 6158 (CC). The Court in Samson v CCMA & others 2009 11 BLLR 1119 (LC) was critical of the applicant’s use of the pre-Sidumo language of rational justifiability; considering it the incorrect test.

828 2006 JOL 15636 (CC); 2006 (2) SA 311 (CC). According to the Court, this development sets on the one hand a lower threshold for review and on the other hand, a higher standard for administrative action than was the case under the 1993 Constitution.

829 Value Logistics Ltd v Basson & others 2011 10 BLLR 1024 (LC).
6.2.2 **Reasonableness is not encompassing**

A key question that has arisen following *Sidumo* is whether the grounds of review contained in section 145(2) have become obsolete in that an arbitration award will only be reviewable if it is found to be unreasonable.\(^{830}\) In *Fidelity Cash Management Services*, the Labour Appeal Court held that *Sidumo* has not obliterated the section 145(2) grounds of review, but that the grounds were suffused by reasonableness.\(^{831}\) According to the Court, awards could therefore be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter, that the CCMA had made a decision that was *ultra vires* its powers or on any of the other grounds specified in section 145 of the LRA, without questions arising as to the reasonableness of such decisions.

*Maepe v CCMA & another* is an example of a judgment where an arbitration award was set aside on the basis that the commissioner had fallen foul of a section 145(2) review ground without having regard to *Sidumo* reasonableness.\(^{832}\) In this case, the Court considered whether the commissioner had committed a gross irregularity in failing to take into account that the appellant had given false evidence under oath at arbitration. Without referring to reasonableness, the Court held that the commissioner’s failure to take account of the appellant’s conduct when he considered the issue of relief constituted a gross irregularity which justified setting aside the commissioner’s reinstatement order.\(^{833}\) Similarly, in *SA Rugby Players’ Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby Pty Ltd v SARPU & another*\(^{834}\) and *Group Six Security Services (Pty) Ltd & Andrew Masters v R Moletsane, CCMA & Dean Weller*,\(^{835}\) the Court dealt with the question of a reviewable excess of power and misconduct respectively without considering the impact of reasonableness on the determination. In *SARPA*, for example, Tlaletsi AJA accepted that the question before the court *a quo* was whether, on the facts of the case, a dismissal had taken place and not whether the commissioner’s finding that there had been a dismissal was justifiable, rational or reasonable. According to the Court, the CCMA was a

---


831 Para 101.

832 2008 8 BLLR 723 (LAC).

833 Para 22.

834 2008 9 BLLR 845 (LAC).

835 Unreported Labour Appeal Court judgment; JA77/05 (26 February 2009).
creature of statute that, as a general rule, could not decide its own jurisdiction, but could only make a ruling for convenience. In the circumstances, the Court found that it was for the Labour Court to decide whether, objectively speaking, the facts existed which would give the CCMA jurisdiction. If the facts did not exist, the Court reasoned that the CCMA would have no jurisdiction irrespective of its finding to the contrary. Consistent with this, Van Niekerk J held in *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* that the Court was not precluded from scrutinising the process in terms of which the decision was made by the requirement that the outcome of CCMA arbitration proceedings must fall within a band of reasonableness.

On the other hand, the courts have linked reasonableness to the section 145(2) grounds of review by, for example, finding that a commissioner had committed a gross irregularity and that the irregularity rendered the result unreasonable. This suggests that the courts are not all convinced as to the non-encompassing role of reasonableness. Specific reference is made to *Mollo v Metal & Engineering Industries Bargaining Council & others* and *Zilwa Cleaning & Gardening Services CC v CCMA & others*. In the former case, Nyathela AJ concluded that the commissioner had committed a gross irregularity when he presided over a matter that was part heard and disallowed witness testimony on the basis that it was unnecessary. Seemingly recognising an overlap or link between the section 145 grounds of review and reasonableness, the Court found that, given the irregularities, the commissioner’s decision was not one which a reasonable decision-maker could have reached on the materials which were before him. In the latter case, the Court found that the remedies granted in the arbitration award must be set aside in so far as the commissioner had committed a gross irregularity and exceeded his powers as envisaged in section 145 of the LRA by failing to apply his mind to relevant facts and applicable legal principles. According to the Court, the commission of the defects also caused the commissioner to come to a decision which a reasonable commissioner could not have come to.

---

836 Para 40-41.
837 2009 11 BLLR 1128 (LC).
838 Para 17.
839 2009 JOL 24323 (LC).
840 2010 31 ILJ 780 (LC) para 25.
841 Para 34.
842 Para 24.
843 In this instance, the commissioner had failed to consider whether reinstatement was practicable taking into consideration evidence that the cleaning contract had expired and that the employee’s employment might have come to an end on the expiry of that contract. The commissioner also awarded both reinstatement and the
Notwithstanding these decisions, the Supreme Court of Appeal in *Samancor* accepted that the Labour Court can interfere with arbitration awards on the basis of one or more of the defects stated in section 145(2) of the LRA and when the award is one that a reasonable decision maker could not reach.\(^{845}\) The same was confirmed in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and others*\(^{846}\) and more recently in *Herholdt*.\(^{847}\) In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*, the Labour Appeal Court again held that a decision is not automatically reviewable on the basis of section 145(2)(a) and (b) unless the outcome is unreasonable.\(^{848}\)

The majority of judgments therefore demonstrate that CCMA awards can be reviewed in terms of the grounds set out in section 145(2)(a) and (b) of the LRA and on the basis of *Sidumo* reasonableness. This means that, where an applicant on review has established that a commissioner had committed misconduct, a gross irregularity and/or had exceeded his powers, the award can be set aside on review on those grounds without reasonableness necessarily coming into play. It is nevertheless possible that the commission of a defect as per section 145(2) may also lead to an unreasonable and hence reviewable result; suggesting that the grounds of review are not tightly separated from one another, but may overlap. This does however not mean that one would by necessity have to test whether an established gross irregularity has led to an unreasonable outcome.\(^{849}\)

---

\(^{844}\) Para 25. See also *PAWUSA obo Skosana & others v Public Health & Social Development Sectoral Bargaining Council & others* 2011 11 BLLR 1079 (LC); *Sasol Mining (Pty) Ltd v Commissioner Ngqeleni & others* 2011 4 BLLR 404 (LC). In this case, it was alleged that the commissioner had committed a gross irregularity and that as a result, he reached a conclusion which no reasonable decision-maker could reach.

\(^{845}\) See para 6 1. See para 5. See also *National Commissioner of the South African Police Service v Myers & others* 2012 JOL 28980 (LC). In that case the Court noted that *Sidumo* reasonableness does not replace the grounds of review contained in section 145(2) of the LRA and that they still remain relevant.

\(^{846}\) 2013 JOL 29935 (LAC). However, the Labour Court in *Kievits Kroon Country Estate (Pty) Ltd v CCMA & others* 2011 3 BLLR 241 (LC) para 21 and 28, initial held that the applicant had relied on grounds of review that were no longer part of South African law.

\(^{847}\) *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* 2013 11 BLLR 1074 (SCA) para 14.


\(^{849}\) See chapter 2 para 2 6 1 2. An irregularity is reviewable if it is material and of such a serious nature that it resulted in the aggrieved party not having its case fully and fairly determined.
6.2.3 **Reasonableness of outcome or process**

The essential difference between an outcome-focussed or process-focussed approach turn around the role that commissioners’ reasoning process plays in the assessment of the reasonableness of their decisions. Under the process-focussed approach, commissioners’ process of reasoning is determinative of the reasonableness of their decisions. As such, it is descriptive of defects in the reasoning process which may have influenced the outcome of the awards in question. By contrast, under the outcome-focussed approach, the reasoning process is of secondary importance and the reasonableness of the decision depends primarily on the relationship between the evidentiary material properly before the commissioner and the conclusion reached by the commissioner. In other words, one asks whether the decision is one to have been made from the factors, values and standards used in support thereof.

The Labour Appeal Court in *Fidelity Cash Management Services* approved of an outcome-focussed approach to *Sidumo* reasonableness. In terms thereof, an arbitration award should not be set aside on review on the basis that a commissioner’s process of reasoning was unreasonable if the court is able to find that the commissioner’s conclusion is reasonable in relation to the evidentiary material before him or her, albeit for reasons other than those relied on by the commissioner. The focus is therefore not on the way in which commissioners arrive at their conclusions, but on the relationship between the conclusions and the evidence as a whole. This approach entitles the court to rely on reasons and/or evidence, not relied upon by commissioners, to determine whether their findings are reasonable. The Court approved of this outcome-focussed approach because: 1) the constitutional imperative, which required administrative action

---

850 See *Myers v National Commissioner of the South African Police Service and others* 2013 JOL 30564 (SCA). The Court held that: 1) *Sidumo* reasonableness requires one to look at the decision and how the decision-maker came to his or her conclusion; 2) it is important to bear in mind at all times that one is not dealing with an appeal but a review; and 3) one is concerned with how the decision was arrived at rather than the conclusion.

851 The question is whether the award is rationality related to the reasons given by the commissioner. The award will be set aside on review if it is found to be appreciably or significantly based on flawed reasons; regardless whether it is otherwise sustainable on the material in the record. See *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and others* 2007 1 All SA 164 (SCA) para 33-34.

852 G Ray-Howett “Is it Reasonable for CCMA Commissioners to Act Irrationally?” 2008 29 ILJ 1621-1622. The reasoning process of the commissioner assists the review court in determining whether the award is one that could not reasonably have been reached. The award is not set aside on review as a result of a flaw in the commissioner’s reasoning, but as a result of the award being one that a reasonable decision-maker could not have reached in light of the issues and the evidence.

853 Para 103.
to be justifiable in relation to the reasons given for it, had fallen away; 2) the substantive test for review was an objective one and evaluating the decision-maker’s process of reasoning inappropriately required a subjective enquiry; and 3) a more stringent approach to reviews advanced the LRA objective of promoting the effective resolution of labour disputes.\textsuperscript{854}

Ray-Howett however advocates a reasonableness concept that is both outcome and process-focused; contending that: 1) although the commissioner’s process of reasoning is subjective, the criteria used to evaluate and test the reasoning process is not; 2) expediency should not override the general constitutional principle that public power must be exercised rationally; and 3) commissioners will not be held accountable for the proper exercise of their powers if their decisions are allowed to stand notwithstanding the fact that their reasoning process was fatally flawed.\textsuperscript{855} There is also the risk that an outcome-focused approach would blur the distinction between the appeal and review processes by inviting the review court to substitute its own view of what the correct decision is. This potential danger was recognised by the Supreme Court of Appeal in \textit{Sidumo} in its criticism of \textit{Fidelity Cash Management Services}.\textsuperscript{856} The Court described the test adopted in \textit{Fidelity Cash Management Services} as more akin to an appeal process than a review. The Court reasoned that it inexorably drew the court into stepping into the shoes of the commissioner by compelling the review court to try to find its own reasons to justify the arbitrator’s findings and substituting the commissioner’s reasoning process with that of its own.

Despite this criticism, nothing said in \textit{Sidumo} automatically counted the outcome-focused approach as unconstitutional or inconsistent with the reasonableness test. This judgment only served to establish that: 1) erroneous reasons for decisions would not \textit{per se} render awards reviewable; 2) the reviewability of decisions depended on whether or not the erroneous reasons demonstrated a defect in the arbitration proceedings as contemplated by section 145 - as suffused by reasonableness; and 3) the presence or absence of reviewable defects was to be established from a perusal of the award and the record of proceedings forming the subject-matter of the

\textsuperscript{854} Para 100-103. See also \textit{Specialised Belting & Hose (Pty) Ltd v Sello NO \& others} 2009 7 BLLR 704 (LC) para 21.

The Court may be inclined to find that the ultimate decision arrived at is one that no reasonable commissioner could have arrived at if the commissioner flagrantly disregarded relevant or crucial evidence or where the reasoning was fatally flawed or incorrect legal principles was applied.

\textsuperscript{855} Ray-Howett \textit{ILJ} 1627-1630.

\textsuperscript{856} Ray-Howett \textit{ILJ} 1631; see also para 22.
review. Whether an outcome, process or outcome and process-focused approach is thus to be preferred is to be ascertained from the courts’ subsequent interpretation of the constitutional standard or test of review.

In *Edcon Ltd v v Pillemer NO & others*, the central issue before the commissioner was whether the employee’s conduct had breached the trust relationship taking into account the employee’s length of service, her previous unblemished record and that she was two years away from retirement. The commissioner ruled the dismissal substantively unfair; finding that no evidence was led on the employer’s behalf regarding dismissal as appropriate sanction. In the ensuing appeal to the Supreme Court of Appeal, the Court emphasised that the reasonableness of the award was determined having regard to the material before the decision-maker and the conclusion arrived at. The Court accepted that it was inevitable that a court, in determining the reasonableness of an award, would have to make a value judgment as to whether a commissioner’s conclusion was rationally connected to his or her reasons taking account of the material before him or her. In doing so, the Court found that the commissioner could not be reproached for finding that the employer had led no evidence showing the alleged breakdown in the trust relationship. In the absence of such evidence, and based on the material available to her, the Court reasoned that the commissioner’s conclusion was rationally connected to the reasons she gave and ruled that the dismissal was correctly found to have been unfair. The Court seemingly held that despite procedural irregularities in the commissioner’s award, the outcome was reasonable and should not be set aside.

In *Senama v Commission for Conciliation, Mediation and Arbitration*, Molahlehi J held that a reasonable decision was reached when a commissioner, in performing his or her functions as an arbitrator, applied the correct rules of evidence and weighed all the relevant factors and circumstances of the case before him or her. Having regard to these principles, the Labour Court

---

857 2010 1 BLLR 1 (SCA).
858 Para 15-16.
859 Para 23.
860 2008 9 BLLR 896 (LC) para 18-19. In this case, the employee was dismissed for removing the employer’s stock from its premises without authority after a vehicle registered in his name was identified as having entered the employer’s warehouse. At arbitration, the commissioner rejected the employee’s claim that he had been on leave at the time and confirmed the substantive fairness of the dismissal. In doing so, the commissioner drew an adverse inference against the employee due to his failure to provide a plausible explanation as to why he only disclosed his ownership of the vehicle at arbitration.
found that the applicant had failed to establish a basis for interference because the commissioner’s decision was based on a proper evaluation of the circumstances and the evidence that was led during the arbitration hearing. A similar approach was adopted in Karen Beef (Pty) Ltd v Bovane NO & others. In setting aside the commissioner’s decision, Molahlehi J agreed with the findings of Van Niekerk AJ in Sil Farming CC t/a Wigwan v CCMA that a decision was one which no reasonable maker could reach if the decision was unsupported by any evidence or by evidence that was insufficient to reasonably justified a decision arrived at or where the decision maker ignored uncontradicted evidence. In the present case, the Court found that the commissioner’s conclusion was unsupported by the evidence or the evidence before her was insufficient to support the conclusion she reached. According to the Court, it was apparent that the commissioner had based her determination on the subjective submission of the applicant employee and not on the objective assessment of the evidence before her. In determining whether the commissioner had issued an award that was not justifiable on the facts, the Labour Court in RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan & others again found that the commissioner’s use of incorrect criteria to identify the guilty employees from the innocent ones was based on a mistake of fact that was “foundational to his reasoning” and amounted to an irregularly and unjustifiably exculpation of the reinstated employees.

Explicit support for process-related reasonableness is found in Southern Sun Hotel Interests. Van Niekerk J dismissed the suggestion that it might be inferred from Sidumo that process-related conduct by a commissioner was irrelevant to a review brought under section 145 of the LRA and

---

861 2008 8 BLLR 766 (LC). In this case, the employee was dismissed for being drunk on duty after having failed a breathalyzer test. At arbitration, the commissioner found that the employee’s dismissal was substantively unfair because a second breathalyzer had yielded a negative result. The commissioner also found the dismissal to be procedurally unfair because the chairman of the disciplinary enquiry was biased, in that, on the day of the incident, he had refused to speak to the employee. On review, the employer contended that the commissioner had failed to have proper regard to the evidence when deciding on the employee’s guilt and had misconstrued the test for bias when assessing the fairness of the pre-dismissal procedure. More specifically, it was submitted that the commissioner had failed to appreciate that the chairperson’s response was aimed precisely at obverting an allegation of bias.


863 Para 20.

864 2008 2 BLLR 184 (LC).

865 Para 50. The commissioner had distinguished the guilty employees from the innocent ones by: 1) setting March 2000 as the end of the period during which sample was discarded. The evidence however showed that the dumping continued until May 2002; and 2) the employees’ motive. The commissioner relied only on the financial motive of the employees (payment for overtime and a potential bonus if the employees eased the backlog) without considering a non-financial motive proffered by the employer (discarding the sample reduced the unpleasant workload, made work easier and allowed the employees more time to relax).
that the review court should only be concerned with the record of the arbitration proceedings and its result.\textsuperscript{866} According to the Court, section 145 of the LRA invited a scrutiny of the process by which the result of an arbitration proceeding was achieved and a right to intervene if the commissioner’s process-related conduct was found wanting. The Court also commented that reasonableness was not irrelevant to this enquiry as the reasonableness requirement was relevant to both process and outcome. In support thereof, the Court referred to \textit{CUSA v Tao Ying Metal Industries & others} wherein the Constitutional Court had previously considered the role of commissioners and their process-related obligations when conducting arbitrations. In that case, the Court had found that commissioners were acting unlawfully and/or unreasonably (in breach of the right to administrative justice) if they failed to apply their minds to the issues in a case.\textsuperscript{867} In consequence, the Court concluded that it was not precluded from scrutinising the process in terms of which the decision was made. If a commissioner failed to take material evidence into account, had regard to evidence that was irrelevant, committed misconduct or a gross irregularity during the proceedings under review, and a party was likely to be prejudiced as a consequence, the commissioner’s decision was capable of being set aside. According to the Court, this principle applied regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result was nevertheless capable of justification.

In \textit{SA Airways (Pty) Ltd v Blackburn & others}\textsuperscript{868} the Labour Court again accepted that \textit{Sidumo} established a result based test in terms of which an award will only be reviewable if the result was incapable of justification on all the material before the commissioner. However, referring to the judgment of Ngcobo J in \textit{Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)},\textsuperscript{869} the Court noted the findings that: 1) there was an obvious overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of the decision; 2) a consideration of the factors that a decision maker was bound to take into account was essential to a reasonable decision; and 3) if a decision-maker failed to take into account a factor that he or she was bound to take into consideration, the resulting decision could not be said to be that of a

\textsuperscript{866} 2009 11 BLLR 1128 (LC) para 14.
\textsuperscript{867} 2009 1 BLLR 1 (CC).
\textsuperscript{868} 2010 3 BLLR 305 (LC).
\textsuperscript{869} 2006 JOL 15636 (CC).
reasonable decision-maker. Against this background, the Court then held that an arbitration award would also be reviewable for process-related unreasonableness if the commissioner committed a material error of law or failed to apply his or her mind to materially relevant factors. In this instance, the Court held that the applicant on review did not have to prove that the result of the award was unreasonable but rather than the result might have been different if the commissioner had acquitted him- or herself properly. The Court did not explain whether process-related unreasonableness was distinguishable or the equivalent of a gross irregularity.

The practical application of process-related reasonableness is demonstrated in *MEC for Education, Gauteng v Mgijima*. In this case, the employer learned that the employee, despite having been offered an opportunity at her pre-appointment interview, had neglected to disclose that she had resigned from her previous employer in exchange for the withdrawal of misconduct charges leveled against her. At the pre-dismissal arbitration, the commissioner found that the employee was not obliged to disclose that she had been suspended pending disciplinary action and that the employer could not rely on non-disclosure of charges which had not been proved. In the subsequent review application, Van Niekerk J found that the commissioner was manifestly wrong to have relied on the presumption of “innocent until proven guilty” in the context of proceedings relating to fair administrative action. According to the Court, the crucial issue before the commissioner was not whether the employee was guilty of the offences brought against her, but the non-disclosure of information at the time of the interview. The Court reasoned that the employee’s non-disclosure of material information in response to an express invitation to do so deprived the employer of the opportunity to make an informed decision as to the effect, if any, of the suspension and pending charges on the contemplated employment relationship. As a result of the commissioner’s failure to apply his mind properly to the issue before him, the Court found

870 Para 511.
871 I.e. incapable of justification.
872 Para 21.
873 2011 3 BLLR 253 (LC).
874 2012 2 BLLR 99 (LAC). The Court criticised the commissioner’s award primarily on the basis of his inadequate appraisal of relevant criminal law principles before finding the dismissal unfair.
875 2012 JOL 28779 (LAC). The Court found that the commissioner had failed to apply his mind to material evidence. This impacted on the ultimate decision; causing the result of the award to be unreasonable.

182
the Labour Appeal Court accepted that a commissioner’s irrational way of deciding the issue could cause the commissioner to reach an unreasonable decision. Along this line of reasoning, Sidumo reasonableness has also been stretched to incorporate deficiencies in reasoning; a failure to properly assess evidence; failing to conceive the issue to be determined; and/or defect in logic.

It is however in Herholdt v Nedbank Ltd that the Labour Appeal Court dealt most comprehensively with the question of process-related reasonableness. Referring to the Labour Court’s judgment in Southern Sun Hotel Interests, the Court endorsed its finding that awards will be reviewable if it suffered from process-related unreasonableness or was substantively unreasonable in its outcome. The Court went on to find that this standard recognised that dialectical and substantive unreasonableness were intrinsically inter-linked and that latent process irregularities carried the inherent risk of causing an unreasonable substantive outcome. In terms of the test for substantive unreasonableness, the Court confirmed that the ultimate decision was to be assessed with regard to the sufficiency and cogency of the evidence to determine if it was reasonably supportable. The Court accepted that, by necessity, this involved a consideration of substance and merits in relation to the outcome, but allowed a measure of legitimate diversity and deviance from the correct or perfect decision. According to the Court, an applicant must therefore not only establish that the commissioner’s reasons were unreasonable, but that there existed no good reasons on all the material before the commissioner to justify the award.

---

876 2012 3 BLLR 285 (LAC).
877 There is an overlap between gross irregularities and reasonableness. In this case, the Court held that where commissioners fail to properly apply their mind to material facts and unduly narrow the inquiry by incorrectly construing the scope of an applicable rule, they cannot be said to have fully and fairly determined the case before them. The ensuing decision is inevitably tainted by dialectical unreasonableness, which characteristically results in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness). There may often be an overlap between the ground of review based on failure to consider a relevant factor and one based on the unreasonableness of a decision. If commissioners do not take into account factors they are bound to consider, their decisions will invariably be unreasonable. The flaw in the process will alone usually be sufficient to set aside the award on the grounds of it being a latent gross irregularity, permitting review in terms of section 145(1) read with section 145(2)(a)(ii) of the LRA.
878 Woolworths (Pty) Ltd v CCMA and others 2011 10 BLLR 963 (LAC).
879 SA Post Office Ltd v CCMA and others 2012 1 BLLR 30 (LAC).
880 Trident Steel SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council 2012 1 BLLR 93 (LC).
882 2012 9 BLLR 857 (LAC).
883 Para 33 and 36.
884 Para 35.
Turning to process-related unreasonableness, the Court accepted that it would constitute a gross irregularity should a commissioner fail to have regard to material facts because the commissioner would have unreasonably failed to perform his or her mandate and would thereby have prevented the aggrieved party from having his or her case fully and fairly determined. The Court reasoned that a proper consideration of all relevant and material facts and issues was indispensable to reasonable decisions and if decision-makers failed to take account of relevant factors which they were bound to consider or did not apply their mind to the issues in a case, the resulting decisions would not be reasonable in the dialectical sense.\(^{885}\) The Court rejected the submission that the target on review was the result or outcome rather than the process and that the award should not be interfered with if the result was reasonable. According to the Court, the weight of authority favoured greater scrutiny and section 145(2) of the LRA expressly permitted the review of awards on the ground of irregularity. Then, considering the threshold for interference in the case of an irregularity, the Court found that there was no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconstruing the whole nature of the enquiry. According to the Court, it was sufficient that the commissioner had failed to apply his or her mind to certain of the material facts or issues before him or her, that there was a potential for prejudice and the possibility that the result may have been different. This aspect of the Labour Appeal Court judgment was subsequently rejected by the Supreme Court of Appeal on the basis that: 1) it set a lower threshold for interference than that established in Sidumo because the mere possibility of prejudice sufficed; and 2) it rendered it immaterial whether the result reached was one that could reasonably have been reached on the material before the commissioner.\(^{886}\) According to the Court, a defect in the conduct of the proceedings constituted a gross irregularity only if the commissioner had misconceived the nature of the inquiry or arrived at an unreasonable result. Whilst the rejection of a relaxed review is applauded, it is questionable whether substantive reasonableness would sit comfortably within section 145(2)(a)(ii). Fergus has pointed out that section 145 was cast in a procedural light with lawfulness in mind and that its enduring

\(^{885}\) “Rationality” and/or “rational justifiability” seemingly relate to “dialectical” unreasonableness only. See Kotze v Minister of Health 1996 3 BCLR 417 (T) 425. The Court noted that “justifiable” means that the decision must be “capable of being justified or shown to be just” or “regverdigbaar”. The Court made it clear that the words denote something that can be defended; the reasons advanced for the administrative action must show that the action is adequately just or right. To succeed on review, the court must be satisfied that the reasons advanced for the action under review are not supported by the facts or the law or both.

\(^{886}\) Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae) 2013 11 BLLR 1074 (SCA) para 17 and 25.
relevance lies in protecting the aspects of the right to administrative justice aside from reasonableness.\textsuperscript{887}

On the one hand, there is thus \textit{Fidelity Cash Management Services, Ellerine Holding Limited} and \textit{Herholdt} which advocate a more substantive approach. In terms thereof, an award should not be set aside on review as unreasonable because of the commissioner’s defective process of reasoning if the conclusion is nevertheless reasonable in relation to the evidentiary material generally before the commissioner. On the other hand, there are a host of authorities that draw a distinction between substantive and process-related unreasonableness.\textsuperscript{888} In terms of the latter, commissioners’ failure to apply their minds and consider all materially relevant facts and considerations or ignore irrelevant factors itself constitute unreasonable conduct susceptible to review. This process-related reasonableness appears to be similar to and/or overlap with a latent irregularity. As mentioned in chapter 2, a latent irregularity takes place in the mind of the commissioner and is evident from the commissioner’s flawed reasoning. It also includes a failure to take material evidence into account or having regard to evidence that is irrelevant. However, the courts seem to have imposed a lighter test on review for process-related reasonableness. Whereas latent irregularities call for an enquiry into whether it prevented a fair trial of the issues, process-related reasonableness simply enquires whether a party to the proceedings was likely to be prejudiced as a consequence. In other words, it is sufficient that the decision might have been different but for the process-related unreasonableness of the decision. However, although the foregoing appears to be a contradiction in terms, it is submitted that it is not one that is irreconcilable in practice.

Substantive unreasonableness is not readily identifiable by a commissioner’s failure to consider materially relevant factors or by a consideration of irrelevant factors, but raises the question whether the ultimate ruling is reasonably supported having regard to the evidence, arguments and

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{888} Southern Sun Hotel Interests (Pty) Ltd v CCMA and others 2009 11 BLLR 1128 (LC); Gaga v Anglo Platinum Ltd and others 2012 3 BLLR 285 (LAC); Woolworths (Pty) Ltd v CCMA and others 2011 10 BLLR 963 (LAC); SA Post Office Ltd v CCMA and others 2012 1 BLLR 30 (LAC); Trident Steel SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council 2012 1 BLLR 93 (LC).
\end{flushright}
considerations objectively recognised as valid. In this instance, the reasonableness of a commissioner’s decision does not depend exclusively upon the adequacy of the reasons that the commissioner gives for the decision, but where other reasons upon which the commissioner did not rely to support his or her decision can render the decision reasonable. Opposed thereto, where the reasoning process of the commissioner demonstrates a latent gross irregularity, the ultimate decision should be set aside on review regardless of the substantive reasonableness thereof. As such, process-related unreasonableness (inadequate reasoning) may be construed as evidence of a gross irregularity. In other words, the question is whether the process-related unreasonableness is so manifest that it is indicative of a gross irregularity in the conduct of the proceedings. If not, substantive reasonableness will only excuse defects in decision-makers’ reasoning process in limited circumstances. This approach ensures that commissioners are held accountable for the proper exercise of their powers. Where the commissioner’s reasoning process is fatally flawed, the decision will not be allowed to stand. Interestingly, in all the cases discussed above, the commissioners’ decisions were not sustainable on the evidentiary material before the commissioners in the case of process-related unreasonableness because the mistake or error on the part of the commissioner was material or foundational to the decision. It is therefore submitted that the question should be whether the alleged error on review is foundational or material to the reasoning of the award. As case law suggests, the materiality of an error should be determined having regard to the evidence before the commissioner and the conclusion arrived at. So construed, the question will thus be whether the conclusion is sensibly connected to the reasons taking into account the material (or evidence) before the commissioner or alternatively, whether the commissioner’s “bad” reasons or errors serve as evidence of the occurrence of one or more of the section 145(2) grounds for review as suffused by reasonableness. In this manner, the concerns expressed in Fidelity Cash Management Services and Ellerine Holding Limited is addressed. Parties would not be able to succeed in a review application by merely formalistically passing through an award and alleging reviewability on the basis of a mere irregularity. Such an

---

889 See Maepe v CCMA & another 2008 8 BLLR 723 (LAC). The Court held that although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. The Court reasoned that while it was reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.
approach will require scrutiny of the nature of the “errors” or “bad reasons”. On the one hand, if it constitutes proof that the decision was reached as a result of the occurrence of one or more of the section 145(2) grounds for review, it should be set aside on review regardless of the fact that the decision may potentially be sustained by other reasons identified in the record. This would apply for example where commissioners fail to take account of material facts or to apply their minds to the issues. This is because the focus on review should always be the process leading to the decision and not the decision itself.\footnote{890} On this basis it does not matter whether the outcome may be sustained by good reasons identified in the record. On the other hand, if the “bad reasons” or “errors” amount to an incorrect factual finding, as in the Sidumo case, which, as discussed above is not \textit{per se} a ground for review, the award would not be reviewable unless it is \textit{unsupported} by any evidence or by evidence that was \textit{insufficient} to reasonably justify the decisions arrived at in order to come to the conclusion that the decision is one which no reasonable decision-maker could have reached. It is submitted that this is a different way of saying that the ultimate ruling is not reasonably supported having regard to the evidence, arguments and considerations because the “defective” reasons for the ultimate ruling outweighs the “good” reasons. This would be in harmony with the distinction between an appeal and review.\footnote{891} This would also be in line with the finding in Ramdaw that the dispute resolution system prescribed by the LRA does contemplate that there will be arbitration awards which are unsatisfactory in many respects, but must nevertheless be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review.\footnote{892} In other words, the commissioner’s award cannot be said to be unjustifiable when having regard to all the circumstances of the case and the material before the commissioner. The Court reasoned that, without such contemplation, the LRA’s objective of the expeditious resolution of disputes would have no hope of being achieved.

\section{6.3 \textit{APPLYING REASONABLENESS IN VALUE JUDGEMENTS}}

A study of case law is invaluable in establishing how reasonableness must be applied in practice. In what follows, recent judgments, applying reasonableness in various different contexts, will be

\footnotesize
890 See chapter 2 para 2 3.
891 See chapter 2 para 2 3.
892 Para 7-8.
considered in more detail. As an introduction however, reference should be made to the finding in *Fidelity Cash Management Services* that: 1) a review court should not interfere with a commissioner’s finding merely because it would have dealt with the matter differently; \(^{893}\) and 2) on review, the test is not whether the dismissal is fair or unfair but whether the commissioner’s decision, one way or another, is one that a reasonable decision-maker could not reach in all the circumstances of the case. Zondo JP warned that the *Sidumo* reasonableness test was a stringent test that would ensure that awards are not lightly interfered with, but are final and binding as per the objectives of the LRA as long as it could not be said that such an award was one that a reasonable decision-maker could not have made in the circumstances of the case. \(^{894}\) Likewise, in *Palaborwa Mining Co Ltd v Cheetam & others*, \(^{895}\) a differently constituted Labour Appeal Court ruled that the compass of reasonableness was narrow and simple. \(^{896}\) According to the Court, *Sidumo* did not only shift away from any degree of deference towards employers, but also reduced the scope for a dissatisfied employee to take his or her dispute further; and reduced the potential for the review court to exercise scrutiny over the decisions of commissioners who were appointed to arbitrate in terms of the LRA. Along the same lines, the Labour Appeal Court emphasised in *Bestel* that a review was ultimately based upon the principle of *justification* and that the correctness of a decision was irrelevant to review proceedings. \(^{897}\) Although the scope of section 145 has therefore been extended by the suffusion of section 145 with *Sidumo* reasonableness, this selection of cases confirms that reasonableness is not recognised as an extensive ground of review but that it has stringent requirements that should substantially reduce its application. It is submitted that such an interpretation is consistent with the legislature’s purpose of finally and expeditiously resolving disputes at arbitration level. \(^{898}\)

### 6.3.1 Dismissal for misconduct: findings regarding sanction and penalty reviews

In *Sidumo* the Constitutional Court confirmed that a commissioner was required to determine the

---

893 Para 99.
894 Para 100.
895 2008 6 BLLR 553 (LAC).
896 Para 6. The review court must defer (but not in an absolute sense) to the decision of the commissioner.
897 Para 18.
898 See chapter 2.
fairness of a dismissal in accordance with his or her own sense of fairness.\textsuperscript{899} However, fairness is an elusive concept and, in deciding whether the sanction of dismissal is fair, a commissioner is basically making a value judgment.\textsuperscript{900} Taking into account that there exists a permissible range of reasonableness,\textsuperscript{901} it is submitted that it will be rare for a commissioner’s finding as to the fairness of a dismissal to be regarded as falling foul of the requirement of reasonableness. On the other hand, \textit{Sidumo} also held that a commissioner must consider all relevant circumstances\textsuperscript{902} and identified a non-exhaustive list of factors that were to be taken into account when making such a value judgment. This included the importance of the rule breached, the reason why the employer imposed the sanction of dismissal, the basis of the employee’s challenge to the dismissal, the harm caused by the employee’s conduct, the effect of dismissal on the employee and the employee’s service record.\textsuperscript{903} In \textit{Fidelity Cash Management Services}, the Labour Appeal Court referred to the foregoing factors and held that, once a commissioner has considered all these factors and others not mentioned herein, he or she would have to use his or her own sense of fairness to determine whether dismissal was, in all of the circumstances, a fair sanction. In doing so, the Court reasoned that the commissioner was not at liberty to act arbitrarily or capriciously or to be \textit{mala fide}, but \textit{to make a finding that is reasonable}. The Court in other words confirmed that commissioners could only reasonably exercise a value judgment as to whether dismissal was a fair sanction in the circumstances once they had considered all materially relevant factors. Absent such a consideration, an award would be reviewable for lack of reasonableness.\textsuperscript{904}

This principle was reaffirmed in \textit{Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & others}.\textsuperscript{905} In this case, the employee was dismissed for dishonesty after she arranged for a parcel, containing material belonging to her employer, to be delivered to her daughter. The employee claimed that the sanction of dismissal was unfair and inconsistent because the employee to whom she had handed the parcel had only received a final written warning and a

\footnotesize
\textsuperscript{899} Para 75-76.
\textsuperscript{900} See \textit{NUMSA v Vetsak Co-operative Ltd & others} 1996 6 BLLR 697 (A).
\textsuperscript{901} \textit{Sidumo} para 109.
\textsuperscript{902} Para 79.
\textsuperscript{903} Para 78. See also \textit{Motsamai v Everite Building Products (Pty) Ltd} 2011 2 BLLR 144 (LAC) para 22. According to the Court, the commissioner must decide what is the appropriate sanction having regard to all of the evidence presented to him or her; the company’s code of conduct; and the nature and seriousness of the misconduct. The decision is not made in a vacuum.
\textsuperscript{904} Para 95.
\textsuperscript{905} 2008 3 BLLR 241 (LC).
suspension for a specified period. At arbitration, the commissioner agreed that dismissal was too harsh a sanction among others because of inconsistency. In the subsequent review application, the Labour Court referred to *Sidumo* and noted that in determining the fairness of dismissals, commissioners were required to exercise a value judgment taking into account all the circumstances of the case. The latter included the importance of the rule breached, the circumstances of the infringement, the reasons why the employer imposed the sanction of dismissal and the employee’s inputs.\textsuperscript{906} Taking this into consideration, the Court held that it was required to determine whether a reasonable decision-maker, based on the evidence and material before him or her, would have derived at a different decision. In applying this standard, the Court concluded that the award was, objectively speaking, unreasonable and constituted a misapplication of the principles of parity. According to the Court, a reasonable decision-maker would have taken into account existing precedent on the issue of parity as well as recognised that fairness would not dictate that the employee’s case and that of the other employee be treated alike because the two cases had different features.\textsuperscript{907}

The matter of *Edcon Ltd v Pillemer NO and others* further demonstrates the relevance of reasonableness in relation to arbitration findings as to sanction.\textsuperscript{908} In this instance, the employee was dismissed for dishonesty after having failed to report that her company car had been involved in an accident while being driven by her son. Having been under the mistaken impression that her son was prohibited from driving the car, the employee had arranged for the car to be fixed at her husband’s workshop and had thereafter kept the accident a secret. At arbitration, the commissioner found dismissal unfair having regard to the circumstances of the matter, the employee’s seventeen years of service and clean record and the fact that she was only two years away from retirement. A review application, following the employee’s reinstatement without back pay, was dismissed. On appeal to the Labour Appeal Court, Sangoni AJA held that the relevant factors and the circumstances of each case, objectively viewed, informed the element of reasonableness.\textsuperscript{909} On this basis, the Court found that the commissioner’s conclusion and the facts of the case were such that it could not be found that that a reasonable decision-maker in the

---

\textsuperscript{906} Para 27–28.  
\textsuperscript{907} Para 32.  
\textsuperscript{908} 2008 JOL 21412 (LAC) para 21.  
\textsuperscript{909} Para 21.
commissioner’s position could not reach the conclusion which she did. In a subsequent appeal to the Supreme Court of Appeal, the commissioner’s decision was also found to be beyond reproach and the appeal dismissed.

The perception that sanction reviews are not easily susceptible to review is therefore subject to the proviso that awards must reflect a consideration of all materially relevant factors, the absence of misdirection on the part of commissioners and an application of their minds to the facts and the law. This is also demonstrated in the matter of NUMSA & another v Trentyre (Pty) Ltd.\textsuperscript{910} In this case, the employee was dismissed for being under the influence of alcohol at work on an isolated occasion. The commissioner found the employee’s dismissal unfair and ordered his reinstatement on a final written warning with the forfeiture of back pay. In the ensuing review application, the employer managed to have the award overturned and replaced with an order that the employee’s dismissal was substantively fair. On a further appeal to the Labour Appeal Court, the Court again reversed the decision of the Labour Court and restored the award. The Court found that, on the evidence before the commissioner and taking into consideration his rejection of the evidence of the employer’s witnesses of the extent to which the employee was under the influence, the only conclusion open to the commissioner to reach was that the employee was under the influence but not to the extent that he could not perform his duties.

In light of the aforementioned case, the findings in Palaborwa Mining Co Ltd v Cheetam & others\textsuperscript{911} are very interesting. The appellant employee was dismissed after a random alcohol test indicated that, contrary to a workplace rule, he had more than 0.05 grams of alcohol per 100ml of blood while on duty. At arbitration, the commissioner found that the dismissal was both substantively and procedurally fair. In an ensuing review to the Labour Court, the commissioner’s decision was substituted with an order that the dismissal was substantively unfair. The Court reasoned that the commissioner had erred by adopting an inflexible approach and failing to take into account that: a) the employee had had eight years’ service with the appellant; b) no one was endangered by the employee’s conduct; c) the employee was not visibly

\textsuperscript{910} Unreported Labour Appeal Court judgment JA49/05 (27 March 2008).
\textsuperscript{911} 2008 6 BLLR 553 (LAC).
intoxicated; and d) the employee was 58 years old and a first offender.\textsuperscript{912} The Court accordingly set aside the award and ordered the employer to pay the employee compensation.

It is submitted that, in line with \textit{Sidumo}, the Court had held that the award was reviewable, not because the commissioner’s value judgment was wrong, but because, in making his value judgment, the commissioner had failed to consider and weigh all materially relevant facts. However, on a further appeal to the Labour Appeal Court, the appellant argued that its strict policy on alcohol was operationally justified and that discipline had to be consistently applied. As a result, the commissioner’s award was restored. In doing so, Willis JA, with reference to \textit{Sidumo}, held, despite the fact that decision-makers, acting reasonably, may reach different conclusions, the LRA has given the decision-making power to the commissioner and there it rested, unless it be concluded that a reasonable decision-maker could not reach such a conclusion.\textsuperscript{913} According to the Court, \textit{Sidumo}, when read together with \textit{Bato Star Fishing}, had the effect that the courts must defer (but not in an absolute sense) to the decision of a commissioner. Although concurring with the judgment of Willis JA, Patel JA wrote a separate judgment, confirming that it was permissible for the decisions of different decision-makers to lead to different results.\textsuperscript{914} Except for this, the Court did not address the correctness or otherwise of the Labour Court’s finding that the award was reviewable because the commissioner had failed to consider materially relevant factors.

Myburgh submits that a comparison between \textit{Trentyre} and \textit{Palaborwa Mining} is a good illustration of the unpredictable operation of \textit{Sidumo} reasonableness in the context of sanction reviews.\textsuperscript{915} In \textit{Trentyre}, the Labour Appeal Court found it unfair to dismiss an employee for an isolated incident of alcohol whereas in \textit{Palaborwa Mining} the Labour Appeal Court found it to be fair. In both cases, the Court however found that the decision of the commissioner passed the \textit{Sidumo} test – \textit{Trentyre}, because dismissal was unfair taking into account all relevant factors and \textit{Palaborwa Mining}, because the sanction did not fall outside the range of reasonableness.

\textsuperscript{912} Para 2.
\textsuperscript{913} Para 5.
\textsuperscript{914} Para 12-13.
\textsuperscript{915} Myburgh A “\textit{Sidumo v Rustplats}” 7.
That the courts are not readily prepared to set aside a decision on sanction is further evident from the judgments in *Shoprite Checkers (Pty) Ltd v CCMA & others*[^916] and *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & others*.[^917] In *Shoprite Checkers*, an employee with a previously clean disciplinary record and thirty years of service was dismissed for unauthorised consumption after having been captured on video tape eating in an area where the consumption of food was prohibited. The commissioner found dismissal unfair and reinstated the employee on a final written warning without backpay. Although the Labour Court set the award aside on account of the absence of an arbitration record, the Labour Appeal Court, in a subsequent appeal, found that the commissioner had reasonably reasoned that dismissal was too harsh a sanction. In fact, the Court went as far as to hold that there was no prospect that a reasonable decision-maker could *on the facts of the case* have found that dismissal was a fair sanction. In *Mutual Construction*, an administrative clerk was again dismissed for having falsely recorded the amount of hours worked by him; claiming more remuneration that would otherwise have been due to him. At arbitration, the commissioner found the dismissal substantively unfair on the basis that the employer had failed to prove its case and ordered the employee’s reinstatement.[^918] The ensuing review application was dismissed by the Labour Court. On appeal, the Labour Appeal Court (per Ndlovu AJA) found that it was severely detrimental to the employer’s operational requirements and hence inappropriate to retain the employee in the employer’s employment when that employee admitted to committing misconduct which involved gross dishonesty.[^919] In the circumstances, the Court concluded that it was reasonable to conclude that a continued working relationship between the employer and employee was rendered intolerable as a result of the breach of the trust relationship.

In the matter of *Miyambo v CCMA & others*,[^920] a security guard was dismissed after he was found in possession of scrap metal that he had removed from the factory to repair his stove at home. The commissioner found that dismissal was too harsh a sanction and ordered the

[^916]: 2008 12 BLLR 1211 (LAC). However, see *Shoprite Checkers (Pty) Ltd v CCMA & others* 2009 7 BLLR 619 (SCA) where the Supreme Court of Appeal found that the Labour Appeal Court’s decision to alter the award of non-retrospective reinstatement to reinstatement with full retrospective effect amounted to a misdirection because no ground existed for interference with commissioner’s decision.

[^917]: 2010 JOL 24970.

[^918]: Para 21.

[^919]: Para 38-39.

[^920]: 2010 10 BLLR 1017 (LAC).
employee’s reinstatement on a final written warning. On review, the award was set aside by the Labour Court. In an ensuing appeal, the Labour Appeal Court (per Patel JA) referred to various authorities that have held that dismissal was warranted in theft cases and concluded that the award was reviewable in so far as it was not justifiable in relation to the reasons given for it.\textsuperscript{921} On the basis of the factual findings made by the commissioner, the dismissal of the employee was accordingly found to be justified for operational reasons and fair.\textsuperscript{922}

\textit{MEC for Finance, KwaZulu-Natal \& another v Dorkin NO 540 \& another} is an example of a case where the Labour Appeal Court decided to set aside a decision on sanction based on reasonableness considerations.\textsuperscript{923} In this case, a director of the KwaZulu-Natal Department of Education was charged with misconduct involving the granting of student bursaries in excess of authorised amounts, the unauthorised purchase of goods for the department and the loss of assets under his control; resulting in a loss to the department of approximately R1.2 million. The disciplinary enquiry chairperson found the employee guilty on all counts and directed that he be given a final written warning. On appeal to the Labour Appeal Court, Zondo JP held that the chairperson’s conclusion that a final written warning was the appropriate sanction could only be reached by someone who did not exercise any discretion or who acted arbitrarily and did not apply his mind at all.\textsuperscript{924} In concluding that the decision was one that no reasonable person could reach on the facts of the case, the Court found that not even the employee’s twenty-one years of service and clean disciplinary record could save him from the sanction of dismissal. In \textit{Boxer Superstores (Pty) Limited v Zuma and others},\textsuperscript{925} an award for compensation was again found irrational because the commissioner had failed to provide reasons for awarding compensation instead of the default remedy of reinstatement in circumstances where the employer was found to have failed to discharge the onus of proving the substantive fairness of a dismissal.

On the other hand, \textit{Department of Labour v General Public Service Sectoral Bargaining Council}

\textsuperscript{921} Para 21.
\textsuperscript{922} The factual findings included among others that the company had a consistent policy of zero tolerance for theft that had been clearly conveyed to all the employees and that the employee had undoubtedly breached the relationship of trust built up over many years of honest service.
\textsuperscript{923} 2008 6 BLLR 540 (LAC).
\textsuperscript{924} Para 18.
\textsuperscript{925} 2008 9 BLLR 823 (LAC) para 11.
& others\(^{926}\) constitutes a judgment in which a commissioner’s decision on sanction was found to meet the reasonableness requirements. In this case, the commissioner had found dismissal to be the appropriate sanction for sexual harassment despite the appellate employer having offered the respondent employees the option of accepting a sanction short of dismissal. In the subsequent review application, the Court reasoned that the offer of an alternative sanction was an attempt to implement corrective discipline and an opportunity to the employees to correct their behaviour and to rehabilitate themselves.\(^{927}\) According to the Court, it was illogical to argue that alternative sanction considerations in compliance with a disciplinary code meant that the employment relationship was not intolerable and that the appellant employer showed some trust in the respondent employees. The Court reasoned that the alternative sanction was a form of punishment which had its own conditions which would, if successful, repair the respondent employees’ relationship with the appellant employer. The Court noted that the respondent employees were required to consent to a suspension from duty for a period of three months without pay as per the collective agreement as a measure of cooperation. According to the Court, it was clear from the judgment of the Labour Court that these factors were not considered when it made an order to review and correct the award rendered by the commissioner. In the circumstances, the Court concluded that the decision by the commissioner was not a decision that a reasonable decision maker could reach and the appeal succeeded.\(^{928}\)

In *Motsamai v Everite Building Products (Pty) Ltd*,\(^{929}\) the Labour Appeal Court again dealt with a penalty review in relation to a dismissal for sexual harassment. In this case, the commissioner had found the sanction of dismissal unfair and had ordered the re-employment of the employee. The Labour Court found no ground for reviewing the commissioner’s finding that the appellant was guilty of sexual harassment, but set aside the relief granted and substituted it with the sanction of dismissal. On the appeal of the review application, the Labour Appeal Court (per Waglay DJP) found it difficult to comprehend on what basis the employee could have escaped dismissal having regard to the following facts and circumstances: 1) the commissioner wrongly reduced the seriousness of the misconduct in the context of determining the appropriate sanction;

\(^{926}\) 2010 31 ILJ 1313 (LAC).
\(^{927}\) Para 32 and 33.
\(^{928}\) Para 34 and 38.
\(^{929}\) 2011 2 BLLR 144 (LAC).
2) the commissioner wrongly found that the company’s failure to convene a meeting between the employee and the complainant as provided for in the employer’s disciplinary code could serve as a mitigating factor; 3) the relief granted by the commissioner of re-employment in an unspecified position on new terms and conditions was not based on evidence that would justify it; and 4) the employee was found to have committed serious misconduct without repentance. Although the Court was mindful of the fact that its opinion as to the appropriate sanction was irrelevant, the Court found that any person in the position of the commissioner could not reasonably arrive at a decision other than the one that the dismissal was fair having regard to all the facts and circumstances as set out above. This judgment therefore gave substance to the principle - laid down in Mutual Construction, Miyambo and Department of Labour - that a sanction of dismissal must be justified by sound reasoning to escape reasonableness review. It did this by clearly demonstrating that, where a commissioner went wrong in his or her appreciation of the severity of the misconduct, made findings in mitigation which were not sustainable or did not have proper regard to the relevant facts in the determination of a penalty, the decision on sanction would be susceptible to reasonableness review.

It is submitted that the authorities discussed above demonstrate that a review directed at sanction or penalty will not easily be susceptible to a finding of unreasonableness. This is primarily due to the fact that penalty decisions constitute discretionary decisions which the courts recognise may differ from one decision-maker to the other without being labelled as unreasonable. To succeed in establishing that the relevant decision thus fall outside the recognised range of reasonableness, the applicant on review will have to prove that the decision is one that a reasonable decision-maker could not reach – put differently, that dismissal was the only conceivable sanction. As the cases demonstrate, it is only in exceptional cases that a sanction decision will foul fall of the reasonableness requirement – for instance where the decision is not justifiable in its reasoning to uphold a sanction of dismissal. Alternatively, there is authority for the view that a decision will also be reviewable for lack of reasonableness in instances where the decision-maker has failed to consider all materially relevant factors or have otherwise misdirected himself in making the decision subsequently challenged on review.

---

931 Para 26-27.
6 3 2  Findings in respect of relief

*Transnet Ltd v CCMA & others*.\(^{932}\) illustrates that a compensation award is also subject to the reasonableness qualification. In this instance, a senior managerial employee was dismissed after he had assaulted his wife at the workplace in such a manner that she suffered serious bodily harm. In arbitration proceedings before the CCMA, the commissioner found the dismissal substantively fair but procedurally unfair and awarded the employee six months’ remuneration as compensation. Upon review, Basson J found that the commissioner had failed to consider the seriousness and the highly offensive nature of the employee’s misconduct in arriving at the quantum of compensation. According to the Labour Court, a reasonable decision-maker would not have allowed the employee to benefit from his reprehensible actions, but would have concluded that it was not just and equitable to award compensation because the reprehensible nature of the misconduct outweighed any consideration of compensation.\(^{933}\) Similarly, in *Shoprite Checkers* the Labour Appeal Court allowed a cross-review because the commissioner’s non-retrospective order of reinstatement was found unreasonable.\(^{934}\) The Court reasoned that: 1) it was unable to reconcile the commissioner’s finding that the employee should forfeit more than two years’ worth of backpay with his finding that the employee should not have been dismissed and 2) the amount with which the employee had effectively been penalised bore no relation to the value of the food he had consumed.\(^{935}\) As is the case with penalty reviews, reviews against relief are therefore not easily assailable but requires something specific to challenge the decision based on reasonableness. Based on *Transnet Ltd* and *Shoprite Checkers* it is submitted that it can be contended that the decision just does not make sense having regard to all the circumstances before the decision-maker.

6 3 3  Findings of procedural unfairness

The role of reasonableness in procedural challenges on review is evident from *Mutual Construction*.\(^{936}\) In this case, the Labour Appeal Court (per Ndlovu AJA) considered whether a

---

\(^{932}\) 2008 29 ILJ 1289 (LC).
\(^{933}\) Para 29.
\(^{934}\) 2008 12 BLLR 1211 (LAC) para 26.
\(^{935}\) Para 25.
\(^{936}\) *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & others* 2010 JOL 24970. See para 6 3 1 above.
dismissal was procedurally unfair in so far as the employer had failed to specify in the charge sheet the alleged fraudulent entries recorded by the employee in its time sheets. The Court acknowledged that the charge sheet did not specify with any certainty what it was that the employee was alleged to have done in support of the charges preferred against him, but found that this procedural flaw was not so gross and of such a nature as to justify the vitiation of the process. According to the Court, it was clear from the employee’s evidence and the nature of his defence that he understood the nature and import of the charges he was required to answer and that these were also made clearer in the subsequent arbitration proceedings.  

In *Brolaz Projects v CCMA* the commissioner found the employee’s dismissal procedurally unfair because the employer had tainted the consultation process by unreasonably withdrawing a *mala fide* offer of alternative employment once the employee had accepted it. On review, Basson J however disagreed and found that the evidence did not support the conclusion that the offer was not made in good faith. The Labour Court then criticised the commissioner’s disregard of the employee’s short nine month period of employment and appalling performance record in coming to the conclusion to award him twelve months’ compensation. In the Court’s view the conclusion reached by the commissioner in respect of compensation was not one that a reasonable commissioner would have reached having regard to all the relevant factors, his own factual findings and the applicable case law. 

It is submitted that it can be deduced from the two judgments above that awards would be susceptible to review because it is unreasonable where commissioners impose too high a standard of procedural fairness or fail to have regard to all relevant factors, the factual findings and the applicable case law.

6 4  **REVIEWING FINDINGS OF FACT AND LAW**

6 4 1  **Dismissal for misconduct: findings regarding guilt**

---

937 Para 41.
938 2008 29 ILJ 2241 (LC).
In an earlier judgment of the Labour Appeal Court, namely that of Sil Farming CC t/a Wigwam v CCMA,\(^{939}\) the Court commented that a commissioner will arrive at a decision which no reasonable decision maker could reach if the decision was unsupported by any evidence, or by evidence that was insufficient to reasonably justify a decision arrived at or where the decision maker ignored uncontradicted evidence.\(^{940}\)

In Senama,\(^{941}\) the Labour Court also had an opportunity to comment on the role of reasonableness where the substantive fairness of a dismissal was upheld by the CCMA. In this instance it was alleged that the commissioner had confirmed a guilty finding because he failed to apply his mind to relevant evidence; considered evidence not placed before him; failed to attach sufficient weight to certain evidence and made findings that were not justifiable on the material before him.\(^{942}\) In dismissing the review application, the Labour Court held that the commissioner’s finding was based on a proper evaluation of the circumstances and the evidence that was led during the arbitration hearing and the commissioner had given reasons for accepting the version of the employer and rejected that of the employee.\(^{943}\)

In NUM & others v CCMA,\(^{944}\) the employees were dismissed after being found guilty of selling diesel from a company vehicle at a squatter camp as well as steel belonging to the employer to one of its competitors for their own profit. Although both employees denied that they were guilty of any wrongdoing, the commissioner found that the employer has proved its case and upheld their dismissals. On review, the employees contended that the commissioner had not explained why he had found them untruthful, that he had relied on hearsay evidence and that he had ignored the true reason for their dismissals, which was that the employees had recently joined a trade union. The Labour Court found that there was no basis on which the commissioner’s assessment of the evidence could be faulted for unreasonableness, both in respect of the assessment of the probabilities and credibility and the manner in which he approached the hearsay evidence.

---

\(^{940}\) Para 16.  
\(^{941}\) See para 6 2 3.  
\(^{942}\) Para 8-9.  
\(^{943}\) Para 20.  
\(^{944}\) 2010 9 BLLR 681 (LC).
presented by the employer.\textsuperscript{945} According to the Court, the commissioner had relied on such evidence in keeping with the provisions of the section 3(1)(c) of the Law of Evidence Amendment Act. In the circumstances, the Court found that the commissioner had not act unreasonably, but had applied his mind to the issue of the hearsay evidence which had been presented and had recognised that he was vested with the discretion in the interests of justice whether or not to accept such hearsay evidence.\textsuperscript{946}

Subsequently, in \textit{Bestel},\textsuperscript{947} the Labour Appeal Court had to determine whether the commissioner, in being confronted with two conflicting versions of events, had made a finding that was not supported by evidence that could reasonably justify the decision or, alternatively, made a finding in ignorance of evidence that remained uncontradicted. Having analysed the factual findings made by the commissioner in support of his conclusion that the employee was not guilty of dishonesty, the Court (per Davis JA) held that the appellant’s critical contentions of the commissioner’s construction of the evidence were insufficient to justify a conclusion that the commissioner’s findings on the facts supported by the evidence was insufficiently reasonable to justify his decision or made in ignorance of uncontradicted evidence.\textsuperscript{948} According to the Court, there was no thus basis by which the commissioner’s award should have been set aside on the \textit{Sidumo} test for review.

In the matter of \textit{Timothy v Nampak Corrugated Containers (Pty) Ltd}\textsuperscript{949} the employee had been dismissed for among others impersonating an attorney and bringing his employer’s name into disrepute. At arbitration, the commissioner found that the employee’s dismissal was unfair and ordered his reinstatement principally on the basis that the employee had not acted wilfully and had no intention of bringing his employer into disrepute. In upholding the decision of the Labour Court to set aside the award on review, the Labour Appeal Court (per Davis JA) found that the test as to whether an employee had brought an employer’s name into disrepute was an objective test as opposed to the subjective one incorrectly applied by the commissioner.\textsuperscript{950} According to the

\textsuperscript{945} Para 25.  
\textsuperscript{946} Para 24.  
\textsuperscript{947} See para 621.  
\textsuperscript{948} Para 30.  
\textsuperscript{949} 2010 8 BLLR 830 (LAC).  
\textsuperscript{950} 833.
Court, an objective test enjoined an examination, in all the circumstances, of the nature of the conduct, evaluating the turpitude and the seriousness thereof and then making an evaluation as to whether the charges could be sustained.\textsuperscript{951} The importance of this judgment lies in the finding by the Court that an erroneous legal approach to the determination of a charge of misconduct will render an award susceptible to review for want of reasonableness.\textsuperscript{952} Interestingly, the Court found that, had a reasonable decision-maker adopted an objective test to the facts of this case, there was no doubt that a conclusion opposite to that reached by the commissioner would have been sustained. Again this supports the submission that the error on the part of the decision-maker must be foundational to the decision that was made.

It is submitted that the abovementioned judgments of the Labour Court and Labour Appeal Court give content to the concept of reasonableness as introduced by \textit{Sidumo}, particularly in the context of factual findings relating to whether or not an employee is guilty of misconduct. In summary: a commissioner’s finding on the facts will be considered reasonable provided the following conditions are met: (a) it is supported by the evidence; (b) all relevant factors and circumstances of the case have been weighed and taken into account; (c) the decision-maker has applied the correct rules of evidence and did not deviate therefrom in such a nature that it materially denied a party a fair hearing; (d) the evidence is sufficient to reasonably justify the decision arrived at; (e) the decision-maker has taken into account the uncontradicted evidence; (f) adopted the correct legal approach in its application of the law to the facts in a charge of misconduct; and (g) the decision-maker has given reasons for his decision.

6.4.2 Findings as to jurisdiction

For the CCMA, as a creature of statute, to entertain a dispute, it must have the necessary jurisdiction in terms of the LRA to hear the matter. If a jurisdictional challenge is therefore raised and argued, the CCMA is obliged to determine the jurisdictional point before proceeding with a finding on the matter on the merits – hence the existence of jurisdictional rulings. \textit{In limine} points range from allegations of improper service and late referrals due to a failure to comply with

\textsuperscript{951} 834E-F.
\textsuperscript{952} See also \textit{Seardel Group Trading t/a Romatex Home Textiles v Petersen} 2011 2 BLLR 211 (LC) para 11-16.
prescribed time limits to points that the referring party is not an “employee” as defined by section 213 or has not been “dismissed” for the purposes of section 186. The question that arises is whether these findings qualify as jurisdictional rulings that are subject to review based on reasonableness. This very question was considered by the Labour Appeal Court in Fidelity Cash Management Services. The Court ruled that Sidumo have not obliterated the right to review CCMA’s awards on the grounds that the CCMA has no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. According to Zondo JP, questions as to the reasonableness of a decision would not arise if the CCMA had no jurisdiction in a matter or if the CCMA made a decision that exceeded its powers in the sense that it was ultra vires its powers.

From the foregoing judgement it appears as if the judicial review of jurisdictional findings by the CCMA are unaffected by the requirement of reasonableness. Such a conclusion is confirmed by the judgment of the Labour Appeal Court in SARPA. In that case, the Labour Appeal Court considered whether the Labour Court had correctly declined to review an award to the effect that the rugby players concerned had been constructively dismissed following a failure to renew their contracts on the same terms and conditions despite their reasonable expectation that their contracts were going to be renewed. In finding that no dismissal had been proved, Tlaletsi AJA referred to Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO & others and noted that the erstwhile Labour Appeal Court have held that the validity of the proceedings before the Industrial Court was not dependent upon any finding which the Industrial Court might have made with regard to jurisdictional facts, but upon their objective existence and that any conclusion to which the Industrial Court arrived at on the issue had no legal significance. In the context of the present case, the Court accordingly reasoned that it was not for the CCMA to grant itself

---

953 See Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & others 2009 12 BLLR 1214 (LC). There are jurisdictional rulings which are suited to be raised at the commencement of conciliation and those that better determined after the hearing of evidence at the arbitration phase. The former includes jurisdictional rulings which establishes threshold (e.g. condonation for late filling of the referral, whether bargaining council has jurisdiction over the parties or whether the dispute is the one contemplated by the Act) and the latter includes the determination of whether the applicant is an employee or whether there is a dismissal or not.

954 Para 101.

955 2008 9 BLLR 845 (LAC).

956 Para 3.

957 1994 15 ILJ 801 (LAC) 804C--D.
jurisdiction which it did not have; nor could it deprive itself of jurisdiction by making a wrong finding that it lacked jurisdiction which it actually had.\textsuperscript{958}

According to the Labour Appeal Court,\textsuperscript{959} the question was therefore not whether the commissioner’s finding that a dismissal had taken place was justifiable, rational or reasonable. The proper question to ask was whether, objectively speaking, the facts which would give the CCMA the jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary. This effectively meant that the CCMA or the bargaining council could not grant itself jurisdiction which it did not have and that the Labour Court may review such decisions to determine the existence of the prerequisite jurisdiction with reference to the existence of objective facts.\textsuperscript{960}

In the matter of \textit{J & J Nfreeze Trust v Statutory Council for the Squid & Related Fisheries of SA \& others},\textsuperscript{961} the Labour Court referred to SARPA\textsuperscript{962} when called upon to review a ruling which had effectively dismissed the employer’s jurisdictional point that the CCMA had no jurisdiction because the referring party was an independent contractor and not an employee. In this regard, the Labour Court held that it was its task to determine whether or not the objective facts provided the council with jurisdiction to entertain the unfair dismissal dispute.\textsuperscript{963} The court applied the aforementioned principle and concluded that the commissioner’s finding was “undoubtedly correct” as the objective facts of the case revealed that an employer/employee relationship existed between the parties.\textsuperscript{964}

Consistent with this approach, the Labour Appeal Court and Labour Court in \textit{Solid Doors (Pty) Ltd v Commissioner Theron}\textsuperscript{965} and \textit{Consol Glass (Pty) Ltd v CCMA}\textsuperscript{966} respectively also confirmed that the question of jurisdiction was a factual one that had to be determined objectively without reference to the standard of reasonableness.

\textsuperscript{958} Para 40.
\textsuperscript{959} Para 41.
\textsuperscript{960} See also \textit{Mokhethi v General Public Service Sectoral Bargaining Council and others} 2012 JOL 28180 (LC).
\textsuperscript{961} 2011 11 BLLR 1068 (LC).
\textsuperscript{962} Para 21.
\textsuperscript{963} Para 22-23.
\textsuperscript{964} Para 33.
\textsuperscript{965} 2004 25 ILJ 2337 (LAC) para 29.
\textsuperscript{966} 2011 JOL 28051 (LC) para 11.
In the more recent matter of *Joseph v University of Limpopo & others*, the Labour Appeal Court however diverted from the principles applied in *SARPA*, assessing the commissioner’s finding that the employee had been dismissed with reference to the reasonableness, rather than the correctness, thereof.\(^967\) The courts’ divergent attitudes raise the question which approach should be preferred. In so far as *Joseph* discourages interference with CCMA awards in line with the LRA, it seems preferable. Yet, notwithstanding the advantages thereof, in *University of Pretoria v CCMA & others* the Labour Appeal Court’s attitude reverted to that evinced in *SARPA*.\(^968\)

It is submitted that in terms of the judgments referred to above, the standard in jurisdictional reviews is not that of a reasonable decision-maker but whether the objective facts as they exist form a basis upon which the CCMA or bargaining council can assume jurisdiction. This requires the courts to apply their minds and determine whether the objective facts as presented gave the commissioner the jurisdiction upon which to entertain the dispute. According to Myburgh, this effectively means that applicants on review need to establish that the jurisdictional finding was wrong in order to succeed with the application.\(^969\) Such a conclusion however seems contrary to *Sidumo* when it is considered that the Constitutional Court has held that a commissioner, *conducting a CCMA arbitration*, was performing an administrative function\(^970\) and that such function was to be exercised reasonably. The Court did not stipulate that reasonableness was only applicable in the case of value judgments;\(^971\) nor did the Court hold that different requirements were to be applied depending on the nature of the dispute at arbitration. This was recognised by Ngalwana J in *Elston v McEwan NO and others*.\(^972\) The Court did not support the contention that *Sidumo* unreasonableness could not be relied upon because the present matter was not concerned with the unfairness of a dismissal but rather with a finding on a jurisdictional fact. According to the Court, there was nothing either in section 145(2) of the LRA or in the *Sidumo* judgment that confined the application of the review standard only to unfair dismissal cases. In the Court’s view, the standard in *Sidumo* was clearly the overarching standard of general application to all review cases outside those falling within the purview of PAJA.

\(^967\) 2011 32 ILJ 2085 (LAC).
\(^968\) 2012 2 BLLR 164 (LAC).
\(^969\) Myburg A “*Sidumo v Rustplats*” ILJ 11.
\(^970\) Para 88.
\(^971\) E.g. sanction and relief.
In addition to the foregoing, any requirement that implies that the applicant on review must show that the commissioner’s finding was “wrong” in order to have it set aside, also creates the risk of blurring the distinction between an appeal and review. It also does not take cognisance of the two different categories of jurisdictional facts identified by Corbett J in *SA Defence & Aid Fund v Minister of Justice* and approved of by Zondo JP in *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others.* In the former case the Court has held that:

> “Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a court of law. If the court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power (see eg *Kellerman v Minister of Interior* 1945 TPD 179; *Tefu v Minister of Justice and Another* 1953 (2) SA 61 (T)). On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his mind to the matter. (See eg *Minister of the Interior v Bechler and others* (supra); *African Commercial and Distributive Workers’ Union v Schoeman NO and Another* 1951 (4) SA 266 (T); *R v Sachs*, 1953 (1) SA 392 (AD).”

Commissioners are entrusted with the function of determining whether they have jurisdiction in a

---

973 1967 (1) SA 31 (C).
974 2000 12 BLLR 1389 (LAC).
975 34H-35D.
It is accordingly submitted that in the review of commissioners’ findings that they have the prerequisite jurisdiction to exercise their arbitration function, an alternative argument exists that the focus should be on the commissioner’s subjective reasons for his findings rather than the jurisdictional fact’s objective existence. The rationale for such an approach is evident from SARPA. The commissioner ruled that in his opinion the rugby players had had a reasonable expectation that their contracts would be renewed, that the contracts had not been so renewed and that the failure to renew those contracts constituted a constructive dismissal. It is submitted that it is difficult to perceive how these facts would be capable of being purely, objectively determined. The same principle will apply in any other instance where a value judgment has to be made or a discretionary power has to be exercised. It is further submitted that a court on review will only be able to review a decision following upon the non-observance of a jurisdictional fact if the commissioner, in deciding that the jurisdictional fact existed, committed one or more of the section 145 grounds for review (now suffused by reasonableness). Within the context of such an interpretation the court on review will also be entitled to ask whether a jurisdictional finding was one that a reasonable commissioner could make. It is partly also as a result of this uncertainty that a comparative study with English law is proposed.

6.5 CONCLUSION

In this chapter it has been established that there is inconsistency among the courts as regards the nature and application of reasonableness. On the one hand, Fidelity Cash Management Services, Value Logistics Ltd, Ellerine Holding Limited and Gold Fields Mining support reasonableness as a standard or test on review. On the other hand, Fidelity Cleaning (Pty) Ltd, Super Group Autoparts and Samancor prefer to treat reasonableness as a ground of review in addition to the section 145(2) grounds of review. Having regard to the above mentioned cases, it was however concluded that the terms “ground” and “test” should not be used interchangeably, but that it should be established whether reasonableness is intended to be the one or the other; having regard also to the ordinary English language meaning of “ground” and “test”. Specifically focusing on

976 See Rule 22 of the Rules for the Conduct of Proceedings before the CCMA. The question whether an employment relationship exists, also requires the resolution of factual disputes, the leading of oral evidence and a determination of questions of mixed law and fact on matters that are bound up with the substantive merits of the dispute and left for the CCMA’s final determination subject to review. See Eoh Abantu (Pty) Ltd v CCMA & another 2008 7 BLLR 651 (LC) para 24.
its meaning for purpose of review applications, it was determined that, as a “ground” of review, reasonableness would constitute a reference to the reason for the review. In other words, parties to a dispute will launch a review application on the basis of an allegation that the award is unreasonable per se. This would have the effect of widening the scope of review as provided for in section 145(2) of the LRA. On the other hand, as a “test” on review, reasonableness would not necessarily extend the section 145(2) grounds for review, but may potentially narrow it. When applied in the latter sense, the court will effectively review and set aside an award if the decision, alleged to be arrived at as a result of the occurrence of one or more of the grounds for review contained in section 145(2) of the LRA, is one that a reasonable decision-maker could not have made in all the circumstances of the case. In other words, it would constitute a measure employed to determine whether the conditions for interference on review, as captured in section 145(2), have been met.

However, be that as a standard or ground of review, it was established that reasonableness is not encompassing and that the section 145(2) grounds of review have not been superseded as a result of reasonableness “suffusing” section 145 of the LRA.977

In seeking further clarity on this reasonableness issue, the question was posed whether reasonableness was outcome - or processed focus. Reference was made to Fidelity Cash Management Services and in particular the finding that a flawed process of reasoning was not reviewable if the conclusion reached by the commissioner was sustainable on all the evidence before him or her. In this regard, the judgments of Rawdaw, RSA Geological Services and Senama were considered. The latter judgments confirmed, contrary to Fidelity Cash Management Services, that any error alleged on review must be foundational or material to the reasoning of the award in order to render it reviewable. In fact, case law revealed that the materiality of an error was determined having regard to the material before the commissioner and the conclusion arrived at. To this end, the question that had to be asked and answered was whether or not the conclusion was sensibly connected to the reasons taking into account the material (or evidence) before the

977 See Maepe v CCMA & another 2008 8 BLLR 723 (LAC); SA Rugby Players' Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby Pty Ltd v SARPU & another SARPA 2008 9 BLLR 845 (LAC) and Group Six Security Services (Pty) Ltd & Andrew Masters v R Moletsane, CCMA & Dean Weller unreported Labour Appeal Court judgment; JA77/05 (26 February 2009).
commissioner or alternatively, whether the commissioner’s “bad” reasons or errors served as evidence of the occurrence of one or more of the section 145(2) grounds for review as suffused by reasonableness. This was recognised as a thin line as the reviewing court should not be required to scrutinise material in order to find whether or not the decision was one that a reasonable court could not reach.

Based on these case law discussions, it was further argued in harmony with the distinction between an appeal and review that, if the error or bad reason constituted proof of the fact that the decision was reached as a result of the occurrence of one or more of the section 145(2) grounds of review, it should be set aside on review regardless of the fact that the decision could be sustained by other reasons identified in the record. On the other hand, if the “bad reasons” or “errors” amount to an incorrect factual finding, as in the Sidumo case, which, as discussed is not a ground of review, the award would not be reviewable unless the incorrect factual findings constitute evidence of one or more of the reviewable grounds. However, although the focus should always be on the way in which the commissioner arrived at his conclusions, rather than the outcome of the process, this does not mean that any defect or error in the reasoning process will render a decision reviewable. The reviewability of a decision all depends on whether or not the erroneous or “bad” reasons for the decision can be ascribed to one or more of the ground for review in terms of section 145(2) of the LRA.

The practical application of reasonableness was also discussed in relation to guilt, sanction and relief findings in disputes relating to dismissals for misconduct as well as procedural fairness and findings as to jurisdiction. It was established that reviews directed at penalty and/or relief had as its subject discretionary decisions, calling for the exercise of a value judgment by the decision-maker without there necessarily being a single right or wrong answer. As a result, it was established that it will not be often that a decision-maker’s decision will be found to fall outside the range of reasonableness and thus be reviewable in terms of Sidumo reasonableness. However, in Senama, Karen Beef, Hulet Alumium and Tao Ying Matal Industries, the challenge before the court was not the outcome of a discretionary decision, but rather a dispute as to whether or not the commissioner had applied his or her mind to all the relevant facts and the law in making

---

978 The focus on review should always be the process leading to the decision and not the decision itself.
that decision. Herein the court recognised an important qualification to the reasonableness of outcome approach which relates to the consideration of materially relevant factors. Essentially it provides that an award will be unassailable on the basis of unreasonableness if it is established that a commissioner has applied his or her mind to the facts and the law and that he/she has not otherwise misdirected him/herself.

In relation to guilty findings challenged on review, it was established that a commissioner's finding on the facts will be considered reasonable provided the following conditions are met: 1) it is supported by the evidence; 2) all relevant factors and circumstances of the case has been weighed and taken into account; 3) the decision-maker has applied the correct rules of evidence and did not deviate from them to such an extent that it materially denied a party a fair hearing; 4) the evidence is sufficient to reasonably justify the decision arrived at; 5) the decision maker took into account the uncontradicted evidence and/or 6) adopted the correct legal approach in its application of the law to the facts in a charge of misconduct.

In relation to sanction findings, it was established that sound reasoning was required in order to justify a sanction on a reasonableness review. In fact, it was demonstrated that, where a commissioner wrongly appreciated the severity of the misconduct, made findings in mitigation which were not sustainable or did not have proper regard to the relevant facts in the determination of a penalty, the decision on sanction was susceptible to a reasonableness review. Likewise, where a commissioner fails to objectively rationalise his/her finding as to the appropriate relief or imposes too high a standard of procedural fairness, the award will be susceptible to review because it is unreasonable.

In relation to jurisdictional reviews, Fidelity Cash Management Services, SARPA, J & J Nfreeze Trust and University of Pretoria were referred to. These judgments made it clear that the question of reasonableness did not arise in relation to jurisdictional reviews. However, in contradiction thereto, the courts in SA Defence & Aid Fund and Fidelity Guards Holdings (Pty) Ltd argued that the focus in jurisdictional reviews was on the commissioner’s subjective reasons for his findings rather than the jurisdictional fact’s objective existence, and hence the reasonableness standard was capable of being applied thereto. In Joseph, the Labour Appeal Court also assessed the
commissioner’s finding that the employee had been dismissed with reference to the reasonableness thereof. On this basis, a court on review will be able to set aside a decision following upon non-observance of the jurisdictional fact if the commissioner, in deciding that the jurisdictional fact existed, committed one or more of the section 145(2) grounds of review.

Finally, to the extent that section 145(2) of the LRA prescribes the statutory grounds of review, it was reasoned that it was not for the courts to introduce reasonableness as an independent (statutory) ground of review. It was argued that the proper approach is for litigants to challenge the constitutionality of section 145 of the LRA by either alleging that the remedy of review as provided for therein is inadequate or do not give proper effect to the right to just administrative action as contained in the 1996 Constitution. Only in such an instance will the court be able to determine whether section 145 infringes the right to just administrative action as contained in the 1996 Constitution and, if so, whether the infringement can be justified as a permissible limitation in terms of the section 36 of the 1996 Constitution, failing which section 145 would be capable of being declared unconstitutional. The only alternative is for the legislature to intervene and amend section 145(2) to include reasonableness as a ground of review.

This chapter indicates that in the five years since the Sidumo judgment was handed down, the courts have made significant strides in interpreting and applying reasonableness and have produced a reasonably consistent jurisprudence dealing therewith. Although reasonableness is now better understood than before these judgments were made available - as this chapter reflects - there are still a number of key issues that have yet to be finally settled. It is for the purpose of seeking clarification as well as guidance and direction in the interpretation of the role, nature, impact and content of reasonableness in South African law that a proposal has been made for a comparative study with English law.

979 2011 32 ILJ 2085 (LAC).
980 Currie & De Waal The Bill of Rights Handbook 32.
CHAPTER 7

A COMPARISON

7.1 INTRODUCTION

In this chapter the similarities and differences between the role of reasonableness in English administrative and employment law compared to the role in South African employment law are identified and highlighted. This will be done in order to construct a foundation for making recommendations suitable for implementation in the South African employment law setting.

7.2 THE ROLE OF JUDICIAL REVIEW IN THE SOUTH AFRICAN AND ENGLISH ADMINISTRATIVE LEGAL SYSTEM

Judicial review in England and South Africa is a procedure whereby the courts may exercise supervision and control over the exercise of power by public authorities.982 In South Africa, a distinction is drawn between judicial review under the common law - and constitutional dispensation.983 At common law, judicial scrutiny of administrative decisions was possible via the High Courts’ inherent power of judicial review. With no statutory framework from which to operate, the courts developed administrative law principles on a case by case basis; having regard to English administrative law. The South African principles of common law review were therefore strongly influenced by the English doctrines and grounds of review. The courts, for example, accepted that a review ground was only established once it was shown that the decision-maker had failed to apply his or her mind to relevant matters in accordance with the applicable statutory requirements and the principles of natural justice. Unreasonableness review was also very narrowly circumscribed. The substantive unreasonableness of a decision was not regarded as an independent ground of review. Unreasonableness only became relevant if it was of such a degree that it was symptomatic984 of another ground of review like *mala fides*, ulterior motive or

---

982 See chapter 2 para 2 2 1.
983 See chapter 2 para 2 2 1 1 and 2 2 1 2.
984 This descriptive term was coined by Jerold Taitz “But ‘Twas a famous victory” 1978 *Acta Juridica* 109 111. He gave the example where the consequences of an administrative act were unreasonable but the unreasonableness
the failure of a decision-maker to apply his or her mind to the matter concerned.\textsuperscript{985} This played an important role in delineating the scope of review and unreasonableness review in particular.

Under the constitutional dispensation, parliamentary sovereignty was rejected; the rule of law was recognised as one of the founding values of the constitutional regime and the courts were empowered to review legislation and conduct inconsistent with the 1996 Constitution.\textsuperscript{986} As custodian of the fundamental rights entrenched in the 1996 Constitution, the courts’ role has developed to include giving content and meaning to the values and principles contained in the 1996 Constitution and to ensuring that the exercise of powers is authorised and complies with the law. One of the fundamental rights is the right to lawful, \textit{reasonable} and procedurally fair administrative action provided for in section 33 of the 1996 Constitution. The right to fair administrative action has been given statutory effect to by means of PAJA. Section 6(2)(a) to (i) of PAJA provides for the review of administrative action on a non-exhaustive list of grounds, including irrationality and unreasonableness. These grounds are viewed as a codification of the common law grounds. Unless inconsistent, the common law meaning of the grounds continue to find application.\textsuperscript{987} PAJA does not distinguish between reviewable and non-reviewable errors of law, but every material error of law permits judicial review.\textsuperscript{988}

In terms of the English legal tradition, parliament is sovereign. Administrative decision-makers are primarily responsible for exercising administrative powers and making administrative decisions on the merits of a matter. The role of the review court has traditionally been limited to deciding whether administrative decision-makers had stayed within the bounds of their powers, expressly or impliedly conferred upon them by Parliament. Decision-makers stayed within the bounds of their powers by properly interpreting the law, not infringing the public law recognised

\textsuperscript{985} See Chapter 2 para 2 2 1 1; see also \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others} 2004 4 SA 490 (CC) para 43; \textit{Union Government v Union Steel Corporation Limited} 1928 AD and \textit{Northwest Township (Pty) Ltd v The Administrator, Transvaal} 1975(4) SA 1 (T).

\textsuperscript{986} See chapter 2 para 2 2 1 2.

\textsuperscript{987} See chapter 2 para 2 2 2. Common law administrative law remains relevant in so far as its principles that had previously provided the grounds for judicial review have been included therein to the extent that it is not inconsistent with it. Inconsistencies aside, what is lawful, reasonable and procedurally fair under the 1996 Constitution is therefore considered to have the same meaning as provided for in terms of the common law.

\textsuperscript{988} See section 6(2)(d).
principles that govern the exercise of discretionary powers and following a fair procedure. As such, judicial review was based upon an appraisal of the manner of decision-making only to determine its lawfulness. It did not empower the review court to substitute its own decision for the decision of the administrative decision-maker. A decision that was properly made within the boundaries of the administrative power could not be challenged.

A changing philosophy however appears to have permitted greater scope for review. Judicial review is presently provided for in English administrative law in terms of section 31 of the Senior Courts Act 1981 on the ground of a (statutorily undefined) error of law. Since Anisminic Limited as expounded in Pearlman and ex parte Page, the English courts do not in principle distinguish between jurisdictional and non-jurisdictional errors of law to determine the scope of review, but view almost all errors of law as jurisdictional errors. In the normal course, questions of fact are not reviewable. There is growing support for the proposition that a material finding of fact will be reviewable if it was made in the absence of evidence to support that finding, in consequence of failing to take account of a relevant consideration or upon taking into account an irrelevant consideration. These developments have challenged the traditional position that the courts do not engage in some form of merits review. Provision has also been made for the review of non-statutory and/or prerogative powers that cannot be justified purely with reference to vires, intention and statutory construction. Unreasonableness has also been recognised as an independent ground of review rather than evidence that a decision-maker had misunderstood the relevant law or overlooked a critical and required criterion. Guided by the Wednesbury formation of unreasonableness, the courts accept that they do not interfere with a discretionary decision unless it is so unreasonable that no reasonable authority could ever have come to it. The Wednesbury formation of unreasonableness has been labelled practically

989 See chapter 3 para 3 2.
990 1969 2 AC 147.
991 1979 QB 56.
992 1993 AC 682.
993 See chapter 3 para 3 3 1. In the event of a jurisdictional error of law, the decision-maker embarks upon an unauthorised inquiry. In the event of a non-jurisdictional error of law, the decision-maker embarks upon an authorised inquiry, but exercise his or her powers in an unauthorised manner.
994 See Chapter 3 para 3 4 1 2.
995 See Council of Civil Service Unions v Minister for the Civil Service 1984 3 All ER 935 in chapter 5.
inadequate due to its vagueness and deferential nature, leading to frequent attempts at redefinition by the English courts. The unreasonableness standard has caused similar uncertainty in South Africa.\footnote{214}

Although England is not a constitutional state that allows judicial review of the lawfulness of acts of parliament, section 3 of the Human Rights Act 1998 provides that all legislation in the United Kingdom must be interpreted, as far as possible, in accordance with the European Convention of Human Rights. Where this is not feasible, the courts may issue a declaration of incompatibility. Section 6 of the same Act recognises that public authorities have a duty to act in accordance with the fundamental rights set out in the European Convention on Human Rights. This means that public authorities may be subject to judicial review on the ground that they have unlawfully breached one or more of the convention rights. The grounds of review are therefore considered to encompass fundamental rights in addition to the orthodox process-oriented rights.\footnote{531}

Taking the above considerations into account, the distinction between parliamentary sovereignty in England and constitutional supremacy in South Africa is not considered a hindrance to a comparison between English and South African law for the purpose of interpreting the role of reasonableness in judicial review in South African employment law.

\section*{JUDICIAL REVIEW DISTINGUISHED FROM APPEAL\footnote{532}}

In South Africa and England the validity of administrative decisions can be challenged in court by means of review or appeal.\footnote{533} Theoretically, the maintenance of the distinction between the

\footnotesize
\begin{itemize}
\item \footnoteref{214} See chapter 4 para 4 3.
\item \footnoteref{531} M Elliot \textit{The Constitutioonal Foundations of Judicial Review} (2001) 4. See also A Freckelton \textit{The Concept of Deferece in Substantive Review of Administrative Decisions in Four Common Law Countries} Degree of Master of Laws University of British Colombia (2013) 97. The Human Rights Act 1998 has incorporated the European Convention of Human Rights into law in the United Kingdom. As a result, the substantive review of administrative decision-making differs depending on the kind of law in question: 1) the courts undertake a proportionality review when considering European Union laws applicable or expressly implemented in England; and 2) in cases not involving any form of European Union law, the courts use a “sliding scale” of reasonableness.
\item \footnoteref{532} See Chapter 2 para 2 3.
\item \footnoteref{533} M Wiechers & Y Burns “Administrative Law” in LAWSA 1 2ed (2003) para 158. South Africa does not have a general administrative appeals tribunal; instead legislation on an \textit{ad hoc} basis makes provision for appeals from administrative bodies to a wide range of officials, boards, tribunals and courts.
\end{itemize}
two processes is one of the fundamental principles in South African and English administrative law generally and in judicial review in particular. The differences are briefly repeated here.

Whilst the reasoning behind the institution of an appeal or review is usually the same – namely to have the administrative decision set aside - England and South Africa distinguish between the two processes on the basis that they reconsider decisions in different ways and perform different functions.\footnote{Chapter 2 para 2 3 and chapter 3 para 3 2 1.} Firstly, in England, the right of appeal from administrative decisions exist only where it is provided for by statute. Depending on the provision, the scope of an appeal may be extended to matters of fact or law or both.\footnote{Chapter 2 para 2 3. See P Cane Administrative Law 43. D Pollard, N Parpworth & D Hughes Constitutional and Administrative Law: Text with Materials 4 ed (2007) 475.} Where a statute does not restrict the grounds of appeal, an appeal may be utilised to challenge a decision on the basis that the decision-maker came to the wrong conclusion on the facts or the law.\footnote{For example an appeal against conviction or sentence in the Criminal Appeals Act 1968.} As the challenge in these circumstances requires a fresh decision on the outcome, the appellate court is entitled to re-examine the dispute, including the arguments of fact. The appellate body may enquire whether another decision-maker could have come to a different conclusion and, depending on the answer, to declare the original decision \textit{incorrectly} determined.\footnote{Chapter 2 para 2 3.} In South Africa, legislation makes provision on an \textit{ad hoc} basis for administrative appeals. The scope and power of the appeal as well as the procedure to be adopted vary in accordance with the provisions of the constitutive legislation.\footnote{L G Baxter “Administrative Institutions and the Administrative Process” (1984) Annual Survey of SA Law 32 33; Hoexter Administrative Law 64. For example, the Lands Claims Court by section 22 of the Restitution of Land Rights Act 22 of 1994; Competition Appeal Court by section 37 of the Competition Act 89 of 1998; Commissioner of Patents by section 75 of the Patents Act 57 of 1978; Labour Court and Labour Appeal Court by sections 151, 158, 167 and 174 of the LRA. See also South African Law Reform Commission Project 24 Investigation into the Courts’ Powers of Review of Administrative Acts (1992) (Project 24) 106.} Irrespective whether the administrative appeal is limited to the record of the initial proceedings or constitutes a hearing \textit{de novo},\footnote{Tikly v Johannes NO 1963 2 SA 588 (T) 590F-591A. Hoexter Administrative Law 66.} the administrative appeal is concerned with the actual \textit{merits} of the decision and if the decision reached was \textit{correct}.

Opposed thereto, judicial review in England and South Africa originate from the courts’ inherent power under the common law to determine whether an administrative act or omission was \textit{lawful}. Viewed as a supervisory jurisdiction, review courts are not concerned with the correctness of the
primary decision, but with the manner in which the decision was reached. The review court must establish whether the outcome could be sustained on the facts found and the law applied by the original decision-maker. The review court does not embark upon a fresh assessment of the merits, based upon the evidential material before the decision-maker, and exercise its own discretion as to what is fair and reasonable. Where the objection relates to the method whereby the result was obtained, the review court typically scrutinises the conduct of the proceedings to determine the correctness of the procedure that was followed. The considerations which are taken into account are process-related. The review court does not consider in principle whether the record reveals relevant considerations that are capable of justifying the outcome. In this manner, the review courts are not usurping the inherent discretionary or decision-making powers of the executive, but are maintaining the requisite checks and balances.

The remedies available on appeal and review also differ. Where a statute does not restrict the grounds of an appeal and it is established that the original decision was incorrectly determined, the administrative appeal body may set aside the original decision and make another decision in substitution. By contrast, South African and English law recognise that the characteristic judicial review remedy is to set aside the original decision and remit it to the original decision-maker for reconsideration. It is only in exceptional cases that the original decision will be substituted or varied. In English administrative law, the primary judicial review remedies are aimed at ensuring that the original decision-maker makes a lawful decision. The primary judicial review remedies do not intend the review court to step into the shoes of the original decision-maker and make a decision in its stead. Similarly, South Africa’s preferred remedy in terms of PAJA entails setting aside the administrative action and remitting the matter for reconsideration by the administrative decision-maker, with or without directions.

1007 See the South African cases of Lekota v First National Bank of SA Ltd 1998 10 BLLR 1021 (LC); Coetzee v Lebea NO 1998 JOL 3657 (LAC) and the English case of R v Secretary of State for the Home Department, ex p Launder 1997 1 WLR 839 referred to in chapter 2 para 2 3.
1008 The courts apply general legal principles of legality, rationality or procedural propriety.
1009 In England, for example, the Upper Tribunal (in an appeal from the First Tier Tribunal) can substitute its decision for that of the decision-maker based on it being the wrong decision. In South Africa, the appellate body is allowed to step into the shoes of the original decision-maker and decide the matter anew. See Hoexter Administrative Law 63.
1010 An example is S8(1)(c)(ii)(aa) of PAJA. It recognises that the court may make any order in exceptional cases – substituting or varying the administrative action or correcting a defect resulting from the administrative action.
1011 Chapter 3 para 3 2 1. I.e. a mandatory, prohibitory or quashing order or an injunction or declaration.
1012 See section 8 of PAJA.
Despite the theoretical differences detailed above, the term “appeal” and “review” in practice continue to be difficult to define.\textsuperscript{1013} The focus of judicial review frequently falls on the merits of the decision as opposed to the decision-making process.\textsuperscript{1014} An example is unreasonableness review. In some matters it is impossible to separate the merits from the rest of the matter, since the court must consider the merits to effectively judge the legality of the decision.\textsuperscript{1015} A clear distinction between appeal and review is further complicated because of an overlap between the processes that brings into question the authenticity of the distinction. Firstly, in some instances a statutory appeal process may be available as an alternative to judicial review proceedings.\textsuperscript{1016} Secondly, not all appeals are on “the merits”, but an appeal may be limited to points of law as well.\textsuperscript{1017} In those instances, the grounds for intervention are the same as those in a claim for judicial review.\textsuperscript{1018} The appeal body does not reconsider the disputed decision on the merits. The appeal body identifies and corrects substantive and procedural errors of law with reference to general principles of law, jurisdiction, legality and natural justice. An example is section 21(1) of the Employment Tribunals Act 1996 in England.\textsuperscript{1019} Limited to errors of law, the Appeal Tribunal does not in principle re-examine disputes of fact to determine whether the Tribunal decision was incorrect, but ensures that the correct and consistent interpretation of the law has been applied. Compatible with English judicial review, it is only in exceptional circumstances that errors of fact provide grounds for a successful claim on appeal on a point of law.\textsuperscript{1020} Both processes only allow for the setting aside and substitution of the original decision in exceptional

\textsuperscript{1013} See G C Armstrong \textit{Administrative Justice and Tribunals in South Africa: A Commonwealth Comparison} Degree of Master of Laws University of Stellenbosch (2011) 32-33.

\textsuperscript{1014} See Chapter 2 para 2 3. Hoexter \textit{Administrative Law} 106.

\textsuperscript{1015} Hoexter \textit{Administrative Law} 106. These include whether sufficient weight was given to a relevant consideration, whether an ulterior purpose or motive was pursued by the decision-maker, whether the decision was dictated by an unauthorised person or body or whether the decision-maker adhered rigidly to a policy or precedent.

\textsuperscript{1016} In South Africa, the Competition Appeal Tribunal for example functions as both a court of appeal and review in respect of decisions of the Competition Tribunal. In England, a special appeal tribunal for example exists to deal with challenges to decisions of the disability tribunal; albeit it being an administrative decision. See \textit{Moyna v Secretary of State for Work and Pensions} 2003 UKHL 44.

\textsuperscript{1017} D Feldman English Public Law 2 ed (2009) 866. In South African criminal procedure, the powers of the court are on appeal the same as on review, with the addition that a sentence can be increased. See section 304(2)(c) of the Criminal Procedure Act 51 of 1977 applied to appeals by section 309(3). The prosecution may for example appeal against the granting of bail, an acquittal on a legal ground and also against an inadequate sentence. The prosecution does however not have a right to appeal against a finding of not guilty in relation to the facts of the case - the so-called appeal on the merits. See section 310 of the Criminal Procedure Act 51 of 1977. In England, see \textit{Bangs v Connex South Eastern Ltd} 2005 EWCA Civ 14 para 8.

\textsuperscript{1018} P Cane \textit{Administrative Law}182.

\textsuperscript{1019} See Chapter 4 para 4 3.

\textsuperscript{1020} Chapter 4 para 4 4.
circumstances: on appeal to the Appeal Tribunal, where the decision is plainly and unarguably wrong and on review in England,\textsuperscript{1021} where there is only one decision that could have been reached, but for the error.\textsuperscript{1022} Thirdly, a statute may recognise grounds of appeal that encompass judicial review grounds. An error of law in appeal proceedings may therefore also constitute an error of law on review.\textsuperscript{1023} In England, the illegality ground of review for example reflects the ground of appeal in English employment law that the decision was not in accordance with the law. Both processes require decision-makers to interpret the law correctly, exercise a power for the purpose imposed, consider relevant factors and ignore irrelevant factors.\textsuperscript{1024} The similarity in grounds is further demonstrated with reference to the concept of unreasonableness in England. The appellate courts refer to the interpretation of unreasonableness in judicial review proceedings in the administrative law context to establish the meaning of perversity in appeal proceedings.\textsuperscript{1025}

This similarities and differences between appeal and review are important because, as is evident from the discussions in chapter 3 and 6, section 145 of the LRA in South Africa affords a special statutory power of \textit{review} to the Labour Court in order to scrutinise CCMA awards. On the other hand, in England, section 21(1) of the Employment Tribunals Act 1996 specifically allows for an \textit{appeal} against a Tribunal finding to the Appeal Tribunal on the basis of a question of law only.

7.4 REASONABLENESS IN ENGLISH ADMINISTRATIVE LAW

As mentioned above, English public law traditionally based judicial review upon \textit{procedural} standards. The determination of evidential or factual questions remained the ultimate responsibility of the original decision-maker. Focused on the \textit{manner} in which a decision was taken,\textsuperscript{1026} judicial intervention did not require freshly reassessing the matter to determine whether the court preferred a decision different to the one made by the original decision-maker. It was, however, also recognised that there should be a measure of judicial control over the exercise of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1021} Chapter 4 para 4.3.
\item \textsuperscript{1022} Chapter 3 para 3.2.1.
\item \textsuperscript{1023} See Anisminic Ltd v Foreign Compensation Commission 1969 2 AC 147.
\item \textsuperscript{1024} Chapter 3 and 4.
\item \textsuperscript{1025} See Dobie v Burns International Security 1984 ICR 812.
\item \textsuperscript{1026} See Chapter 2 para 2.3 and Chapter 3 para 3.2.1. See also Chief Constable of the North Wales Police v Evans 1982 3 ALL ER 141, Council of Civil Service Unions v Minister for the Civil Service 1984 3 All ER 935 and R v Secretary of State for the Home Department, ex p Launder 1997 1 WLR 839 847.
\end{enumerate}
\end{footnotesize}
discretionary decisions; without it causing a substitution of judgment or too great an intrusion on the merits. It was therefore accepted that administrative decisions could be challenged on the basis of *unreasonableness*, but only by having recourse to the principle of an inferred but unidentified error of law attributable to the decision-maker.\textsuperscript{1027}

In the seminal decision in *Wednesbury Corporation*, the Court envisaged unreasonableness as having a twofold meaning.\textsuperscript{1028} Unreasonableness was firstly used as a heading for the various grounds of challenge pertaining to legality when decision-makers exercise discretionary powers.\textsuperscript{1029} Decisions were required to be properly reasoned and based on relevant considerations and material evidence. Unreasonableness embraced a variety of defects including misdirection in law, an improper purpose, disregard of relevant considerations and advertence to immaterial factors.\textsuperscript{1030} If a decision was made outside the terms of the powers conferred upon the decision-maker by the legislature, the courts were allowed to intervene. Secondly, unreasonableness, regarded as a synonym for irrationality, was afforded a substantive meaning in its own right distinct from illegality and/or procedural impropriety.\textsuperscript{1031} Whilst a decision-maker may have acted within the scope of the powers conferred upon him or her, interference on the basis of substantive unreasonableness was warranted if the decision was so unreasonable that no reasonable authority, properly directing and applying his or her mind to the question to the decided, could ever have come to it.\textsuperscript{1032} In terms of *Wednesbury* unreasonableness, the courts presumed that the decision was unlawful. *Wednesbury* unreasonableness was considered to be an objective measuring stick that imposed limits on which outcomes could not be pursued without dictating the specific outcomes that should be reached. Prevalent in the review of matters of substance such as fact-finding, weighing of factors, judgment and the exercise of discretion by administrative decision-makers, *Wednesbury* unreasonableness prevented the courts from overstepping their proper bounds and interfering too greatly in the merits of a matter.\textsuperscript{1033}

\textsuperscript{1027} See *Council of Civil Service Unions v Minister for the Civil Service* 1984 3 All ER 935. See Chapter 3 para 3 3 3.
\textsuperscript{1028} See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1948 1 KB 223 and *R v Chief Constable of Sussex, ex parte International Trader’s Ferry Ltd*.
\textsuperscript{1029} 228-231; Chapter 3 para 3 3 3.
\textsuperscript{1030} A broader unreasonableness.
\textsuperscript{1031} Chapter 3 para 3 3 3.
\textsuperscript{1032} Chapter 3 para 3 3 3. I.e. the irrationality is apparent from the decision itself and there is no need to examine the factors considered, or the motivations for, reaching the decision.
\textsuperscript{1033} Chapter 3 para 3 6.
The *Wednesbury* unreasonableness standard required the unreasonableness of a decision to be readily apparent and indefensible from the decision itself. Over time, the *Wednesbury* unreasonableness standard has been relaxed. The courts query whether the exercise of discretion was *reasonable*. In *International Trader’s Ferry Ltd*, the Court questioned whether the decision was one that a reasonable authority could have reached.\(^\text{1034}\) In *ex parte Smith*, the Court again enquired whether the decision was beyond the range of responses open to a reasonable decision-maker.\(^\text{1035}\) The requirement that the exercise of a discretion must be *reasonable* imposed an obligation on the judiciary to *identify* and *articulate* the *basis* for finding that a discretionary decision was one which could not reasonably have been made.\(^\text{1036}\)

In an unreasonableness review, the courts therefore comment on the reasonable or logical connection between the evidence thought by the court to be true and the reasoning or purposes supporting the decision that was made. An unreasonableness review is effectuated on the basis of the substantive quality, intelligibility and/or justification of the decision underlying the manner in which the discretion itself was exercised.\(^\text{1037}\) Unreasonableness review constitutes a deviation from the general principle that judicial review is concerned with the legitimacy of the original decision rather than the accuracy thereof. Decision-makers must apply logical or rational principles in their decision-making process so as to make a competent decision based on the available facts.\(^\text{1038}\) Unlike an illegality and/or procedural impropriety challenge, an unreasonableness allegation cannot be tested against a *correctness* standard. By its very nature, a *discretionary choice* recognises that there is room for legitimate disagreement and a right to choose between more than one possible course of action.\(^\text{1039}\) A discretionary choice excludes from the ambit of unreasonableness review differences of opinion that may exist among reasonable persons.\(^\text{1040}\) The question is whether the evidence is such that a reasonable person could have reached the decision from the evidence and the inferences. A decision would, for example, be unreasonable where the evidence, reasonably viewed, is incapable of supporting the

\(^\text{1034}\) Chapter 3 para 3.5.1.
\(^\text{1035}\) Chapter 3 para 3.3.3. See also *R v Secretary of State for the Home Department, ex parte Daly* 2001 2 AC 532 549.
\(^\text{1036}\) Chapter 3 para 3.5.2 and 3.6.
\(^\text{1037}\) Chapter 3 para 3.3.3 and 3.5.
\(^\text{1038}\) See Chapter 3 para 3.3.3.
\(^\text{1039}\) See *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* 1977 AC 1014; Chapter 3 para 3.3.3.
\(^\text{1040}\) See *Re W (An Infant)* 1971 AC 682. See chapter 3 para 3.3.3.
decision made\textsuperscript{1041} because it is inconsistent with adopted guidelines or policy and that inconsistency is not adequately explained. A mistaken exercise of judgment must contain an element of perversity, arbitrariness or absurdity to be reviewable.\textsuperscript{1042}

Other than the moral element evident in the courts’ formulation of the test, unreasonableness does not identify further factors that would assist a review court in identifying an unreasonableness decision.\textsuperscript{1043} The courts have, however, accepted that unreasonableness requires decision-makers to consider and balance all relevant considerations;\textsuperscript{1044} disregard irrelevant information and make decisions that are logical and/or comprehensibly justifiable\textsuperscript{1045} and founded upon probative evidence. Decisions should also not demonstrate inconsistency; discord between the means employed and the aim sought to be attained or create legal uncertainty. Nonetheless, the task of the review court remains supervisory and the review court is in principle not entitled to substitute the original decision with its own unless, without the error, there would have been only one decision which the decision-maker could have reached. In the end, the test for reasonableness requires the courts to make a secondary decision, with the primary decision about the merits of the matter being left to the public authorities.\textsuperscript{1046}

The role of unreasonableness is prominent when distinguishing between an error concerning the law that demarcates the decision-maker’s powers\textsuperscript{1047} and a mistake in the application of the statutory criteria to the facts of a particular case.\textsuperscript{1048} In the first instance, the willingness of the review court to substitute its own judgment for that of the original decision-maker varies with the nature of the jurisdictional, statutory term in question. Where the jurisdictional precondition requires objective verification (in that there is only one correct answer), the court must determine as ultimate arbiter whether the jurisdictional precondition exists or prescribe what it perceives to

\textsuperscript{1041} Re Minister for Immigration and Multicultural Affairs; Ex parte Eshetu 1999 HCA 21.
\textsuperscript{1042} G L Peiris “Wednesbury Unreasonableness: The Expanding Canvas” (1987) CLJ 53-56.
\textsuperscript{1043} See Council of Civil Service Unions v Minister for the Civil Service 1984 3 All ER 935; Chapter 3 para 3 3 3.
\textsuperscript{1044} See Secretary of State for Trade and Industry Ex p BT3G Ltd 2001 Eu LR 325 and West Glamorgan County Council v Rafferty and others 1987 1 All ER 1005 discussed in chapter 3 para 3 4 1 1.
\textsuperscript{1045} I.e. require rational connection between objective and the measure designed to further the objective. See The Association of British Civilian Internees – Far East Region v Secretary of State for Defence 2003 EWCA Civ 473; 2003 QB 1397 discussed in chapter 3 para 3 4 1 1.
\textsuperscript{1046} Chapter 3 para 3 6.
\textsuperscript{1047} I.e. a question of statutory interpretation; may the statutory power be exercised?
\textsuperscript{1048} I.e. the question whether the interpretation of a statutory term is satisfied by the evidence before the decision-maker - if the statutory power may be exercised, should it be exercised?
be the correct meaning of the relevant statutory term. The original decision-maker enjoys no discretion.1049 Where the precondition is not objectively verifiable but dependent on an exercise of judgment by the original decision-maker, the review court demonstrates greater deference to the original decision-maker’s choice among a range of permissible considerations. The courts only lay down the limits of permissible meanings.1050 However, having satisfied itself that the jurisdictional precondition has been met, the question arises whether the jurisdictional power should be exercised having regard to the evidence before the decision-maker. This inquiry involves an assessment of the merits of the particular matter; the conclusion which is ultimately for the original decision-maker, and not the review court, to determine. Nevertheless, in addressing the merits of the matter, the original decision-maker needs to conform to the underlying public law principles of rationality. A failure to do so amounts to a transgression of the limits placed upon the exercise of the administrative power. If a decision is pre-eminent a matter for the original decision-maker and the decision-maker reaches a decision that is outside a range of rational or reasonable decisions, the review court may therefore intervene on the basis of an error of law.1051

*Wednesbury* unreasonableness has however been described as defective because it gives rise to uncertainty,1052 is unrealistic1053 and depicts a requirement of particularly extreme behaviour.1054 The courts have therefore loosened the restraints of *Wednesbury* reasonableness, varying the depth of judicial scrutiny in accordance with the nature and gravity of the subject matter concerned, and introduced a spectrum of reasonableness review.1055 Evidence of light-touch review and anxious scrutiny is prominent in decisions involving policy and fundamental rights respectively.1056 Whereas the courts are hesitant to scrutinise polycentric decisions,1057 the courts

---

1049 Chapter 3 para 3 3 1. See *Pearlman v Keepers & Governors of Harrow School* 1979 QB 56.
1050 I.e. “If the Secretary of State thinks fit”. See *Pulhofer v Hillington London Borough Council* 1986 UKHL 1; *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport* 1993 1 WLR 23.
1051 See chapter 3; *R v Tower Hamlets LBC Ex p Begum* 1993 AC 509; 1986 AC 484 and *Rolls v Dorset CC* 1994 COD 448.
1052 *Wednesbury* reasonableness does not provide sufficient justification for judicial intervention or the reasons why decisions are considered unreasonable.
1053 I.e. unreasonable decisions often follow a rational decision-making process.
1054 For example bad faith and/or perverse or absurd decisions. Chapter 3 para 3 3 3.
1055 Chapter 3 para 3 5.
1056 Chapter 3 para 3 5 1 and 3 5 2. *Budgaycay v Secretary of State for the Home Department* 1987 AC 514 531. The level of scrutiny should be commensurate with the importance of the right involved. The more important the right involved, the more carefully scrutinised an administrative decision will be.

222
are more willing to engage in deeper scrutiny when fundamental rights are concerned. This is illustrated in *Brind* where the Court began its inquiry from the premises that only a compelling public interest would justify the invasion of rights.\(^{1058}\) Similarly in *ex parte Smith*, the Court confirmed that the greater the interference with human rights, the more would be required by way of justification. The more intensive approach to unreasonableness requires decision-makers to articulate their weighing process and enables the courts to enter into a more in depth unreasonableness debate. Context is therefore important in determining whether the decision-maker has exceeded the reasonableness margin of appreciation in a particular case.\(^{1059}\)

There has also been increasing support for *Wednesbury* unreasonableness to be replaced with *proportionality* as the general standard in the substantive review of administrative law.\(^{1060}\) Proportionality is utilised in European Union law as a review criterion and the proportionality test is also applied under the Human Rights Act.\(^{1061}\) In *ex parte Daly*, the court confirmed that there was a difference between the two concepts in so far as: 1) proportionality could require the review court to assess the balance which the decision-maker had struck and not merely whether it was within the range of reasonable decisions; and 2) proportionality could require a court to consider the relative weight accorded to interests and considerations in a manner not generally done under reasonableness review.\(^{1062}\)

The future of *Wednesbury* unreasonableness was most directly addressed by the Court of Appeal in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence*.\(^{1063}\) The Court accepted that: 1) the strictness of *Wednesbury* unreasonableness had been relaxed over time; 2) *Wednesbury* unreasonableness was moving closer to proportionality and 3) in some cases it was impossible to see the difference between the two tests. Whilst the Court had

---

\(^{1057}\) See for example *Nottinghamshire County Council v Secretary of State for the Environment* 1986 2 AC 240 248 in the context of matters involving the raising and spending of public revenue. See also *R v Chief Constable of Sussex, ex parte International Trader’s Ferry Ltd* 1999 2 AC 418 in the context of exercising wide discretionary powers.

\(^{1058}\) 1991 1 AC 696 748-749.

\(^{1059}\) *R v Secretary of State for the Home Department, ex parte Daly* 2001 UKHL 26.

\(^{1060}\) Chapter 3 para 3 3 3.

\(^{1061}\) It involves a three part analysis: 1) whether the measure was necessary to achieve the desired objective; 2) whether the measure was suitable to achieve the desired objective; and 3) whether the measure nonetheless imposed excessive burdens on the individual (i.e. the measure must not be disproportionate).

\(^{1062}\) 2001 UKHL 26, Chapter 3 para 3 3 3. See also *Doherty v Birmingham City Council* 2009 1 AC 367 para 135.

\(^{1063}\) 2003 EWCA Civ 473; 2003 QB 1397.
some difficulty discerning a continuing justification for the retention of *Wednesbury*
unreasonableness, it reluctantly concluded that it was not for it to “perform its burial rites”.
In England, the courts continue to distinguish between a Convention right based claim, where
proportionality review is available, and a traditional judicial review claim, where only
unreasonableness review is available.

7 5  **REASONABLENESS IN ENGLISH EMPLOYMENT LAW**

The Tribunal is an independent judicial body designed to provide an accessible, more informal
and speedy resolution of employment disputes. Described as an industrial jury, decisions as to
the merits of the dispute are final; subject only to an appeal on a point of law to the Appeal
Tribunal. What constitutes a point of law is not statutorily defined. A point of law has been
interpreted by the courts to include: 1) an error of law on the part of the Tribunal in exercising its
powers or performing its functions; 2) a breach on the part of the Tribunal of the common law
rules of natural justice or procedural fairness or a failure to comply with a statutory procedural
obligation; or 3) a perverse decision and/or a decision not justified by the evidence. The
Appeal Tribunal will not interfere with a properly reached judgment of the Tribunal on the facts
of the case. The Tribunal’s conclusion that an employee was fairly dismissed, that witnesses
were not credible or that a reinstatement order was appropriate on the facts of a particular case
would generally be unassailable on appeal, subject to one exception. It would be appealable as a
question of law on the basis of reasonableness and/or perversity if the Tribunal: 1) has reached a
finding of fact without any evidence to support it and that fact forms part of the reasoning for the

---

1064 Chapter 3 para 3 4 1 1.
1065 Chapter 4 para 4 1.
1066 Chapter 4 para 4 3 and 4 4. See section 21(1) of the Employment Tribunals Act 1996.
1067 For example: 1) defining a constructive dismissal on the basis of the employer acting unreasonably instead of the
employer fundamentally beaching the employment contract; 2) failing to follow binding authorities; 3) applying
the burden of proof wrongly or not applying it at all.
1068 For example by denying a party the right to a fair trial or creating a real apprehension of bias.
1069 Chapter 4 para 4 4 3. A question of law is not confined to misconstruing or misapplying substantive law in the
decision itself. It may also arise from a procedural error or irregularity in the conduct of the proceedings before
the tribunal, which, depending on the nature and gravity of the error or irregularity, may lead to a successful
appeal and even to an order for the case to be re-heard by another tribunal.
1070 I.e. the reasonableness and/or perversity ground of appeal. The Tribunal must make a decision which no Tribunal
properly directing itself as to the relevant law could reasonably have reached on the material before it.
decision; or 2) the decision is "perverse" in the sense that it is outside the ambit within which reasonable disagreement is possible.\textsuperscript{1071}

Perversity is recognised as a separate, albeit very narrow, ground on appeal to challenge factual findings of the Tribunal or inferences drawn from the evidence presented. Influenced by English administrative law and unreasonableness review in particular, perversity does not apply to decisions where the Appeal Tribunal would have come to a different conclusion. Perversity relates to decisions that are unarguably wrong on the evidence before the Tribunal. In challenging an unfair dismissal finding for example, it is not enough that the Tribunal misunderstood or misapplied facts falling short of perversity or that a differently constituted Tribunal would have come to a different conclusion. It is also not enough that the finding was contrary to the weight of the evidence or that the Tribunal heard evidence that was hard to believe.\textsuperscript{1072} Applied to value judgments, it is accepted that different tribunals may reach opposite conclusions on, or drawn different inferences from, the same set of facts without those findings being perverse. Akin to the meaning ascribed to unreasonableness in Wednesbury Corporation,\textsuperscript{1073} the Appeal Tribunal is asked to presume that, although the Tribunal had not expressed a detectable error of law, the Tribunal must have made one because the decision makes no sense and/or is illogical and therefore amounts to a judgment or order which no reasonable Tribunal could have reached.

Perversity applies to discretionary decisions for which there may be more than one reasonable answer. Firstly, perversity may come into play because there is a reasonable dispute about whether the finding of fact is sufficiently supported by the evidence. Secondly, a decision may be perverse if, despite it not being linked to a misdirection of law or the absence of evidence, it is evident to the Appeal Tribunal that the conclusion of the Tribunal on the evidence before it

\textsuperscript{1071} Chapter 4 para 4 4. See T Redman & A Wilkinson The Informed Student Guide to Human Resource Management (2002) 74; S Honeyball Honeyball and Bowers’ Textbook on Employment Law 12 ed (2012) 165. It is not enough if the decision is considered to be a permissible option in the circumstances. The decision is only perverse if the Tribunal made a factual finding or drew an inference from the evidence presented to it that was wholly unreasonable – so unreasonable that no tribunal aspiring to the standard of reasonableness could possibly have reached the same determination.


\textsuperscript{1073} See chapter 3 para 3 3 3. In exercising this extended jurisdiction, the appellate bodies have been guided by the review courts’ interpretation of Wednesbury unreasonableness in English Administrative law. See W M Morrison Supermarkets PLC v Mr G Talbot 1997 UKEAT 237_96_2102.
offended reason and/or was certainly wrong in that no Tribunal, properly directed, could have reached such a conclusion. 1074 A finding of perversity would be rare, particularly in deciding unreasonableness in unfair dismissal disputes, given that the Tribunal must assess objectively whether the dismissal fell within the range of reasonable responses available to the employer in the circumstances. 1075

Perversity sets a high threshold for interference. The conclusion must be: 1) certainly wrong in that it is one to which no reasonable tribunal could have come; 2) an impermissible option in that it is unsupported by any evidence or amount to a clear misdirection in law by the Tribunal; 3) irrational, offend reason, certainly wrong, very clearly wrong, must be wrong, is plainly wrong, is not a permissible option, is fundamentally wrong, is outrageous, makes absolutely no sense or flies in the face of properly informed logic; and/or 4) of such a nature that the Appeal Tribunal is satisfied in the light of its own experience and of the sound practices in the industrial field that the decision is not a permissible option.

Because the presence of perverse decisions are identified by examining the evidence and the findings of fact and turn on the particular circumstances of the case, perversity has a predominately factual element. 1076 Perversity includes a misunderstanding of the evidence, leading to a crucial finding of fact that is unsupported by evidence or that is contrary to uncontradicted evidence. 1077 This does not mean that the appellate body may weigh the evidence and assess its importance with a view to substitute the decision with its own assessment of the evidence. Nor does it mean that the appellate body may overturn findings of fact made by the Tribunal because it disagrees with the Tribunal as to the justice of the result, the merits of the case or the interpretation of the facts. 1078 The substitution of a decision in these circumstances will in itself constitute an appealable error of law. The appellate bodies accept that the Tribunal is the final arbiter of facts in so far as it has had the advantage of seeing and hearing the witnesses, sensing the atmosphere in the particular workplace, gauging the qualities of the different

1074 See chapter 4 para 4 4 3.
1075 It would need to be demonstrated that no reasonable Tribunal could possibly have come to the conclusion that a reasonable employer could have decided to dismiss.
1076 See Piggott Brothers and Jackson 1991 IRLR 309; Chapter 4 para 4 4 3.
1077 Chapter 4 para 4 4 2.
1078 Chapter 4 para 4 4.
personalities and weighing the impact of their effect upon the other.\(^{1079}\) The appellate bodies also accept that there are many factual situations in the field of industrial relations in which different conclusions could be reached by different tribunals, all within the realm of reasonableness, and where there is no correct answer.\(^{1080}\)

The scope for an appeal which effectively challenges factual conclusions is therefore limited. Appellate bodies will not interfere with the original decisions, even if they reason that they might have conducted and decided the cases differently, unless it is able to identify a finding of fact which was unsupported by any evidence or demonstrates a clear self-misdirection in law by the Tribunal.\(^{1081}\) The question remains whether an overwhelming case has been made out that the Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. In determining whether a claim of perversity ought to succeed, the appellate bodies also do not subject Tribunal decisions to microscopic analysis. The appellate bodies consider the substance of the Tribunal’s decision broadly and fairly to see if the reasons given for the decision were sufficiently expressed to inform the parties as to why they won or lost the case and to enable their advisers to identify an error of law that may have occurred in reaching the conclusion.\(^{1082}\)

7.6 REASONABLENESS IN SOUTH AFRICAN ADMINISTRATIVE LAW

At common law, unreasonableness was regarded as a controversial ground of review largely because an unreasonableness examination tends to: 1) blur the generally perceived distinction between review and appeal; 2) impede the finality of administrative decisions and the exercise of discretion; 3) prevent administrators from expressing expertise flexibly; and 4) disregard the doctrine of separation of powers.\(^{1083}\) The courts initially followed the English symptomatic unreasonableness approach in terms of which a decision pointed to being unreasonable if it was so gross that *mala fides*, ulterior motive or a failure on the part of the decision-maker to apply his

\(^{1079}\) See discussion of *Royal Society for the Protection of Birds v Croucher* 1984 IRLR 425; Chapter 4 para 4 4 3.

\(^{1080}\) See discussion of *Stewart v Cleveland Guest (Engineering) Ltd* 1994 IRLR 443; Chapter 4 para 4 4 3.

\(^{1081}\) See discussion of *Piggott Brothers and Jackson* 1991 IRLR 309.

\(^{1082}\) Chapter 4 para 4 4. See also discussion of *Stewart v Cleveland Guest (Engineering) Ltd* 1994 IRLR 443.

\(^{1083}\) G E Devenish “Reasonableness as a Requirement for the Validity of Administrative Actions” 2000 21(1) *Obiter* 86.
or her mind to the matter concerned could be inferred from it. Problems accordingly arose where the unreasonableness of a decision could not be linked to any of the recognised grounds of review. When the 1993 Constitution came into operation, the right to administrative justice was entrenched and the unreasonableness ground of review was reformulated to require administrative action that is justifiable in relation to the reasons given for it. Early case law recognised that this formulation was one of substantive rationality which required administrative decisions to demonstrate a rational objective basis that would justify the connection made between the material properly available to the decision-maker and the conclusion he or she arrived at. It was accepted that the rational justifiability analysis would require value judgments to be made which would involve a consideration of the merits of the matter in some way or another. It did, however, not go as far as to allow the review court to substitute its own opinion on the correctness thereof. Factors that had to be considered in the rational justifiability analysis included the serious objections and alternatives to the decision, including plausible reasons for discarding them, as well as the rational connection between the information before the decision-maker and the conclusion arrived at. It was not categorically stated that reasonableness, rationality and/or justifiability had the same meaning, but case law (similar to English law) did equate justifiability with reasonableness and did consider justifiability and rationality as sufficiently similar to conclude that rationality could be accommodated within the concept of justifiability. On the other hand, rationality has also been described as a minimum threshold requirement that regulates the legality of non-administrative action; suggesting that administrative action may be susceptible to review on a higher standard. The Constitutional Court has however rejected the proposition that justifiability introduced a substantive fairness requirement and, referring to rationality and justifiability interchangeably, emphasised that rationality only required decisions to be taken lawfully and for a proper purpose. Reminiscent of

---

1084 Chapter 2 para 2 2 1 1. The courts therefore considered the unreasonable disposition of the decision-maker as opposed to the consequence and/or effect of the decision itself.

1085 See G E Devenish “Reasonableness as a Requirement for the Validity of Administrative Actions” (2000) 21(1) Obiter 82.

1086 Chapter 2 para 2 2 1 2.

1087 Chapter 5 para 5 4. See Carephone (Pty) Ltd v Marcus NO 1998 11 BLLR 1093 (LAC); para 31 and 37.

1088 Carephone (Pty) Ltd v Marcus NO 1998 11 BLLR 1093 (LAC); para 36.

1089 The dictionary definition of “justifiable” in Carephone equated it with reasonableness.


1091 Chapter 5 para 5 5 2. See Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa 2000 2 SA 674 (CC).
symptomatic unreasonableness, the Court held that unfairness was not reviewable unless it was of such a degree that an inference could be drawn from it that the decision-maker had erred in a respect that would provide a ground for review and a review court would not interfere if the decision was one that a reasonable authority could make.\(^{1092}\)

Not yet having established the exact standard of review required by “justifiability”, section 33(1) of the 1996 Constitution adopted “reasonableness” as an important component of the right to just administrative action as well as a ground of review in terms of PAJA. These developments did not expressly confirm the interrelatedness of reasonableness and rationality. Irrationality was however recognised as a separate ground of review in section 6(2)(f) of PAJA. On the face of it, section 6(2)(h) seemed to only recognise as a narrow ground of review a decision which is “so unreasonable that no reasonable person could have so exercised the power”. Drawing directly on the language of *Wednesbury Corporation*,\(^{1093}\) this formulation of unreasonableness was suggestive of the gross unreasonableness test of the common law.

In *Bato Star Fishing*, however, the Constitutional Court held that it was not the proper constitutional meaning of section 6(2)(h) that a decision would rarely if ever be found unreasonable. According to the Court, the subsection had to be construed consistently with section 33 of the 1996 Constitution which requires administrative action to be “reasonable”. Section 6(2)(h) of PAJA was accordingly interpreted to mean that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. According to the Court, the reasonableness of a decision was to be determined with reference to the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.\(^{1094}\) Reasonableness was

\(^{1092}\) I.e. the Constitution did not introduce substantive fairness into South African law as a criterion for judging whether administrative action is valid or not. A decision was considered justifiable if it was a rational decision taken lawfully and directed to a proper purpose and was one which a reasonable authority could reach. See *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 89-90 making reference to *R v Chief Constable of Sussex, ex parte International Trader’s Ferry Ltd* 1999 2 AC 418.

\(^{1093}\) See *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 44 making reference to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1948 1 KB 223.

\(^{1094}\) Chapter 5 para 5 5 2.
not determinative of any particular equilibrium but simply required the relevant decisions to strike a reasonable equilibrium between competing interests or considerations.

In progressing from parliamentary sovereignty to constitutional supremacy in South Africa, there have therefore been substantial developments in relation to the concept of reasonableness as a standard for evaluating administration action. These developments have given birth to an incoherent approach to its interpretation and application, ranging from decisions that hold that rationality only required decisions to be taken lawfully and for a proper purpose to decisions that hold that an act is reasonable if it could have been reached by a reasonable decision-maker.

7 7 REASONABLENESS IN SOUTH AFRICAN EMPLOYMENT LAW

One of the key objectives of the LRA is the effective resolution of labour disputes. To achieve this, the LRA utilises the main mechanisms of conciliation and arbitration to resolve matters between parties on a voluntary basis or to impose determinations on parties. Administered by the CCMA, commissioners are afforded a discretion as to the appropriate form of the proceedings and may conduct arbitrations in a manner that they consider appropriate in order to determine disputes fairly and quickly as well as deal with the substantial merits of disputes with the minimum of legal formalities. Decisions emanating from the CCMA arbitration proceedings are final and binding, subject only to judicial review.

In the formulation of section 145(2), the legislature was guided by a similar procedure utilised in the Arbitration Act; strictly interpreted to be available on the basis of procedural grounds only. As a consequence, the grounds of review have been cast in section 145(2) of the LRA in similarly narrow terms with no reference to a substantive interpretation. In terms thereof, an award may be set aside if the arbitration proceedings suffered from a ‘defect’ and a ‘defect’ exists where: 1) the commissioner committed misconduct in relation to the duties of the commissioner

---

1095 Section 1(d)(iv). See Chapter 1 para 1 1; Chapter 2 para 2 6.
1096 Chapter 1.
1097 Chapter 5 para 5 4.
1098 In South Africa, the courts have accepted that the review grounds must be afforded their ordinary meaning in accordance with the aims and objects of the LRA, taking into consideration any guidance that may be provided by the interpretation of an analogous provision in the Arbitration Act. See Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others 1997 12 BLLR 1632 (LC); Chapter 2 para 2 5 3.
as an arbitrator;\textsuperscript{1099} 2) the commissioner committed a \textit{gross irregularity} in the conduct of the arbitration proceedings;\textsuperscript{1100} 3) the commissioner \textit{exceeded} his or her powers;\textsuperscript{1101} and/or 4) the award was \textit{improperly obtained}.\textsuperscript{1102} The statutory review grounds focus on the conduct of the commissioner and/or the parties in the course of the decision-making process, rather than the quality of the decision that was made. Findings of fact, even if misconceived, are not reviewable in terms of section 145\textsuperscript{1103} and are only touched upon to the extent required to prove the misconduct, gross irregularity, excess of power or improper attainment of an award.

The interpretation of these grounds of review received fresh attention when the Labour Appeal Court in \textit{Carephone} found that the CCMA was an \textit{administrative} body, bound by the Bill of Rights relating to administrative justice, and that commissioners must be fair and unbiased, the proceedings must be lawful and procedurally fair and the award must be justifiable in terms of the reasons given.\textsuperscript{1104} Despite the narrow confines of section 145, the Court in \textit{Carephone} accepted that the section was not in conflict with the constitutional administrative justice right, but that its interpretation was frustrated because of a misplaced reliance on decisions interpreting the corresponding section in the Arbitration Act when there were material differences between the two sections: 1) section 146 of the LRA expressly excluded the operation of the Arbitration Act in respect of CCMA arbitrations; 2) the Arbitration Act applied to private, consensual arbitration in contrast to compulsory arbitration under the LRA; and 3) its provisions were assessed and interpreted in a different constitutional context.

\textsuperscript{1099} Chapter 2 para 2.5.3.1. Misconduct by the commissioner in relation to his or her duties has been interpreted by the courts to refer to wrongful or improper conduct by the commissioner. See \textit{Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others} 1997 12 BLLR 1632 (LC). This includes for instance a situation where a commissioner has failed to disclose a conflict of interest. See B Jordaan, R Le Roux, M I Van Jaarsveld, E Kalula, E M L Strydom \textit{Understanding the Labour Relations Act} (2009) 137.

\textsuperscript{1100} Chapter 2 para 2.5.3.2. Gross irregularities are defined having regard to the way in which proceedings were conducted. The question is whether the alleged irregularity prevented a fair trial of the issues. Examples include a failure on the part of the commissioner to take all the evidence into account, ignoring or improperly rejecting materially relevant evidence; misconstruing the commission’s functions by determining the appropriateness of sanction egregiously or not providing a full opportunity for an examination of all aspects of the case.

\textsuperscript{1101} Chapter 2 para 2.5.3.3. A commissioner would exceed his or her powers conferred by the LRA when straying from the ambit of his or her jurisdiction or making a ruling or award beyond the powers conferred by the LRA. This includes for example an award of reinstatement for procedural unfairness in instances where the LRA only allows for compensation.

\textsuperscript{1102} Chapter 2 para 2.5.3.4. An award is improperly obtained if a party to the arbitration proceedings succeeds in obtaining an award in his or her favour through fraud or other improper means, including bribes or false and/or fraudulent representations or evidence under oath.

\textsuperscript{1103} \textit{Lekota v First National Bank of SA Ltd} 1998 10 BLLR 1021 (LC) para 16-17; Chapter 2 para 2.3.

\textsuperscript{1104} Chapter 5 para 5.2.
Nevertheless, the Court held that the constitutional right to administrative justice had broadened the scope of judicial review in so far as administrative action must be justifiable in relation to the reasons given for it. The Court revised the section 145(2) grounds of review accordingly. It was the Court’s interpretation that a failure to act reasonably would constitute an excess of power by the commissioner concerned as contemplated in section 145(2)(a)(iii). The rational justifiability assessment required the review court to enquire whether there was a rational objective basis justifying the connection made by the decision-maker between the material properly available to him or her and the conclusion he or she eventually arrived at. Justifiability was thus a measure or test utilised to determine whether the commissioner had exceeded his or her powers in terms of section 145(2)(a)(iii).\textsuperscript{1105}

The Labour Appeal Court has, however, not consistently applied justifiability in relation to section 145(2)(a)(iii). In County Fair Foods, the Court held that a decision, not justifiable in terms of the reasons given, may also in appropriate circumstances amount to misconduct in terms of section 145(2)(a)(i) or a procedural irregularity in terms of section 145(2)(a)(ii). In Radebe, the Court was also not convinced that unjustifiability constituted an independent ground of review taking into consideration: 1) that justifiability was not included in section 145; 2) that there was a difference between appeals and reviews; and 3) the constitutional implications of section 145.\textsuperscript{1106}

These matters were brought to the forefront in Sidumo. The Constitutional Court agreed that it was inappropriate to restrict the review of a commissioner’s decision to the grounds of procedural misconduct that a first reading of section 145(2) would suggest. The Court also acknowledged that the labour-law setting, requiring a speedy resolution of disputes with the outcome basically limited to dismissal or reinstatement, made it inappropriate to apply the full PAJA-type administrative review on substantive and procedural grounds. The Court accordingly referred to Carephone’s formulation of justifiability, noting that it was substantive and involved greater scrutiny than the rationality test set out in Pharmaceutical Manufacturers Association. The Court then ruled that section 145 was now suffused by the constitutional standard of reasonableness.

\textsuperscript{1105} Chapter 5 para 5 4.
\textsuperscript{1106} Chapter 5 para 5 4.
Mirroring the wording of section 6(2)(h) of PAJA, the question was whether the commissioner’s decision was one *that a reasonable decision-maker could not reach*. This reasonableness standard was taken to imply that different decision-makers acting reasonably could reach different conclusions. The decision under review was only required to fall within the boundaries of what was required by the concept of reasonableness. The Court also acknowledged that it was not always possible to separate the merits from scrutiny, but that the danger in such scrutiny was only founded in courts setting aside administrative decisions that did not coincide with their own opinions. It was reasoned that reasonableness did not side-line the section 145(2) grounds of review and introduce an additional, constitutional basis for review. Reasonableness continued to respect and give effect to the legislature’s choice to permit reviews on the grounds in section 145(2)(a). The only difference was that the section 145 grounds of review could no longer be interpreted to be purely procedural, but *substantive* also to the extent that it encapsulated the reasonableness requirement from administrative decision-makers in the *merit or outcome* of the decisions concerned. The Court did not expressly hold unreasonableness to be an independent ground of review. The Court described reasonableness as a *standard* against which the reviewability of a decision was to be tested.\(^{1107}\)

The Constitutional Court’s interpretation has however given rise to an incoherent application of unreasonableness as both a standard and a ground of review with no clear indication of the connection between unreasonableness and the section 145(2) grounds. Elaborating upon the Constitutional Court’s interpretation of reasonableness, the Court in *Fidelity Cash Management Services, Value Logistics Ltd* and *Ellerine Holdings Ltd* supported reasonableness as a *standard* or *test* on review that will only render an award reviewable if it was one that a reasonable decision-maker could not have made in the circumstances of the case.\(^{1108}\) On the other hand, in *Fidelity Cleaning (Pty) Ltd, Super Group Autoparts* and *Samancor*, the Courts preferred to treat unreasonableness as a *ground* of review in addition to the section 145(2) grounds of review in so far as: 1) the decision was unsupported by the evidence; 2) the evidence was insufficient to support the conclusion reached; or 3) the decision amounted to a failure on the part of the decision-maker to apply his or her mind properly to the issue before him or her. Moreover, the

---

\(^{1107}\) Chapter 5 para 5.5.

\(^{1108}\) Chapter 6 para 6.2.1.
Courts have found commissioner’s decisions to be reviewable on one or more of the section 145(2) review grounds without any regard to the question of reasonableness at all\textsuperscript{1109} or have linked reasonableness to the section 145(2) grounds of review\textsuperscript{1110} to the extent that the misconduct and/or gross irregularity were of such a nature that the ultimate decision was one which a reasonable decision-maker could not have reached.\textsuperscript{1111}

Reasonableness has also been described as a highly deferential standard. In \textit{Trentyre}, the Labour Appeal Court found it unfair to dismiss an employee for an isolated incident of alcohol whereas in \textit{Palaborwa Mining} the Labour Appeal Court found it to be fair. In both cases, the Court however found that the CCMA arbitration award passed the \textit{Sidumo} test – \textit{Trentyre}, because dismissal was unfair taking into account all relevant factors and \textit{Palaborwa Mining}, because the sanction did not fall outside the range of reasonableness.\textsuperscript{1112} In \textit{Shoprite Checkers (Pty) Ltd v CCMA & others}\textsuperscript{1113} and \textit{Shoprite Checkers (Pty) Ltd v CCMA}\textsuperscript{1114} employees were dismissed for consuming food belonging to their employer, without permission and in unauthorised areas of the workplace. However, in the first case, the Court found that there was no prospect that a reasonable decision-maker could on the facts of this case find that dismissal was a fair sanction whilst the second case confirmed a fair dismissal. According to the court the two cases where distinguishable from one another in so far as the employee in the first case had an unblemished service record of thirty years prior to the misconduct and had not manufactured evidence.\textsuperscript{1115}

Reasonableness has also been found to be applicable to both the \textit{process} and the \textit{substantive outcome} of a matter.\textsuperscript{1116} The former is considered to come into play where the commissioner’s

---

\textsuperscript{1109} \textit{Maepe v CCMA & another} 2008 8 BLLR 723 (LAC); \textit{SA Rugby Players’ Association (SARPA) & others v SA Rugby (Pty) Ltd & others}; \textit{SA Rugby Pty Ltd v SARPU & another SARPA} 2008 9 BLLR 845 (LAC); \textit{Group Six Security Services (Pty) Ltd & Andrew Masters v R Moletsane, CCMA & Dean Weller} 2005 11 BLLR 1072 (LC) and \textit{Samancor Tubatse Ferrochrome v MEIBC & others} 2010 8 BLLR 824 (LAC).

\textsuperscript{1110} \textit{Mollo v Metal & Engineering Industries Bargaining Council & others} 2009 JOL 24323 (LC); \textit{Zilwa Cleaning & Gardening Services CC v CCMA & others} 2010 31 ILJ 780 (LC).

\textsuperscript{1111} \textit{See Shoprite Checkers (Pty) Ltd v Ramdaw NO & others} 2001 9 BLLR 1011 (LAC); discussed in chapter 2. The Court found that the ground of review contained in s 145(2)(a)(iii), namely, that a commissioner exceeded his powers, incorporated the constitutional requirement that an administrative action must be “justifiable in relation to the reasons given for it”.

\textsuperscript{1112} Chapter 6 para 6 3 1.

\textsuperscript{1113} Unreported Labour Appeal Court judgment, JA46/05 (21 December 2007).

\textsuperscript{1114} 2008 9 BLLR 838 (LAC).

\textsuperscript{1115} Chapter 6 para 6 3 1.

\textsuperscript{1116} Chapter 6 para 6 2 3.
process of reasoning is alleged to have, for example, resulted in an unreasonable decision because he or she took account of irrelevant matters or ignored relevant considerations. In such cases, the reasonableness of the reasoning process is objectively considered without the Court necessarily agreeing or disagreeing with the ultimate outcome of the matter. Opposed thereto, substantive reasonableness establishes whether the ultimate outcome is reasonably supported by the sufficiency and cogency of the evidence presented and is not arbitrary. More of a subjective enquiry, the focus is directed at the result of the proceedings, rather than the method thereof.

In determining the fairness of the sanction of dismissal, a decision may be reviewable for dialectical unreasonableness if the commissioner failed to take account of an employee’s service record and length of service. A decision is substantively unreasonable if the evidence and material before the commissioner demonstrates that dismissal was a fair sanction, but for some reason the commissioner awarded a final written warning only; suggesting that he or she did not apply his or her mind to the exercise of his or her discretion, but acted arbitrarily.\textsuperscript{1117}

In labour disputes, determinations typically challenged on review relates to jurisdiction, guilt, sanction and/or relief. Where jurisdictional reviews are concerned, the courts have been inconsistent in their approach. In some cases, the question whether a dismissal has occurred or whether an employment relationship exists has been classified as a jurisdictional fact, subject to correctness review. In other cases, the courts have determined that these matters are not jurisdictional questions in the true sense of the word and have, for example, dealt with the question whether there was a reasonable expectation of a contract renewal as a substantive fact question, subject to reasonableness review only. The majority of case law however appear to favour the proposition that applicants on review need to establish that the jurisdictional finding was wrong in order to succeed with the application. Whilst it is unarguably so that the question of reasonableness should not arise where the CCMA has no jurisdiction in a matter (as is the case when the referring party referred the dispute outside the statutory prescribed time limit) the courts do not appear to distinguish between the existence of jurisdictional facts that are objectively determinable and those whose existence may fall within the discretion of the repository of the

\textsuperscript{1117} I.e. the decision does not make sense having regard to the circumstances before the commissioner.
power (like condonation applications) – in which case, the focus should rather be on the commissioner’s subjective reasons for his or her findings.\textsuperscript{1118}

Opposed to jurisdictional decisions, courts agree that decisions in relation to penalty and/or relief are discretionary decisions, calling for the exercise of a value judgment by the decision-maker, and are reviewable in terms of \textit{Sidumo} reasonableness. However, in \textit{Senama, Karen Beef, Hulett Aluminium} and \textit{Tao Ying Matal Industries}, the challenge before the court was whether the commissioner had applied his or her mind to all the relevant facts and the law in making the decision.\textsuperscript{1119} In the process, the court recognised an important qualification to the reasonableness of outcome approach which relates to the consideration of materially relevant factors. This demonstrates that a CCMA award will be unassailable on the basis of unreasonableness if it is established that a commissioner has applied his or her mind to the facts and the law and that he or she has not otherwise misdirected him or herself.\textsuperscript{1120}

A commissioner’s finding of guilt on the facts will also be considered reasonable provided: 1) it is supported by the evidence; 2) all relevant factors and circumstances of the case has been weighed and taken into account; 3) the decision-maker has applied the correct rules of evidence and did not deviate from them to such an extent that it materially denied a party a fair hearing; 4) the evidence is sufficient to reasonably justify the decision arrived at; 5) the decision maker took into account the uncontradicted evidence and/or 6) adopted the correct legal approach in its application of the law to the facts in a charge of misconduct.\textsuperscript{1121}

Also, where a commissioner wrongly appreciates the severity of the misconduct, makes findings in mitigation which are not sustainable or does not have proper regard to the relevant facts in the determination of a penalty, the decision on sanction will be susceptible to a reasonableness review. Likewise, where a commissioner fails to rationalise his or her finding as to the

\textsuperscript{1118} Chapter 6 para 6 4 2.  
\textsuperscript{1119} Chapter 6 para 6 3 1 and 6 4 1.  
\textsuperscript{1120} Chapter 6 para 6 3 1.  
\textsuperscript{1121} Chapter 6 para 6 4 1.
appropriate relief objectively or imposes too high a standard of procedural fairness, the award will be susceptible to review because it is unreasonable.\textsuperscript{1122}

Lastly, the courts have also questioned the continued utility of judicial review, as opposed to an appeal, and reasonableness. Not only has it been contended that the choice of reviews over appeals has not served to avoid lengthy proceedings, lawyers, legalism, excessive delays and high costs, but also that wrong decisions are rarely reasonable.\textsuperscript{1123}

7 8 \textbf{COMPARISON: CONCLUDING REMARKS}

In England and South Africa a distinction is drawn between appeal and review for administrative law purposes. Subject to statutory restrictions on the grounds of appeal, appeal courts are generally specifically authorised to consider whether the decision of the court \textit{a quo} was correct and, depending on the answer, to uphold or vary the decision. In contrast, review courts are not concerned with the correctness of decisions and eschew scrutinising its content. The question is whether the decision-making process involved a proper interpretation of the law, did not infringe any of the recognised public law principles governing the exercise of discretionary powers and involved a fair procedure.\textsuperscript{1124} Depending on whether the decision-maker has exceeded the legal limits to his or her powers, the court may uphold or quash the decision. Generally, the review court does not also substitute its own decision on the merits for that of the original decision-maker, but refers the matter back to the original decision-maker to determine afresh. This traditional distinction between legality and merits and process and substance has therefore caused judicial review to be understood in much narrower terms than appeal.\textsuperscript{1125}

However, in England, as in South Africa, this generalised distinction has become difficult to maintain in practice. Judicial review has grown wider in scope and the intensity of review has also increased. England and South Africa, for example, no longer distinguish between jurisdictional and non-jurisdictional errors of law in administrative law to determine the right of

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{1122}] Chapter 6 para 6 3 1 to 6 3 3.
\item[\textsuperscript{1123}]\textit{Herholdt v Nedbank Ltd} 2012 9 BLLR 857 (LAC).
\item[\textsuperscript{1124}] For example legality, rationality and procedural propriety.
\item[\textsuperscript{1125}] Chapter 2 para 2 3.
\end{enumerate}
\end{footnotesize}
review. Decision-makers may exceed the legal limits of their authority by making an error of law when determining the limits or extent of their powers expressly or impliedly conferred upon them. Alternatively, whilst acting within the scope of their authority, decision-makers may exceed the legal limits of their authority by making a decision that does not adhere to the public law principles of legality, procedural propriety and rationality in England or lawfulness, reasonableness or procedural fairness in South Africa. In essence, all errors of law are therefore “jurisdictional”. Jurisdictional questions, like that relating to the interpretation of a statutory provision or the determination of the applicable legal standard, is generally addressed by means of an “appeal test”. These questions must be answered correctly by the original decision-maker. No judicial deference is afforded to decision-makers should they answer true jurisdictional questions incorrectly. Where the jurisdictional, statutory precondition itself is not objectively verifiable but largely dependent on an exercise of subjective judgment by the original decision-maker, the review courts in England however demonstrate greater deference to the original decision-maker’s choice amongst a range of permissible considerations.

It is also not accurate to state that merits or errors of fact are not reviewable without further qualification. Judicial review is available where jurisdictional conditions require the existence in fact of a certain set of circumstances before a specific power may be exercised. A distinction is drawn between factual findings that are objectively verifiable and those that require the exercise of a discretion and for which there is strictly speaking no correct answer. In the first instance, the review courts in England and South Africa agree that they must examine the merits of the matter to satisfy themselves that the set of circumstances actually exist and to substitute the decision if it does not. Where the jurisdictional condition is classified as a matter of degree, require an exercise of judgment, or is curtailed by its ambiguity, the Courts in England accept that it is not a question which the decision-maker has to answer correctly in the view of the court, but a matter

1126 In England, see Anisminic Ltd v Foreign Compensation Commission 1969 2 AC 147; R v Lord President of the Privy Council, ex parte Page 1992 UKHL 12; Pearlman v Keepers and Governors of Horrow School 1979 QB 56; Re Racial Communications Ltd 1981 AC 3744. In South Africa, see section 6(d) of PAJA as well as Hira v Booyisen 1992 4 SA 69 (A); J F E Sapela Electronics (Pty) Ltd v Chairperson, Standing Tender Committee 2004 3 All SA 715 (C).

1127 Chapter 3 para 3 4 1 2. R v Secretary of State for the Home Department, ex parte Khawaja 1984 AC 74. The Immigration authorities’ power to remove the appellants only arose if they were actually illegal entrants. In South Africa, see Paola v Jeefa 2004 1 SA 396 (SCA). In this case, the power to approve building plans depended on the prior recommendation of a building control officer. Because, on the facts, no building control officer had been appointed, the decision to approve the plan was set aside.
for the decision-maker to determine, subject to a limited right of review on the basis of unreasonableness only. In South Africa, where the decision-maker has been entrusted with determining the existence of a prerequisite fact, the review court will not be entitled to set the decision aside unless the decision-maker’s finding amounted to a transgression of one or more of the recognised grounds of review.

The review courts are also not confined to reviewing factual findings in the context of jurisdictional, statutory criterion. Non-jurisdictional errors of fact may be reviewable in England and South Africa provided certain conditions are met. In England, the courts may review errors of fact provided: 1) there has been a mistake as to an existing fact, including a mistake as to the availability of evidence; 2) the fact or evidence was uncontentious and objectively verifiable; 3) the appellant or his advisers have not been responsible for the mistake; 4) the mistake has played a material, though not necessarily decisive, part in the decision-maker’s reasoning; and 5) the statutory context is one “where the parties share an interest in co-operating to achieve the correct result”. In South Africa, an error of fact is required to be material to the decision that was made prior to it being considered reviewable.

In administrative law in England and South Africa reasonableness plays an important part in ascertaining the limits of judicial intervention over decisions left to the discretion or determination of public authorities – jurisdictional or otherwise. Although unreasonableness does overlap with other grounds of review like errors of fact, errors of law and the taking into consideration of irrelevant considerations or the ignoring of relevant considerations, unreasonableness is effectively a ground for challenging a decision that required an equilibrium to be struck between competing interests or considerations, which was taken by a decision-maker with specific expertise in that area and for which there is strictly speaking no “correct” answer.

---


1129 See South African Defence and Aid Fund v Minister of Defence 1967 1 SA 31 (C) on jurisdictional facts.

1130 E v Secretary of State for the Home Department 2004 EWCA Civ 49; Chapter 3 para 3 4 1 2.


1132 Reasonableness is not confined to decisions made outside the terms of the powers conferred upon decision-makers, but includes non-jurisdictional decisions made by decision-makers that are repugnant to reason.
English law, the orthodox test for determining the reviewability of the decision is whether the decision is so unreasonable that no reasonable authority, properly directing itself, could ever have come to it. The strict formulation of unreasonableness has been relaxed by the courts over time. The courts enquire whether the decision was one that a reasonable authority could have reached\textsuperscript{1133} or whether the decision was beyond the range of responses open to a reasonable decision-maker.\textsuperscript{1134} A decision may therefore be reviewable not only if the unreasonableness is evident and indefensible from the decision itself, but also if the review court is able to identify that the decision was preceded by flawed logic. Unreasonableness in England is contextually sensitive in so far as the courts apply a variable intensity of unreasonableness review that has a less or more intrusive quality – ranging from a rationality type of unreasonableness to a proportionality type of unreasonableness - having regard to the nature and gravity of the matter concerned.\textsuperscript{1135} Where human rights are concerned, for example, the courts require a heightened scrutiny of compelling public interest,\textsuperscript{1136} a substantial objective justification\textsuperscript{1137} or significant countervailing considerations justifying interference.\textsuperscript{1138} Reasonableness is distinguished from proportionality in so far as: 1) reasonableness applies to English, domestic law and proportionality to European Union laws applicable or implemented in England; 2) proportionality can require the review court to assess the balance which the decision-maker had struck and not merely whether it was within the range of reasonable decisions; 3) the proportionality query can go further than that of reasonableness as it can require a consideration of the relative weight accorded to interests and considerations; and 4) even the anxious scrutiny test of reasonableness is not necessarily appropriate to the protection of human rights because reasonableness and proportionality occasionally yield different results.

In South Africa, the unreasonableness ground of review in section 6(2)(h) of PAJA is couched in language similar to Wednesbury unreasonableness; suggesting that the South African legislature

\begin{itemize}
  \item \textsuperscript{1133} Regina v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd 1999 2 AC 418. See chapter 3 para 3 5 1.
  \item \textsuperscript{1134} R v Minister of Defence ex parte Smith 1996 1 All ER 257; 1996 QB 517. See chapter 3 para 3 3 3.
  \item \textsuperscript{1135} I.e. a sliding scale of reasonableness review ranging from a light-touch unreasonableness review to one of anxious scrutiny. See J Laws The Golden Metwand and the Crooked Cord 187 196. See also P P Craig Administrative Law 4 ed 536. See also D R Knight “A Murky Methodology: Standards of Review in Administrative Law” 2008 6 NZIPIL 117.
  \item \textsuperscript{1136} Brind and others v Secretary of State for the Home Department 1991 UKHL 4; Chapter 3 para 3 5 2.
  \item \textsuperscript{1137} R (Mahmood) v Secretary of State 2001 1 WLR 840; Chapter 3 para 3 5 2.
  \item \textsuperscript{1138} R v Lord Saville of Newdigate ex p A 2000 1 WLR 1855; Chapter 3 para 3 5 2.
\end{itemize}
has adopted the English orthodox interpretation that requires egregiously unreasonable decisions. The Constitutional Court has however preferred the “relaxed” interpretation tendered in International Trader’s Ferry Ltd, namely a decision that a reasonable decision-maker could not reach. Similar to English law, the Court has accepted that reasonableness in a particular case would depend on the circumstances, taking into consideration the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision; the reasons given for the decision; the nature of the competing factors involved; and the impact of the decision on the lives and well-being of those affected. Although proportionality is not expressly provided for in PAJA, factors like that pertaining to the “impact of the decision”, “the range of factors relevant to the decision” and “the nature of the competing factors involved” do appear to invite some form of a proportionality inquiry into the reasonableness question.1139

The distinction between judicial review and appeal where questions of law are concerned is brought more into question when considering the role of reasonableness in English employment law. In contrast to the judicial review remedy in South African employment law, an appeal lies to the Appeal Tribunal in respect of any question of law arising from any decision of, or arising in any proceedings before, the Tribunal. The Appeal Tribunal, in general, distinguishes between appealable errors of law (that require no further factual analysis)1140 and non-appealable errors of fact (that are factual and contested and do require a consideration of the evidence) - similar to judicial review in English administrative law. The meaning of an “error of law” is not statutorily defined, but has been developed by the courts on a case by case basis. The misinterpretation of statutes; the misapplication of case law; failing to ask or answer the right questions or entertaining the wrong issue;1141 making a decision with no proper evidential basis; taking into account an irrelevant factor or ignoring a relevant consideration;1142 failing to resolve a conflict of evidence or opinion central to a case or a failing to comply with the rules of natural justice; and allegations of bias or procedural impropriety1143 all constitute errors of law that may be corrected once established. On the other hand, the Tribunal is the final decision-maker as to the

1139 Hoexter Administrative Law 316.
1140 For example, an error in the construction of a contractual term.
1141 For example, by the Tribunal substituting its own view for that of the employer in deciding that the dismissal was unfair, rather than asking whether the dismissal was within the range of reasonable responses. See Fuller v The London Borough of Brent 2011 EWCA Civ 267.
merits of a dispute within its jurisdiction and findings, determined by an investigation and evaluation of factual circumstances, are not open for correction on appeal. The only exception is unless no Tribunal, properly directed in law, could have reached the decision that the Tribunal had reached on the evidence. The unreasonableness could be attributed to the fact that a material finding of fact was made without supporting evidence or despite contrary evidence. This includes the question whether work was performed by a person in the capacity of an employee or as an independent contractor;1144 whether an employee resigned or was dismissed;1145 whether taking part in an overtime ban amounted to taking part in a strike or other industrial action;1146 whether there was a constructive dismissal;1147 and whether the employer’s decision to dismiss was within a range of reasonable responses.1148 A standard of perversity as opposed to correctness is applied in these cases because: 1) it is the Tribunal’s objective to deal with cases proportionately, expeditiously, fairly and in a cost effective manner; and 2) the Tribunal with its lay members sit as an “industrial jury” when it hears first hand and in full the evidence and submissions of the parties involved, find the facts, apply the relevant law and reach the conclusion to which their findings and their experience lead them. Called a “perverse” decision, it is not sufficient that the Tribunal’s reasoning process might lead to two potential, and equally reasonable, decisions. Merely preferring one decision over another is not perversity. There must be one obvious answer, but the Tribunal reached another answer. It is only if these exceptional circumstances are present that a decision left for the Tribunal’s determination would provide a ground for a successful claim for an appeal on a point of law. Judicial review allows for the decision to be set aside and substituted where there is only one decision that could have been reached, but for the error. An appeal on a point of law allows for the decision to be set aside and substituted where the decision is plainly and unarguably wrong. The question is not whether the discretionary power could have been exercised differently. The question is whether it should have been exercised differently. There therefore appears to be very little difference, if at all, between an appeal on a point of law and judicial review in so far as it relates to discretionary decisions.

1144 Lee Ting Sang v Chung Chi-Keung and Another 1990 2 AC 374; O’Kelly v Trust House Forte plc 1983 IRLR 413.
1145 Martin v Glynwed Distribution Ltd 1983 ICR 511.
1146 Naylor v Orton & Smith Ltd 1983 ICR 665.
1147 Woods v WM Car Services (Peterborough) Ltd 1981 IRLR 347; 1982 IRLR 27 EAT.
In South Africa, as with the Tribunal system in England, flexibility, accessibility and efficiency are concepts entrenched in the rationale behind the establishment of the CCMA. To enhance the efficiency with which labour disputes were resolved, decisions emanating from CCMA arbitration proceedings are also final as to the merits of the matter, but specifically conferred to be subject to judicial review to the Labour Court in the event of a defect. Unlike an error of law in English employment law, a “defect” is statutorily defined to exist only where: 1) the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator; 2) the commissioner committed a gross irregularity in the conduct of the arbitration proceedings; 3) the commissioner exceeded his or her powers; and/or 4) the award was improperly obtained. Substantive unreasonableness does not feature explicitly as a ground for review in section 145(2) of the LRA. The section 145(2) grounds of review have also been interpreted by the courts to be largely procedural in nature. Mirroring the grounds of challenge recognised by the Appeal Tribunal in England, section 145(2) has been interpreted to include a commissioner: 1) committing a material error of law, including misconstruing a statute and/or failing to follow legal principles laid down in authoritative case law; 2) not complying with the rules of natural justice; 3) misconstruing the nature of a dispute; 4) undertaking the wrong enquiry in relation to an issue; 5) failing to consider the credibility and reliability of witnesses or the inherent probabilities of the parties’ competing versions; 6) ignoring or improperly rejecting materially relevant evidence; or purporting to determine a dispute in the absence of jurisdiction to do so. It is evident that despite the different processes preferred in the respective countries, both England and South Africa restrict considerably the scope of judicial intervention by focusing on the way in which a decision-maker came to his or her conclusions and asking whether it has been shown that the decision was arrived at as a result of the commission of an error of law as contemplated by section 21(1) of the Employment Tribunals Act or one or more of the section 145 grounds for review provided for in section 145 of the LRA. Likewise, it is evident that the courts in South Africa and England are charged with determining whether a section 145 ground

1149 In South Africa, the importance of these concepts is evident from the fact that the LRA identifies the effective resolution of labour disputes as one of the primary objectives of the LRA; prescribes arbitration as the chosen mechanism to arrive at a final and binding decision; and specifies that a commissioner may conduct an arbitration in such a manner so as to determine the dispute fairly and quickly and with the minimum of legal formalities. In England, the same objectives are apparent from the Tribunal’s procedural regulations that confirm that the Tribunal must handle cases justly by ensuring that they are dealt with proportionately, expeditiously, fairly, on an equal footing and in a cost effective manner.

1150 In England and South Africa, the courts are not concerned with re-hearing the evidence, but are concerned only with the legal argument presented before it.
for review or a section 21(1) ground for appeal is present. The question is not whether the outcome is correct. Nevertheless, case law in South Africa and England makes it apparent that a contemplation of the merits is unavoidable; especially where the reasonableness or otherwise of a decision is brought into question. In fact, it is because a perversity challenge questions the outcome of the matter that the English courts set such a high hurdle for a perversity appeal.

With the introduction of the 1993 Constitution, the Labour Appeal Court in Carephone looked beyond the procedural grounds of review provided for in section 145 and accepted that an arbitration award, as an administrative act, must also be justifiable in relation to the reasons given for it. Introducing a substantive ingredient into the judicial review process, the Court accepted that the test was whether there was a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him or her and the conclusion he or she eventually arrived at. Unlike perversity in English employment law, the Court did not expressly hold unjustifiability to be an independent ground of review; but determined that it would constitute an excess of power by the commissioner concerned as contemplated in section 145(2)(a)(iii). In County Fair Foods, the Labour Appeal Court also subsequently linked reasonableness to misconduct in terms of section 145(2)(a)(i) or a procedural irregularity in terms of section 145(2)(a)(ii) and in Toyota the Labour Appeal Court expressed doubts as to the independent existence of reasonableness as a ground of review.1151 Reminiscent of symptomatic unreasonableness in administrative law, the question was thus whether the conclusion reached was so aberrant in itself, or so out of touch with the law and the facts, that it could be said to be defective in one of the senses contemplated by section 145, properly interpreted.

Given the confusion surrounding the proper application of reasonableness, the Constitutional Court’s attempted clarification of the role of reasonableness in Sidumo was greeted with enthusiasm. In Sidumo, decided under the 1996 Constitution, the Court referred to Carephone and the administrative law judgment of Bato Star Fishing and accepted that reasonableness should henceforth suffuse section 145 of the LRA. According to the Court, the reasonableness enquiry

---

1151 Toyota South Africa Motors (Pty) Ltd v Radebe & others 2000 3 BLLR 243 (LAC).
required the reviewing applicant to establish that the result of the arbitration award fell outside of a range of reasonableness, having regard to the reasoning of the commissioner and the material before him or her. Regrettably however the Court in Sidumo did not explicitly determine that unreasonableness was an independent ground of review and the role of unreasonableness has therefore remained unclear.

Left with the practical task of applying the general principles laid down by the Constitutional Court on a case by case basis, the courts have applied unreasonableness review in an arbitrary manner with unpredictable results. Fidelity Cash Management Services, Value Logistics Ltd and Ellerine Holding Ltd supported reasonableness as a standard or test on review. On the other hand, Fidelity Cleaning (Pty) Ltd, Super Group Autoparts and Samancor preferred to treat unreasonableness as a ground of review in addition to the section 145(2) grounds of review. The courts have also referred to unreasonableness, unjustifiability and irrationality interchangeably – suggesting that a light touch review test applies – however, different levels of deference are evident in review courts’ decisions since Sidumo.1152

Where jurisdictional questions are concerned, it has also been debated whether questions of jurisdiction are subject to a standard of reasonableness or correctness. Fidelity Cash Management Services, SARPA, J & J Nfreeze Trust, Solid Doors, Consol Glass (Pty) Ltd and University of Pretoria all support the proposition that jurisdictional decisions are reviewable for lack of correctness. On the other hand, in Joseph the Labour Appeal Court preferred to assess jurisdictional decisions with reference to reasonableness. In addition thereto, judgments like that of SA Defence & Aid Fund and Fidelity Guards Holdings (Pty) Ltd distinguish between objectively verifiable and subjectively determinable jurisdictional facts. The former is for the court to determine whether correct, but the latter focuses on the commissioner’s subjective reasons for his findings rather than the jurisdictional fact’s objective existence and hence the reasonableness standard is considered to be capable of being applied thereto. It is submitted that the latter approach is more in line with English law approach.

1152 See Chapter 6.
The courts have attempted to refine the review test in the aftermath of Sidumo. In Bestel v Astral Operations Ltd\(^{1153}\) and Sasol Mining (Pty) Ltd v Nggeleni,\(^{1154}\) the Courts confirmed that unreasonableness review would be competent where a commissioner’s findings were: 1) unsupported by any evidence; 2) based on speculation; 3) entirely disconnected from the evidence; 4) supported by evidence that is insufficiently reasonable to justify the decision; or 5) made in ignorance of evidence that was not contradicted. Despite this attempted clarification, the precise meaning of reasonableness in South African employment law remains elusive:

1. Is unreasonableness a standard, test or an independent ground of review?
2. Is unreasonableness encompassing in that an arbitration award will only be reviewable in terms of section 145(2) if it is found to be unreasonable?
3. How does unreasonableness review of a CCMA award differ from an appeal on the merits?
4. Is unreasonableness distinct from irrationality or is it equivalent to rationality and justifiability?
5. To what type of decisions should unreasonableness apply?
6. What is the appropriate test for reviewing CCMA arbitration awards, including the limits or bounds thereof, taking into consideration that the CCMA is a specialist dispute resolution body that have been mandated by the legislature to resolve disputes quickly and fairly?

Whilst judicial review in terms of the LRA has not necessarily had the effect of enhancing the efficiency with which employment disputes are resolved and ambiguity and uncertainty in relation to unreasonableness have caused complicated and technical legal arguments, it is submitted that this complexity is not novel to South African law. It is also true of unreasonableness in English administrative law and perversity in English employment law. There is an inevitable and continuing overlap between process and substance and merits and legality in both appeal and review proceedings that intensify the complicated nature of unreasonableness. Although it is arguable whether the limitation of appeals in labour disputes is actually achieving its objectives, in substantive terms, an appeal on a point of law is functionally the equivalent of judicial review.\(^{1155}\) In the circumstances, it is submitted that the better answer to the uncertainties

\(^{1153}\) Bestel v Astral Operations Ltd 2011 2 BLLR 129 (LAC).
\(^{1154}\) Sasol Mining (Pty) Ltd v Nggeleni 2011 4 BLLR 404 (LC).
\(^{1155}\) See Begum (FC) v London Borough of Tower Hamlets 2003 UKHL 5 para 7.
and complexities existing in South African employment law lies in addressing and answering the questions raised above and developing a consistent, objective and workable approach to unreasonableness review. This will be explored in chapter 8.
CHAPTER 8

CONCLUSION

8 1 INTRODUCTION

In South Africa there has been an important and continuing controversy regarding the permissible scope of judicial review of CCMA arbitration awards in terms of section 145 of the LRA.\(^{1156}\) Initially, the grounds in section 145(2) were narrowly interpreted to be procedural in nature in line with a similarly worded section in the Arbitration Act in respect of private arbitration award reviews.\(^{1157}\) As a result, the absence of a justifiable link between the evidence and the conclusion was not regarded as misconduct by the commissioner in relation to his or her duties, a gross irregularity in the conduct of the proceedings or proof that the commissioner exceeded his or her powers or that the award was improperly obtained in the traditional sense of the terms.\(^{1158}\) However, in Carephone, the Court determined that the interpretation of section 145 was influenced by justifiability in accordance with the right to just administrative action in section 33, read with item 23(2) of Schedule 6, of the 1996 Constitution.\(^{1159}\) The Labour Court was accordingly required to determine if there was a rational objective basis justifying the connection made by the decision-maker between the material properly available to him or her and the conclusion he or she eventually arrived at.\(^{1160}\) Subsequently, in Sidumo,\(^{1161}\) the Constitutional Court held that section 145 of the LRA was suffused by reasonableness in accordance with the right to just administrative action as provided for in section 33(1) of the 1996 Constitution. The Labour Court was required to determine if the CCMA arbitration award was one that a reasonable decision-maker could not reach.\(^{1162}\) However, section 145 makes no reference to unjustifiability or unreasonableness. There has also been no constitutional challenge to section 145 on the ground that the section fails to give effect to the constitutional right to just administrative action. Nor has there been a “reading in” of unjustifiability or substantive unreasonableness as grounds.

---

\(^{1156}\) Chapter 1 para 1 2; Chapter 5 para 5 6 and chapter 6 para 6 5.
\(^{1157}\) Chapter 2 para 2 6.
\(^{1158}\) Chapter 2 para 2 6 1 1 – 2 6 1 4.
\(^{1159}\) Chapter 5 para 5 4. Interim provision.
\(^{1160}\) Chapter 5 para 5 4.
\(^{1161}\) Chapter 5 para 5 5 2.
\(^{1162}\) Chapter 5 para 5 5 2.
of review into section 145.\textsuperscript{1163} The purpose of this thesis is to clarify the role of reasonableness in the review of CCMA arbitration awards with reference to the role of reasonableness in English administrative and employment law. The purpose of the thesis is further to formulate the enquiry into reasonableness with greater clarity.\textsuperscript{1164} Hopefully that will promote the application of the concept of reasonableness in labour matters with greater consistency than has been seen thus far.

8 2 \textbf{REASONABLENESS AS A STANDARD, TEST AND/OR GROUND OF REVIEW}

In English administrative law, there is no statutory classification of the grounds of judicial review.\textsuperscript{1165} It is accepted that unlawfulness for review purposes includes the common law grounds of illegality, procedural impropriety and irrationality. Since the Human Rights Act 1998 was enacted, unlawfulness for review purposes also includes a breach of fundamental rights as set out in the European Convention on Human Rights.\textsuperscript{1166} Examples of sub-grounds of illegality include errors of law, errors of fact, exercising a power for an improper purpose, taking irrelevant considerations into account or disregarding relevant considerations, fettering of discretion and unauthorised delegation.\textsuperscript{1167} Procedural impropriety includes non-compliance with statutory procedural requirements, denying a party the right to a hearing, failing to comply with the duty to provide reasons for a decision, non-adherence to the rule against bias and legitimate expectation.\textsuperscript{1168} Irrationality, on the other hand, applies to the exercise of an executive discretion where the decision-maker has obviously stepped outside the range of decisions that he or she could reasonably make in the circumstances.\textsuperscript{1169}

Irrationality is considered to be an independent ground of review and not merely evidence of the grounds of illegality or procedural impropriety, although the grounds may overlap.\textsuperscript{1170} It is not necessary to rely on irrationality where a decision is made for a purpose that is foreign to the purpose for which the decision-making authority was granted or where decision-makers

\begin{flushleft}
\textsuperscript{1163} Chapter 6 para 6 2 1. \\
\textsuperscript{1164} Chapter 1 para 1 3 and 1 8. \\
\textsuperscript{1165} Chapter 3 para 3 3. \\
\textsuperscript{1166} Chapter 3 para 3 3 and chapter 7 para 7 2. \\
\textsuperscript{1167} Chapter 3 para 3 3 1. \\
\textsuperscript{1168} Chapter 3 para 3 3 2. \\
\textsuperscript{1169} Chapter 3 para 3 3 3. \\
\textsuperscript{1170} Chapter 3 para 3 3. 
\end{flushleft}
considered irrelevant factors or disregarded factors which they were obliged to consider.\textsuperscript{1171} Such cases constitute a sub-category to the illegality ground for review. It is also not necessary to rely on irrationality where decision-makers failed to observe the rules of natural justice or to act with procedural fairness. A decision that is not reviewable on the ground of illegality or procedural impropriety, may nevertheless be reviewable because of substantive unlawfulness. The grounds of review are not mutually exclusive, but may overlap and cause a decision to be tainted by more than one ground of review. A decision may, for example, be reviewable on the ground of illegality because the decision-maker acted outside the scope of his or her powers in considering irrelevant factors. That decision may at the same time also be reviewable on the ground of irrationality, due to the magnitude of the irrelevant considerations, since no reasonable decision-maker could have made such a decision. Likewise, the failure to grant a person affected by a decision a hearing, in breach of principles of procedural fairness, may also result in a failure to take into consideration relevant factors.

In English employment law, there is no judicial review process to challenge the decisions of the Tribunal. Instead, provision is made for an appeal on the ground of a question of law to the Appeal Tribunal.\textsuperscript{1172} Similarly to English administrative law, there is no further statutory classification of the grounds of appeal.\textsuperscript{1173} It is accepted that questions of law for appeal purposes include: 1) a misdirection, misunderstanding or misapplication of the law;\textsuperscript{1174} 2) a misunderstanding or misapplication of relevant undisputed or indisputable facts that are material to the decision in question;\textsuperscript{1175} and 3) “perverse” decisions.\textsuperscript{1176} Perversity is not a test to establish whether a question of law is present.\textsuperscript{1177} It is considered to be a free-standing basis for appeal. The grounds of appeal are also not strictly compartmentalised, but may overlap. The Tribunal may make a finding of fact which is unsupported by any evidence. At the same time, the finding of fact may be one which no reasonable Tribunal, properly directed in law, could have made.

\begin{flushleft}
\textsuperscript{1171} Chapter 3 para 3 3 1. \\
\textsuperscript{1172} Chapter 4 para 4 1 and 4 3. \\
\textsuperscript{1173} Chapter 3 para 3 2 1. \\
\textsuperscript{1174} Chapter 4 para 4 4 1. \\
\textsuperscript{1175} Chapter 4 para 4 4 2. \\
\textsuperscript{1176} Chapter 4 para 4 4 and 4 4 3. \\
\textsuperscript{1177} Chapter 4 para 4 4. \\
\end{flushleft}
As far as South African law is concerned, unreasonableness in English administrative law and perversity in English employment law are semantically identical to the South African notion of unreasonableness. In fact, the South African Constitutional Court in *Bato Star Fishing* was guided by the English administrative standard of unreasonableness when it set out to determine the proper meaning of unreasonableness, recognised as a ground of review in section 6(2)(h) of PAJA. Having regard to the English approach, it is submitted that it is not the proper meaning of unreasonableness in South African employment law that unreasonableness only *widens* the scope of review by affording a broader interpretation to the grounds of review contained in section 145(2). Nor should unreasonableness be regarded as *narrowing* the scope of review in that a section 142(2) ground of review will only be found to be present if it was of such a nature that it resulted in an unreasonable decision. Unfortunately, the Constitutional Court in *Sidumo* never explicitly addressed the question whether unreasonableness should be identified as a ground of review independent from the existing grounds of review in section 145(2)(a) and (b). It is submitted that unreasonableness cannot properly be accommodated within the context of section 145(2) of the LRA. The grounds of review are not prescribed in an open-ended manner. In accommodating unreasonableness within section 145(2), it is suggested that the unreasonableness of the *outcome* of the exercise of the discretionary power will only point to an inferred or deemed legal error or that the power has not been properly exercised in terms of section 145(2). It does not recognise that unreasonableness may itself provide an independent substantive limit on the width of a discretionary power as was the case in *Bato Star Fishing* and as is the case in section 6(2)(h) of PAJA. As an example, section 145(2)(iii) relates to excesses of power and generally finds application where commissioners exceed their jurisdiction or where commissioners make rulings or awards beyond their

---

1178 Chapter 3 para 3 1 and chapter 5 para 5 5 2.
1179 Chapter 6 para 6 2 1 and 6 2 2.
1180 Chapter 5 para 5 5 3 and 5 6.
1181 Chapter 1 para 1 1.
1182 Chapter 2 para 2 6 1 2.
powers. Drafted in narrow, procedural terms, section 145(2)(iii) does not traditionally find application where a commissioner merely chooses one remedy over another where there is a choice of remedies is given, nor does it find application where the substantive outcome is undesirable.

It is submitted that reasonableness should not be treated as an over-arching standard or test of review that is used to determine the reviewability of CCMA arbitration awards in terms of section 145(2)(a) and (b). Thus, interference on review should not merely be warranted where the irregularity, misconduct or excess of power complained of is of such a nature that it renders the decision that has been reached unreasonable in the circumstances. Unreasonableness should be recognised as an independent ground of review. It does not mean that unreasonableness has replaced the statutory grounds of review or that the statutory grounds of review have merged under the broad heading of unreasonableness. Section 145(2)(a) and (b) continue to find application as independent grounds of review but unreasonableness exists alongside it. This interpretation is in line with section 33 of the 1996 Constitution, which requires administrative action to be reasonable in addition to being lawful and procedurally fair. The effect would be that a CCMA arbitration award can be reviewed and set aside by the Labour Court on the basis of both procedural defects as well as substantive unreasonableness. Such an approach effectively widens the scope of CCMA arbitration award reviews. It also clarifies the status of unreasonableness vis-à-vis the grounds of review in section 145(2). Section 145(2) is a closed list of grounds of review and makes no reference to unreasonableness as a ground of review. In the circumstances, it is proposed that section 145(2) be amended to expressly include unreasonableness as a ground of review.

Unreasonableness may in certain instances overlap with the section 145(2) grounds of review for instance where a commissioner fails to take account of matters which the LRA, upon proper construction, indicates are relevant considerations. Such a decision will be reviewable due to a gross irregularity as well as on the basis of unreasonableness if, due to the extent of the relevant circumstances, it is proposed that section 145(2) be amended to expressly include unreasonableness as a ground of review.

---

1183 Chapter 2 para 2 6 1 3.
1184 Chapter 1 para 1 2 and chapter 2 para 2 6 1 3.
1185 Chapter 6 para 6 2 2.
1186 Chapter 1 para 1 2 and chapter 2 para 2 6.
considerations not taken into account, the decision is so unreasonable that no reasonable commissioner could have come to it. It is however also possible that section 145(2) may cover instances that are irrelevant to or distinct from unreasonableness.\textsuperscript{1187} Because different tests are applied to establish the different grounds for review,\textsuperscript{1188} the courts should not determine unreasonableness with reference to the grounds provided for in section 145(2). Consequently, an applicant on review need not establish unreasonableness, for example, to succeed with a review application on the basis of a commissioner’s alleged excess of powers. Similarly, where a commissioner fails to properly resolve an irreconcilable dispute of fact, the question need not be whether the outcome is unreasonable. It needs to be established only whether the commissioner undertook the wrong enquiry or undertook the enquiry in the wrong manner, resulting in the aggrieved party not having his or her case fully and fairly determined. Unreasonableness also does not have to be considered in respect of the other reviewable defects provided for in section 145(2). However, where an award is defective due to a gross irregularity, the award should be set aside on that basis and should not be upheld on the basis that the outcome is reasonable. If unreasonableness is afforded the same status as the section 145(2) grounds of review it is inappropriate to tolerate a defect because the CCMA arbitration award is considered substantively reasonable. Where the section 145(2) grounds are properly interpreted and applied, a decision should also not be substantively reasonable despite misconduct by the commissioner in relation to his or her duties, a gross irregularity in the conduct of the proceedings or proof that the commissioner exceeded his or her powers or that the award was improperly obtained. A different approach would suggest that the statutory grounds of review have been rendered redundant, alternatively it would advance unreasonableness to a higher status.

\textbf{8 3 REASONABLENESS REVIEW IS NOT AN APPEAL ON THE MERITS}

English administrative law distinguishes judicial review from an appeal on the merits.\textsuperscript{1189} An appeal on the merits is concerned with the correctness of the outcome. The appellate body re-examines the factual basis of a decision, weigh in the balance the merits of the case and make a new decision in substitution for the original decision to ensure that the correct decision is made.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1187} Para 8 2 7.
\item \textsuperscript{1188} Chapter 2 para 2 6 1 1 – 2 6 1 4. In relation to English law, see also chapter 3 para 3 3 1 – 3 3 3.
\item \textsuperscript{1189} Chapter 2 para 2 3.
\end{itemize}
\end{footnotesize}
Judicial review scrutinises the *legality* of the decision and invalidates the original decision if it is unlawful. Whilst the *content or outcome* of substantive decisions are relevant to unreasonableness review, judicial scrutiny in terms of unreasonableness requires a more deferential approach than the correctness test applied in an appeal on the merits. Focused on curtailing abuse of discretion, unreasonableness review determines whether the original decision falls within a range of reasonable outcomes only. It effectively places a *substantive* limitation on the width of discretionary powers and removes from decision-makers the outer range of choices which might otherwise have been open to them. But, within these limits, decision-makers remain responsible for making decisions on the merits and the review court is not permitted to impose its own preferred decision upon the original decision-maker. Simple differences of opinion between administrative decision-makers and review courts also do not justify unreasonableness review. Where a decision is found to be unreasonable, the review court generally refers the matter back to the original decision-maker for reconsideration. It is only where the review court considers that there is no purpose to be served in remitting the matter to the original decision-maker that the review court may, subject to any statutory provisions, substitute its own decision for the decision in question. It remains for the administrative decision-maker to decide upon: 1) the findings of fact that should be made; 2) the weight that should be attributed to factors; and/or 3) the judgment or discretion that should be exercised. It is clear that an appeal on the merits is wider in scope than judicial review.

English employment law further differentiates between an appeal on the merits and an appeal on a point of law. In the latter instance, the appellate body does not re-examine the facts to determine whether the decision is correct, but identifies and corrects substantive and procedural errors of law. An appeal on a point of law also resembles judicial review in terms of the *grounds* of challenge. For instance, a decision is perverse in English employment law within the meaning of *Wednesbury* unreasonableness in English administrative law. The content or outcome of substantive decisions also only become relevant to a perversity appeal in so far as it is

---

1190 Chapter 3 para 3 3 3.
1191 Chapter 3 para 3 2 1; section 31(5)(b) and 31(5A) of the Senior Courts Act 1981. The Court’s power to substitute its own decision for that of the original decision-maker is subject to three qualifications: 1) the decision in question was made by a court or tribunal; 2) the decision has been quashed on the ground that there has been an error of law; and 3) without the error, there would have only been one decision.
1192 Chapter 6 para 4 4.
1193 Chapter 3 para 3 3 3.
alleged that the Tribunal’s decision is so irrational as to make the decision perverse in the legal sense. Comparable to unreasonableness review in English administrative law,\textsuperscript{1194} it is accepted that another tribunal might legitimately reach a different conclusion on the basis of the evidence presented. The question is not whether the Appeal Tribunal considers the Tribunal decision incorrect on the facts. Unlike an appeal on the merits, the Appeal Tribunal is cautious not to usurp the function of the Tribunal. Unless a point of statutory construction is involved, the Appeal Tribunal will not substitute its view unless there is only one possible conclusion that could have been reached by the Tribunal.\textsuperscript{1195}

In South Africa, the suggestion has been made that the Labour Court’s review jurisdiction should be replaced with an appeal on the merits. The reasoning is that: 1) a correctness appeal may be less complex than determining on review whether commissioners exercised their statutory discretion to evaluate the fairness of employers’ decisions in a fair manner; and 2) an appeal jurisdiction would give rise to a clearer body of precedent to guide commissioners because the courts would focus on the correctness of commissioners’ decisions rather than the manner in which decisions were made.

It is submitted that the institution of a correctness appeal process calls for rejection. Firstly, a correctness appeal is contrary to the objective in section 143(1) of the LRA that arbitration awards should be final and binding and subject to scrutiny in limited circumstances only. It also fails to take into account that the administrative status of the CCMA requires that some deference be afforded to CCMA arbitration awards. An appeal on the merits would allow the Labour Court to consider all aspects of a case, rather than just aspects connected to the grounds of review contained in section 145(2). It would also involve a consideration of the correctness of a commissioner’s decision. Secondly, the more widely the Labour Court is able to scrutinise and substitute its decision for that of the commissioner, the more incentive parties are likely to have to bring an appeal. That will not support the legislature’s overall objective of effectively resolving disputes at arbitration level. Thirdly, commissioners’ decision-making powers tend to relate to discretionary or value judgments, made on a combination of findings of facts and

\textsuperscript{1194} R (Iran) and others v Secretary of State for the Home Department 2005 EWCA Civ 982 para 11.
\textsuperscript{1195} Chapter 4 para 4 3.
opinions, for which there is usually no single correct answer. A “correctness” test is therefore inappropriate. On appeal, the question would still be whether the discretion was correctly exercised. Lastly, providing for judicial supervision in the form of an appeal on a point of law rather than judicial review would serve little purpose. English law demonstrates that challenges in relation to a perversity appeal and an unreasonableness review are premised on comparably similar grounds.

8.4 MEANING OF REASONABLENESS IN RELATION TO RATIONAL JUSTIFIABILITY

In English law, there is no agreed distinction between “irrationality” and “unreasonableness”. The terms are interchangeably used to refer to decisions that are: 1) arbitrary or capricious; 2) frivolous and vexatious; 3) made in bad faith, 4) dishonest, and 5) arrived at as a result of considering irrelevant considerations or disregarding relevant considerations. Unreasonableness is distinguished from proportionality on the basis that it utilises a different method of inquiry. Unreasonableness requires that the decision must be so unreasonable that no reasonable decision-maker could ever have come to it. Unreasonableness does not specify that the review court must consider the relative weight accorded to interests and considerations and the balance which the decision-maker has struck between the interests and considerations. Proportionality requires that: 1) the decision must be suitable to achieve the desired objective; 2) the decision must be necessary for achieving the desired objective and 3) the decision must not impose excessive burdens on the individual it affected. Proportionality entails a Proportionality may, however, be an aspect of reasonableness where administrative decisions are set aside because there has been an improper balance of relevant considerations or the effect of the decision was unreasonably oppressive.

In South African administrative law, irrationality is recognised as a minimum threshold requirement applicable to the exercise of all public power. It does not entail a particularly stringent test. Rationality requires that a decision must not be arbitrary. There must be a

---

1196 Chapter 3 para 3 3 3.
1197 Chapter 3 para 3 4 1 1.
1198 Chapter 5 para 5 4 and chapter 7 para 7 6.
rational connection between the decision, the information that forms the factual basis of the decision and the reasoning provided for in the decision. It focuses on the transparency, intelligibility and justifiability of the decision-maker’s reasoning process. The court takes account of the substantive merits of the decision under review in so far as it examines the connection between the decision and the reasons given for it to determine whether the connection is rational. It appears that no clear distinction is drawn between unreasonableness, unjustifiability and irrationality: 1) irrationality in terms of PAJA has been assessed with reference to the justifiability test in Carephone; 2) Carephone found “rationality” and “justifiability” sufficiently similar so as to occasion no deviation between the two tests; 3) the courts have used “rational justifiability” interchangeably with “reasonableness” and 4) the Supreme Court of Appeal in Edcon Ltd described the change from rational justifiability to reasonableness as semantics. Unreasonableness and irrationality are, however, both recognised as grounds of review in terms of PAJA.

It is submitted that, as aspects of the same reviewable defect, unreasonableness imports elements of irrationality. For instance, a decision that is arbitrary or capricious will also be unreasonable. It is however submitted that “rationality” and “rational justifiability” seemingly relate to “dialectical” unreasonableness only. To prevent arbitrariness in the decision-making process, rational justifiability is focused on whether there is a rationale for the decision. The rational justifiability test determines whether there is a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him or her and the conclusion he or she eventually arrived at. Rational justifiability does not determine whether the conclusion itself is rational or reasonable. A consideration of unreasonableness extends the review enquiry a little further. Included in its scope is the reasonableness of the outcome of the exercise of power. This second facet to unreasonableness considers whether the decision itself falls within the range of possible acceptable outcomes that is defensible in respect of the facts and the law. It does so by evaluating or assessing the reasonableness of the competing

---

1199 See section 6(2)(f)(ii) of PAJA.
1200 Chapter 5 para 5 5.
1201 Chapter 5 para 5 4.
1202 Chapter 6 para 6 2 1.
1203 Chapter 6 para 6 2 1.
1204 Chapter 6 para 6 2 3.
1205 Chapter 5 para 5 4.
considerations for and against the decision. It asks whether the weight and balance attributed by the commissioner to considerations that have been or can be deemed relevant were reasonable. Unreasonableness therefore tests the substantive validity of the outcome in addition to the rationale for the outcome. Albeit more robust, reasonableness therefore imports elements of proportionality.1206 This is supported by Sidumo wherein the decision was considered reasonable even though the commissioner had made one or two “erroneous” findings. Essentially, the considerations in support of the decision of the commissioner defeated or outweighed the reasons against the decision.1207 Unlike gross unreasonableness, the unreasonableness of a decision might not be readily apparent from the CCMA arbitration award. There is thus a greater obligation on the judiciary to identify and articulate the basis for finding that a discretionary decision was one which could not reasonably have been made. Although the terms “irrationality” and “unreasonableness” have been used interchangeably by the courts in an attempt to control the administrative decision-making process, it is submitted that the two terms are not, in a strict sense, synonymous. As such, it is best practice for the review court to avoid references to irrationality and/or unjustifiability when referring to Sidumo unreasonableness.

8 5 NATURE OF DECISIONS SUBJECT TO REASONABLENESS REVIEW

In English administrative law, irrationality review arises in the context of matters of fact-finding, policy based determinations, the weighing of factors and the exercise of discretion by decision-makers where more than one conclusion is available in the circumstances. That includes the definition and application of jurisdictional, statutory preconditions that are not objectively verifiable but dependent on an exercise of a subjective judgment by the original decision-maker. Because this entails a degree of discretion, the court determines whether the decision amounts to an excess of jurisdictional discretion only.1208 Irrationality also applies where legislation does not specify the considerations that must be taken into account by a decision-maker in the circumstances. In such a case, it is largely for the decision-maker, in the light of the material before him or her, to determine what is relevant and the comparative importance to be accorded to the relevant material.

1206 Chapter 5 para 5 1.
1207 Chapter 6 para 6 3 2.
1208 Chapter 3 para 3 4 1 2.
Irrationality review does not apply to objectively verifiable jurisdictional facts. The review court does not ask whether the decision-maker reasonably thought that the jurisdictional fact was present, but whether - subject to questions of materiality and discretion - the determination that the substance of the matter is within its jurisdiction was correct. Jurisdictional questions, like that relating to the interpretation of a statutory provision or the determination of the applicable legal standard, is addressed by means of an “appeal test” and no judicial deference is afforded to the original decision-makers should they answer it incorrectly. Likewise, a standard of correctness applies to the grounds of illegality and procedural impropriety. It is for the court to decide what the law is or what fairness requires.

The English review courts are reluctant to review errors of fact. Errors of fact are reviewable by way of exception if: 1) there has been a mistake as to the existence of a fact, including a mistake as to the availability of evidence to support a finding of fact; 2) the fact or evidence was uncontentious and objectively verifiable; 3) the appellant or his or her advisers were not responsible for the mistake; 4) the mistake played a material, though not necessarily decisive, part in the decision-maker’s reasoning; and 5) the statutory context is one “where the parties share an interest in co-operating to achieve the correct result”. Reasonableness is relevant in relation to the second condition. A review for error of fact is seemingly ruled out where there is a reasonable dispute about whether a finding was sufficiently supported by the evidence. In these instances, a finding of fact will only be reviewable if the contested finding of fact is unreasonable. Lastly, an error of fact will be reviewable if it amounts to an irrational conclusion of fact based on no evidence.

In English employment law, findings of fact are appealable on the basis that it is contrary to the evidence, that there was no evidence to support the finding or that the finding was one that no reasonable tribunal could have reached and was perverse. Examples of findings of fact include whether: 1) a person is an employee or independent contractor; 2) an employee has been unfairly dismissed; 3) an employee has been constructively dismissed; 4) an employee has engaged in industrial action; 5) an employee is guilty of contributory fault; 6) an employee has resigned or was forced to do so and/or 4) whether an employee has taken part in a strike. Taking the

1209 Chapter 4 para 4 4.
examples into consideration, a perversity appeal will not succeed because of a mere misunderstanding or misapplication of facts or because the Appeal Tribunal has doubts about the decision of the Tribunal. A perversity appeal would also not apply where it is alleged that: 1) the overall decision is perverse because the findings of fact on specific issues on which there was a conflict of oral evidence are perverse; 2) the chairperson’s decision is silent or incomplete on factual points and has therefore been overlooked or the resultant findings of fact are therefore not supported by the evidence; or 3) the Tribunal has reached different conclusions in cases based on similar facts. It is also not enough that the Appeal Tribunal would, on the basis of the merits and the oral evidence, have decided the matter differently to the Tribunal or feels strongly that the result is unfair.

In South African employment law, the question has also arisen in what circumstances the review courts should interfere with commissioners’ assessment of their own jurisdiction. The majority of case law accept that all jurisdictional errors require correctness review. Decisions involving sanction, guilt, penalty and relief do however require some variability by reason of the value judgments they entail. The English administrative law approach to jurisdictional reviews assist with resolving these issues. To the extent to which jurisdictional challenges are raised, it is submitted that the South African courts should distinguish between objectively verifiable jurisdictional facts or state of affairs that must exist before the statutory power(s) of a commissioner can validly be exercised and jurisdictional facts that need only be found to exist in the subjective judgment of the commissioner. In the case of objectively verifiable jurisdictional facts or state of affairs, the review court should be able to determine the objective existence of the jurisdictional fact, as a prelude to the exercise of power in a particular case. If the review court finds that objectively the fact did not exist, it should be able to declare invalid the purported exercise of the power. However, where the legislature has entrusted to the CCMA the power to determine whether in its subjective judgment the pre-requisite fact or state of affairs existed, prior to the exercise of the power, the existence of the fact or state of affairs is not determinable by the review court. It is submitted that in the latter type of cases the review court can only interfere with the exercise of the power on the ground of a non-observance of the

---

1210 Chapter 6 para 6.4.2.
1211 Chapter 6 para 6.4.2.
jurisdictional fact where it is shown that the commissioner unreasonably decided that the pre-requisite fact or state of affairs existed. The determination of the existence of an employment relationship and the existence of a dismissal does fall within the jurisdiction of the CCMA in the course of arbitration proceedings in relation to a dispute before it. Where no employment relationship or dismissal has been established, the CCMA does not lack jurisdiction to determine the dispute. The proper approach is that the employee has failed to discharge the onus of proving a dismissal or the existence of an employment relationship. The existence of an employment relationship or a dismissal does therefore raise a jurisdictional issue, but not in the sense that it is beyond the powers of commissioner to determine. The jurisdictional issue is closely related to the merits of the matter. The jurisdictional determination requires the resolution of factual disputes, the leading of oral evidence and a determination of questions of mixed law and fact on matters that are bound up with the substantive merits of the dispute and left for the CCMA’s final determination subject to review. It is thus not beyond the CCMA’s jurisdiction, but it is a question that falls within the powers of a commissioner to determine in the course of determining whether a case has been made out for relief sought in arbitration proceedings in relation a dispute properly before it. As such, the existence of an employment relationship or a dismissal should be assessed by the review court with reference to Sidumo unreasonableness only. Lastly, commissioners have a broad discretion to resolve disputes generally whilst applying the relevant law to the facts. That discretion includes determination of guilt, sanction, penalty and relief. In these circumstances, commissioners are required to make value judgments on a combination of findings of facts and opinions as opposed to making correct legal determinations only. It is therefore not viable to presuppose that there is one correct determination only.

8.6 REASONABLENESS: THE APPROPRIATE TEST

In English administrative law, the courts have traditionally applied the Wednesbury reasonableness standard to determine the unreasonableness of a decision. The Wednesbury reasonableness standard determines that a decision will be invalidated on review if the decision is so unreasonable that no reasonable decision-maker could ever have come to it.\(^{1212}\) Considered to articulate a narrow standard of reasonableness, the application of the Wednesbury reasonableness

\(^{1212}\) Chapter 3 para 3 3 3.
standard is prominent in the context of economic policy, resource allocation and/or political disputes where the interacting interests and repercussions are not easily accommodated within the adjudicative model of the courts.\textsuperscript{1213} Case law, however, reflects that the courts have begun to distance themselves from a strict application of the \textit{Wednesbury} reasonableness standard. Preferring a more intensive application of the reasonableness standard, the courts refer to an irrational decision as a decision that is beyond the range of responses open to a reasonable decision-maker or a decision that a reasonable decision-maker could not reach.\textsuperscript{1214} This more intensive standard of reasonableness has typically been applied in the context of fundamental rights.\textsuperscript{1215} The more intensive standard of reasonableness suggests that the court will be more thorough in its assessment of the weight given to the relevant considerations when considering whether there is sufficient justification given for a conclusion. The strict application of the \textit{Wednesbury} reasonableness standard traditionally required the unreasonableness of a decision to be evident from the decision itself. The relaxation of the \textit{Wednesbury} reasonableness test has resulted in a focus also on the reasonableness of the decision-making process. It requires scrutiny of the \textit{outcome} and the \textit{reasons} for the outcome to determine the irrationality of the decision.\textsuperscript{1216}

The irrationality of a decision can therefore be established by means of a two-pronged test. Firstly, it needs to be determined if the \textit{outcome} is manifestly unreasonable or defies comprehension. If it is, the decision is reviewable on the basis of irrationality even though it is not necessarily clear from the reasons where the decision-maker erred. Theoretically, it is possible that despite rational and coherent reasons, the decision-maker’s conclusion is not within the range of acceptable outcomes. A decision will be reviewable, despite rational and coherent reasons, where the outcome: 1) bears no relation to the relevant considerations that were taken into account and the irrelevant factors that were disregarded or 2) is so unreasonable in relation to the relevant considerations that were taken into account and the irrelevant factors that were disregarded that the decision-maker must have been motivated by other considerations.

\textsuperscript{1213} Chapter 3 para 35 and 351.
\textsuperscript{1214} Chapter 3 para 333 and 351.
\textsuperscript{1215} Chapter 3 para 352.
\textsuperscript{1216} Chapter 3 para 333.
If the outcome is not manifestly unreasonable or does not defy comprehension, the decision may nevertheless be irrational if the *reasons* in support of the decision show that the *outcome* was preceded by flawed logic. Because a decision-maker must only take into account relevant and material considerations in the exercise of a discretion, the reasons for a decision will be irrational if the decision-maker took into account or acted upon immaterial or irrelevant considerations. Likewise, the reasoning process will be irrational if it amounts to an unreasonable balancing of relevant considerations, lacks logic or comprehensible justification or demonstrates that the decision-maker interpreted his or her authoritative power incorrectly or incorrectly assessed the surrounding facts and circumstances.

In English employment law, the factual conclusions or discretionary decisions of the Tribunal must meet the standard of perversity in order to be appealed against as errors of law. It is not permissible to appeal where the sole purpose is to challenge the reasons for the decision or a particular finding of fact. Both the *outcome* and the *reasons* for the outcome must be challenged in a perversity appeal. A decision is perverse, so as to involve an error of law, if the Tribunal has reached a decision that no reasonable tribunal, on a proper appreciation of the evidence and the law, could have reached.1217 Put differently, a perversity appeal applies where the Tribunal’s finding of fact, inference from the evidence or conclusion is “irrational”, “offends reason”, “is certainly wrong”, “is very clearly wrong”, “must be wrong”, “is plainly wrong”, “is not a permissible option”, “is fundamentally wrong”, “is outrageous”, “makes absolutely no sense” or “flies in the face of properly informed logic”. There are two sets of indicators of perversity. The first is that the Tribunal misunderstood, misstated or misapplied relevant, undisputed or indisputable fact, leading to a crucial finding of fact or inference not supported by probative evidence (reasons). The second is that although the Tribunal did not misunderstand, misapply or misstate a relevant, undisputed or indisputable fact, the *conclusion* cannot be justified by the evidence presented; further, where the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the conclusion in question (outcome).1218 As in English administrative law, perversity is established with reference to the outcome and the reasons for the outcome.1219

---

1217 Chapter 4 para 4.4 and 4.43.
1218 I.e. the reasoning underlying the finding of fact goes against properly informed logic (reasoning).
1219 Chapter 4 para 4.4.
established by means of a correctness standard. There is a difference between finding a decision “wrong” and inferring that a decision “must be wrong” because the decision defies comprehension in outcome or the reasons show that the decision was preceded by manifest illogicality. Where the issue is the adequacy of reasoning, the Appeal Tribunal is entitled to refer a matter back the Tribunal and request further written reasons for its decision prior to determining the appeal. Perversity looks to both the reasoning process as well as the findings that have been made. The Tribunal must give reasoned decisions, informing the parties why they won or lost their case. The decision must enable the Appeal Tribunal to determine whether a question of law arises. Where the reasons explaining the conclusion fall short of the prescribed basic standards for adequate reasoning, the decision may be quashed on that basis alone regardless of the substantive reasonableness of that decision.

In South Africa, the Constitutional Court in *Sidumo* was prepared to set a decision aside on review if the decision was one that a reasonable decision-maker could not reach. The reasonableness standard established in *Sidumo* proposes a higher intensity unreasonableness review than suggested in English administrative law in *Wednesbury Corporation* and *CCSU*. On the other hand, the reasonableness standard established in *Sidumo* is in line with the more liberal approach to unreasonableness review articulated in *International Trader’s Ferry Ltd* and *Boddington*. The relaxation of the *Wednesbury* reasonableness test has resulted in a focus also on the reasonableness of the decision-making process. It requires scrutiny of the outcome and the reasons for the outcome to determine the irrationality of the decision. It is understandable that the Constitutional Court in *Bato Star Fishing* opted to adopt the interpretation of unreasonableness in English law that is applied in the context of fundamental rights. The LRA in South Africa was adopted to give effect to the constitutional right to fair labour practices.

---

1220 *Barke v SEETEC Business Technology Centre Ltd* 2005 IRLR 633, CA. Prior to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 coming into effect, the power to invite the Tribunal to amplify its reasons stemmed from either rule 30(3)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 or section 30(3) of the Employment Tribunals Act 1996. It is not considered appropriate where the inadequacy of reasoning is on its face so fundamental that there is a real risk that supplementary reasons will be reconstructions of proper reasons.

1221 Chapter 4 para 4 4 1.

1222 Chapter 3 para 3 3 3.

1223 Chapter 5 para 5 4.
The reasonableness standard established in Sidumo provides a threshold for court interference that establishes a margin or range of reasonable decisions within which decision-makers acting reasonably may reach different conclusions. Focused on the result of the decision itself and how the decision-maker arrived at the result, the reasonableness standard established in Sidumo involves the review court in the review of the substance of decisions. It must be borne in mind that commissioners exercise exclusive jurisdiction over questions of fact and law, subject to the limits imposed by section 145(2) of the LRA. It would not be sufficient for review purposes that the decision is considered wrong due to incorrect factual or legal findings or due to the weight and relevance attached to particular facts. Incorrect factual or legal findings and the weight and relevance attached to particular facts are of consequence only if its effect is to render the outcome unreasonable. The CCMA is an administrative body exercising a quasi-judicial function when determining employment disputes of right. One can glean from case law that unreasonableness contemplates a decision that could not reasonably have been reached on the evidence or material before the commissioner. The answer to the application of the reasonableness standard established in Sidumo would then depend both on the outcome falling within a range of acceptable outcomes and on the provision of an analysis that reasonably supports the conclusion reached. This reasonableness standard established in Sidumo is an objective one; established with reference to the result of the CCMA award and the reasons of the commissioner in support of the result. As such, reasonableness will be both dialectical and substantive in nature.\footnote{1224 Chapter 6 para 6 2 3.}

It is submitted that, similarly to English law, reasonableness should be established by means of a two stage analysis. It needs to be established firstly whether the commissioner reached the decision by means of a line of reasoning and/or reliance on supporting factors, values and standards that is regarded as valid in the circumstances.\footnote{1225 Chapter 3 para 3 1.} The reasons offered in support of the decision are important. The review court must consider whether the commissioner brought his or her mind to bear on the material before him or her before making the award. The review court will determine whether the commissioner considered the principal objections to the decision and the arguments in favour of the decision as well as made the decision only after weighing the evidence and replying to each objection. Carephone is an example of dialectical reasonableness
in so far as it is aimed at the rationality of the reasoning process of the commissioner. Dialectical reasonableness establishes whether there is a rational justification in the connection established between the evidence and the outcome. Dialectical reasonableness describes defects in the reasoning process which may have influenced or affected the outcome of the particular award.\textsuperscript{1226}

Once the review court has established that the commissioner has reached the decision by means of a line of reasoning or reliance on supporting factors, values and standards that are valid in the circumstances, the review court moves to the second phase of the enquiry. In this second phase the court must ask whether no reasonable decision maker would accept that the decision is the decision to have been made in relation to the factors values and standards and line of reasoning used in its support. The decision-maker must strike a reasonable equilibrium between the different relevant and competing factors and must make a decision which amounts to a reasonable equilibrium in the circumstances.\textsuperscript{1227} The fact that the decision-maker must strike a reasonable equilibrium between the different relevant and competing factors implies that a decision may be reviewable on the basis of unreasonableness where the commissioner affords excessive or inadequate weight to a particular consideration. In determining whether the challenged decision is one that a reasonable decision-maker could not reach, the review court assesses whether the considerations in favour of the decision outweigh the considerations against it. In unreasonableness review, the court does not interfere with the commissioners’ allocation of weight to relevant considerations by re-allocating weight to relevant factors, but satisfies itself that due weight has been accorded to competing and relevant interests and factors by considering whether the decision is supported by factors, values and/or standards that reasonable persons would recognise as legitimate. Viewed as such, it is evident that the reasonableness of a decision cannot be assessed where the commissioner provides inadequate or incomprehensible reasons for the decision. It is submitted that the review court should not in such a case seek its own reasons to justify the commissioner’s findings. It is not desirable that the review court should attempt to fill the vacuum created by the lack of reasons in the commissioner’s decision by constructing possible legal justifications for the outcome, thereby substituting the commissioner’s reasoning process with its own. In respect of such circumstances, South African employment law can once

\textsuperscript{1226} Chapter 6 para 6 2 2.
\textsuperscript{1227} Chapter 3 para 3 1.
more learn from English law. In the employment context, the Appeal Tribunal has the power to refer a decision back to the Tribunal for amplification or clarification unless the reasons given by the Tribunal are considered too deficient to be remedied by amplification.

The question whether a decision should be allowed to stand regardless of a defect in the reasoning process where the outcome is nevertheless reasonable, can also be answered with reference to English administrative law. Reasonableness should be regarded as a ground of last resort to make provision for those decisions that are objectionable but is capable of surviving a review in terms of the section 145(2) grounds of review. Where the defect in the reasoning process amounts to a gross irregularity, for example, the matter can be confined to a review on the basis of the irregularity. The reasonableness of the decision need not be considered. Where a commissioner fails to take into account a relevant factor, the flaw in process alone will usually be sufficient to set aside the award based on the gross irregularity, permitting a review in terms of section 145(1) read with section 145(2)(a)(ii) of the LRA. In such a case, the test is not whether the outcome is reasonable notwithstanding the gross irregularity, but whether the commissioner’s action prevented the aggrieved party from having his or her case fully and fairly determined. Since a gross irregularity has long been an accepted basis for review, its recognition under the heading of procedural unreasonableness does not extend the scope of review. The decision evidencing a deficient process should be susceptible to review regardless of whether the outcome is found to be reasonable. However, the analysis in regard to unreasonableness does contemplate defects in the reasoning process of the commissioner that fall short of the provisions of section 145(2). Where the decision demonstrates a procedural defect in the reasoning process that falls short of a gross irregularity, it is respectfully submitted that the decision may still be susceptible to unreasonableness review. Because the unreasonableness of the decision does not depend solely upon the reasons that the commissioner gives for the decision as per Fidelity Cash Management Services,1228 the award would in the circumstances only be reviewable if the “defective” reasons outweigh the valid reasons. It is possible that circumstances may arise wherein the connections drawn by the commissioner between the evidence, the reasons and the CCMA award demonstrates that the defective reasons outweigh the valid reasons, but there exist other valid reasons discernible from the evidence that support the decision reached. In such circumstances,

---

1228 Chapter 6 para 6 2 1.
the review court should be allowed to take those alternative valid reasons into account when assessing the reasonableness of CCMA arbitration awards.\(^{1229}\)

It is evident that much of the controversy arising from unreasonableness review in South Africa is resolved by a proper reading of English administrative and employment law. The application of the principles that have been identified in the process would assist in addressing the uncertainties and complexities existing in South African employment law and advance the development of a consistent, objective and workable approach to unreasonableness review.

\(^{1229}\) Chapter 6 para 6.2.1 and 6.2.3.
BIBLIOGRAPHY

BOOKS

South Africa


Hoexter C (2007) Administrative Law in South Africa Cape Town: Juta & Co Ltd


Wiechers M (1985) *Administrative Law* Durban: Butterworths

Woolman S & Bilchitz D (2012) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* Cape Town: PULP

**England**

Barnett H *Understanding Public Law* 2010 Oxon: Routledge-Cavendish


**JOURNALS, ARTICLES AND PAPERS**

**South Africa**


Botma C & van der Walt A “The role of reasonableness in the review of labour arbitration awards (Part 1)” 2009 *Obiter* 328

Botma, C & van der Walt, A “The role of reasonableness in the review of labour arbitration awards (Part 2)” 2009 *Obiter* 530
Devenish G E “Reasonableness as a Requirement for the Validity of Administrative Actions” (2000) 21(1) *Obiter* 81

Darcy Du Toit “Reviewing CCMA arbitration awards: Has section 145 become academic?” Papers presented at the 13th Annual SASLAW Conference, Vineyard Hotel, Cape Town (22 October 2010)

Fergus E “Circumventing review – when is a question jurisdictional” (2012) 129(3) *SALJ* 504

Fergus E “The distinction between appeals and reviews – defining the limits of the Labour Court’s powers of review” (2010) 31 *ILJ* 1556

Fergus E & Rycroft A J “Refining review” 2012 *Acta Jurídica* 170

Grogan J “Groping for a reasonable standard” (2008) 24(6) *Employment Law* 2


Grogan J “In the shadow of *Sidumo*: Applying the ‘reasonable commissioner’ test” (2008) 24(6) *Employment Law* 3

Grogan J “‘Justifiability’ is the key Review judgments reviewed” (1998) 14(5) *Employment Law* 4


Grogan J “Now it’s rationality – *Carephone* survives the test” (2001) 17(5) *Employment Law* 9

Grogan J “The chimera of reasonableness: The LAC’s latest thoughts on review” (2013) 29(1) *Employment Law* 12

Grogan J “Untimely reviews: Unresolved issues after Carephone” (June 1999) Employment Law Journal 17


Hoexter C “Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court” (2008) 1 Constitutional Court Review 209


Landman A A “A Study in Deference: Labour Court Deference to CCMA Arbitration Awards” 2008 29 ILJ 1613


Ministerial Legal Task Team “Explanatory Memorandum to the Draft Labour Relations Bill” 1995 16 ILJ 278

Murray J “An Appeal for an Appeal” 2013 ILJ 1

Myburgh A “Reviewing the review test: Recent judgments and developments” (2011) 32 ILJ 1497. See also Myburgh A “Reviewing the Review Test: Recent Judgments and Developments” SASLAW Western Cape Chapter AGM: 24 May 2011, SASLAW Gauteng Chapter seminar: 21 June 2011

Myburgh A “Sidumo v Rustplats: How have the Courts Dealt with It?” (2009) 30 ILJ 1; CCMA Commissioners Indaba: Sun City 19 - 21 November 2008


Partington J & Van der Walt A “Re(viewing) the Constitutional Court’s Decision in Sidumo” 2008 Obiter 209

Pillay A “Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction” (2005) 122(2) SALJ 419

Ray-Howett G “Is it Reasonable for CCMA commissioners to act irrationally?” 2008 29 ILJ 1619
Smit N “When is a dismissal an appropriate sanction and when should a court set aside an arbitration award? Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC) / [2007] 12 BLLR 1097 (CC)” 2008 29 ILJ 1635

Stacey R “Democratising review: Justifiability as the animating vision of administrative law” (2007) 22(1) SA Public Law 79

England

Barclay T “The proportionality test in UK Administrative Law – a new ground of review, or a fading exception?” (2012) 3 SJOL 1


Broadbent A “Fact and Law in the Casual Inquiry” 2009 15(3) Legal Theory 173

Brown P & Loveday D “Procedural Update and Costs” 4-5 Gray’s Inn Square Judicial Review Conference


Daly P “Wednesbury’s Reason and Structure” (2011) PL 238


Oliver D “The Judge Over Your Shoulder” (1989) 42(3) Parliamentary Affairs 302


Phillips J “Some Notes on the Employment Appeal Tribunal” (1978) 7(1) ILJ 137

Poole T “Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights” LSE Law, Society and Economy Working Papers 9/2008, Department of Law, London School of Economics and Political Science, London, United Kingdom


Sinclair A, Botten N & Cahill S “Unfair Dismissal, Representation and Compensation” (2000) 5 Web JCLI


Syrett K “Of resources, rationality and rights: emerging trends in the judicial review of allocative decisions” (2000) 1 Web JCLI

Taitz J “But ‘Twas a Famous Victory” 1978 Acta Juridica 109


**Theses**

**South Africa**


Bednar J *The Extent to which Review for Unreasonableness is Meaningfully Incorporated in the Promotion of Administrative Justice Act No. 3 of 2000* (Master of Laws Thesis, Rhodes University, 2006)


Nchabeleng C P *Unreasonableness as a ground for judicial review in the South African administrative law* (Master of Law Thesis, University of Limpopo 2007)


**Other**


**Other guides**


**TABLE OF STATUTES, BILLS AND LEGISLATIVE INSTRUMENTS**

**South Africa**

Arbitration Act 42 of 1965

CCMA Guidelines: Misconduct Arbitrations, GN 602, GG 34573 of 2 September 2011

Constitution of the Republic of South Africa Act 200 of 1993


Criminal Procedure Act 51 of 1977

Judicial Matters Amendment Act 12 of 2002

Labour Relations Act 28 of 1956

Labour Relations Act 66 of 1995

Rules for the Conduct of Proceedings before the CCMA, GN R1448, GG 25515 of 10 October 2003 as amended

Supreme Court Act 59 of 1959

**England**

Employment Protection Act 1975

Employment Rights Act 1996

Employment Rights (Dispute Resolution) Act 1998

Employment Tribunals Act 1996

Equality Act 2010

Equal Pay Act 1970
Industrial Training Act 1964

Practice Direction (Employment Appeal Tribunal - Procedure) 2013

Promotion of Administrative Justice Act 3 of 2000

Senior Courts Act 1981

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

Tribunals, Courts and Enforcement Act 2007

Employment Appeal Tribunal Rules 1993, as amended
### TABLE OF CASES

**South Africa**

*Abdull & another v Cloete NO & others* 1998 3 BLLR 264 (LC)

*Academic & Professional Staff Association v Pretorius SC NO & others* 2008 1 BLLR 1 (LC)

*Afrox Healthcare Limited v CCMA & others* 2012 JOL 28779 (LAC)

*Amalgamated Clothing & Textile Workers Union of SA v Veldspun* 1994 1 SA 162 (A); 1994 1 All SA 453 (A)

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 4 SA 490 (CC); 2004 (7) BCLR 687 (CC)

*Bel Porto School Governing Body & others v Premier, Western Cape & another* 2002 3 SA 265 (CC); 2002 JOL 9413 (CC)

*Bestel v Astral Operations Ltd & others* 2010 JOL 26403 (LAC); 2011 2 BLLR 129 (LAC)

*Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO & others;* 1994 9 BLLR 1 (LAC); 1994 15 ILJ 801 (LAC)

*Bester v Easigas (Pty) Ltd and another* 1993 1 SA 30 (C)

*Boxer Superstores (Pty) Limited v Zuma and others* 2008 9 BLLR 823 (LAC)

*Brolaz Projects (Pty) Ltd v CCMA & others* 2008 29 ILJ 2241 (LC); 2008 JOL 22788 (LC)

*Cadema (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration (Western Cape Region) and others* 2000 JOL 7425 (LC)

*Carephone (Pty) Ltd v Marcus NO & others* 1998 8 BLLR 872 (LC)

*Carephone (Pty) Ltd v Marcus NO & others* 1998 11 BLLR 1093 (LAC); 1998 JOL 3330 (LAC)

*Carter v Commission for Conciliation, Mediation and Arbitration & others* 2010 31 ILJ 2876 (LC)
CCMA v Law Society, Northern Provinces (005/13) 2013 ZASCA 118 (20 September 2013)

CEPPWAWU v NBCCI & others 2011 2 BLLR 137 (LAC)

Chabeli v Commission for Conciliation, Mediation and Arbitration & others 2010 4 BLLR 389 (LC); 2010 JOL 24795 (LC)

Chevron Engineering (Pty) Ltd v Nkambule & others 2001 JOL 7890 (LAC); 2001 4 BLLR 395 (LAC)

City of Johannesburg Metropolitan Municipality v International Parking Management (Pty) Ltd & others (10548/2010) 2011 ZAGPJHC 5 (17 February 2011)

Clarence v National Commissioner: SAPS 2012 2 BLLR 99 (LAC)

Coetzee v Lebea NO 1998 JOL 3657 (LAC)

Commercial Workers Union of SA v Tao Ying Metal Industries & others 2009 1 BLLR 1 (CC)

Commission for Conciliation, Mediation and Arbitration and others v Law Society of the Northern Provinces (Incorporated as the Law Society of Transvaal) 2013 11 BLLR 1057 (SCA)

Commissioner for Customs and Excise v Container Logistics (Pty) Ltd; Commissioner for Customs and Excise v Rennies Group Ltd t/a Renfreight 1999 8 BCLR 833 (SCA); 1999 JOL 5011 (A)

Competition Commission of SA v Telkom SA Ltd & another 2010 2 All SA 433 (SCA); 2010 JOL 24643 (SCA)

Consol Glass (Pty) Ltd v CCMA & others 2012 1 BLLR 42 (LC); 2011 JOL 28051 (LC)

County Fair Foods (Pty) Ltd v CCMA & others 1999 11 BLLR 1117 (LAC)

De Beers Consolidated Mines Ltd v CCMA and others 2000 JOL 6467 (LAC)

De Lange v Smuts NO and others 1998 3 SA 785 (CC); 1998 JOL 2376 (CC)

Department of Labour v General Public Service Sectoral Bargaining Council & others (PA3/08) 2010 ZALAC 1 (29 January 2010); 2010 31 ILJ 1313 (LAC)
Deutsch v Pinto and Another  1997 18 ILJ 1008 (LC)

Du Preez and Another v Truth and Reconciliation Commission  1997 (3) SA 204 (SCA)

Edcon Ltd v Pillemer NO & others  2008 5 BLLR 391 (LAC); 2008 JOL 21412 (LAC)

Edcon Ltd v Pillemer NO & others  2010 1 BLLR 1 (SCA)

Edgars Stores (Pty) Ltd v Director, CCMA & others  1998 1 BLLR 34 (LC)

Ellerine Holdings Ltd v CCMA & others  2008 JOL 22087 (LAC)

Ellis v Morgan; Ellis v Desai  1909 TS 576

Elston v McEwan NO and others  (C662/07)  2009 ZALC 24 (9 January 2009); 2009 30 ILJ 2079 (LC)

Eoh Abantu (Pty) Ltd v CCMA & another  2008 7 BLLR 651 (LC)

Eskom v Hiemstra NO & others  1999 10 BLLR 1041 (LC)

Eskom Holdings Ltd v Fipaza and others  2013 4 BLLR 327 (LAC)

Ex Parte Minister of Safety and Security & others: In Re S v Walters & another  2002 4 SA 613 (CC); 2002 JOL 9743 (CC)

Fidelity Cash Management Services v CCMA & others  2008 3 BLLR 197 (LAC)

Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others  2000 12 BLLR 1389 (LAC)

Fidelity Supercare Cleaning (Pty) Ltd v Busakwe NO & others  2010 3 BLLR 260 (LC)

Fipaza v Eskom Holdings Ltd  2010 31 ILJ 2903 (LC); (JR 2220/08)  2010 ZALC 66 (6 May 2010)

Foschini Group v Maidi  2010 7 BLLR 689 (LAC)

Fredericks & others v MEC for Education and Training, Eastern Cape & others  2002 (2) SA 693 (CC)
Gaga v Anglo Platinum Ltd and others 2012 3 BLLR 285 (LAC)

Goldfields Investment Limited & another v City Council Johannesburg & another 1938 TPD 551

Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & others 2009 12 BLLR 1214 (LC)

Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others unreported case number JA 2/2012

Government Employees Pension Fund & another v Buitendag & others 2006 JOL 18360 (SCA)

Government of the Republic of South Africa & others v Grootboom & others 2001 1 SA 46 (CC)

Gray Security Services (WC) Pty Ltd v Cloete NO and another 2000 JOL 5974 (LC)

Group 6 Security Services (Pty) Ltd and another v Moletsane NO and others (LJR328/01) [2005] ZALC 31 (21 July 2005); 2005 11 BLLR 1072 (LC)

Group Six Security (Pty) Ltd v CCMA and another unreported case number JA 77/05

Halcyon Hotels (Pty) Ltd t/a Baraza v CCMA & others 2001 8 BLLR 911 (LC)

Health & Hygiene (Pty) Ltd v YAWA NO and others 2000 12 BLLR 1434 (LC); 2000 JOL 7042 (LC)

Herholdt v Nedbank Ltd 2012 9 BLLR 857 (LAC); 2012 23 ILJ 1789 (LAC)

Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae) 2013 11 BLLR 1074 (SCA)

Heyneke v Umhlatuze Municipality 2010 JOL 25625 (LC)

Hira and another v Booysen and another 1992 2 All SA 344 (A); 1992 4 SA 69 (A)

Hugo v President of the RSA & others 1996 6 BCLR 876; 1997 (4) SA 1 (CC)

Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & others 2008 3 BLLR 241 (LC)
International School of SA v Khabele & others 2002 9 BLLR 859 (LC)


J F E Sapela Electronics (Pty) Ltd & another v Chairperson, Standing Tender Committee & others 2004 3 All SA 715 (C)

JHB to Fresh Produce Market (Pty) Ltd v Hiemstra NO & others 2007 JOL 20596 (LC)

Johannesburg City Council v The Administrator, Transvaal and Mayofis 1971 1 All SA 248 (A); 1971 1 SA 87 (A)

Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111

Johannesburg Local Road Transportation Board & others v David Morton Transport (Pty) Ltd 1976 2 All SA 232 (A); 1976 1 SA 887 (A)

Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another 1988 2 All SA 308 (A); 1988 3 SA 132 (A)

Joseph v University of Limpopo & others 2011 12 BLLR 1166 (LAC); 2011 32 ILJ 2085 (LAC)

Karen Beef (Pty) Ltd v Bovane NO & others 2008 8 BLLR 766 (LC)

Kievits Kroon Country Estate (Pty) Ltd v CCMA & others 2011 3 BLLR 241 (LC)

Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and others 2013 JOL 29935 (LAC)

Kotze v Minister of Health 1996 3 BCLR 417 (T)

Kynoch Feeds (Pty) Ltd v CCMA & others 1998 4 BLLR 384 (LC)

Law Society of the Northern Provinces v Minister of Labour and others 2013 1 All SA 688 (GNP)

Lekota v First National Bank of SA Ltd 1998 10 BLLR 1021 (LC)

Lithotech Manufacturing Cape, A division of Bidpaper Plus (Pty) Ltd v Statutory Council Printing, Newspaper & Packaging Industries & others 2010 6 BLLR 652 (LC)
Local Road Transportation Board & another v Durban City Council & another 1965 (1) SA 586 (A)

Maepe v CCMA & another 2008 8 BLLR 723 (LAC)

Marais v Interim Nasionale Mediese en Tandheelkundige Raad van Suid-Afrika en ‘n ander 1997 4 All SA 260 (O)

Masstores (Pty) Ltd t/a Builders Warehouse v CCMA & others 2006 6 BLLR 577 (LC)

Matsekoleng v Shoprite Checkers (Pty) Ltd 2013 JOL 29789 (LAC)

MEC for Education, Gauteng v Mgijima & others 2011 3 BLLR 253 (LC)

MEC for Finance, KwaZulu-Natal & another v Dorkin NO & another 2008 6 BLLR 540 (LAC)

Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae) 2006 JOL 15636 (CC): 2006 (2) SA 311 (CC)

MIT Tissue v Theron & others 2000 8 BLLR 947 (LC)

Miyambo v CCMA & others 2010 10 BLLR 1017 (LAC)

Mkhize v CCMA & another 2001 1 SA 338 (LC)

Mohlakoana v Commissioner, CCMA & another 2010 10 BLLR 1061 (LC)

Mokheti v General Public Service Sectoral Bargaining Council and others 2012 JOL 28180 (LC)

Mollo v Metal & Engineering Industries Bargaining Council & others 2009 JOL 24323 (LC)

Motala & another v University of Natal 1995 3 BCLR 374 (D)

Motsamai v Everite Building Products (Pty) Ltd 2011 2 BLLR 144 (LAC)

Mutual & Federal Insurance Co Ltd v CCMA & others 1997 12 BLLR 1610 (LC)
Myers v National Commissioner of the South African Police Service and others 2013 JOL 30564 (SCA)

National Commissioner of the South African Police Service v Myers & others 2012 JOL 28980 (LC)

Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & others 2010 5 BLLR 513 (LAC); 2010 JOL 24970 (LAC)

Myers v National Commissioner of the South African Police Service and others 2013 JOL 30564 (SCA)

National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others 2000 2 SA 1 (CC); 2000 JOL 5877 (CC)

National Entitlement Workers Union v John NO & another 1997 12 BLLR 1623 (LC)

National Transport Commission & another v Chetty’s Motor Transport (Pty) Ltd 1972 3 All SA 623 (A); 1972 3 SA 726 (A)

Nel v Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad 1996 4 SA 1120 (T)

Nel v Le Roux NO and others 1996 (3) SA 562 (CC)

NetIntelligence Ltd v McNaught [2009] UKEAT 0057_08_0303 (3 March 2009)

NEWU v John & another 1997 12 BLLR 1623 (LC)

Niewoudt v Chairman, Amnesty Subcommittee, TRC, Du Toit v Chairman, Amnesty Subcommittee, TRC; Ras v Chairman, Amnesty Subcommittee, TRC 2002 3 SA 143 (C)

Northwest Townships (Pty) Ltd v The Administrator, Transvaal & another 1975 4 SA 1 (T)

Ntshangane v Speciality Metals CC 1998 3 BLLR 305 (LC)

NUM & others v CCMA & others 2010 6 BLLR 681 (LC)

NUM & another v Samancor Ltd (Tubatse Ferrochrome) & others 2011 11 BLLR 1041 (SCA)

NUM obo 35 employees v Grogan NO & another 2007 4 BLLR 289 (LC)
NUM obo 35 Employees v Grogan NO and another 2010 8 BLLR 799 (LAC)

NUMSA & another v Trentyre (Pty) Ltd (JA49/05) 2008 ZALAC 18 (27 March 2008)

NUMSA v Vetsak Co-operative Ltd & others 1996 6 BLLR 697 (AD)

Orange Toyota (Kimberley) v Van der Walt & others 2001 1 BLLR 85 (LC)

Palaborwa Mining Co Ltd v Cheetam & others 2008 6 BLLR 553 (LAC)

Pam Golding Properties (Pty) Ltd v Erasmus & others 2010 JOL 24963 (LC)

Paola v Jeeva 2004 1 SA 396 (SCA)

Pather v Kotecha & others 2006 JOL 17164 (T); (299976/01) 2006 ZAGPHC 32 (18 April 2006)

PAWUSA obo Skosana & others v Public Health & Social Development Sectoral Bargaining Council & others 2011 11 BLLR 1079 (LC)

Pepcor Retirement Fund & another v Financial Services Board & another 2003 3 All SA 21 (SCA)

Pep Stores Ltd v Advocate AP Laka NO & others 1998 9 BLLR 952 (LC)

Pharmaceutical Manufacturers Association of SA & another In Re: Ex Parte Application of President of the RSA 2000 2 SA 674 (CC); 2000 JOL 6158 (CC)

President of the Republic of South Africa & others v South African Rugby Football Union 1999 JOL 5301 (CC); 2000 (1) SA 1

PSA obo Haschke v MEC for Agriculture & others 2004 8 BLLR 822 (LC)

Relyant Retail Ltd t/a Bears Furnishers v CCMA & others 2009 JOL 24327 (LC)

Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others 1997 12 BLLR 1632 (LC); 1997 ILJ 1393 (LC)

Roman v Williams NO 1998 1 SA 270 (C); 1998 JOL 1514 (C)
RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan & others 2008 2 BLLR 184 (LC)

Rustenburg Platinum Mines Ltd v CCMA and others 1997 11 BLLR 1475 (LC)

Rustenburg Platinum Mines Ltd v CCMA & others 2004 1 BLLR 34 (LAC)

Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and others 2007 1 All SA 164 (SCA)

SA Airways (Pty) Ltd v Blackburn & others 2010 3 BLLR 305 (LC)

SA Defence & Aid Fund v Minister of Justice 1967 1 SA 31 (C)

SA Post Office Ltd v CCMA and others 2012 1 BLLR 30 (LAC)

SA Rugby Players’ Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby Pty Ltd v SARPU & another SARPA 2008 9 BLLR 845 (LAC)

Samancor Tubatse Ferrochrome v MEIBC & others 2010 8 BLLR 824 (LAC)

Samson v CCMA & others 2009 11 BLLR 1119 (LC)

Sanderson v Attorney General (Eastern Cape) 1998 (2) SA 38 (CC)

Sasol Mining (Pty) Ltd v Commissioner Nggeleni & others 2011 4 BLLR 404 (LC)

Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & others 2000 10 BLLR 1219 (LC)

Seardel Group Trading t/a Romatex Home Textiles v Petersen 2011 2 BLLR 211 (LC)

Senama v CCMA & others 2008 9 BLLR 896 (LC)

Shoprite Checkers (Pty) Ltd v Ramdaw NO & others 2000 7 BLLR 835 (LC)

Shoprite Checkers (Pty) Ltd v Ramdaw NO & others 2001 9 BLLR 1011 (LAC)

Shoprite Checkers (Pty) Ltd v CCMA and others 1998 5 BLLR 510 (LC)
Shoprite Checkers (Pty) Ltd v CCMA & others 2008 12 BLLR 1211 (LAC)

Shoprite Checkers (Pty) Ltd v CCMA & others 2009 7 BLLR 619 (SCA)

Sidumo & another v Rustenburg Platinum Mines Ltd & others 2007 12 BLLR 1097 (CC)

Sidumo and RPMR Security (Amplats) & another 2001 2 BALR 197 (CCMA)

Sil Farming CC t/a Wigwan v CCMA unreported case number JR3347/2005

Smith v CCMA 2004 6 BLLR 585 (LC)

Solid Doors (Pty) Ltd v Commissioner Theron 2004 25 ILJ 2337 (LAC)


South African Technical Officials Association v President of the Industrial Court and Others 1985 6 ILJ 186 (A); 1985 1 SA 597 (AD)

Southern Sun Hotel Interests (Pty) Ltd v CCMA & others 2009 11 BLLR 1128 (LC)

Specialised Belting & Hose (Pty) Ltd v Sello NO & others 2009 7 BLLR 704 (LC)

Staatspresident v United Democratic Front 1988 (4) SA 830 (A); 1988 2 All SA 631 (A)

Standard Bank of Bophuthatswana Limited v Reynolds 1995 3 SA 74 (B)

Standard Bank of SA Ltd v CCMA and Others 1998 6 BLLR 622 (LC)

Stocks Civil Engineering (Pty) Ltd v Rip NO & Another 2002 3 BLLR 189 (LAC)

Super Group Autoparts t/a Autozone v Hlongwane NO & others 2010 JOL 24895 (LC)

Superstar Herbs v Director CCMA & others 1999 1 BLLR 58 (LC)

Telcordia Technologies Inc v Telkom SA Ltd 2007 3 SA 266 (SCA)

Timothy v Nampak Corrugated Containers (Pty) Ltd 2010 8 BLLR 830 (LAC)
The Administrator, Transvaal and the Firs Investment (Pty) v Johannesburg City Council 1971 1 SA 56 (A)

The President of the Republic of South Africa v South African Rugby Football Union 1999 JOL 5301 (CC)

Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika 1976 2 SA 1 (A); 1976 2 All SA 286 (A)

Tikly & others v Johannes NO 1963 (2) SA 588 (LAC); 1963 3 All SA 91 (T)

Total Support Management (Pty) Ltd v Diversified Health Systems SA (Pty) Ltd 2002 4 SA 661 (SCA)

Transnet Ltd v CCMA & others 2007 JOL 20974 (LC); (2008) 29 ILJ 1289 (LC)

Transnet Ltd v CCMA 2001 6 BLLR 684 (LC)

Toyota South Africa Motors (Pty) Ltd v Radebe & others 2000 3 BLLR 243 (LAC)

Transnet Ltd v Hospersa and another 1999 7 BLLR 732 (LC)

Trident SA (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others 2012 1 BLLR 93 (LC)

Trinity Broadcasting, Ciskei v Independent Communications Authority of SA 2003 4 All SA 589 (SCA)

UASA v Impala Platinum Ltd & others 2010 9 BLLR 986 (LC)

Union Government v Union Steel Corporation Limited 1928 AD 220

United National Breweries (SA) v CCMA & others 2006 JOL 17485 (LC)

University of Pretoria v CCMA & others 2012 2 BLLR 164 (LAC)

Value Logistics Ltd v Basson & others 2011 10 BLLR 1024 (LC)

Van der Westhuizen NO v United Democratic Front 1989 (2) SA 242 (A); 1989 4 All SA 431 (AD)
Ventersdorp Town Council v President, Industrial Court and Others 1992 13 ILJ 1465 (LAC)

Woolworths (Pty) Ltd v CCMA & others 2010 5 BLLR 577 (LC)

Woolworths (Pty) Ltd v CCMA and others 2011 10 BLLR 963 (LAC)

Zilwa Cleaning & Gardening Services CC v CCMA & others (JR2724/07) [2009] ZALC 96; 2010 31 ILJ 780 (LC)

England

Adan v Newham London Borough Council & another 2001 EWCA Civ 1916; 2001 All ER (D) 216

Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd 1972 1 All ER 280; 1972 1 WLR 19

Anisminic Ltd v Foreign Compensation Commission 1969 2 AC 147; 1969 2 WLR 163

Arhin v Enfield Primary Care Trust 2010 EWCA Civ 1481

Armah v Government of Ghana & another 1968 AC 192

Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948 1 KB 223; 1947 EWCA Civ 1


Bangs v Connex South Eastern Ltd 2005 EWCA Civ 14

Barke v SEETEC Business Technology Centre Ltd 2005 IRLR 633, CA

Barker v Edger and others 1898 AC 748

Bascetta & Anor v Abbey National PLC 2010 EWCA Civ 62

Begum (FC) v London Borough of Tower Hamlets 2003 UKHL 5; 2003 2 AC 430; 2003 2 WLR 388
Boddington v British Transport Police 1998 UKHL 13; 1999 2 AC 143

Bowater v Northwest London Hospitals NHS Trust 2011 EWCA Civ 63

Bracegirdle v Oxley; Bracegirdle v Cobley 1947 KB 349

Brind and others v Secretary of State for the Home Department 1991 UKHL 4; 1991 1 All ER 720; 1991 1 AC 696

British Telecommunications Plc v Sheridan 1990 IRLR 27; 1989 EWCA Civ 14

Bromley LBC v Greater London Council 1981 UKHL 7; 1983 1 AC 768; 1982 1 All ER 153

Budgacay v Secretary of State for the Home Department 1987 AC 514

Cancer Research UK v Harding Case number UKEAT/0485/09/DA (16 June 2010)

Charles Sandhu v Jan de Rijk Transport Ltd 2007 EWCA Civ 430, 2007 ICR 1137; 2007 IRLR 519

Chief Constable of the North Wales Police v Evans 1982 UKHL 10; 1982 3 All ER 141

Chiu v British Eurospace plc 1982 IRLR 56

Cleveland Police Authority v Francis 2010 UKEAT 0262_09_1103 (11 March 2010)

Community Integrated Care v Ms C M Peacock 2010 UKEAT 0015_10_2209 (22 September 2010)

Connolly & Havering LBC v Secretary of State for Communities & Local Government 2009 EWCA Civ 1059

Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180; 143 ER 414 Court of Common Pleas (England)

Council of Civil Service Unions v Minister for the Civil Service 1985 AC 374; 1984 3 All ER 935; 1983 UKHL 6

De Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing 1999 1 AC 69
Dobie v Burns International Security UK Ltd 1984 EWCA Civ 11; 1984 IRLR 329; 1984 ICR 812

Doherty v Birmingham City Council 2009 1 AC 367

E v Secretary of State for the Home Department 2004 EWCA Civ 49

East Berkshire Health Authority v Matadeen 1992 IRLR 336

Eclipse Blinds Ltd v Wright 1992 IRLR 133

Edwards v Bairstow 1956 AC 14

Elston v McEwan NO and others (C662/07) 2009 ZALC 24 (9 January 2009); 2009 30 ILJ 2079 (LC)

Fawcett Properties Ltd v Buckingham County Council 1961 AC 636

Fuller v The London Borough of Brent 2011 EWCA Civ 267

Kent County Council v Gilham 1985 IRLR 18 (CA) sub nom Gilham v Kent County Council (No. 2) 1985 ICR 233

Harrod v Ministry of Defence 1981 ICR 8

Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department 2007 UKHL 11

In re H K (An Infant) 1967 2 QB 617

In re W (An Infant) 1971 AC 682

International Transport Roth GmbH v Secretary of State for the Home Department 2002 EWCA Civ 158

Kanda v Government of Malaya 1962 AC 322

Kemper Reinsurance Company v Minister of Finance (Bermuda) & others 2001 1 AC 1
Kruse v Johnson 1898 2 QB 91

Kuzel v Roche Products Ltd 2008 EWCA Civ 380

Lavender v Minister of Housing and Local Government 1970 1 WLR 1231

Lee Ting Sang v Chung Chi-Keung and another 1990 IRLR 236; 1990 2 AC 374

Lewis v Motor World Garages Ltd 1985 IRLR 465; 1986 ICR 157

Lloyd v McMahon 1987 AC 625

Lodwick v Southwark London Borough Council 2004 EWCA Civ 306

Luton Borough Council and others v Secretary of State for Education 2011 EWHC 217

Magill v Porter 2001 UKHL 67

Martin v Glynwed Distribution Ltd 1983 ICR 511; 1983 IRLR 198; 1983 ICR 511

McInnes v Onslow-Fane & Another 1978 1 WLR 1520; 1978 3 All ER 211

Meek v Birminingham District Council 1987 IRLR 250

Melon v Hector Powe Ltd 1981 ICR 43; 1980 IRLR 477

Morgan v Electrolux Ltd 1991 ICR 369

Moyo v TowerHamlets Consortium 2004 EWCA Civ 1246

Moyna v Secretary of State for Work and Pensions 2003 UKHL 44

Naylor v Orton & Smith Ltd 1983 ICR 665

Neale v Hereford and Worcester County Council 1986 IRLR 168; 1986 ICR 471

Nethermere (St Neots) Ltd v Gardiner and Taverna 1984 IRLR 240
NetIntelligence Ltd v McNaught [2009] UKEAT 0057_08_0303 (3 March 2009)

North Range Shipping Ltd v Seatrans Shipping Corp 2002 EWCA Civ 405; 2002 1 WLR 2397


Northumberland County Council v Secretary of State for the Environment; City of Bradford Metropolitan Council v Secretary of State for the Environment 1986 1 ALL ER 199; 1986 2 AC 240; 1985 UKHL 8; 1986 2 AC 240 248

O’Kelly & others v Trust House Forte PLC 1983 IRLR 413; 1984 1QB 90; 1983 ICR 728

Padfield v Minister of Agriculture, Fisheries and Food 1968 AC 997

Parfums Givenchy v Tabaquin Finch UKEAT/0517/09/RN (30 July 2010)

Paw v HMRC UKEATPA/0703/11/DA; UKEATPA/0704/11/DA; UKEATPA/0705/11/DA; UKEATPA/0715/11/DA; UKEATPA/1552/11/DA (23 November 2011)

Pearlman v Keepers and Governors of Harrow School 1979 QB 56; 1979 1 All ER 365

Pickwell v Camden London Borough Council 1983 QB 962

Piggott Brothers & Co Ltd v Jackson & others 1991 IRLR 309; 1992 IRC 85

Puhlhofer v Hillingdon London Borough Council 1986 1 All ER 467; 1986 AC 484; 1986 UKHL 1

R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions 2001 UKHL 23

R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) 1999 UKHL 52; 2000 1 AC 119

R v Cambridge Health Authority, ex parte B 1995 1 WLR 898

R v Criminal Injuries Compensation Board, ex parte A 1999 UKHL 21; 1999 2 AC 330

R v Criminal Injuries Compensation Board, ex parte P 1995 1 WLR 845
R v Department for Education & Employment, ex parte Begbie 1999 EWCA Civ 2100; 1999 All ER (D) 983; 2000 1 WLR 1115

R v Deputy Industrial Injuries Commissioner, ex parte Moore 1965 1 QB 456

R v Devon County Council, ex parte George 1989 AC 573

R v Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek 1951 2 KB 1; 1951 1 All ER 482

R v Gwantshu 1931 EDL 29

R v HM the Queen in Council, ex parte Vijayatunga 1988 QB 322

R v Inland Revenue Commissioners, ex parte Preston 1985 AC 835

R v IR,C ex parte Taylor (No 2) 1989 3 ALL ER 353

R v Lewisham London Borough Council, ex parte Shell UK Ltd 1988 1 ALL ER 938

R v Lord Chancellor, ex parte Maxwell 1997 1 WLR 104; 1996 4 All ER 751

R v Lord President of the Privy Council, ex parte Page 1992 UKHL 12; 1993 AC 682

R v Lord Saville of Newdigate, ex parte A 2000 1 WLR 1855; 1999 4 All ER 860

R v South Western Hospital Managers, ex parte M 1993 QB 683; 1993 3 WLR 376; 1994 1 All ER 161

R v Ministry of Defence, ex parte Murray 1998 COD 134

R v Minister of Defence ex parte Smith 1996 1 All ER 257; 1996 QB 517

R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd 1993 1 WLR 23

R v North and East Devon Health Authority; ex parte Coughlan 2001 QB 213; 2000 3 All ER 850 (CA)
R v Panel on Takeovers and Mergers, Ex p Guinness plc 1991 QB 146; 1989 1 All ER 509 (CA)

R v Secretary of State for the Environment; Ex parte Hammersmith and Fulham London Borough Council 1991 1 AC 521

R v Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd 1996 3 All ER 304

R v Secretary of State for the Home Department, Ex parte Al Fayed 1998 1 WLR 763 CA; 1996 EWCA Civ 946

R v Secretary of State for the Home Department, Ex parte Bugdaycay 1987 AC 514

R v Secretary of State for the Home Department, Ex parte Benwell 1985 QB 554

R v Secretary of State for the Home Department ex parte Daly 2001 UKHL 26; 2001 2 AC 532

R v Secretary of State for the Home Department, Ex parte Doody 1994 1 AC 531

R v Secretary of State for the Home Department, Ex parte Khawaja 1984 AC 74; 1983 1 All ER 765

R v Secretary of State for the Home Department, Ex p Launder 1997 3 All ER 961, 1997 1 WLR 839

R v Talbot Borough Council, Ex parte Jones 1988 2 All ER 207

R v Tower Hamlets LBC Ex p Begum 1993 AC 509

R v Zackey 1945 AD 505

Re Minister for Immigration and Multicultural Affairs; Ex parte Eshetu 1999 HCA 21

R (Bradley and others) v Secretary of State for Work and Pensions 2008 EWCA Civ 36

R (Cart) v The Upper Tribunal 2011 UKSC 28; 2011 3 WLR 107; 2012 1 AC 663; 2011 4 All ER 127

R (Equitable Life Members Action Group) v HM Treasury 2009 EWHC 2495 (Admin)
R (Iran) and others v Secretary of State for the Home Department 2005 EWCA Civ 982

R (Launder) v Secretary of State for Home Department 1997 1 WLR 839

R (Mahmood) v Secretary of State 2001 1 WLR 840

R (March) v Secretary of State for Health 2010 EWHC 765 (Admin)

R (Medway Council) v Secretary of State for Transport 2002 EWHC 2516 (Admin)

R (Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd 2002 EWHC 2379 (Admin); 2003 1 All ER (Comm) 65

R (on the application of ProLife Alliance) v British Broadcasting Corporation 2003 UKHL 23; 2004 1 AC 185; 2003 2 All ER 977

R (Puspalatha) v Immigration Appeal Tribunal 2001 EWHC Admin 333

R (Rogers) v Swindon NHS Primary Care Trust 2006 EWCA Civ 392

R (Sarkisian) v Immigration Appeal Tribunal 2001 EWHC Admin 486

Railtrack plc v Guinness Ltd 2003 EWCA Civ 188

Re Minister for Immigration and Multicultural Affairs; Ex parte Eshetu 1999 HCA 21

Re Racal Communications Ltd 1981 AC 374

Regina v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd 1999 2 AC 418; 1998 UKHL 40

Regina v Entry Clearance Officer, Bombay, Ex parte Amin 1983 2 AC 818

Regina v London Borough of Brent ex parte Olufemi Baruwa 1997 EWCA Civ 1001; 1997 29 HLR 915

Relyant Retail Ltd t/a Bears Furnishers v CCMA & others 2009 JOL 24327 (LC)

Retarded Children’s Aid Society Ltd v Day 1978 IRLR 128 130
Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others 1997 12 BLLR 1632 (LC); 1997 ILJ 1393 (LC)

Ridge v Baldwin 1963 UKHL 2; 1964 AC 40

Robbins v Secretary of State for the Environment 1989 1 All ER 878

Roberts v Hopwood 1925 AC 578

Rolls v Dorset CC 1994 COD 448; 1995 QB 158

Roman v Williams NO 1998 1 SA 270 (C); 1998 JOL 1514 (C)

Royal Society for the Protection of Birds v Croucher 1984 IRLR 425

Secretary of State for Education v Tameside MBC 1977 AC 1014; 1976 3 All ER 665

R v Secretary of State for the Home Department ex parte Thompson and Venables 1998 AC 407

Secretary of State for Trade and Industry Ex p BT3G Ltd 2001 Eu LR 325

Short v Poole Corporation 1925 All ER Rep 74; 1926 Ch 66

Stanley v Capital Law LLP UKEAT/0417/08/LA (3 April 2009)

Stanley Cole (Wainfleet) v Sheridan 2003 Adj LR 07/25

Stewart v Cleveland Guest (Engineering) Ltd 1994 IRLR 443

Stewart v Perth and Kinross Council 2004 UKHL 16

Tameside Hospital NHS Foundation Trust v Mr M Mylott [2010] UKEAT 0399_10_1304 (11 March 2011)

The Association of British Civilian Internees – Far East Region v Secretary of State for Defence 2003 EWCA Civ 473; 2003 QB 1397

UCATT v Brain 1981 ICR 542
United Kingdom Association of Professional Engineers v Advisory, Conciliation and Arbitration Service 1981 AC 424

Vento v Chief Constable of West Yorkshire Police 2002 EWCA Civ 1871

WM Morrison Supermarkets PLC v Mr G Talbot 1997 UKEAT 237_96_2102

Watling v William Bird & Son Contractors Limited 1976 1 ITR 70

West Glamorgan County Council v Rafferty and others 1987 1 All ER 1005

Wheeler v Leicester City Council 1985 UKHL 6

White v Burton’s Foods Ltd 2010 UKEAT 0514_09_0607 (6 July 2010)

Woods v WM Car Services (Peterborough) Ltd 1981 IRLR 347; 1982 IRLR 27 EAT

Yeboah v Crofton 2002 EWCA Civ 794; 2002 IRLR 634

Re Amin 1983 2 ALL ER 864