THE NATURE AND POTENTIAL EFFECT
OF THE
LABOUR RELATIONS AMENDMENT ACT 2002

by

ANDREW GEDDES CONROY

Submitted in partial fulfilment of the
requirements for the degree of
Magister Legum
in the Faculty of Law
at the University of Port Elizabeth

Supervisor: Prof JA van der Walt

January 2003
# TABLE OF CONTENTS

**SUMMARY**

**TABLE OF LEGISLATION**

**TABLE OF CASES**

1. **INTRODUCTION**

2. **THE NEW LAW ON RETRENCHMENT**
   - 2.1 Section 189 Retrenchments
   - 2.2 Section 189A Retrenchments
     - 2.2.1 Facilitation
     - 2.2.2 No facilitation
   - 2.3 New Remedies
     - 2.3.1 Challenging Substantive Fairness in the Labour Court
     - 2.3.2 Alternatively the Right to Strike
     - 2.3.3 Procedural fairness
   - 2.4 The New Section 191(12)
   - 2.5 Implementation

3. **PRE-DISMISSAL ARBITRATIONS**
   - 3.1 Entity Conducting the Enquiry
   - 3.2 The Arbitration Proceedings
   - 3.3 Preconditions to the Appointment of an Arbitrator
   - 3.4 Representation at Pre-Dismissal Arbitrations
   - 3.5 Remedies on Conclusion
   - 3.6 Implementation

4. **TRANSFER OF UNDERTAKINGS**
   - 4.1 The New Section 197
     - 4.1.1 Outsourcing Remains Unclear
     - 4.1.2 Varying Automatic Transfer
     - 4.1.3 Terms and Conditions Not Less Favourable
     - 4.1.4 Additional Obligations of the New Employer on Transfer
     - 4.1.5 Protection of Accrued Benefits
     - 4.1.6 Retrenchment After Automatic Transfer
SUMMARY

It took 18 months of intensive negotiation at the Millennium Labour Council, NEDLAC and the Labour Portfolio Committee before the Labour Relations Amendment Act of 2002¹ completed its passage through Parliament, taking effect on 1 August 2002.

Fifty-seven amendments to specific sections of the Labour Relations Act² and its schedules cure some obvious anomalies in the original version. It is further apparent that the legislature has taken cognisance of the observations by judges and arbitrators, who voiced their criticism in respect of certain aspects of the original "Act".

The amended "Act"³ does appear to be a genuine commitment by both business and organised labour to improve efficiency in the labour market, to promote employment creation and to protect vulnerable workers. Improved dispute resolution mechanisms, enforcement mechanisms and the resurgence of an unfettered discretion in awarding compensation go some way to improving the application of the "Act".⁴

The most dramatic amendments have taken place in the law regulating retrenchments by large employers, inclusive of the controversial introduction of a right to strike after retrenchments of this nature have been effected, and the regulation of the transfer of a business as a going concern and its impact on workers.

Critics indicate that business and organised labour have subscribed to the package of amendments despite respective reservations and due to certain time constraints. The nett result is a package of amendments that could be described as failing to address, in certain respects, or intentionally overlooking, areas of the "Act" that have traditionally been shown wanting in the past. In the individual employment law sphere specifically, the failure to address the meaning of "benefits" in the definition of unfair labour practices; to allocate a precise meaning to the concept of the transfer of a going

¹ Labour Relations Amendment Act No 12 of 2002.
³ 12 of 2002.
⁴ Ibid.
concern; or to regulate the conduct of employers when transferring employees, remain some of the areas for concern.

It appears that the legislature has decided that certain issues should be resolved by the Labour Court, and ultimately the Labour Appeal Court, on a case-by-case basis rather than by legislative intervention. Whilst this approach has merit, it does present problems to those seeking to apply the provisions of the amended "Act"\(^5\) in everyday practice.

On the whole, the amendments do not, nor were they designed to, mark a major shift in the government's labour market policy. The changes clearly focus on correcting and clarifying sections of the "Act", which have resulted in unintended consequences, or lost touch with commercial reality, over the past seven years.

\(^5\) N3 supra.
# TABLE OF LEGISLATION

<table>
<thead>
<tr>
<th>Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment Equity Act 55 of 1998</td>
</tr>
<tr>
<td>Labour Relations Act 66 of 1995</td>
</tr>
<tr>
<td>Labour Relations Amendment Act 12 of 2002</td>
</tr>
<tr>
<td>Pension Funds Act 24 of 1956</td>
</tr>
<tr>
<td>Protected Disclosures Act 26 of 2000</td>
</tr>
<tr>
<td>No.</td>
</tr>
<tr>
<td>-----</td>
</tr>
<tr>
<td>4.</td>
</tr>
<tr>
<td>5.</td>
</tr>
<tr>
<td>7.</td>
</tr>
<tr>
<td>9.</td>
</tr>
<tr>
<td>10.</td>
</tr>
<tr>
<td>11.</td>
</tr>
<tr>
<td>12.</td>
</tr>
<tr>
<td>13.</td>
</tr>
<tr>
<td>14.</td>
</tr>
<tr>
<td>16.</td>
</tr>
<tr>
<td>20.</td>
</tr>
</tbody>
</table>
1. INTRODUCTION

This treatise sets out the nature and potential effect of the more significant amendments incorporated in the provisions of the Labour Relations Amendment Act\(^6\), regulating the substantive and procedural aspects of individual employment law.

The topic was selected on the basis of its pertinence and its impending importance to employers, employees, trade unions, employers' organisations, labour lawyers and labour practitioners alike. Those who remain ignorant as to its content and potential consequences do so at great financial risk.

The amended law on retrenchment and the amended provisions pertaining to the transfer of an undertaking as a going concern, are anticipated to have the most significant impact in the workplace and for this reason have been concentrated upon.

The process of arriving at the content which follows, involved collating the latest articles, case law and discussion surrounding the amendments. Under each topic, the amended provisions of the "Act" are discussed in detail, including how leading academics and labour law practitioners anticipate the amended provisions will operate in practice after implementation. Areas of anticipated improvement and areas of concern are highlighted. Opinion contrary to general sentiment has also been incorporated.

The desired result is a work which delivers a detailed prognosis of how this set of amendments will operate on the shop floor.

\(^6\) N3 Supra.
2. THE NEW LAW ON RETRENCHMENT

Given the massive restructuring that has taken place since 1996 in both the private and public sectors of the economy, it was predictable that the legislature would revisit the provisions governing dismissal for operational requirements when amending the Labour Relations Act 66 of 1995 (hereinafter referred to as "the Act") in 2002.7

When the Minister of Labour invited business and labour to make submissions on the labour law amendments before the draft bill was prepared, COSATU argued that its members had been sold short by the 1995 "Act", regarding the existing provisions relating to retrenchment.8

The unions argued that Labour Court judges were more concerned with ensuring a form of procedural fairness prior to retrenchment and typically unwilling to second guess managerial business decisions, which led to retrenchments. Provided the employer presented a case with a semblance of commercial rationality or, put differently, provided that the decision to retrench was made in good faith, the courts had traditionally shown an unwillingness to intervene and consider the merits of this type of decision.

The only area of substantive fairness that the Labour Court and Labour Appeal Court had been willing to interfere with, was the selection of the employees to be retrenched, where the courts had shown a willingness to make findings on substantive unfairness where employees were unfairly selected.9

Historically then, retrenchment disputes were largely concerned with whether the employer had moved through the procedural hoops set up by the Act as to the required process for consultation.

COSATU's complaints concerning our law in respect of retrenchment related however to both substantive and procedural fairness. It argued that the court's unwillingness to consider the merits of managerial decisions regarding retrenchments had meant that there was, in effect, little protection against substantively unfair retrenchments.\footnote{Le Roux 2002 \textit{CLL} 102.}

COSATU initially proposed that employers be obliged to negotiate the terms of a retrenchment, as opposed to the lesser obligation of consultation. This was tantamount, of course, to a demand that there should be a right to strike in these circumstances.\footnote{Van Niekerk & Le Roux 2001 \textit{ILJ} 2167.} This on the basis that if the courts were unable or unwilling to provide this protection, employees should be able to protect themselves against substantively unfair retrenchments.

On the procedural side, and again according to COSATU, many consultation processes were a charade in which employers, advised by lawyers and industrial relations consultants, simply went through the motions and never really consulted properly. Unions’ suggestions and counter-proposals were simply ignored. COSATU therefore demanded that amendments be introduced to "tighten up" the duty to consult and avoid \textit{fait accompli}'s.\footnote{Le Roux 2002 \textit{CLL} 102.}

The effect of the amendments introduced in respect of retrenchments is to create two legal regimes governing the retrenchment process. It proceeds to divide employers into two categories – large and small. Small employers, or large employers conducting small retrenchments, continue to be governed by section 189, as amended. Large retrenchments are governed by the new section 189A.

\section*{2.1 \textbf{SECTION 189 RETRENCHMENTS}}

The essential requirements and procedures for a fair retrenchment in terms of section 189 by and large remain unaffected and have been described as peripheral.\footnote{Grogan (Part 4) 2002 \textit{Employment Law} 4.}
In terms of section 189(1) (under the pre-amended "Act"), the employer was required to consult with prescribed entities. This section has now been amended slightly in cases where workplace forums exist. Employers are now required to consult with both the workplace forum and the registered trade union whose members are likely to be affected. Previously, in circumstances where both entities were in existence, only the workplace forum was required to be consulted with, as it had a "preferent ranking" to registered trade unions, so to speak. The rationale for this amendment would then appear to be to ensure that the fear that workplace forums may undermine trade unions' status is quelled. This perception held by trade unionists has proved to be a major stumbling block to the establishment of such forums in the past.

Secondly, the inclusion of the word "or" at the end of the new section 189(1)(c) gives effect to the principle established in case law that the employer who consults with a listed party in Section 189(1) is not obliged to also consult with parties/entities listed below it.14

For the first time mention is made in section 189(2) of the requirement that the employer and other consulting parties must "engage in a meaningful joint consensus-seeking process and attempt to reach consensus on..." the various issues prescribed in this section.15

This requirement has emanated from the principle established in case law, most notably in Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union,16 that rather than adopting a checklist approach to the issues to be consulted upon, a joint consensus-seeking exercise or process should transpire.

The rationale behind encapsulating this phrase into the act is to make it imperative that the consultative process is meaningful and exhaustive, and does not constitute the employer merely going through the motions with no intention of ever reaching agreement on the issues to be discussed and in so doing achieving superficial compliance with the requirements of section 189(2).

15 12 of 2002 section 189(2).
The matters on which the parties are required to reach consensus, namely avoiding or minimising the number of dismissals, changing their timing and mitigating their adverse effects, the method for selection and severance pay, remain unaltered.

Section 189(3) of the "Act" now provides that instead of merely disclosing relevant information in writing to the other consulting party, employers must now also issue written notice inviting the other consulting party to consult. The information to be contained in the notice remains the same, except that employers must now, in addition, disclose the total number of employees employed by the employer and the number of employees dismissed by the employer for reasons based on its operational requirements in the preceding 12 months.17

The intended effect of this amendment would appear to be to ensure that the required notice and the disclosure of the information contained in it is issued prior to the commencement of the consultation process and not during or towards the end of consultation. The other consultative entity would further be in a position to determine, prior to the commencement of the consultation process, whether the section 189 or section 189A procedure is applicable, based on the now required additional disclosures.

There is also an attempt to tighten up on the employer's disclosure obligations set out in the "Act". The amended section 189(4)b states that if an arbitrator or the Labour Court is required to decide whether or not information is relevant to the proposed retrenchments, the onus is on the employer to prove that any information that it refuses to disclose is not relevant for the purposes for which it is sought.18

This in essence constitutes a reversal of the onus of proof in respect of relevance, the onus previously having been upon the employee. The rationale behind imposing the onus of proof of irrelevance on the employer has, as its base, the fact the employer generally has possession and knowledge of the documents requested, whereas the other consultative entity has in the past had to justify the relevance of a document that

17 Grogan (Part 4) 2002 Employment Law 5.
18 Le Roux 2002 CLL 103.
they had no access to. It was therefore appropriate to create a shift in the onus in this regard.

Representations that may be permitted during consultation now go beyond "any matter on which the parties are consulting" to "any other matter related to the proposed dismissals". The range of issues on which consultations must take place have also, potentially at least, been extended.\(^\text{19}\)

In terms of section 189(6)b, should the other consultative entity make representations in writing, the employer must respond thereto in writing.\(^\text{20}\) A mere verbal response will not be sufficient. Prudent employers have, in any event, adopted this approach in the past, simply to create an "evidentiary trail", in the event of a challenge being launched as to the procedure adopted.

Finally, a new sub-section 12 in section 191 of the "Act" gives individual employees the choice of referring a retrenchment dispute to the Labour Court or for arbitration.\(^\text{21}\) This may well be to lighten the case load of the Labour Court and is an indication that more emphasis or importance is placed on multiple retrenchments by the drafters of the amendments to the "Act".

The ability to refer individual retrenchments for arbitration was an option under the pre-amended "Act" in terms of section 141, however the consent of the employer was required. This remains an option as far as multiple retrenchments are concerned.

2.2 SECTION 189A RETRENCHMENTS

The most important amendments dealing with dismissals on the basis of the operational requirements of the employer are to be found in the new section 189A. This section will apply if the total number of employees employed by an employer exceeds 50 and the employer proposes dismissing between ten and 50 employees.\(^\text{22}\) The applicability of

---

19 N18 supra.
20 12 of 2002 section 189(6)b.
21 Grogan (Part 4) 2002 Employment Law 5.
the section to employers is depicted in the following table, which operates as a sliding scale:

<table>
<thead>
<tr>
<th>EMPLOYMENT NUMBERS</th>
<th>RETRENCHMENTS CONTEMPLATED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 200</td>
<td>10</td>
</tr>
<tr>
<td>&lt;300</td>
<td>20</td>
</tr>
<tr>
<td>&lt;400</td>
<td>30</td>
</tr>
<tr>
<td>&lt;500</td>
<td>40</td>
</tr>
<tr>
<td>&gt;500</td>
<td>50</td>
</tr>
</tbody>
</table>

The application of the sliding scale takes into consideration the total number of employees dismissed over a period of 12 months prior to the issuing of the section 189(3) notice.

Any employer may, however, avoid the more onerous provisions of section 189A when effecting retrenchments by staggering the number of employees to be retrenched over a period of more than 12 months. This would of course be dependent upon the practicality of doing so.

If section 189A applies to a proposed retrenchment, two important innovations come into play. The first is an attempt to enhance the quality of the consultation process prior to the decision to retrench being taken, by making provision for the appointment of a facilitator to assist the parties during the consultation process.\textsuperscript{23} The appointment of a facilitator is, however, not automatic, as will be seen below.

The second innovation regulates the reaction of employees to a decision taken by an employer to proceed with retrenchments after the consultation process has been finalised. For the first time a strike may be called in certain circumstances.\textsuperscript{24}

\textsuperscript{23} Le Roux 2002 CLL 103.
\textsuperscript{24} N18 supra.
2.2.1  FACILITATION

If an employer gives notice of a proposed retrenchment which falls within the ambit of section 189A per section 189A(1), either the employer or the other consulting party may request the Commission for Conciliation, Mediation and Arbitration (the CCMA) to appoint a facilitator to assist the parties about to engage in retrenchment consultations.

As stated, the appointment of a facilitator is not automatic. Section 189A(3) provides that under two circumstances the CCMA must (own emphasis) appoint a facilitator.

Firstly, the employer may, in its notice in terms of section 189(3), request facilitation. Presumably what is envisaged is that the said notice, addressed by the employer to the other consulting party, will contain such a request and will also be forwarded to the CCMA. However, draft regulations dealing with the facilitation process envisage the completion of a prescribed form for service on the other consulting party or parties and filing with the CCMA.\(^{25}\)

Secondly, if the employer does not request the appointment of a facilitator, the other consulting party or parties may do so, provided that they represent the majority of employees whom the employer contemplates retrenching. Consulting parties must exercise their rights to request the appointment of a facilitator within 15 days of the issue of the notice of the proposed retrenchments per section 189(3).\(^{26}\)

The CCMA must appoint a facilitator under these circumstances. No option or discretion exists. A discretion to appoint a facilitator does however exist where the request for one’s appointment is not made in terms of section 189(3), i.e. not in terms of the section 189(3) notice or not within 15 days by the other consultative entity or entities. Under these circumstances the CCMA may, but is not obliged to, appoint a facilitator. The opposing consulting party would however have to agree to the appointment.

\(^{25}\) N18 supra.
\(^{26}\) N18 supra.
The facilitation must be conducted in terms of regulations still to be issued by the Minister of Labour. Draft regulations have been negotiated by the social partners within NEDLAC and have been circulated. The most important aspect of these rules still to be issued are anticipated to be the following, based on the draft regulations:

- A request for facilitation must be made by completing a prescribed form and serving it on the CCMA.

- The CCMA must maintain a panel of facilitators consisting of Commissioners of the CCMA and other persons with knowledge, experience and expertise in the conciliation, mediation or facilitation of labour related disputes.

- The CCMA must, within seven days of the request, appoint a facilitator from the panel, notify the parties of the name of the facilitator and, after consultation with the parties, set the date for the first facilitation meeting, on at least seven days' notice.

- The employer and the consulting parties may agree to appoint a facilitator other than the facilitator named in the notice issued by the CCMA. However, in these circumstances, the CCMA will not be liable to pay the fees of the facilitator.

- At the first meeting, the facilitator must seek to facilitate an agreement on the procedures to be adopted and followed during facilitation, the date and times of additional facilitation meetings and the information that the employer will be required to disclose, as well as when that information must be disclosed.

- A facilitator may conduct a maximum of four facilitation meetings between the parties, but the director of the CCMA may increase this number.
• Any meeting convened for the purposes of the facilitator arbitrating a dispute over the disclosure of information will not be regarded as one of the aforesaid four meetings.

• Unless otherwise agreed between the parties, the facilitator may chair meetings between the parties, decide any procedural issues that arise in the course of a meeting, arrange further facilitation meetings and direct that the parties engage in consultations without the facilitator being present. Procedural decisions taken by a facilitator are final and binding.

• A facilitator may order disclosure of information as well as any documentation, provided that before doing so he has received representations from the parties concerned.\(^\text{27}\)

It is important to note that, unless the parties agree otherwise, the facilitator has no power to make decisions that are binding on the parties, as to whether or not a retrenchment may take place, who may be retrenched and when such a retrenchment can take place. Viewed practically, it seems highly improbable that any employer contemplating retrenchments will agree to the appointed facilitator being possessed with such powers.

Facilitation will be conducted on a "with prejudice" basis. This means that any offers or statements made during the course of facilitation can be referred to in evidence in subsequent arbitrations or court proceedings. The parties may nevertheless agree in writing that a part of a facilitation may be conducted on a "without prejudice" basis. If this is the case, nothing regarding that part of the facilitation process can be disclosed in any court proceedings. A facilitator cannot, however, be called to give evidence on any aspect of facilitation.\(^\text{28}\) Section 189A(7) envisages a 60-day period during which facilitation will take place and during which the employer cannot proceed with the proposed retrenchments. The 60-day period is calculated from the date of the section

\(^{27}\) Le Roux 2002 *CLL* 104.
\(^{28}\) Ibid.
189(3) notice and not the date on which the request for the appointment of a facilitator is made. This time period may be varied in accordance with section 189A(6)(a), which authorises the Minister of Labour to make regulations relating to time periods and the variation of time periods for facilitation. Interestingly, the draft regulations do not make provision for such time periods.\textsuperscript{29}

After the lapse of the 60-day period, the employer may give notice to terminate the contracts of employment of employees whom it wishes to retrench, in terms of section 189A(7)a. Notice must be given in accordance with section 37(1) of the Basic Conditions of Employment Act.\textsuperscript{30} Thus, for example, employees who have been employed for more than one year will be entitled to a minimum of four weeks' notice. An employer may presumably pay remuneration in lieu of notice.

In effect this would appear to create an additional financial burden on employers, who traditionally have employees work their notice period, having embarked upon the consultation process. Little point is served by having a retrenched employee work notice and accordingly it is anticipated that a further month's notice pay will, in effect, be added to severance packages at this point in the proceedings.

On receipt of a notice of termination, the retrenched employee who is of the view that his/her retrenchment is substantively or procedurally unfair, is entitled to embark upon either the slightly amended traditional procedures or the new procedures in an attempt to enforce their claims and obtain relief. However, this will be discussed subsequent to the text dealing with the scenario where no facilitator has been appointed and under the heading of "New Remedies".

\section*{2.2.2 NO FACILITATOR}

If neither the employer nor the other consulting parties request facilitation, section 189A still envisages a 60-day time period, during which consultation can take place and retrenchments are prohibited.

\textsuperscript{29} N27 supra.

\textsuperscript{30} Act 75 of 1997.
This is perhaps open to a different interpretation, but it seems clear that the intention to prohibit retrenchments for a period of 60 days, calculated from the date on which the notice of the proposed retrenchments is given, remains a requirement regardless of whether a facilitator has been appointed.

This is not clearly stipulated in the amended section and the employer is left having to interpret and add together the time periods in sections 189A(8)a and 189A(8)b before being in a position to effect a retrenchment.

Section 189A(8)(a) states that if a facilitator has not been appointed, a party may not refer a dispute to a Council or the Commission, unless a period of 30 days has passed since the date on which the notice in terms of Section 189(3) was given.

Section 189A(8)(b) then stipulates that the employer will be able to terminate the contracts of employment of the employees it wishes to retrench once the periods mentioned in Section 64(1)(a) have lapsed. Once again, notice will have to be given in terms of Section 37(1) of the Basic Conditions of Employment Act.\(^\text{31}\)

2.3 **NEW REMEDIES**

If a union or employees want to challenge the fairness of the reason for dismissal, they must choose whether to refer the dispute to the Labour Court or to strike. Once an election has been made, a change of remedy midstream is not permissible. Section 189A(10)(b) provides that if a union gives notice of a strike, then no member of that trade union and no employee who is governed by a collective agreement to which that union is a party, may refer a dispute concerning whether there is fair reason for a dismissal to the Labour Court. The notice to strike cannot be withdrawn to facilitate a Labour Court referral and by implication, the reverse scenario is also not permitted. The

\(^{31}\) Le Roux 2002 *CLL* 105.
obligation to follow the path of the relief elected, and the bar on implementing alternative relief, is absolute.\textsuperscript{32}

\subsection{2.3.1 CHALLENGING SUBSTANTIVE FAIRNESS IN THE LABOUR COURT}

Section 189A facilitates adjudication on the substantive rationale for an effected retrenchment. A referral challenging this aspect of the retrenchment must be made within 90 days of the notice of termination. The section states that the Labour Court must find that the employee was dismissed for a fair reason if:

- The dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- The dismissal was operationally justifiable on rational grounds;
- There were proper considerations of alternatives; and
- The criteria utilised for selecting people for retrenchment were fair and objective.

Most of the criteria the court is required to consider when evaluating the substantive fairness of a retrenchment are not new.

The inclusion of the phrase "operationally justifiable on rational grounds" is anticipated to raise problems, requiring interpretation by the courts. Firstly, economic decisions are largely subjective and no objective measure exists to determine rationality. It has been argued, with some cogency, that the merits of business decisions that result in job losses are not a proper subject for adjudication. Managers know the needs of their business better than outsiders and a court should not prevent them from taking decisions, even if they turn out to be unwise. Such issues are best left for collective bargaining. The introduction of the phrase "operationally justifiable on rational

grounds", and the objectivity required thereby, may bring with it the unenviable position that the ability of South African business to adjust to the ever changing demands of the global economy to which it is now inextricably linked is decided, not in boardrooms or the courts, but by workers who might be unable or unwilling to understand that job sacrifices are sometimes necessary to attain longer term economic goals and an ultimate expansion of the job market.33

Secondly, should the court adopt its historical approach to substantive challenges and not place too strict an interpretation on the words "operationally justifiable on rational grounds", it is probable that labour will rely increasingly on the right-to-strike option to settle retrenchment disputes.34

2.3.2 ALTERNATIVELY THE RIGHT TO STRIKE

The right to strike conferred in terms of section 189A is limited in extent in that the right is only applicable to a situation where the union or employees are arguing that there was not a fair reason for the dismissal.

After the employer has given notice of its intention to terminate employment, a registered trade union or the employees who have received notice of termination may give notice of a strike in terms of section 64(1)(b) or (d).

It is not entirely clear whether the notice to strike need be given immediately upon receipt of the notice of termination or whether they may delay giving notice for a period thereafter. At the very least, however, a notice to an employer of the commencement of a strike must specify in precise terms when the strike is to commence.35

The normal provisions pertaining to strikes in the Labour Relations Act will apply. If the strike is unprotected, the employer will have the usual remedies contained in section 68.

34 Grogan (Part 5) 2002 Employment Law 8.
35 Fidelity Guards Holdings vs PTWV (1997) 9 BLLR 1125 (LAC).
It is also important to note that an employer has the right to embark on a lockout in response to a protected strike called in terms of section 189A. Offensive lockouts are not provided for in the section 189A situation.

Secondary strikes in respect of a matter governed by section 189A are also permissible, with the only exception that 14 days’ prior notice of the strike must be given, rather than the normal seven-day notice period.

Whether the right to strike is an option which will be frequently exercised remains to be seen. One school of thought holds the view that the Labour Court’s and Labour Appeal Court's past unwillingness to interfere with substantive decisions taken by employers to retrench may be viewed by employees and trade unions alike as reason to follow the strike path. A second school of thought anticipates that employees may be reluctant to strike in the context of a retrenchment, as a strike could lead to further retrenchments. Also, the delays in the strike trigger could effect the viability of this option.

2.3.3 PROCEDURAL FAIRNESS

Disputes concerning allegations that an operational requirements dismissal was procedurally unfair must still be adjudicated by the Labour Court and a protected strike on this issue cannot be called. Procedural challenges take the form of an interim remedy.

This new procedure provides that if an employer does not comply with fair procedure, a consulting party may approach the Labour Court, on application, for an order in terms of which:

- An employer may be compelled to comply with fair procedure;

- An employer may be interdicted or restrained from dismissing an employee prior to complying with fair procedure;

---

36 Le Roux 2002 CLL 102.
37 12 of 2002 section 189A(11)c.
• An employer may be directed to reinstate an employee until the employer has complied with fair procedure; or

• An award for compensation may be made if one of the above orders is inappropriate.\(^{39}\)

This application must be made not later than 30 days after the employer gave notice of termination or, if no notice of termination was given, within 30 days of the date on which the employee was dismissed. The Labour Court may however, on good cause shown, condone the failure to bring the application within the prescribed time limit.\(^{40}\)

The intention underpinning this procedure is clearly to attempt to provide a speedy mechanism for determining disputes regarding procedural fairness. Further, where possible, corrective action will be preferred to the payment of compensation. However, in practice, applications often give rise to disputes of fact. This would necessitate the hearing of oral evidence and potentially delay the process. It is hoped that the courts will devise procedures for dealing with this problem expeditiously.\(^{41}\)

Another practical effect of this form of relief is that if employees do not complain during the consultative process about the conduct of the employer, they cannot do so later on if and when they refer a dispute under Section 191(5)(b)(ii) to the Labour Court. When such referrals come before the courts, the procedural aspects of the retrenchment may not be placed in issue as, at this point, a court will only be empowered to consider the substantive fairness of the retrenchment.\(^{42}\)

\(^{39}\) 12 of 2002 section 189A(13).
\(^{40}\) Le Roux 2002 CLL 107.
\(^{41}\) Ibid.
\(^{42}\) Grogan (Part 5) 2002 Employment Law 7.
2.4 **THE NEW SECTION 191(12)**

The new section 191(12) states that if an individual employee has been retrenched following a consultation procedure that was applied to that employee only, that employee can elect to refer the dispute to arbitration rather than to the Labour Court.\(^{43}\)

The pre-amendment position only facilitated arbitration of retrenchment disputes by way of consent, in accordance with section 141 of the "Act".

The option given to individually retrenched employees indicates that the drafters of this provision have elected to place greater emphasis on retrenchments en masse, but have also possibly realised that arbitration, as opposed to adjudication, may resolve the position where referrals are not made by individual retrenches due to the deterrent of potential costs orders in the Labour Court. The amendment thus facilitates proper ventilation of individual retrenchment disputes.

The obligation to consult with a single retrenchee is no different to the consultation requirements should a number of employees be potentially affected by retrenchment. The Labour Court has recently, in dealing with a single retrenchment, held that consultations must be held with all employees likely to be affected.\(^ {44}\) The court indicated that the employer needs to meet collectively with its employees in the category within which it seeks to minimise its staff complement, with the purpose of pursuing the possibility of a voluntary retrenchment or to investigate the option of the employee taking up a different post within the organisation. This would facilitate safeguarding employment, should the aforesaid options be exercised. The failure to consult on this basis renders a retrenchment unfair.

---

\(^{43}\) N41 supra.

The approach adopted by the court in dealing with a single retrenchment may be too wide. Practically, only those who have a direct interest or stake in the outcome of a retrenchment exercise should be engaged in consultations.\textsuperscript{45}

2.5 IMPLEMENTATION

Business and organised labour have subscribed to the amendments pertaining to retrenchments despite reservations concerning particular aspects, but have elected to accept a compromise under time constraints. There is little doubt that the new laws of retrenchment will make it more difficult and expensive for employers to restructure their operations.\textsuperscript{46}

On the positive side, the idea of facilitation as a way to enhance consultation is, in theory at least, a welcome step. The strike option may further prove a useful weapon to unions to fight retrenchments. Questions remain as to whether a right to strike should exist in this area, but it is hoped that this concession will encourage more co-operative relationships between capital and labour and it is premised on this right being an accepted feature of many labour law systems, according to the International Labour Organisation.\textsuperscript{47}

Potential negatives include new areas of uncertainty where the Labour Court will once again be called upon to provide guidance. One such area exists in the determination as to what constitutes a substantively fair retrenchment per the new section 189A(19). Finally, the 60-day waiting period before a retrenchment can take place (in the absence of an agreement between the consulting parties to shorten this time period) may be too little, too late, to assist ailing business concerns.\textsuperscript{48}

\textsuperscript{45} Hutchinson "Some Factors Arising Out of the Retrenchment of a Single Employee" 2002 Contemporary Labour Law 40.
\textsuperscript{46} Greenstein 2002 NMG Levy Benefits 7.
\textsuperscript{47} Le Roux 2002 CLL 108.
\textsuperscript{48} Ibid.
3. PRE-DISMISSAL ARBITRATIONS

The new section 188A of the "Act" now introduces a process whereby disciplinary enquiries may for all intents and purposes be outsourced.

This initiative in the "Act" is born out of the realisation that employers are hard pressed to find a neutral chairperson to preside over their disciplinary enquiries and, secondly, should the resultant disciplinary steps be challenged, employers often have difficulty in finding the time and resources to attend these proceedings.

In crafting a solution to these problems, the new section 188A facilitates impartiality and, if invoked, negates the rehearing of the matter at subsequent arbitration proceedings. The procedure reduces the time and expense spent at disciplinary hearings, internal appeals, conciliations and arbitrations, and eliminates the need for employers to develop in-house skills of chairpersons for disciplinary enquiries and those able to present evidence (initiate). 49

Concisely put, the proposed new section 188A of the Labour Relations Act contains a concept which could have a profound effect upon the law of unfair dismissal in South Africa. The section permits the parties, in certain circumstances and by agreement, to refer a potential dismissal case to final and binding arbitration prior to dismissal by the employer. 50

The enquiry envisaged in section 188A is one that deals with both misconduct and incapacity allegations against an employee. Presumably both ill-health/injury and poor work performance incapacity are included.

50 Brand 2002 AMSSA News 2.
3.1 **ENTITY CONDUCTING THE ENQUIRY**

These outsourced processes may be conducted by the CCMA itself, a bargaining council or an accredited agency that has been accredited for this purpose.

Away from these bodies and the provisions of section 188A, private arbitration remains an option, in terms of which the parties elect an arbitrator and determine his or her terms of reference. The "Act" does not bar such a process and no reason exists why it could not operate on similar lines to section 188A.

3.2 **THE ARBITRATION PROCEEDINGS**

Arbitrators appointed in terms of section 188A will have all the powers conferred on a Commissioner by section 142 of the "Act", meaning that, for example, an arbitrator may:

- Subpoena for questioning any person who may be able to give information; or who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear and to be questioned or to produce the book etc.

- Call and, if necessary, subpoena any expert to appear and give evidence relevant to the resolution of the dispute.

- Administer an oath or accept an affirmation from any person called to give evidence or be questioned.\(^5^1\)

- Make a finding that a party is in contempt.

---

\(^{51}\) Landman "Pre-Dismissal Arbitrations" 2002 *CLL* 73.
An arbitrator conducting an arbitration in terms of this section must, in the light of the evidence presented and by way of reference to the criteria of fairness in the "Act", direct what action, if any, should be taken against the employee.\(^5^2\)

The award of the arbitrator is final and binding unless it takes the form of an advisory award. However, it is unlikely that an employer would be bound by an award to the extent that the employer may not impose a lesser sanction, if it so desires. This rationale being in line with the fact that the dismissal of an employee or employees is affected by the employer and not the arbitrator. It further seems in accordance with the spirit, if not the letter, of the section that an employer would not be permitted to impose a greater sanction, assuming that the arbitrator does not direct termination of the employment relationship.\(^5^3\)

Section 138 is extended to these proceedings.\(^5^4\) The effect being that the arbitrator may conduct the arbitration in the manner he or she considers appropriate in order to determine the dispute fairly and quickly, with a minimum of legal formalities. Within fourteen days of the conclusion of the arbitration proceedings, the appointed arbitrator must issue an award giving brief reasons for the findings.\(^5^5\)

The arbitrator may not include an award for costs, unless a party or the person who represented that party in proceedings acted in a frivolous or vexatious manner in proceeding with, or in defending, the dispute, or in its conduct during the arbitration proceedings.\(^5^6\)

---

\(^5^2\) 12 of 2002 section 188A(9).

\(^5^3\) Landman 2002 CLL 73.

\(^5^4\) 12 of 2002 section 188A(6).

\(^5^5\) Albertyn 2002 ILJ 1729.

\(^5^6\) Landman 2002 CLL 73.
3.3 **PRECONDITIONS TO THE APPOINTMENT OF AN ARBITRATOR**

An employer wishing to invoke this procedure would have to comply with the following preconditions:

- A request must be made in writing on a prescribed form. The form provides that the employer may select the venue for the pre-dismissal arbitration.

- The employer must pay a prescribed fee to the CCMA, either by way of bank guaranteed cheque or by electronic transfer into the CCMA's bank account. Within 21 days of receiving the request, the CCMA must schedule the pre-dismissal arbitration on 14 days' notice to the parties.\(^{57}\)

The CCMA tariff of fees provides that the employer must pay R3,000.00 for the first day of a pre-dismissal arbitration. This is based on a senior commissioner's daily fee, award fee and a 25% administration fee.\(^{58}\) Employers are not permitted to split this cost with the employee concerned.

- If the employee concerned earns less than the statutory minimum set out in the Basic Conditions of Employment Act (R89,455.00 per annum), the employee must consent to the pre-dismissal arbitration. An employee may only consent after the employee has been advised of the allegations relating to his or her alleged misconduct or incapacity.\(^{59}\) This consent must be in writing and be submitted with the prescribed form mentioned.

---


\(^{58}\) Albertyn 2002 *ILJ* 1729.

\(^{59}\) 12 of 2002 section 188A(4)(a).
If the employee earns in excess of the statutory minimum, the employee may consent to the holding of a pre-dismissal arbitration in his or her contract of employment. Presumably this could also be done by way of an appropriate collective agreement, which has the effect of amending the contracts of employment of persons subjected to it.60

3.4 REPRESENTATION AT PRE-DISMISSAL ARBITRATIONS

Representation in any arbitration in terms of section 188(A) is permissible by the following parties, should the employee not wish to represent himself or herself, namely:

- A co-employee;
- A director or employee, if the party is a juristic person;
- Any member, office bearer or official of that party’s registered trade union or registered employers' organisation; or
- A legal practitioner, not at the discretion of the appointed Commissioner, but only where the other parties agree.

3.5 REMEDIES ON CONCLUSION

The award can be taken on review to the Labour Court by any party who alleges that it is defective. The proceedings must be launched within six weeks of notice of the award being served, unless it involves corruption, in which case the six week period would run from the date that the applicant discovers the corruption.61

The arbitrator further has limited powers to correct or rescind the award. This is effected by the arbitrator issuing the award, or possibly, another arbitrator appointed by

---

60 Brand 2002 AMSSA News 72.
61 Landman 2002 CLL 74.
the same agency or institution. Rescission or variation is possible where the award is ambiguous; or contains an obvious error or omission; or if the award was granted as a result of a mistake common to the parties.\textsuperscript{62}

3.6 IMPLEMENTATION

This new procedure introduces a viable alternative to the traditional dispute resolution processes advocated by the "Act". Its success is, however, largely dependent on how it is perceived by affected employees and trade unions who will in essence have an election, in most instances, whether to consent to its implementation.

A potential deterrent to its use is the realisation that any challenge to a perceived incorrect award needs to be brought in the Labour Court, with the potential for a negative costs order being awarded, should the challenge in this forum fail. This as opposed to having a relatively cost effective "second bite at the cherry" in the CCMA or accredited bargaining council, if a normal dispute resolution procedure is followed.

The costs risks will have to be balanced against expediency, in deciding whether to utilise this new dispute resolution mechanism.

\textsuperscript{62} 12 of 2002 section 144.
4. **TRANSFER OF UNDERTAKINGS**

The pre-amendment section 197's scope and potential effect were far from clear. The murkiest aspect of this section was the ability of the transferor employer (the old employer) and the transferee employer (the new employer), to agree between themselves on whether employees would be transferred.

This issue was first canvassed by the Labour Court in *Schutte vs Powerplus Performance (Pty) Ltd* 63 where the conclusion was reached that the old and new employer cannot, by agreement between themselves, prevent the transfer of the employees to the new employer on the sale of a going concern. This approach was accepted by the Labour Appeal Court in *Foodgro, a Division of Leisurenct Ltd v Keil*. 64

The court, and more specifically Froneman D J P, in arriving at this position that the new employer must take the employees of the old employer, into its service, on transfer of a going concern, whether it wants to or not, placed emphasis on the Industrial Court judgement in *Kebeni v Cementile Products (Ciskei) (Pty) Ltd*, 65 in which the court stated:

"the need to protect employees in situations of this kind was recognised by requiring safeguards in the transfer agreement, such as a clause deeming all existing contracts of employment to be transferred to the purchaser…".

In the Foodgro decision, the Labour Appeal Court regarded section 197 as a statutory expression of the clause contemplated in the Cementile Products decision. The Labour Appeal Court in the Foodgro decision spoke of "automatic" transfers of contracts of employment on the sale of a going concern, holding that section 197 gave rise to an enforceable right of employees to be transferred along with the business. 66

---

64 (1999) 20 ILJ 2521 (LAC).
65 (1987) 8 ILJ 442 (LC).
In 2002, in contrast with the aforementioned position, the majority of the Labour Appeal Court held in the judgement in *NEHAWU v University of Cape Town*\(^{67}\) that employers could indeed, by agreement, prevent the transfer of employees.

Van Dijkhorst AJA, who wrote the majority judgement, placed reliance on the purchasers and sellers of businesses "as going concerns" being at liberty to define what is included in that concept. This interpretation of a "going concern" enabled the employers to ensure that their transaction escaped the provisions of section 197 as it was, by simply agreeing not to include all or most of the employees in the transfer. The transaction, as van Dijkhorst put it, would then amount to "a bleached skeleton, not a vibrant horse", i.e. not the transfer of a business as a whole.\(^{68}\)

This judgement, placing uncertainty on the meaning of section 197, was handed down on the eve of the sections replacement by a wholly revised provision in terms of the amended section 197 which, as will be seen, has provided the required clarity, leaving no doubt as to the legislature's intention to deprive employers of the right to decide whether or not employees will be retained when businesses are transferred.

The Constitutional Court\(^{69}\), in deciding NEHAWU's application for leave to appeal against the decision of the Labour Appeal Court and, in so doing, ordering the case to be remitted back to the Labour Appeal Court in the light of its judgment, has endorsed the position expressed in the new section 197.

The Constitutional Court agreed with Judge Zondo's minority judgement in the Labour Appeal Court, emphasising that in line with comparable foreign instruments and foreign case law, together with the fact that section 197 forms part of the chapter in the Labour Relations Act dealing with unfair dismissals, the primary purpose of the section is to protect workers in the event of the transfer of a business. This is achieved by the new section 197\(^{70}\).

---

\(^{67}\) (2002) 4 BLLR 311 (LAC).

\(^{68}\) Grogan (Part 3) 2002 *Employment Law* 11.


\(^{70}\) *NEHAWU v University of Cape Town* (CC) 2002-12-6 Case No CT 2/02.
The proposed new version splits the provisions regulating transfers in circumstances of solvency and those effected in insolvent circumstances, in terms of a new section 197 and section 197A respectively.  

---

71 Grogan *Workplace Law* 214.
4.1 THE NEW SECTION 197

The new section 197(1) regulates the employment consequences when a business is transferred as a going concern. Business is defined to include the whole or part of any business, trade, undertaking or service. This indicates therefore that transfer of a business is a wider concept than the mere sale of a business.\textsuperscript{72}

The fact that business is defined to include a service may be an indication that it was intended to include outsourcing as a going concern transfer, however "outsourcing" or "contracting out" of services are not specifically addressed. This issue will accordingly have to be determined by the courts, presumably on a case-by-case basis.\textsuperscript{73}

In terms of section 197(1), "transfer" is defined as transfer of a business from one employer (the old employer) to another employer (the new employer) as a going concern. No attempt has, however, been made to define what constitutes a going concern.\textsuperscript{74}

The new section 197(2) provides that, unless agreed, the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer.\textsuperscript{75} Reference to the substitution of the new employer for the old employer means that, as far as the employment relationship is concerned, the person or entity who acquires a business or part thereof as a going concern is transformed \textit{ex lege} into the employer of the transferor's employees.\textsuperscript{76} The transfer of the contracts of the employees concerned is an automatic consequence of the transfer of a business as a going concern, with the new section removing the phrase "without the employee's consent", which is no longer required.\textsuperscript{77}

\textsuperscript{72} Le Roux "Consequences Arising Out of the Sale or Transfer of a Business" 2002 CLL 62.
\textsuperscript{73} Van Niekerk & Le Roux 2002 ILJ 2172.
\textsuperscript{74} Le Roux 2002 CLL 62.
\textsuperscript{75} 12 of 2002 section 197(2)(a).
\textsuperscript{76} Grogan \textit{Dismissal} 1\textsuperscript{st} ed (2002) 265.
\textsuperscript{77} Grogan \textit{Workplace Law} 215.
The provision pertaining to all rights and obligations between the old employer and an employee at the time of the transfer continuing in force, as if they had been rights and obligations between the new employer and the employee,\textsuperscript{78} is carried forward within the amended provisions, as is the provision that the transfer does not interrupt an employee's continuity of employment or seniority.\textsuperscript{79}

A welcome addition is the provision confirming that employees retain their rights to bring an action against the new employer, even if action had not been instituted at the time of the transfer; the new employer being liable for any alleged unfair dismissal, unfair labour practice or act of unfair discrimination committed by the old employer\textsuperscript{80} prior to transfer.

Criminal liabilities are not transferred from the old to the new employer.\textsuperscript{81}

The controversy reflected in the Foodgro and the earlier University of Cape Town decisions is thus resolved. The new section 197 leaves no doubt that employers who are party to transfers of businesses as going concerns are deprived of the right to decide which employees will be transferred and which employees will, in effect, be retrenched prior to transfer.\textsuperscript{82}

\subsection*{4.1.1 OUTSOURCING REMAINS UNCLEAR}

The reference to the concept of a "service" in the definition of a business was apparently inserted at the insistence of COSATU, to ensure that most, if not all, outsourcing operations are regarded as transfers of a business as a going concern. The inclusion of this phrase does not necessarily mean, however, that the transfer of part of a business will be regarded as the transfer of a going concern.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{78} 12 of 2002 section 197(2)b.
\item \textsuperscript{79} 12 of 2002 section 197(2)d.
\item \textsuperscript{80} 12 of 2002 section 197(2)c.
\item \textsuperscript{81} 12 of 2002 section 197(10).
\item \textsuperscript{82} Grogan (Part 4) 2002 Employment Law 8.
\end{enumerate}
\end{footnotesize}
Until recently, it was arguable that should the outsourcing employer and the outsource agent agree that the outsourcing of a service is not a transfer of a going concern, as it is, for example, not inclusive of all employees, that section 197 would not apply.

This argument would emphasise the Labour Appeal Court's stance in the *NEHAWU vs University of Cape Town* decision, that if certain employees are not part of the transfer, then the transfer is not "a going concern".

Emphasis would further be placed on the reference in section 197(2)(a) to all contracts of employment in existence "immediately" before the date of transfer. Employers contemplating outsourcing services could ensure that the time periods between retrenching existing employees in the service to be outsourced and the effective date of transfer are well separated.

The Labour Court entertained this argument after the implementation of the amending provisions, in the matter of *South African Municipal Workers Union v Rand Airport Management Company, Turnkey Facility Management Limited and Capital Air Security Operations (Pty) Limited*. 83

The court held that although the word “service” had been inserted into the definition of "business", this did not alter the reach of the amended section significantly. The court further held that a transfer of a going concern, as contemplated by this section, must relate to the transfer of a functioning business with a prospect of continuing. Landman J noted that this concept is difficult to conceive when dealing with a support function (the function in issue).

Interestingly, the judge further held that the court was bound by the decision of the Labour Appeal Court in *NEHAWU vs University of Cape Town* in its finding that a business is only a going concern if its assets are utilised in the production of profit. 84

In finding that the outsourcing of a gardening function did not constitute the transfer of a going concern, due regard was had to the fact that this service did not have a separate

---

84 Ibid.
management structure, assets, customers or goodwill and further, that it was a non core (non profit) service.

The problem with the production of profit test is that outsourcing is often a commercial measure undertaken by a transferee business in order to turn a previously unprofitable non-core or support function into a profitable concern. The effect being that as non-core or support functions are not normally utilised in the production of profit, the test excludes their transfer from being a transfer of a going concern.85

The door facilitating this argument, that functions outsourced do not qualify as transfers of a going concern, as the workforce was not transferred, has been partially shut by the Constitutional Court, in its decision of 6 December 2002.86

The court indicated that there was nothing to suggest in the context of the language of section 197 that the phrase "going concern" must be given the meaning assigned to it by the majority of the Labour Appeal Court. The correct approach in determining whether the outsourced function qualifies as the transfer of a going concern, is to consider substance and not form, with no one factor being decisive.87

The fact that the seller and purchaser have agreed not to transfer the workforce does not disqualify the transaction from being a transfer of a going concern. Such an interpretation would render compliance with section 197 a voluntary obligation. Accordingly, each case of outsourcing will have to be determined on its own merits, with the transfer of the workforce being one factor to be considered amongst all other relevant factors.88

4.1.2 VARYING AUTOMATIC TRANSFER

The amendments to this section do facilitate an agreement allowing the variation of the application of sub-section two in respect of the new employer substituting the old

85 Schooling "Outsourcing the Garden" 2002 CLL 28.
86 NEHAWU v University of Cape Town (CC) 2002-12-6 Case No: CCT 2/02.
87 Ibid.
88 Ibid.
employer in respect of all contracts; all rights and obligations continuing in force after transfer; the liability for prior acts; and the transfer of seniority.

This agreement is required to be in writing and must be concluded between either the old employer, the new employer, or the old and new employer jointly, on the one hand and the appropriate body referred to in section 189(1) on the other hand. Both employers are required to disclose all relevant information that will allow the other party to engage effectively in the negotiations. The provisions of section 16 of the Labour Relations Act will apply, should the employer fail to provide such information, or should a dispute arise as to whether the information is disclosable.

Agreement may be achieved where certain employees may, for example, prefer to be retrenched and receive a severance package rather than be transferred. However, section 189 and section 197 are mutually exclusive to the extent that if section 197 does govern the transfer, then the employees insisting upon retrenchment and the benefit of a severance package have no such right. These employees will have to use their bargaining strength to achieve what they require and ultimately resign.

In practice, the agreement between the parties regulating the transfer of the going concern will regulate this aspect, with agreement being sought from the appropriate body referred to in section 189(1). The agreement of the employees to a transfer to the new employer on less favourable terms and conditions may be obtained by the old employer paying some form of compensatory amount to the employees concerned. This often takes place on the basis that all employees are retrenched by the old employer and receive a severance package. Those selected by agreement would start employment afresh with the new employer.

4.1.3 TERMS AND CONDITIONS NOT LESS FAVOURABLE

The amendment spells out in precise terms what the new employer must do to comply with the requirements of a transfer. This is to employ the transferred employees on the

89 12 of 2002 section 197(6).
90 Le Roux 2002 CLL 64.
91 Ibid.
same terms and conditions as those on which the employees were employed by the old employer, or, if on different terms, those which are on the whole "not less favourable to the employees".92

This section, being section 197(3), recognises that the new employer may face difficulties in placing its newly acquired employees in exactly the same position they enjoyed with their old employer. The new employer will be able to provide employment on the basis that certain terms and conditions are less favourable to the employees transferred, provided the "total package" is on the whole not less favourable.93

Although this provision is likely to generate litigation, the intention is clearly not to bind the new employer to conditions of service inappropriate to its operational needs, such as unsuitable shift arrangements and, perhaps, overtime work. In disputes over whether conditions of service are "on the whole" less favourable to the transferred employees, the courts can be expected to have regard to the operational requirements of the new employer.94

Any collective agreement regulating the terms on which a new employer will employ the transferred employees supercedes the "Act", making it permissible for a registered trade union to agree to the transfer being effected on less favourable terms.95

In the event of terms and conditions of employment being regulated by collective agreement entered into prior to transfer, the flexibility provided by section 197(3)a does not apply, even if a collective agreement determines some, but not all, of the terms and conditions of employment of the employees concerned. Less favourable terms than those set out in a binding collective agreement cannot be provided.96

Section 197(2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund, other than the fund of which he or she was a member on the date immediately prior to the date of transfer, provided that the

92 Grogan Workplace Law 215.
93 Le Roux 2002 CLL 63.
94 Grogan Dismissal 264.
95 Ibid.
96 Le Roux 2002 CLL 63.
provisions of section 14 of the Pension Funds Act\textsuperscript{97} have been met.\textsuperscript{98} The section of the Pension Funds Act referred to protects the interests of employees transferred from one fund to another, and provides that the amount of money transferred to a new fund in respect of the transferring employee should be fair, and the rights of employees to monies accumulated in the old fund are protected. Interestingly, no mention is made of medical aid funds, meaning employees will be penalised from a cost perspective in ensuring that benefits of this nature are provided to transferees of a similar nature to those that they enjoyed previously.\textsuperscript{99}

The obligation of an employer to contribute to a pension, provident, retirement or similar fund and the terms on which such a contribution must be made, will also typically fall within the ambit of section 197(2), as this aspect is usually regulated in the employee's contract of employment. The issue of whether the employee is entitled to receive the same benefits from a fund is more difficult to determine and is one which will have to be finally decided by the courts. In the case of defined contribution funds, this is not an issue, as the benefit will primarily be determined by the contribution made to the fund by the employee and/or employer and the investment returns enjoyed by the fund. However, in the case of the rapidly diminishing number of defined benefit funds the position is not clear. The ideal is to regulate such issues as are facilitated in section 197(6), by agreement.\textsuperscript{100}

4.1.4 ADDITIONAL OBLIGATIONS OF THE NEW EMPLOYER ON TRANSFER

The transfer of conditions of employment places an additional burden on the new employer, who may well require that this be factored into the price it is prepared to pay for the business.

Should the new employer elect not to transfer the existing conditions of employment after the transfer, it may be faced with a contractual claim for breach of contract and a

\textsuperscript{97}24 of 1956.
\textsuperscript{98}12 of 2002 section 197(4).
\textsuperscript{99}Le Roux 2002 \textit{CLL} 63.
\textsuperscript{100}Ibid.
claim for damages; a protected strike may be called; or the effected employees may claim to have been dismissed in terms of the new section 186(f), which states that a dismissal takes place if:

"an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer."\textsuperscript{101}

The latter option, which in effect would amount to a constructive dismissal, makes no reference to the terminology "terms and conditions of employment". This, together with the reference to "circumstances", would imply that we are dealing with something else in this section, presumably aspects such as the physical circumstances at work. Breaches of contractual obligations (including conditions of employment) would therefore fall within the scope of section 186(e) – the present constructive dismissal provision.\textsuperscript{102}

Aside from the obligations imposed by section 197(2), section 197(5)\textsuperscript{103} states that, unless otherwise agreed, the new employer will be bound by any arbitration award that, immediately prior to the date of transfer, bound the old employer in respect of the employees that are transferred. This includes arbitration awards made in terms of the Labour Relations Act, the common law or any other law.

The new employer will further be bound by the collective agreements which bound the old employer immediately prior to transfer. If a collective agreement deals with the terms and conditions of employment, this provision will not have a significant impact. This is so because these terms and conditions would become part of the contracts of the employees falling under the collective agreement's scope and be transferred by

\textsuperscript{101} 12 of 2002.
\textsuperscript{102} Le Roux 2002 \textit{CLL} 67.
\textsuperscript{103} 12 of 2002.
virtue of section 197(2).\textsuperscript{104}

This provision is of more importance when dealing with collective agreements which grant collective bargaining and organisational rights to a union. In most cases however, the new employer would be entitled to terminate the agreement by giving agreed or reasonable notice of termination. Of course such termination may trigger a dispute with the union, which may either lead to an attempt to renegotiate and possible arbitration in terms of section 21 of the Labour Relations Act, or the union embarking on strike action.\textsuperscript{105}

Both collective agreements concluded outside of bargaining councils and bargaining council agreements that are extended to so called non-parties, are included in this section. The lack of reference to section 31, which provides that a bargaining council agreement is binding on the parties to the council that entered into the agreement, seems anomalous.\textsuperscript{106}

A transfer of a business and more probably a part thereof, may result in employees falling outside of the industry covered by its bargaining council. There is also the possibility that transferred employees may, by virtue of a transfer, fall under the jurisdiction of another bargaining council with its own agreements. To avoid potential problems, a CCMA commissioner may, acting in terms of section 62 of the Labour Relations Act, determine whether an agreement applies to transferred employees.\textsuperscript{107}

4.1.5 PROTECTION OF ACCRUED BENEFITS

The fact that the new employer is placed in the position of the old employer means that the new employer becomes liable for certain financial benefits that have accrued to an employee as at date of transfer.\textsuperscript{108}

\begin{flushleft}
\textsuperscript{104} Le Roux 2002 \textit{CLL} 66. \hfill \\
\textsuperscript{105} Ibid. \hfill \\
\textsuperscript{106} N104 supra. \hfill \\
\textsuperscript{107} Le Roux 2002 \textit{CLL} 67. \hfill \\
\textsuperscript{108} Van Niekerk & Le Roux 2002 \textit{ILJ} 2172. \\
\end{flushleft}
Section 197(7)\textsuperscript{109} places an obligation on the old employer to agree with the new employer on a valuation, as at date of transfer, of the following:

- The leave pay accrued by the employees to be transferred;

- The severance pay that would have been paid by the old employer in the event of a dismissal by reason of operational requirements; and

- Any other payments that have accrued to the transferred employees but have not been paid to the employees by the old employer.

The liability of the old employer and new employer is capable of being apportioned in terms of a written agreement, which must further state what provision has been made for the payment of the benefits valued. In this regard the old employer is to “take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for the obligation on the new employer” created in this section.\textsuperscript{110} This may include inserting in the commercial contract appropriate provisions ensuring the new employer is able to make the necessary payments.

If the old employer fails to show that he has complied with the above provisions, the old employer is jointly and severally liable with the new employer to any employee who becomes entitled to the valued benefits. However, this liability only arises in the event of the employee's employment being terminated on the basis of the employer's operational requirements, or the employer's liquidation or sequestration and only extends for a period of 12 months after the date of transfer.\textsuperscript{111}

There appears to be a potential conflict between the provisions of section 197(7) and section 197(9), which provides that the old employer and the new employer are, in any event, jointly and severally liable in respect of a claim concerning a term and condition of employment that arose prior to transfer. No qualifications are placed on this liability.

\textsuperscript{109} 12 of 2002.
\textsuperscript{110} 12 of 2002 section 197(7).
\textsuperscript{111} Le Roux 2002 CLL 69.
As many of the obligations on the old employer referred to in section 197(7)(a) will constitute terms and conditions of employment, the interplay between these two sub-sections is presumably to regulate the accrued rights referred to in section 197(7) separately and that the provisions of section 197(9) will not apply to them.  

4.1.6 RETRENCHMENT AFTER AUTOMATIC TRANSFER

The new employer may not need all the employees automatically transferred to it and will, as a result, be able to retrench after the transfer, provided that such a dismissal can be justified on the basis of operational requirements of the business and after a fair consultation process has been complied with.

Of course, most new employers may realise the need to retrench prior to transfer of the business and, in the absence of an agreement with the affected employees, in terms of section 197(6), may factor in the cost of retrenchment into the purchase price that they are prepared to pay for the business.

The new employer will further have to be mindful of the provisions of the new section 187(1)g, which provides that a dismissal will be automatically unfair if the reason for the dismissal is a transfer, or a reason related to a transfer contemplated in section 197 and section 197A.

Clearly this is going to be a difficult provision to apply and interpret, however, a bona fide decision to cut costs after transfer should not fall foul of this provision.

4.1.7 IMPLEMENTATION

The new section 197 grants employees significant new rights and does, to a certain extent, clarify important aspects of our law concerning the transfer of going concerns. However, it also creates areas of uncertainty by, for example, not defining what

---

112 N111 supra.
113 Le Roux 2002 CLL 68.
114 12 of 2002.
115 Le Roux 2002 CLL 68.
constitutes a going concern, or failing to address outsourcing sufficiently. The crucial question is of course, whether it will succeed in its aim of protecting employees from the loss of jobs. If it makes the acquisition of a failing business too unattractive, the result could be that businesses are closed rather than sold, which would be counterproductive.\textsuperscript{116}

\textsuperscript{116} N111 supra.
4.2 THE NEW SECTION 197A & B

The amendments to section 197A ensure that the results of a transfer of a business or part of a business of an insolvent employer, or in terms of a scheme of arrangement designed to avoid winding up or sequestration, are the same as any other transfer of business; namely, unless it is otherwise agreed in terms of Section 197(6), the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration, or the entering into of a scheme of arrangement.117 The transfer to the new employer does not interrupt the employees' continuity of employment.118

However, unlike in the case of section 197 transfers, the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee and are not transferred. Secondly, anything done before the transfer by the old employer is considered to have been done by the old employer.119 This presumably refers to dismissals, commission of unfair labour practices and acts of discrimination on the part of the old employer.

Furthermore, the provisions in section 197 pertaining to the agreement between the two employers to value and apportion liability in respect of leave pay, severance pay and other payments; the continued liability for certain payments by the old employer in the 12 month period following the transfer where the requirements of section 197 have not been complied with; and joint and several liability on the part of both employers concerning claims based on any term and condition of employment arising prior to transfer have not been included, or rather have been specifically excluded in the new section 197A.120

---

117 Grogan Dismissal 266.
118 12 of section 197A(2)(d).
120 12 of 2002 section 197A(5).
Collective agreements entered into by the insolvent employer also transfer to the new employer. In effect, if the terms and conditions of employment are determined by a collective agreement, these terms and conditions will continue to apply.\textsuperscript{121} This section also does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to transfer.\textsuperscript{122}

The new section 197B obliges an employer who is considering winding-up or sequestrating to advise the party it should consult with in terms of section 189(1). The section further obliges the employer to notify this consultative body of any application for its winding-up or sequestration, by providing a copy of the application.\textsuperscript{123} It remains to be seen what recourse is to be had should this section not be complied with, however reinstatement would afford the employer an opportunity to comply with the act, alternatively some form of compensation could be claimed from the directors or members of the insolvent entity who have traded recklessly and may as a result be personally liable.

4.2.1 IMPLEMENTATION

The effect of the new section 197A is to ensure continuity of employment, but with the effect that accrued obligations of the old employer expire upon provisional liquidation, winding-up, sequestration or a scheme of arrangement being entered into. The amendments to this genre of transfers were necessary in order to align them with the amendments to section 197.

\textsuperscript{121} Grogan \textit{Dismissal} 266.
\textsuperscript{122} Van Niekerk & Le Roux 2001 \textit{ILJ} 2173.
\textsuperscript{123} 12 of 2002 section 197(B).
5. PRESUMPTION OF EMPLOYMENT

The fact that self-employed, independent contractors remain outside the protection of labour legislation, whilst dependent workers are protected if categorised as "employees", has had the effect internationally that the creation of an employment relationship has been avoided by those hiring workers, leading to the use and abuse of those engaged to work.\textsuperscript{124}

South Africa has proved no different with attempts by employers to evade the provisions of the Labour Relations Act and the Basic Conditions of Employment Act, by trying to structure relationships between themselves and the people who work for them as something other than an employment relationship.\textsuperscript{125}

Both the CCMA and the Labour Court have been willing to interpret the definition of "an employee" in such a way as to discourage attempts to evade the provisions of both statutes. These forums have often had difficulty in distinguishing between an employee and an independent contractor in borderline cases. Zondo J, as he then was, described the task of making the distinction between a contract of service and a contract of work, in \textit{Medical Association of South Africa and Others v Minister of Health and Another},\textsuperscript{126} as one of the most difficult operations which courts have grappled with for decades.

In line with an international clamp down on the avoidance of employment relationships and the associated abuse of workers; demands from COSATU that the concept of who constitutes an employee, as defined, be expanded; and in order to provide guidance through existing murky jurisprudence, the legislature has now created a presumption of employment. The presumption is to be found in the new section 200A of the Labour Relations Act and is mirrored in section 83A of the Basic Conditions of Employment Act.\textsuperscript{127}

\textsuperscript{124} Christianson "Defining Who is an Employee" 2001 \textit{CLL} 21.
\textsuperscript{125} Van Niekerk & Le Roux \textit{ILJ} 2173.
\textsuperscript{126} (1997) 18 \textit{ILJ} 528 LC 533.
\textsuperscript{127} Grogan (Part 5) 2002 \textit{Employment Law} 4.
Section 200A reads:

(1) Until the contrary is proved, a person who works for, or provides services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:\textsuperscript{128}

- The manner in which the person works is subject to the control or direction of another person;

- The person's hours of work are subject to the control and direction of another person;

- If a person works for an organisation, the person forms part of that organisation;

- The person has worked for that person for an average of at least 40 hours per month over the last three months;

- That person is economically dependant on the person for whom they work or provide services;

- The person is provided with the tools of their trade or work equipment by that person; or

- The person only works for or supplies services to one person.

\textsuperscript{128} 12 of 2002 section 200A(1).
5.1 THE ONUS

The pre-amended position placed the onus of proving that an applicant was in fact an employee as defined, on the employee on the preponderance of probability, as opposed to beyond reasonable doubt.

The new presumption of an employment relationship on the existence of one or more of the factors cited in section 200A(1), shifts this onus to the employer. This shift is occasioned on the mere allegation that one or more of the factors is present within the relationship. The employer will then bear the burden of proving that the worker was not in fact an "employee". 129

The presumption is rebuttable with the listed factors doing little less than lending legislative endorsement to the factors the court would in any event take into account when applying the dominant impression test. 130

Not all of the factors are quantifiable, for example, the degree to which a person is subject to the direction and control of another clearly brings with it the uncertainties of the old control test, however, the last four factors leave less room for debate. Grogan submits that the amended provision does not seek to exclude from the definition of an employee persons who satisfy all but one of the requirements or conversely include an employee on the basis that one factor is present. 131

In short, the presumption, if invoked by the alleged existence of one or more of the listed factors, shifts the onus to the employer with the arbitrator or adjudicator being called upon to apply the dominant impression test. It is only in unlikely instances where the probabilities for and against an employment relationship are in fact balanced, that the employer will be found not to have discharged the onus imposed on it.

---

129 Christianson 2001 CLL 28.
130 Grogan (Part 5) 2002 Employment Law 5.
In instances where workers earn less than the amount determined in section 6(3) of the Basic Conditions of Employment Act, section 200A(3) makes provision for the obtaining of advisory awards from the CCMA where the parties are uncertain as to the status of their relationship.  

5.2 SUBSTANCE AND NOT FORM

The presumption in section 200A makes it clear, as have our courts, that it is immaterial whether the contract is called a contract of employment or a contract of an independent contractor. What is relevant is the nature and purpose of the contract. This stance bends the rules on freedom of contract in order to identify a vulnerable or dependent worker.

It is clear that the legislature is concerned with the kind of arrangements uncovered in cases like *Building Bargaining Council Southern & Eastern Cape v Melmons Cabinets CC*, in which the employer turned its workers into independent contractors with contracts which the Labour court described as “cruel hoaxes” and which attempted to style the employment of a humble labourer into an independent contractor. Workers in this position will now be assisted by the new section 200A.

5.3 EXCLUSIONS

Section 200A(2) stipulates that the provisions regarding a presumption of employment do not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act (this amount is currently R89,445.00 per annum).

This is an indication that the drafters of the proposed amendments were primarily concerned with the notion of protecting the most vulnerable employees and not senior managerial employees who are essentially capable of bargaining on their own behalf.

---

132 12 of 2002 section 200A(3).
133 Christianson 2001 *CLL* 28.
135 12 of 2002 section 200A(2).
The distinction does not appear to make much sense, after all, the difference between employees and independent contractors remains constant, regardless of how much they earn. This appears to have been acknowledged in a sense within the provisions of section 200A(2)(b), which provides that a code of good practice should be prepared and issued by NEDLAC to determine whether persons earning in excess of the statutory amount alluded to in this Section are "employees".  

5.4 IMPLEMENTATION

In broad terms, the tightening of the definition to distinguish between an independent contractor and an employee is welcomed. The same is in line with the stance currently being taken by the international community on the abuse of fixed term contracts and the exploitation taking place where people who are actually employees are contracted in as independent contractors in order that the so-called employer can dodge obligations relating to statutory rights and fair labour practices.

The general consensus would appear to be that the statutory presumption of employment is something new but not yet perhaps the final word or optimum mechanism on how to distinguish between an employee and an independent contractor in borderline cases.

136 Christianson 2001 CLL 29.
6. CON-ARB

A con-arb is a process by which the parties to a dispute go to a single third party who first conciliates and, failing an agreed resolution, determines the dispute by final and binding arbitration. The same person generally is thus both conciliator and arbitrator.\(^{137}\)

In an attempt to speed up the resolution of unfair dismissal disputes, the Labour Relations Amendment Act, through the insertion of a new section 191(5)(a), now makes provision for the introduction of a "con-arb" process,\(^{138}\) as opposed to the process of conciliation followed by a referral to arbitration within 90 days of the dispute having been conciliated.

The new section directs that the CCMA or a bargaining council, having convened conciliation and after certifying that the dispute remains unresolved, must commence with the arbitration immediately.\(^{139}\) The process is obligatory in cases of dismissal of an employee for reasons relating to probation, or any unfair labour practice relating to probation, or any other dispute contemplated in section 191(5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.

These latter disputes, in respect of which one may object to immediate arbitration, include:

- Unfair dismissal disputes based on misconduct or incapacity; and

- Any alleged constructive dismissal.

It is presumed that in instances where obligatory immediate arbitration is required, that after commencement of the arbitration, a commissioner will be entitled to postpone the arbitration on good cause shown.

\(^{138}\) Le Roux "Unfair Dismissal the New Con-Arb Process" 2002 *CLL* 114.
\(^{139}\) Grogan *Workplace Law* 304.
If one of the parties has applied to the director of the CCMA for the matter to be referred to the Labour Court, the dispute will not be arbitrated immediately.\textsuperscript{140}

The fact that the provision is cast in peremptory terms is puzzling. If the word "must" is taken literally, an arbitrator would be in breach of the act if, after several hours of conciliation, he or she did not commence arbitration, where a case concerned a probationary employee, even if this involved postponing other scheduled conciliations. A commissioner surely cannot be said to act unlawfully in such circumstances. Nor, it is suggested, would commissioners act improperly if they were to refuse to arbitrate disputes concerning probation immediately, if a party reasonably objected because the commissioner had compromised his or her impartiality during the conciliation phase.\textsuperscript{141}

6.1 **PROCEDURE**

This process of arbitration commencing immediately after conciliation is dealt with in terms of rule 17 of the new CCMA rules, which prescribe that 14 days notice be given to all parties involved in a con-arb. The rules read together with the new LRA form 7.11, provide that a referring party who intends to object to the con-arb process must do so when referring the dispute. The other party has seven days before the scheduled date to lodge an objection by serving and filing such an objection on the other party and the CCMA.\textsuperscript{142}

Once an objection to the con-arb process has been lodged, the conciliation and arbitration phases of the dispute referred will be separated and dealt with as they were in the past. In cases where the dispute is not arbitrated immediately, the matter must be scheduled for arbitration in the presence of the parties or on written notice on at least 21 days prior notification.\textsuperscript{143}

\textsuperscript{140} Le Roux 2002 *CLL* 115.
\textsuperscript{141} Grogan (Part 5) 2002 *Employment Law* 9.
\textsuperscript{142} Alberyn 2002 *ILJ* 1721.
\textsuperscript{143} Le Roux 2002 *CLL* 115.
If a party fails to appear or to be represented at the con-arb, the appointed commissioner must nevertheless conduct the conciliation. A formal meeting of this nature is required in order to facilitate the issue of a certificate. In a case where the employer or its representative fails to appear, the arbitration will presumably take place in its absence and will, in all probability, be decided in favour of the employee. If the employee or their representative fails to appear, the matter will typically be dismissed in terms of section 138(5) of the Labour Relations Act.\(^{144}\)

The new CCMA rules specifically state that all the rules and provisions of the "Act" that are applicable to conciliation and arbitration apply to con-arbs, read with the necessary changes required by the context.\(^{145}\)

As far as representation is concerned, it appears that the drafters of rule 17 have replicated the pre-amendment provisions dealing with representation, with one notable exception, namely that a party to a dispute subjected to con-arb can be represented by a legal practitioner. However, once again the right to legal representation is qualified in certain unfair dismissal disputes, namely disputes concerning misconduct or incapacity. The provisions of the now repealed section 140(1) of the Labour Relations Act\(^{146}\) are repeated within this rule, with the result that legal representation will only be permitted in these cases where all the parties agree to this, or the commissioner permits such representation on the basis that it would be unreasonable to hold otherwise.\(^{147}\)

During the CCMA’s last financial year (2001 to 2002) 80% of cases referred to this forum were dismissal disputes.\(^{148}\) Bearing this in mind, the exclusion of legal practitioners from representing parties under these circumstances cannot pass constitutional muster and will surely be challenged shortly.

---

\(^{144}\) N143 supra.


\(^{146}\) 66 of 1995.

\(^{147}\) Le Roux 2002 \textit{CLL} 116.

\(^{148}\) Albertyn 2002 \textit{ILJ} 1721.
The general prohibition on the use of legal representatives during the conciliation process has however been relaxed in the case of the conciliation part of the con-arb process.\footnote{Le Roux 2002 \textit{CLL} 116.}

Neither the new rules nor the Labour Relations Amendment Act deal with whether the same commissioner should conduct both conciliation and the arbitration in a con-arb. Section 136(3) provides that if there is an objection to the same commissioner's involvement, this point must be raised within seven days of the issue of the certificate, however this is clearly inapplicable to con-arbs.\footnote{Albertyn 2002 \textit{ILJ} 1721.}

The problem lies in the fact that the two processes are very different in nature, with a conciliating commissioner playing an active and engaging role in a conciliation and in so doing becoming privy to sensitive and/or confidential information. To go on to arbitrate the dispute, impacts on the commissioner's obligation to remain impartial and places the appointed commissioner into a position where his or her function may have become compromised. Generally, the CCMA's practice has been to utilise different commissioners to conciliate and arbitrate disputes. Should this practice continue, commissioners will not be exposed to potential areas of conflict of interest within the con-arb procedure.\footnote{N150 supra.}

6.2 IMPLEMENTATION

The rationale underpinning the new con-arb procedure, to speed up dispute resolution, is commendable, however the procedure may not have the desired effect in practice and comes at a cost to the parties involved and the CCMA.

It is anticipated that, due to the perception that one commissioner will deal with both conciliation and arbitration, the parties may generally elect to object to this procedure being adopted. To avoid this perception, the CCMA will be required to have arbitrators
on stand-by should conciliation fail. This equates to having to pay arbitrators who may not be called upon to arbitrate at all.

The cost concern extends to employers and, to a lesser degree, to employees, who will be called upon to have their respective witnesses available, even in situations where the need to lead evidence becomes uncalled for. This equates to direct costs, such as the costs incurred in securing witness attendance and certain indirect costs, such as loss of productivity, or lost man-hours.
7. PROBATION

Probation has long been a contentious issue. Prior to 1992 no protection was afforded to probationers. The 1995 Labour Relations Act\textsuperscript{152} reversed the position, drawing little distinction between probationers and tenured employees, leaving employers disillusioned with probation as a concept. Employers accordingly adopted a different strategy in order to assess the performance and suitability of newly appointed employees, by way of entering into short-term fixed-period contracts. At the end of this contract, an employee who was assessed as being non-suited to the job would not have their contract renewed; a process perceived by employers as insulating themselves against claims for unfair dismissal for not having applied the provisions of Schedule 8 Item 8.\textsuperscript{153} This strategy had its own set of risks, with employees faced with non-renewal of a fixed-term contract claiming in certain instances that, on termination, they had been unfairly dismissed and claiming an expectation of permanent employment or at least a right to a contractual renewal.

Prior to the 2002 amendments, with employers having formed the view that to submit an employee to a probation period served little or no purpose, probationary clauses were more often than not, absent from employment contracts with new employees.\textsuperscript{154}

Whilst little difference existed between probationers' and tenured employees' rights to procedural fairness, arbitrators were at liberty to interpret the "fair opportunity" that probationers must be given to meet standards in the relevant code of good practice in a more restrictive sense than the "reasonable period of time for improvement" to which the non-probationer was similarly entitled. Arbitrators were also able to exercise their discretion as to whether dismissal of a probationer was permissible, even if he or she had not been given a "fair opportunity", whereas in the case of non-probationers, dismissal was expressly enjoined until a "reasonable period" had passed.\textsuperscript{155}

\textsuperscript{152} 66 of 1995.
\textsuperscript{153} Ibid.
\textsuperscript{154} Le Roux "Probationary Periods for New Employees" 2002 CLL 81.
The most detailed discussion on what certain commissioners considered the appropriate test to be applied in determining the substantive fairness of a dismissal relating to probation was formulated in *Crawford v Grace Hotel*, where the appointed commissioner formulated the following approach:

"Does the arbitrator charged with determining this issue simply make his or her own substantive determination as to the employee's fitness for permanent appointment, thereby substituting his own decision for that of the employer, or should the arbitrator afford the employer a measure of discretion in making such an assessment and, if so, what is the legitimate scope for interference by an arbitrator in an employer's assessment of the employee's suitability for a permanent appointment where such assessment is found to be a genuine one that has been made in good faith and can be demonstrated to be founded on objectively ascertainable criteria that go beyond irrational or arbitrary whims, likes or dislikes of a particular employer, whatever the rights or wrongs of the employer's decision may be?

Where such criteria have been satisfied, I believe the legitimate area for interference by the arbitrator with the substantive merits of the employer's assessment as to the employee's suitability for a permanent appointment is or should be substantively limited in scope, and that in the premises outlined, an arbitrator would be slow to interfere on substantive grounds with the merits of the employer's assessment.

I find nothing unfair in such an approach, nor do I believe it to be subversive of any principles or objectives of the Labour Relations Act or its guidelines. On the contrary, an employer's right to contract with a prospective employee for a reasonable period of grace in which to assess the correctness of his original decision to

---

appoint that person is recognised by the code of good practice for the very good reason that employment decisions may be and, with hindsight, often do turn out to have been imprudently made, which is not surprising considering the limited information and knowledge of the applicant and his/her suitability for the post and capacity to adapt successfully to the working environment available to the employer at the time of recruitment.

An employer's right to contract for a reasonable probationary period to assess the correctness of his earlier decision is further not inequitable to the employee who, by his or her agreement thereto, must be aware that permanent employment is not being offered prior to the successful completion of the agreed period of probation. An employee is not justified in holding expectations of permanent employment before that time.

My conclusion on this issue is that, subject to the employer's compliance with the fairness safeguards cited, he ought to be afforded a considerable degree of latitude in assessing a probationary employee's suitability for a permanent appointment."\(^{157}\)

Contrary to common misconceptions then, and subject to the procedural requirements as set out in the relevant code of good practice, namely to offer appropriate evaluation, instruction, training, guidance or counselling and some form of hearing prior to dismissal,\(^{158}\) it appears that at least some arbitrators had been prepared to defer to management, standards and assessments regarding poor work performance in the case of probationary employees before the amended provisions relating to probation were implemented and gave judicial recognition to this approach as being correct.\(^{159}\)

\(^{157}\) Crawford v Grace Hotels (2000) 21 ILJ 2315 (CCMA) 2318B – 2319B.

\(^{158}\) PETUSA obo van der Merwe v Libra Bathroomware & Spa (Pty) Ltd (1999) 2 BALR 177 (CCMA).

\(^{159}\) Le Roux 2002 CLL 83.
The amendments to the provisions pertaining to probation gave legal effect to the manner in which probation was being applied by astute arbitrators, who as far as substantive fairness was concerned, acknowledged that employers were entitled to a period of grace in order to assess the correctness of their decision to employ.\textsuperscript{160}

The amendments were, in effect, required to give clarity to the legislature's obvious intention to draw a distinction between probationary and other employees; to facilitate the proper utilisation of probation as a concept being designed to afford an employer an opportunity to evaluate an employee's performance prior to confirming a permanent appointment; and to give partial effect to the position advocated by some, who sought greater flexibility in dismissal laws, particularly in the form of qualifying periods, or a significant reduction in the extent of an employer's obligations in these circumstances.\textsuperscript{161}

7.1 \hspace{1em} THE AMENDED CODE OF PRACTICE

The Labour Relations Amendment Act of 2002 amends the relevant code of practice by inserting new provisions relating to probationary employees. The new code makes it clear that the imposition of a probationary period is not compulsory; it is a requirement that an employer may elect to impose in a contract of employment in the case of a newly hired employee.\textsuperscript{162}

The new item 8(1) makes it clear that the sole purpose of probation is to evaluate new employees' performance before confirmation of their appointments. The code emphasises that probation should not be used for any other purpose and, in particular, should not be used to deprive employees of the status of permanent employment.\textsuperscript{163}

At first glance it would appear that the purpose of probation is fairly narrow, namely to assess the work performance of the employee concerned, however, a closer reading shows that probation can have a wider purpose. The reference to "suitability" for the first time could include an assessment of an employee's general suitability for continued

\textsuperscript{160} Le Roux 2002 \textit{CLL} 82.
\textsuperscript{161} Van Niekerk & Le Roux \textit{ILJ} 2167.
\textsuperscript{162} Van Niekerk \textit{Unfair Dismissal} 1\textsuperscript{st} ed (2002) 58.
employment, inclusive of such aspects as the employee's character, his general attitude towards the job and his ability to get on with fellow employees and customers, etc.\textsuperscript{164}

The code also makes it clear that the use of probation clauses should not be abused.\textsuperscript{165} By way of an example, the code cites the practice of dismissing employees who have recently completed a probationary period and replacing them with newly hired employees as inconsistent with the purpose of probation and constituting an unfair labour practice.\textsuperscript{166}

An initial draft of the amended Labour Relations Act provided that, in most cases, a period of three months' probation ought to be sufficient. Jobs requiring low levels of skill or technical expertise may require a period of less than three months. Jobs requiring higher levels of skill or technical expertise would generally justify longer periods, but probationary periods exceeding six months would be exceptional. This provision was however subsequently excluded. The new code requires that the period of probation should be determined in advance and be of "a reasonable duration". What might constitute a reasonable period of probation is not indicated. What is reasonable ought to be determined on a case-by-case basis and is dependent on a number of factors. The code specifically mentions the nature of the job and the time it takes to determine the employee's suitability for continued employment as factors to be considered.\textsuperscript{167}

Generally, lower-skilled occupations would require shorter periods of probation. The greater the skill level, the longer the period of assessment should be. In some instances, for example, employees in academic institutions and senior managerial employees who are required to meet specific financial targets, a fair assessment of the employee's performance might not be able to be conducted in less than an academic or financial year.\textsuperscript{168}

In these situations the employer will be able to approach the employee and propose an extension of the probation period. The formulation of the code indicates that this is the

\textsuperscript{163} Grogan (Part 5) 2002 Employment Law 7.
\textsuperscript{164} Le Roux 2002 CLL 84.
\textsuperscript{165} 12 of 2002 Item 8(1)(c) Schedule 8.
\textsuperscript{166} Van Niekerk Unfair Dismissal 58.
\textsuperscript{167} Van Niekerk Unfair Dismissal 59.
employer's right, which can be rejected by the employee without challenge, however the decision not to offer an extension and dismiss can be challenged.\textsuperscript{169}

The period of the extension should not be disproportionate to the legitimate purpose the employer seeks to achieve. In other words, the period of an extension must be determined by what is reasonable in the circumstances and the specific objectives that the employer seeks to achieve by requiring a further period within which to continue evaluating the employee's performance.\textsuperscript{170}

The decision to offer an extension or dismiss the employee must, in either case, be preceded by a hearing and, if aggrieved by the outcome, the employee may refer the dispute for expedited arbitration.\textsuperscript{171}

Where an extension is offered, it may be argued that the proposed period of extension is too long or is being applied for an unacceptable purpose. In this event the employee may resign and claim constructive dismissal or argue that the employer's conduct constitutes an unfair labour practice. In such circumstances employers would point to the offer of an extension as an indication of its willingness to act fairly. The arbitrator would have to determine what period is reasonable under the circumstances and the specific objectives the employer seeks to achieve by requiring that an extended period of probation be served.\textsuperscript{172}

Procedurally, the amended guidelines require that where an employee's performance be assessed, inclusive of reasonable evaluation, instruction, training, guidance or counselling, in order to allow the employee to render a satisfactory service. If the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the

\textsuperscript{168} N167 supra.
\textsuperscript{169} Le Roux 2002 \textit{CLL} 85.
\textsuperscript{170} Van Niekerk \textit{Unfair Dismissal} 59.
\textsuperscript{171} Grogan (Part 5) 2002 \textit{Employment Law} 7.
\textsuperscript{172} Le Roux 2002 \textit{CLL} 85.
\textsuperscript{173} Le Roux 2002 \textit{CLL} 84.
employee to be failing to meet the required standard and in what respects the employee is believed to be incompetent.\textsuperscript{173}

Where the required standard has not been met, the employer is afforded two options, namely to extend the probation period or to dismiss the employee concerned.

Typically, an employer will consider extending a probation period in two situations. The first would be where the employee has failed to meet the required standards (after the employer has made the necessary assessments and given the required guidance, counselling, etc.), but the employer is of the view that there may be acceptable reasons for this failure and/or the employer is of the opinion that the employee may be able to meet the required standards within a further reasonable period of time. The second situation would be where circumstances are such that the employer has been unable to properly assess the employee's suitability for continued employment, for reasons such as illness on the employee's part.\textsuperscript{174}

An employer may elect to dismiss an employee after inviting the employee to make representations and considering any representations made.\textsuperscript{175} The most fundamental difference between the provisions relating to probation in the July 2000 bill and the code of practice as amended by the 2001 bill, relates to the determination of the fairness of the decision to dismiss an employee during, or on the expiry of, a probation period. The 2000 bill proposed that an employer need only prove that the dismissal was effected in accordance with a fair procedure, i.e. substantive fairness was assumed. The 2001 bill provides that in any dispute about the fairness of a termination of employment during or on expiry of a probationary period and based on poor work performance, that the person tasked with making a decision about the fairness of that dismissal ought to accept reasons for dismissal that may be "less compelling" than would be the case in dismissals effected after the completion of the probationary period. This directive will have the effect of remedying the approach adopted by some commissioners of the

\textsuperscript{173} N173 supra.
\textsuperscript{174} 12 of 2002 Item 8(1)h Schedule 8.
\textsuperscript{175} Van Niekerk & Le Roux 2001 ILJ 2167.
CCMA, who drew no distinction between an employer's obligation prior to, and after, the completion of a probationary period.\textsuperscript{176}

Given that nobody really knows just how compelling the reasons must be for the dismissal of any employee, this provision does not really mean much, save that arbitrators should be wary of interfering with employer's standards, or with their judgments on whether probationary employees have measured up to those standards.\textsuperscript{177}

Whether probation as a concept may be applied to existing employees who have been promoted internally in order to assess their suitability to their new position is a vexed question. André van Niekerk expresses the view that probation is not limited to new employees. Employers may, according to this view, require a newly promoted employee to serve a period of probation in the position to which the employee has been promoted.\textsuperscript{178} Other academics adopt the view that the concept of probation is limited in its application to newly hired employees only. This is certainly borne out by the wording of item 8(1)a.\textsuperscript{179} Much will however depend on how the Labour Court interprets the term "newly hired" as to whether promoted employees may be called upon to serve periods of probation.

Misconduct committed during the course of a probationary period must be dealt with as a misconduct issue rather than a performance issue. However, the lines between these two issues may have become suitably blurred by the use of the term "suitably" to facilitate the application of stricter workplace standards on probationary employees. Thus, for example, where an employee has exhibited a poor time keeping record during the probationary period (a concept usually dealt with as a form of misconduct), this conduct may justify a termination of employment at the end of the probationary period based on a lack of suitability to the position.\textsuperscript{180}

\textsuperscript{177} Grogan (Part 5) 2002 \textit{Employment Law} 7.
\textsuperscript{178} Van Niekerk \textit{Unfair Dismissal} 58.
\textsuperscript{179} 12 of 2002 Schedule 8.
\textsuperscript{180} Le Roux 2002 \textit{CLL} 86.
7.2 IMPLEMENTATION

The amended concept of probation facilitates the use of probation as a concept by employers for the purpose for which it was originally intended, namely to provide an opportunity for employers to evaluate an employee's performance before confirming permanent employment.

Employers may now have the confidence to utilise probationary clauses in contracts of employment and refrain from the practice of entering fixed-term contracts. Drafters of probation clauses are, however, cautioned to ensure that such clauses are correctly formulated.\(^{181}\)

Drafters should give proper consideration to the length of the probationary period. A standard period applicable to all employees of whatever rank or status should be avoided. The purpose of the probationary period should be spelt out in detail, including the fact that the employee's "suitability" to the position is also a determinant alongside work performance. If the employee has been appointed on the understanding that he or she has certain skills that can be utilised immediately, this should also be specified in the employment contract, so as to limit the possibility of an arbitrator finding that training, counselling, evaluation and instruction should have taken place prior to dismissal being effected.\(^{182}\)

Again the amended provisions on probation do not bring with them certainty as to how the relevant item of the code will be interpreted by the Labour Court. Concepts such as "newly hired" employees and their strict or broad application, and the application of a "less stringent test" as opposed to the test in the case of non-probationary dismissals, in determining the substantive fairness of the dismissal (bearing in mind that it has frequently been pointed out that substantive and procedural fairness are inextricably linked in incapacity cases\(^{183}\)) will all require interpretation in due course.

---

\(^{181}\) Le Roux 2002 CLL 85.
\(^{182}\) N181 supra.
\(^{183}\) White v Medpro Pharmaceutica (Pty) Ltd (2001) 12 (2) SALLR (CCMA).
8. UNFAIR LABOUR PRACTICES

The 1995 Labour Relations Act abolished both the wide concept of an unfair labour practice and the Industrial Court, which was charged with striking down these practices. The "residual" unfair labour practice clung to life in terms of schedule 7 of the Labour Relations Act\textsuperscript{184} and was considerably more limited in scope than its predecessors, only protecting employees from certain employer practices that did not amount to dismissal. In 1998, the Employment Equity Act\textsuperscript{185} removed unfair discrimination from the definition of an unfair labour practice as it appeared in item 2 of schedule 7, further limiting the scope of these practices.\textsuperscript{186}

The awkward original positioning of the "residual unfair labour practice" definition in schedule 7 is apparently accounted for by the drafters' intention ultimately to deal with unfair labour practices in a separate statute. That intention has been finally jettisoned in favour of absorbing unfair labour practices into the body of the Labour Relations Act.\textsuperscript{187} No longer contained in a transitional schedule and no longer "residual", the unfair labour practice now finds its place in the amended section 186(2) of the "Act".\textsuperscript{188}

The new definition of unfair labour practice differs from the previous definition in two respects. The first relates to protected disclosures which are now specifically included in the definition\textsuperscript{189} and the second relates to the inclusion of unfair conduct of an employer relating to probation, excluding disputes about dismissals for reasons relating to probation.\textsuperscript{190} This adds acts or omissions relating to probation to those concerning promotion, demotion, training and "the provision of benefits" as forms of potential statutory unfair labour practices.\textsuperscript{191}

\textsuperscript{184} 66 of 1995.  
\textsuperscript{185} 55 of 1998.  
\textsuperscript{186} Le Roux "The New Unfair Labour Practice" 2002 Contemporary Labour Law 91.  
\textsuperscript{187} Grogan (Part 5) 2002 Employment Law 5.  
\textsuperscript{188} Le Roux 2002 CLL 91.  
\textsuperscript{189} 12 of 2002 section 186(2)(d).  
\textsuperscript{190} 12 of 2002 section 186(2)(a).  
\textsuperscript{191} Grogan (Part 5) 2002 Employment Law 5.
8.1 PROTECTED DISCLOSURES

Protected disclosures, in the context of unfair labour practices, cannot be fully understood without visiting the Protected Disclosures Act,\textsuperscript{192} which came into operation in February 2001. Section 3 provides that no employee may be subjected to any occupational detriment by his or her employer on account of having made a protected disclosure. Section 4(2)(b) provides that any occupational detriment short of dismissal in breach of the "Act" is deemed to be an unfair labour practice.

The Protected Disclosures Act applies to employers and employees, the purpose of the "Act" being to encourage employees in the public and private sectors to disclose information relating to criminal or other irregular conduct in the workplace, by providing statutory procedures and protection to facilitate this. Similar whistle-blowing legislation has been introduced in Australia, New Zealand and the United Kingdom.\textsuperscript{193}

Once a disclosure meets the requirements, as set forth in the Protected Disclosures Act, the employee making the disclosure may not be subjected to any occupational detriment, namely the employee may not be:

- Subjected to any disciplinary action;
- Dismissed, suspended, demoted, harassed or intimidated;
- Transferred against his or her will;
- Subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- Refused a transfer or promotion;

\textsuperscript{192} 26 of 2000.
\textsuperscript{193} Landman "A Charter for Whistleblowers" 2001 ILJ 37.
• Refused a reference, or provided with an adverse reference from his or her employer;

• Denied appointment to any employment, profession or office;

• Threatened with any of the above; or

• Otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

With the exception of the reference to dismissals, all the other occupational detriments listed above will qualify as unfair labour practices if they result from a protected disclosure in terms of the Protected Disclosures Act.  

The affected employee may approach any court having jurisdiction, including the Labour Court, for appropriate relief or pursue any other process allowed or prescribed by any law, including the unfair labour practice jurisdiction of the Labour Relations Act. In addition, the Protected Disclosures Act provides that an employee who has made a protected disclosure and who reasonably fears that he or she may be victimised, may request a transfer.

8.2 PROBATION

Unfair conduct of the employer relating to probation as a form of unfair labour practice must be read with the new item 8 that has been inserted into schedule 8 of the Labour Relations Act. This item entitles the employer to require a new employee to serve a period of probation before confirmation of the appointment; that the length of the probation period be determined in advance with reference to the nature of the job and the time it takes to determine the employee’s suitability for continued employment; that the period of probation may only be extended for a reason that relates to the purpose of

195 26 of 2000 section 4(1).
196 26 of 2000 section 4(3).
197 12 of 2002.
probation and only after the employer has invited the employee to make representations; and requires that the employee's performance should be assessed during probation, with the employer giving reasonable evaluation, instruction, training, guidance or counselling to facilitate the employee rendering a satisfactory service.\textsuperscript{198}

Unfair labour practices in this regard will presumably relate to reasonableness of the training and evaluation provided, the failure to provide any, or the extension of the probation period for reasons that do not relate to the purpose of probation, including the failure to give the employee an opportunity to make representations or a failure by the employer to consider such representations. For example, an employee who has not received training or instruction as promised, or who has not received the same training or instruction as other contemporary probationists, may seek protection during the probation period.\textsuperscript{199}

8.3 \textbf{REVISED TIME LIMITS AND REMEDIES}

Previously, the referral of an unfair labour practice dispute had to take place within a "reasonable" time period. No set time period was stipulated. Now, however, the new section 191(1)(b)(ii)\textsuperscript{200} provides that the referral must be made to the CCMA or bargaining council within 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

Previously, arbitrators had the power to determine unfair labour practice disputes on reasonable terms, empowering arbitrators to make a variety of creative orders, for example, an order to restart a recruitment process found to be unfair\textsuperscript{201} or to pay a transfer allowance because certain other employees enjoyed free transport to work.\textsuperscript{202}

\textsuperscript{198} 12 of 2002 Item 8 Schedule 8.
\textsuperscript{199} Le Roux 2002 \textit{ILJ} 1707.
\textsuperscript{200} 12 of 2002.
\textsuperscript{201} NUMSA \textit{obo} Cook and Delta Motor Corporation (2000) 9 CCMA 6 Obtained on \url{www.irnetwork.co.za}.
\textsuperscript{202} SACCAWU and Garden Route Chalets (Pty) Ltd (1997) BLLR 325 CCMA.
Section 193(4) amends the aforementioned position slightly, providing that arbitrators may determine the dispute on terms they deem reasonable, which may include ordering reinstatement, re-employment or compensation. This does not substantially change the powers that arbitrators had before the amendments were effected.

### 8.4 REVISED FORUMS AND PROCEDURES

Section 191(5)(a)(iv) provides that if an unfair labour practice remains unresolved after conciliation, the CCMA or bargaining council with jurisdiction must arbitrate the dispute. However, in one limited instance, the employee may refer the dispute to the Labour Court for adjudication, namely, where the employee alleges that he or she has been subjected to an occupational detriment in contravention of section 3 of the Protected Disclosures Act.

Section 191 (5A)(b) requires the new "con-arb" procedure to be followed in the case of any unfair labour practice relating to probation. Probation is, by its nature, of limited duration and the "con-arb" procedure will hopefully assist in resolving the dispute during the currency of the probation period.

### 8.5 IMPLEMENTATION

While two new forms of unfair labour practice have been added to the existing list, which has moved to the main body of the "Act", these constitute a *numerus clausus* as far as these types of disputes are concerned. The amendments have failed to address the growing need for a return to a wider concept of an unfair labour practice, therefore issues such as "re-deployment policy" and transfers fall outside the ambit of the Labour Relations Act. Disputes concerning these issues will now have to be

---

203 12 of 2002.
204 Le Roux 2002 *ILJ* 1712.
205 12 of 2002.
206 12 of 2002 section 191(13).
207 Le Roux 2002 *ILJ* 1712.
208 Schoeman & another v Samsung Electronics SA (Pty) Ltd (1997) 18 ILJ 1098 (LC) 1103A.
209 Le Roux 2002 *CLL* 95.
decided away from the specialised Labour Court, in forums such as the High Court, based on the constitutional protection of the right to fair labour practices.\textsuperscript{210}

9. DISMISSALS AND AUTOMATICALLY UNFAIR DISMISSALS

The definition of a dismissal as found in section 186 of the Labour Relations Act of 1995 has been extended by the amendments to include the situation where the employee terminates a contract of employment after his or her contract has been transferred to a new employer by virtue of section 197 or section 197A and the reason for the termination is that the employee has been provided with conditions or circumstances at work that are "substantially less favourable" than those provided by the old employer.211

The new section 186(1)(f) provides transferred employees with an escape clause. If they find that the new employer has proposed to employ them, or is employing them, on less favourable terms and conditions, they can resign and claim, in effect, to have been constructively dismissed. As in conventional cases of constructive dismissal, the onus rests on the employee to prove that the terms and conditions offered by the new employer were in fact substantially inferior. Therefore, a safer course than resigning would be to first approach the Labour Court for a declarator.212

An employee claiming compensation under this provision must prove that the conditions offered by the new employer are in fact substantially different from those offered by the old employer. Minor changes will not justify a resignation in terms of this provision.213

It is not clear whether the reference to the term "conditions" means terms and conditions of employment. Even less clear is the meaning of "circumstances", which are believed to be ambient factors at work or work practices short of terms and conditions of employment.214 It is significant that the section does not utilise the usual terminology of "terms and conditions of employment", which would typically be seen as contractual obligations. This together with the reference to "circumstances" would imply that we are dealing with something else in this section, presumably aspects such as the

213 Grogan Dismissal 44.
214 Van Niekerk Unfair Dismissal 21.
physical aspects at work. Breaches of contractual and other obligations by the new employer would usually fall within the scope of section 186(e) – the present constructive dismissal provision. If applied to anything else but workplace practices, this provision of the new section 186(1)(f) will have ludicrous consequences and, at least in certain circumstances, may have the effect that commercial transactions of this nature will not be entered into.\textsuperscript{215}

The amendments to the provisions of section 197 dealing with the transfer of undertakings and the enactment of the Protected Disclosures Act, has necessitated the introduction of two new grounds on which a dismissal will be regarded as automatically unfair. These are respectively, where the reason for a dismissal is a transfer or a reason related to a transfer contemplated in section 197 or section 197A, and a dismissal of an employee on account of having made a protected disclosure as defined in the Protected Disclosures Act.\textsuperscript{216}

If an employer is contemplating transfer of its business in solvent circumstances, or contemplating liquidation or a scheme of arrangement that may result in the transfer of its business to another employer, and it dismisses an employee in order to facilitate the transfer, the dismissal is automatically unfair. The section's purpose would appear to be an attempt to limit job losses in the situation where there is a transfer of a going concern.\textsuperscript{217}

Clearly this is going to be a difficult provision to apply. If strictly interpreted, it could constitute a significant restriction on going concern transfers and in the long run destroy jobs rather than protect them.\textsuperscript{218}

Employers may be required to retrench as a precondition to the sale of a business as a going concern, or new employers may wish to retrench immediately after taking transfer to cut costs.\textsuperscript{219}

\textsuperscript{215} Le Roux 2002 \textit{CLL} 67.  
\textsuperscript{216} Van Niekerk & Le Roux \textit{ILJ} 2166.  
\textsuperscript{217} Grogan (Part 5) 2002 \textit{Employment Law} 6.  
\textsuperscript{218} Le Roux 2002 \textit{CLL} 68.  
\textsuperscript{219} Ibid.
Disputes can be expected over whether the reason for a dismissal relates to a transfer or whether they are legitimate dismissals for operational requirements either before or after transfer.\textsuperscript{220} It is submitted that a \textit{bona fide} decision to cut costs will not fall foul of this provision.\textsuperscript{221}

Being able to retrench before and after transfer is an aspect specifically addressed in the English Transfer of Undertakings Regulation (from which section 187(1)(g)\textsuperscript{222} was largely drawn), however the South African subsection does not establish a similar defence. In principle, the right to dismiss must exist, but the factual and legal cause of the dismissal will have to be established in each case.\textsuperscript{223}

The new section 187(1)(g) will, however, certainly render automatically unfair dismissals in circumstances such as those at issue in \textit{NEHAWU v University of Cape Town},\textsuperscript{224} where the transferring employer offered its employees the choice of applying for positions with the new employer, or being retrenched.\textsuperscript{225}

The second new form of automatically unfair dismissals is created by section 187(1)(h).\textsuperscript{226} As stated earlier, this arises if an employer dismisses an employee because the employee has "blown the whistle" on criminal or illegal acts by the employer, a colleague or a superior, in circumstances where the disclosure of the employee qualifies as a protected disclosure in terms of the Protected Disclosures Act.\textsuperscript{227}

This "Act" makes provision for mechanisms or procedures in terms of which employees may, without fear of reprisal, disclose information relating to suspected or alleged criminal or irregular conduct by their employers, whether in the private or public sector.\textsuperscript{228}

\textsuperscript{220} Grogan (Part 5) 2002 \textit{Employment Law} 6.
\textsuperscript{221} Le Roux 2002 \textit{CLL} 68.
\textsuperscript{222} 12 of 2002.
\textsuperscript{223} Van Niekerk \textit{Unfair Dismissal} 33.
\textsuperscript{224} (2002) 4 BLLR 311 (LAC).
\textsuperscript{225} Grogan (Part 5) 2002 \textit{Employment Law} 6.
\textsuperscript{226} 12 of 2002.
\textsuperscript{227} Grogan (Part 5) 2002 \textit{Employment Law} 7.
\textsuperscript{228} Grogan \textit{Dismissal} 86.
Section 187(1)(h) does not cover disclosures of false information which the employee knew to be false, or the disclosure of confidential information that does not relate to illegal activities. In cases where the disclosure is unprotected, the fairness of the dismissal of a "whistleblower" must be assessed according to the normal principles relating to dismissals for misconduct.

9.1 TIME PERIODS AND FORUMS

An unfair dismissal of whatever nature is still required to be referred to the forum vested with jurisdiction to conciliate the dispute, be it the CCMA or relevant bargaining council, within 30 days. However, the prescription period now starts from the date of the final decision to uphold the dismissal, meaning that employees need no longer seek condonation if, as it happened in so many cases prior to the amendments, the 30-day time period expired before the employee's internal appeal was finalised.

Disputes in terms of section 186(1)(f) are required to be arbitrated with the amended "Act" conferring jurisdiction on the CCMA or a bargaining council to facilitate this. Any dispute alleging an automatically unfair dismissal must be adjudicated by the Labour Court. Therefore if an employee alleges to have been constructively dismissed based on intolerable conditions arising from victimisation based on union membership or sexual harassment, for example, these disputes must be adjudicated in the Labour Court.

9.2 IMPLEMENTATION

It is apparent that most academics advocate a narrow interpretation of the provisions of section 186(1)(f) and section 187(1)(g). A failure by the Labour Court to interpret these provisions in this manner will negate the effect that these provisions were designed to achieve. The inclusion of section 187(1)(h) is a matter of good housekeeping rather

---

229 Grogan (Part 5) 2002 Employment Law 7.
230 Grogan Dismissal 86.
232 12 of 2002 section 191(5).
than a consequence of any new policy imperative and gives effect to the Protected Disclosures Act.$^{234}$

$^{234}$ Van Niekerk *Unfair Dismissal* 33.
10. COMPENSATION

Perhaps the most welcome change to the Labour Relations Act lies in the amendment to section 194, which regulates compensation for unfairly dismissed employees and victims of unfair labour practices. The formulaic determination of the 1995 "Act" in respect of procedurally unfair dismissals was drafted on the assumption that dismissal disputes would be resolved by either the CCMA or the Labour Court within six to eight weeks of the date of dismissal. As more and more disputes were resolved from anything between 12 and 18 months from the date of dismissal, a literal interpretation of section 194 led to absurd consequences in which employees dismissed in circumstances where the only unfairness comprised minor procedural infractions, were awarded vast sums of money.\textsuperscript{235}

The Labour Appeal Court dealt with this problem pragmatically when it decided that the statutory cap of 12 months compensation applied even if an award was made or a judgment given after the anniversary date of the dismissal, and by deciding that the section conferred a discretion to award no compensation at all, or as it became better known, "the all or nothing approach".\textsuperscript{236} The courts were therefore left with a Solomonic choice in each individual case, of whether it might be more unfair to the employer to award the full quantum of compensation, than to leave the employee with nothing. Moreover compensation in cases of procedural unfairness often exceeded that awarded for manifestly substantively unfair dismissals.\textsuperscript{237}

In an attempt to address these flaws, section 194 was amended and now provides simply that:

"The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements, or the employer did not follow a fair

\textsuperscript{235} Van Niekerk & Le Roux 2001 ILJ 2170.
\textsuperscript{236} Johnson & Johnson v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC).
\textsuperscript{237} Schooling "Limits on Compensation in Cases of Procedural Unfairness" 2002 CLL 26.
procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on date of dismissal."\textsuperscript{238}

The same principles are applicable to compensation awarded in case of automatically unfair dismissals, save for the punitive 24 months' ceiling being retained.\textsuperscript{239}

The requirement that, subject to a ceiling, compensation must be "just and equitable in the circumstances" restores to arbitrators and judges the discretion that the original section 194 sought to remove. The "Act" however, provides no guidance on the criteria to be taken into account when applying the discretion and deciding on the amount of compensation to award, save for the fact that the discretion must be judicially exercised.\textsuperscript{240}

It can be presumed that the new provision revives the criteria recommended by the Labour Appeal Court under the 1956 Labour Relations Act, where the court generally took the view that a claim for unfair dismissal was akin to one in delict and that the object of compensation is to compensate the employee for the actual loss occasioned by his or her dismissal.\textsuperscript{241}

Factors generally taken into consideration by the court in assessing the quantum of compensation were:

- The patrimonial loss suffered by the person claiming compensation;
- That the loss must be foreseeable, i.e. not remote or speculative;

\textsuperscript{238} 12 of 2002 section 194(1).
\textsuperscript{239} 12 of 2002 section 194(3).
\textsuperscript{240} Grogan Dismissal 342.
\textsuperscript{241} Grogan Workplace Law 123.
• That the award should endeavour to place the applicant, in monetary terms, in the position he or she would have been had the unfair labour practice not have been committed;

• That there is a duty on the employee to mitigate his or her damages; and

• Any benefit which the applicant received, e.g. by way of a severance package, must be taken into account.\textsuperscript{242}

The last factor is, however, in direct contradiction to the provisions of section 195 of the amended "Act", which provides that compensation awarded under section 194 is in addition to and not a substitute for any other amount to which the employee is entitled in law, collective agreement or contract of employment. This would indicate that set-off cannot be applied.\textsuperscript{243}

The court will, however, take into account remuneration received by employees in alternative employment, but has traditionally ignored unemployment insurance benefits.\textsuperscript{244}

The court, in applying these principles in \textit{Ferodo (Pty) Ltd v de Ruiter}\textsuperscript{245}, held further that judges and arbitrators should be guided by whatever is reasonable and fair in the circumstances and take into account the flagrancy of the employer's disregard for the provisions of the Labour Relations Act.

The wording of the amended section 194 suggests that the discretion to award no compensation has been retained. This has typically been implemented in cases where the employer, after conceding the unfairness of the dismissal, has made an unconditional offer of reinstatement or has provided or attempted to provide the employee concerned with substantially the same kind of redress.\textsuperscript{246}

\textsuperscript{242} Grogan \textit{Workplace Law} 124.
\textsuperscript{243} 12 of 2002 section 195.
\textsuperscript{244} Grogan \textit{Dismissal} 343.
\textsuperscript{245} (1993) 14 ILJ 974 (LAC) 981 D – G.
\textsuperscript{246} Van Niekerk \textit{Unfair Dismissal} 108.
Judges and arbitrators may further reduce the compensation to which an unfairly dismissed employee would otherwise be entitled if the employee unreasonably delayed initiating or prosecuting their claim.\textsuperscript{247}

In \textit{Fouldien v The House of Trucks (Pty) Limited t/a SA Road Tankers},\textsuperscript{248} the court had the opportunity to consider the new section 194 and the application of the discretion afforded by it to judges and arbitrators alike. Landman J noted \textit{in casu} that three weeks had passed between the time when the retrenched applicants were given inaccurate notice of their impending retrenchment and full disclosure by the employer. He concluded that this three week period was an appropriate yardstick for the exercise of his discretion to award compensation.

This yardstick may, however, lead to unfair results by, for example, utilising the time period to obtain a new unbiased chairperson in an internal disciplinary enquiry as the relevant period in applying the discretion conferred. Indeed this approach may make awards of compensation more susceptible to happenstance than prior to the amendments. It seems that the extent of compensation should rather be determined by the severity of the procedural defect.\textsuperscript{249}

In the same Labour Court judgment, it was decided that the amended section 194 should apply retrospectively to pending cases.\textsuperscript{250}

\textbf{10.1 IMPLEMENTATION}

The extent to which compensation can be awarded over and above the employee's patrimonial loss is uncertain, however a punitive discretion does remain dependent upon the severity of the procedural defect. This is further suggested by the higher ceiling set for automatically unfair dismissals.\textsuperscript{251}

\textsuperscript{247} Grogan \textit{Workplace Law} 124.
\textsuperscript{248} (2002) 11 BLLR 1176 (LC).
\textsuperscript{249} Schooling 2002 \textit{CLL} 27.
\textsuperscript{250} Grogan "Dead and Buried Scrapping the Old Section 194" Vol 18 (Part 6) \textit{Employment Law} 14.
\textsuperscript{251} Grogan (Part 5) 2002 \textit{Employment Law} 11.
The amendment of section 194 is widely regarded as an improvement. It will certainly relieve judges and arbitrators of the distasteful duty of awarding dismissed employees compensation far in excess of the amount which they deserve, or denying them compensation altogether when, in the circumstances, they deserve some.\footnote{Grogan (Part 5) 2002 Employment Law 11.}

It is, however, anticipated that the new compensation provisions will bog down arbitrations and trials with evidence relating to actuarial assessment of the employee's actual and anticipated loss, as sometimes happened in the old Industrial Court.\footnote{N251 supra.}
11. LEGAL REPRESENTATION AND COSTS

The controversial rule excluding legal representation from arbitrations concerning disputes over dismissals for misconduct, poor work performance or incapacity has been repealed. So too has the statutory limitation of the grounds on which CCMA commissioners can award costs against unsuccessful parties to arbitrations.\textsuperscript{254}

The intention underpinning the repeal of these sections is apparently to leave the CCMA and bargaining councils free to deal with such matters as they deem fit, in terms of their rules and constitutions.\textsuperscript{255}

The new item 27 to schedule 7 of the "Act",\textsuperscript{256} a transitional arrangement, specifically states that the repealed provisions of the "Act" shall remain in force until such time as the CCMA has made rules to regulate the issue of representation. The pre-amended position in respect of legal representation was to remain applicable until proclamation of the CCMA rules by the State President.

Such rules have now been made and became operational on 1 August 2002.\textsuperscript{257} Rules 17 and 25 deal with the right to representation specifically. Rule 25 deals with objections in respect of a representative appearing before the commissioner. The existence of this rule implies that there may be certain limitations to this right, however the rules fail to set out any limitations and in fact make no specific reference to legal representation.\textsuperscript{258}

Some have suggested that, as the new CCMA rules do not define who may represent parties at conciliation and arbitration, the status quo must remain until these issues have received proper attention by the drafters of the CCMA rules. They suggest that the provisions of section 135(4), section 138(4) and section 140(1)\textsuperscript{259} remain in force

\textsuperscript{254} Grogan (Part 5) 2002 Employment Law 12.
\textsuperscript{255} Ibid.
\textsuperscript{256} 12 of 2002.
\textsuperscript{257} Government Gazette No. 23611 Regulation 61.
\textsuperscript{258} Schultz v British American Tobacco Company (Pty) Ltd CCMA Case No EC3134/02.
\textsuperscript{259} 66 of 1995.
until such time as the deficiencies in the rules pertaining to representation are revisited.\textsuperscript{260}

Arbitrators may accordingly apply either view, however it is submitted that the former view is the correct interpretation of the law as it currently stands on this issue. The transitional arrangements which sustained section 135(4), section 138(4) and section 140(1) were made applicable until such time as the CCMA rules came into force and were not subject to those rules being acceptable or sufficient.\textsuperscript{261} It is evident that the drafters of the rules had due regard to the sections regulating the pre-amendment position and took a conscious decision not to incorporate their content into the substantive provisions of the new rules regulating representation.\textsuperscript{262}

The CCMA having elected or failed to deal with the issue of legal representation in its rules does not detract from the fact that the resolutive condition in item 27 has been met. Therefore legal representation should be permitted without any qualification.\textsuperscript{263}

The exception to this position is rule 17, which governs con-arb proceedings. Rule 17(6) identifies who may represent a party to a dispute and makes specific reference to a legal practitioner. However, rule 17(7) qualifies the right to make use of a legal practitioner, in essence replicating the qualifications contained in the now repealed section 140. Thus in con-arb proceedings and in disputes based on allegations of misconduct or incapacity, legal representation will only be permitted if the parties agree to this, or the commissioner permits legal representation on the grounds that it would be unreasonable to refuse such representation.\textsuperscript{264}

\begin{itemize}
\item \textsuperscript{260} Albertyn 2002 \textit{ILJ} 1730.
\item \textsuperscript{261} 12 of 2002 Item 27(1) Schedule 7.
\item \textsuperscript{262} \textit{Schultz v British American Tobacco Company (Pty) Ltd} CCMA Case No EC3134/0.
\item \textsuperscript{263} Ibid.
\item \textsuperscript{264} Le Roux 2002 \textit{CLL} 115.
\end{itemize}
11.1  **COSTS**

The new item 28 to schedule 7 of the "Act",\(^{265}\) a transitional arrangement, provides that section 138(10)\(^{266}\) will come into effect when the CCMA rules come into effect. Section 138(10) empowers the commission to make rules regulating orders for costs according to the requirements of law and fairness, having regard to any relevant code of good practice issued by NEDLAC and any relevant guideline issued by the CCMA.

Rule 39 of the new CCMA rules provides that costs may only be awarded against a party who acted in a frivolous or vexatious manner, in accordance with section 138(10). The same provisions of the old "Act" pertaining to costs are thus repeated in the CCMA rules.\(^{267}\)

11.2  **IMPLEMENTATION**

The drafters of the CCMA rules have failed to address the right to legal representation sufficiently, save for the provisions regulating representation in con-arb proceedings. The nett effect of this, until this failure is revisited, is that no bar exists to a party being legally represented in arbitration proceedings. To the extent that the CCMA rules attempted to exclude legal representation, they have clearly failed.\(^{268}\)

It would further appear that the general prohibition on the use of legal representatives during the conciliation process has been relaxed, inclusive of the conciliation part of con-arb proceedings.\(^{269}\)

It is anticipated that parties seeking legal representation will avoid participating in the con-arb process, where possible, as the arbitration phase of this process appears to be the only arena in which legal representation will have to be applied for and will not be permitted as a right.

\(^{265}\) 12 of 2002.
\(^{266}\) Ibid.
\(^{267}\) Albertyn 2002 *ILJ* 1730.
\(^{268}\) *Schultz v British American Tobacco Company (Pty) Ltd* CCMA Case No EC3134/02.
\(^{269}\) Le Roux 2002 *CLL* 116.
Unfortunately the CCMA rule dealing with the basis on which a commissioner may make an order for costs also falls short of the mark. No indication is given in the rules as to the factors that should be taken into account in applying the requirements of law and fairness in awarding costs. Parliament has confined the discretion of the Labour Court in this regard, per section 162(2) of the "Act", but imposed no similar constraints on the CCMA. This is clearly an oversight.\textsuperscript{270}

\textsuperscript{270} Albertyn 2002 \textit{ILJ} 1730.
12. **ENFORCEMENT**

Before the amendments to section 33 and section 143 of the Labour Relations Act, an arbitration award issued by the CCMA could only be executed or enforced by contempt proceedings after it was made an order by the Labour Court in terms of section 158(1)(c).

The amendments establish new procedures for the enforcement of these awards. The amended section 143(1) states that an arbitration award (other than an advisory award) issued by a commissioner of the CCMA is final and binding and may be enforced as if it is an order of the Labour Court, provided that the employee who wishes to enforce the award, has referred the award to the director of the CCMA, who must certify that the award "is an award" as contemplated in section 143(1).

In terms of the new section 33A, awards issued by arbitrators appointed by bargaining councils also have the status of orders of the Labour Court in terms of the amended section 143, with the powers of the CCMA director being exercised by the bargaining council secretary. It appears that a bargaining council's ability to grant final, binding and enforceable arbitration awards and to convert settlement agreements into arbitration awards, may be excluded or curtailed by collective agreement.

Rule 40 of the new CCMA rules sets out the procedure to be followed in the CCMA when making an application for certification of an arbitration award. It provides that a party must complete the relevant referral form, which contains an affidavit to be completed by the applicant, a section for the director to certify the award and a writ of execution, which the registrar of the Labour Court must complete.

---

271 Grogan (Part 5) 2002 *Employment Law* 11.
272 12 of 2002.
273 12 of 2002 section 143(3).
274 12 of 2002.
275 Grogan (Part 5) 2002 *Employment Law* 12.
276 12 of 2002 section 51(8).
The purpose of certification seems to be limited to ensuring that the award is what it
purports to be and to ensure fraudulent awards are not enforced. Whereas the Labour
Court previously enjoyed a discretion whether or not to make an award an order of
court, it seems the power of a director is more limited in this regard. He is required
to certify that the award is an award contemplated in subsection 143(1). Subsection
143(1), in turn, simply refers to arbitration awards issued by a commissioner. So it
seems all the director can do is certify that the award was indeed issued by a
commisioner.

The director is therefore not possessed with any discretion to decide whether the award
was fundamentally defective, or to stay certification pending the outcome of review or
rescission proceedings.

Once a certificate is issued, if the award is one granting compensation, the dismissed
employee will be entitled to have a writ of execution issued by the registrar of the
Labour Court. If the award re-instated the employee, the dismissed employee will be
capable of enforcing it by way of contempt of court proceedings, in the Labour Court
instituted in terms of section 143(4).

The new section 142A also now permits bargaining council and CCMA
commissioners to make settlement agreements arbitration awards, at the request of the
parties. This means that once effected, these agreements will also have the status of
orders of court.

12.1 IMPLEMENTATION

These amendments will relieve the Labour Court of a portion of its massive case load,
in rendering arbitration awards final, binding and enforceable, without the court's
intervention. The procedure will assist employees wanting to enforce awards and place

279 Grogan (Part 5) 2002 Employment Law 12.
280 Ibid.
281 Le Roux 2002 CLL 113.
282 12 of 2002.
283 Grogan (Part 5) 2002 Employment Law 12.
pressure on employers who seek not to comply with them. However, the amendments will also place pressure on employers who have legitimate grounds for non-compliance.\textsuperscript{284}

If an employer has been ordered to pay compensation, but wishes to challenge the award on review, it is highly probable that the enforcement procedure will take a far shorter period of time than is currently the case with review applications. It appears that the director of the CCMA will not be able to refuse to grant a certificate simply because the employer has indicated an intention to review the award. In these circumstances and in the absence of some form of undertaking from the employee concerned not to proceed with enforcement of the award, the employer will not only have to commence review proceedings with some speed, but also possibly have to ensure that application is made to the Labour Court, on an urgent basis, to have the award (as well as any certificate issued by the director) suspended, pending the review application. Another alternative would possibly be to approach the Labour Court to attempt to prevent or stay the issuing of a writ of execution or, if it is already issued, approach the court for an order suspending such a writ. Whether the Labour Court will be willing to grant such an order and, if so, under what circumstances, remains to be seen.\textsuperscript{285}

Applications for rescission of arbitration awards in terms of section 144, on the basis that the award was erroneously obtained in the absence of the employer, where for example no notification of the arbitration hearing was received, are anticipated to be less problematic. Applications of this nature should be capable of being heard prior to certification being effected, provided the employer acts swiftly. If the director of the CCMA has knowledge of the fact that a rescission application is pending, it may be that the decision to grant a certificate would be postponed, pending the outcome of the rescission application. If not, it appears that it may be necessary to approach the Labour Court for relief.\textsuperscript{286}

\textsuperscript{284} Le Roux 2002 \textit{CLL} 113.
\textsuperscript{285} N284 supra.
\textsuperscript{286} Le Roux 2002 \textit{CLL} 114.
If the relief granted is re-instatement, it may be possible to persuade the Labour Court not to find the employer guilty of contempt of court, on the basis that a rescission or review application has been launched.287

Practically, employers will have to consider ways of limiting the possibility of problems arising out of the amended enforcement provisions. Steps to ensure that managers who represent them at arbitration proceedings are well trained and have the expertise and time to minimise the outcome of unfavourable awards, or that proper procedures are in place to ensure CCMA notices are brought to the attention of the appropriate person within the employer's organisation as speedily as possible, may limit potential risk and exposure.288

287 Le Roux 2002 CLL 114.
288 N286 supra.
13. **CONCLUSION**

The amended provisions of the "Act", from an individual employment law perspective, can be categorised on a thematic basis into three broad areas, namely dismissals and unfair labour practices, procedural mechanisms and enforcement provisions and the provisions, pertaining to transfer of undertakings.

The amended law regulating large-scale retrenchments constitutes the most important area of amendment to dismissal law. New procedures allowing for the assistance of a facilitator and the right to refer individual retrenchments to arbitration without the employer's consent, and new remedies emphasising substantive over procedural fairness, are all positive changes. Whilst COSATU's initial request to incorporate a negotiation requirement as opposed to consultation has not been incorporated, the right to strike may prove a potentially powerful tool should the reason for retrenchment be perceived to be unfair. The extent to which this option afforded will be exercised over adjudication, remains to be seen.

Whilst other amendments and additions have been put in place in respect of unfair dismissals and unfair labour practices, many bring the "Act" into line with other legislation, such as the Protected Disclosures Act, or other amendments such as the amendment to section 197. The amended provisions in respect of probation, having received legislative clarification, are certainly positive and facilitate the eradication of the misuse of fixed term contracts, in line with the International Labour Organisation's drive to clamp down on the abuse of workers in this area.

New procedures for dispute resolution clearly seek to expedite dispute resolution and relieve the CCMA and bargaining councils of heavy case load. Con-Arb's and Pre-Disciplinary Arbitrations are perceived to be positive amendments, which, together with existing dispute resolution procedures, are now well served by the amendments clarifying compensation, the evidentiary tool provided by the new section 200A and stricter provisions in respect of enforcement of awards.
To a large degree the confusion created by the opaque words of the old section 197 has been clarified by its amended successor. Transfer of businesses will result in the automatic transfer of contracts of service, unless otherwise agreed by the affected employees. Certain case law, after the implementation of the amended section, lent support to escape routes from the amended provisions of section 197, with imaginative counsel utilising the definition of "going concern" to exclude certain transfers or the outsourcing of certain functions from the section's ambit. The Constitutional Court has now, however, stepped in to align interpretation with the intention of the legislature, namely to protect jobs but still promote commercial business transactions.

Viewed as a package, the amendment can be described as a positive intervention by the legislature. Of course, certainty after implementation is not possible and much litigation will result, however most provisions or areas within the "Act" requiring an update have received attention, in the hope that new and updated provisions will regulate the employment relationship which has evolved since 1995. It is anticipated that further amendments will be effected as the need arises, however this set of amendments make for an act better equipped to balance job creation and protection with sustainable economic growth and the labour stability required to secure foreign investment.
BIBLIOGRAPHY

TEXTS


JOURNALS AND ARTICLES

1. Albertyn "The New CCMA Rules" 2002 *ILJ* 1715
2. Brand 2002 *AMSSA News* 2
3. Christianson "Defining Who is an Employee" 2001 *Contemporary Labour Law* 21
5. Grogan "Dead and Buried Scrapping the Old Section 194" Vol 18 (Part 6) 2002 *Employment Law* 14
10. Landman "A Charter for Whistleblowers" 2001 *ILJ* 37
11. Landman "Pre-Dismissal Arbitrations" 2002 *Contemporary Labour Law* 71
15. Le Roux "Probationary Periods for New Employees" 2002 *Contemporary Labour Law* 81
17. Le Roux "The New Unfair Labour Practice" 2002 *Contemporary Labour Law* 91
20. Schooling "Outsourcing the Garden" 2002 *Contemporary Labour Law* 21

**WEBSITES**

1. IR Network [www.irnetwork.co.za](http://www.irnetwork.co.za)
4. University of Port Elizabeth Library [www.upc.ac.za](http://www.upc.ac.za)