

The role of an effective grievance procedure in creating tolerable employment

In the South African Police Services

by

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Signed by candidate

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PREFACE

In many instances, the South African Constitution is been seen as the most advanced constitutions in the world. Section 196(4)(f)(ii) of the Constitution has made provision for the Public Service Commission(PSC) to investigate grievances of employees in the Public Services and furthermore to recommend appropriate remedies. However, there is a contradiction when implementing these procedures, as the PSC tends to follow their own set of guidelines with regard to the relevant procedures to be followed when dealing with grievances. Due to this, the public servant [s] rights are been under minded and they seem to lose all confidence and faith with the system. The individual have the potential of resolving the differences that exist amongst them, if it is based on the honest and transparent manner. As mentioned above, even though it is the duty of the PSC to implement the proper grievance procedure at work, its fairness and objectivity will be tested and discuss further in detail in this research.

However, in the South African Police Services, due to the nature of their protocol which emphasised on the seniority dominated by rank structure, creates an environment of inequality. Meaning that junior officers are not encourage to challenge their superior on the hostile treatment as it will be viewed as a lack of discipline on the part of the junior officer. The grievance procedure therefore, serves as the formal vehicle which the union will encourage the employee to follow in seeking for justice against unfair treatment. In most case the employee are sceptical to file a grievance against their seniors, for fear of victimization, however, this might worsen the situation if it was not brought to the attention of the management. On many occasions the employees have rather taken a decision to resign due to pressure from the management. In terms of section 186(1)(e) of the Labour Relations Act, continued employment are made intolerable if the discontent experience by the employees becomes more and more imminent in the work environment . In a situation where the continued employment has become intolerable, the employee can claim constructive dismissal.

This research looks at the different ways which the courts arrive at, when deciding on cases from the South African legal system, in order to determine which tests to apply when dealing with constructive dismissal.

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CHAPTER ONE

INTRODUCTION ON GRIEVANCE PROCEDURE

1.1 Introduction

In the employment environment workers have rights to raise their discontent regarding management, working conditions, and their fellow colleagues. In most cases this dissatisfaction¹ is not serious and can be resolved promptly and informally between the aggrieved, the manager or their colleagues. This is a cost effective manner as it saves time and money. However, when trouble and conflict of a more serious nature occur, these differences need to be dealt with in a more formal manner. Raising discontent by employees should be done according to the rules and regulations pertinent to company policy.

The course of action of raising dissatisfaction, either formal or informal, is called the grievance. The grievance is the term which refers to a process whereby a complaint is lodged and this is followed by a set procedure, which may either be included in a collective agreement or be part of workplace policies incorporated into a contract of employment. A collective agreement may lay out certain processes to be followed, in order for any disputes concerning the interpretation, application, administration, and the alleged violation of any clause of the collective agreement to be addressed.

Therefore, grievance procedures offer a way to deal with such matters, with the aim of resolving the problems as fairly and promptly as possible. A grievance refers to the feeling or treatment which is unfair, or discrimination based either on race or gender. Collective agreements are written documents between employers and the trade unions. This documentation is in writing and it is normally between an employer and an employee/organisation on the one hand and a trade union or council of trade unions on the other. This documentation represents employees of the organisation, who fall under the terms and conditions of employment or have

¹ SSSBC Agreement 3/2005

rights, privileges or duties of the employer's organization, the trade union or the employees. A collective agreement is a legally and binding contract of employment between the parties, namely the employer and a trade union. Any disputes arising from the contract can be challenged by using internal processes such as the grievance procedure.

The purpose of the grievance procedure is that the workers acquire the recognition to voice their concerns, without any fear of victimisation. It is important for management to be knowledgeable about the workers' rights and know that they are allowed representation by a representative of their choice during the lodging of any grievance procedure.² However, it is very surprising, that once a grievance is lodged, the lodging is invariably followed by the employee's rights being violated. It still remains the responsibility of the employer to ensure that the relationship between employer and employee is as it is defined by the contract of employment.

Therefore, the aim of a grievance procedure is to promote consistency, transparency and fairness in the handling of workplace problems and complaints. However, the employer should be allowed to seek an informal resolution where appropriate, but also more formal proceedings should the circumstances demand. Grievance procedure, as a means of dispute resolution, follows certain stages in an attempt to resolve matters; the focus remains individual responsibility at each stage because employees have rights, in terms of the Section 23(1) which provides that everyone has the right to fair labour practices³.

The meaning of fairness and its determination must be considered, with regard to what can possibly qualify as unfair labour practices. Fairness is a concept used to describe the proper treatment, in terms of the relationship between employees and the employers. Fairness can also be used interchangeably with the words equitable, reasonable, impartial, just,

² SSSBC Agreement 3/2005 Annexure E

³ The constitution of the republic of South Africa no 108 of 1996

balanced, according to the rules of what is right.⁴ These synonyms have a high degree of ethical and moral notions and so does the notion of fairness⁵. Baxter states that fairness is a concept that is ambiguous and difficult to ascertain. Consequently, its meaning must be deduced with reference to immediate circumstances.⁶ The concept of fairness includes both procedural and substantive process.

The principle of natural justice is understood from its broader perspective to refer to procedural fairness.⁷ This procedural fairness plays a role in determining the legitimate outcome⁸.

The unfair labour practices in terms of the 1995 Act of 186(2) of the Labour Relation Act definition read as follows: “*An unfair labour practice means any unfair act omission that arises between an employer and an employee involving :*

- a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reasons relating to probation) or training of an employee or relating to the provision of benefits to an employee
- b) The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee
b) is defined as any act or omission, other than a strike or lock-out which has or may have the effect that any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
- c) An occupational disclosure other than dismissal, in contravention of the Protected Disclosure Act, 2000(Act 26 of 2000) on account of employee having made a protected disclosure defined in that Act.”

The principle of an unfair labour practice is relevant if used with reference to section 23(1) of the constitution. This should be used as a guideline to

⁴ See T Poolman *Principles of Unfair Practices* (1985) 42 and *SADWV V Master Diamond Cutters Association of SA* 1982 ILJ 879 (IC)

⁵In *The Press Corporation* Not a full citation! 1992 ILJ 391 (A) at 400 C Grosskopf JA in referring to court pursuant to the tem. It is the passing of a moral judgement on a combination of findings of fact and opinion.

⁶ L Baxter *Administrative Law* (1984) 543

⁷ Marais *Onbilike Arbeidspraktyke*(1989) 12

⁸ Idem

determine the concept of fairness and consequently with the Court's interpretation of the concept of unfair labour practices. Labour Legislation should reflect the level of fairness to both to the management and labour, promoting the essence of human dignity, equality and freedom. In terms of the LRA section 186(2) there are four categories of unfair labour practices, namely:

- Unfair discrimination
- Unfair conduct relating to the promotion, demotion or training of an employee and the provision of benefits to an employee
- The unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee.
- The failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement.⁹

The unfair labour practices are currently¹⁰ regulated by section 185 and section 186 of the LRA. Section 185 states that every employee has the right not to be subjected to unfair labour practices.

This makes provision for how the individual contracts of employment are perceived by our labour courts. The contracts or terms of contracts that are contrary to the constitution, which prevent or impact on the fundamental rights guaranteed in our constitution, may not be valid or fair. By taking into consideration the trends towards the employment contracts, this provision plays an important role in redressing the imbalance of power existing between the employers and employee. The unequal power balance is due to the economic control that the employer has over the company. This also influences the employer in deciding which complaints need attention to be taken to the level of a grievance. The shift in contractual obligation, which placed the responsibility of creating the workplace as an area of mutual respect between the employer and employees, is the primary fact in the final decision to establish whether or not the merit of the complaint deserves attention of a higher authority. Labour reform emphasises the fact that a

⁹ As brought by SS41©OF THE Labour Relation Amendments Act of 2002

¹⁰ Since 1 August 2002

framework should be in place to see to it that the resolution of conflict is conducted according to the set process. This means that there should be an agreement between the employer and labourer based on an agreed set of rules on how to deal with conflict issues in the work place. The employees have the right to be represented by a recognised union where there is a recognition agreement entered into by the employer and the employees. In the absence of such recognition a fellow colleague can also represent an employee. The purpose is to afford the employee the opportunity to also have his side of the story heard. This is in accordance with the audi alteram partem principle which affords the individual the right to be given notice of the intended action and a proper opportunity to be heard¹¹. It is clear that the notice should be given as no notice, or inadequate notice, would deny the individual the opportunity to be heard.¹²

The notice of the intended action should contain information which states when and where the opportunity to be heard will take place (date and time), as well as the reasons and the salient factors influencing the proceeding.¹³ This means that the employee must be informed about the charges against him or her. In other words, a reasonable time should be given to allow the employee charged enough time to consult with the representative of his or her choice and reasonable time to prepare the case. What is considered to be reasonable time depending on the circumstances?¹⁴ According to principle 4(d) the fair treatment of employees is created by ensuring that they¹⁵-

1. Enjoy a fair hearing in both the formal and informal proceedings;
2. Are timeously informed of allegations of misconduct made against them;

¹¹ Baxter op 544 , see also Van Jaarsveld , Fourie and Olivier Principle and practice of Labour Law(2004) par 1097 , Mhlangu v CIM Deltax 1986 ILJ 346(IC) Holgate v Minister of Justice 1995 ILJ 1426(E)

¹² Baxter op 544

¹³ Idem

¹⁴ Idem

¹⁵ Government Gazette vol 493 no 289895

3. Receive written reasons explaining the rationale for any decision taken and;
4. Have the right to appeal against any finding of misconduct made at a disciplinary hearing, or sanction imposed at such a hearing;

The employee should be given the opportunity to interrogate evidence; present the evidence and also cross-examine witnesses. The employee should be allowed the opportunity to appeal the sanction of the disciplinary hearing, if the need arises to seek for legal representations¹⁶.

The degree of fairness is based on the level of objectivity during the procedure, with reference to the public interest and public confidence. As soon as doubt exists concerning bias on the side of the judge or arbiter, the fairness of the procedure is questionable.¹⁷ The principle of *nemo iudex in propria* cause plays a vital role.¹⁸ It is a fact that once there are questions regarding bias on the part of the presiding officer or arbitrator, the fairness of the procedure becomes questionable.

1.2 Meaning of Fairness

1.2.1 Introduction

Substantive fairness focuses on the degree of fairness of the sanction, as well as the treatment which is unfavourable. Each case is determined with regard to equity, as well as substantial fairness in all circumstances.¹⁹ The substantive fairness or labour practice as an objective test is determined by what the reasonable employer or employee would have done in a given

¹⁶ Baxter op cit 555

¹⁷ Baxter op cit 557-558

¹⁸ In the case of *Gotso v Afrox Oxygen LTD(2003) BLLR(TK)* at par 11, for example, the court held that the plaintiff had been unfairly dismissed because the presiding officer in the disciplinary enquiry had acted as a judge and a prosecutor. The court stated: The nub of applicant's case is that Mr Nel conduct in the disciplinary hearing consulted an irregularly which caused his dismissal to be unfair. On a proper analysis the respondent is alleged to have breached a fundamental principle of natural justice that no one may be a judge in his own case. The principle is entrenched in our legal jurisprudence and pervades our constitutional law. A proven breach of this principle by the respondent will render his actions both unlawful and with equal force, unfair labour practice

¹⁹ Poolman op 64

circumstance. The action of the reasonable employer or employee is based on reference to the standards of fairness of a situation and the interest of the community.²⁰ The fairness of a situation is attained by having recourse not only to the results of the action or failure, but also to the reasons for the action or failure and also the manner in which such action took place. This means that the fairness should be taken into account within all spheres that are surrounding the circumstances in a particular situation.²¹ The interpretation of fairness depends on the numerous factors of each situation as it presents itself.

1.3 How do the courts interpret the Concept of Fairness?

1.3.1 Introduction

In order to have a sound Labour Practice it is important to understand the concept of fairness to the unfair labour practice. The test that the court uses when dealing with the concept of fairness, is based on different approaches, as stated by Marais. They are the following:

- a. The first approach²² serves as a starting point where the court will now try to interpret the meaning of unfair labour practice. This becomes the interpretation of statutes.²³
- b. In the second approach²⁴ the relevant question would be, given the circumstances of the nature of the problem, 'Will the reasonable employer arrive at a different conclusion to that of the respondent?' This is a reasonable employer approach.
- c. The third approach²⁵ questions whether or not the interest and the operation of the business were taken into account.

²⁰ Idem

²¹ Baxter op cit 553

²² Marais Onbilike Arbeidspraaktyke(1989) 15-39

²³ Marais calls this the wetsuitleg werkwysse

²⁴ Marais calls this the redelikheidskriterium werwyse.

²⁵ Marais calls this the Kommersiele rede werkwysse

1.3.2 Interpretation of Statutes Approach

The criticism raised against this model is that the concept should be read not in isolation to the act and the intended legislation, but rather within its context. The superficial interpretation of the meaning of the word would result in losing focus on what the intended meaning is trying to achieve. The lack of understanding of the meaning of the words will result in a failure to consider the underlying policies and objectives. Dependence on the legal system is not always the best option because of different legislation; different degrees of socio-economic circumstances can have a negative impact on the analysis. For example, the English legislation does not provide for unfair labour practice jurisdiction.²⁶ Each legal system also has its own unique problems and might have statutory principles.²⁷

1.3.3 The Reasonable Employer Approach

The issues of dismissals are challenged in our court and are codified in our legislation.²⁸ There are matters in which an unfair dismissal results in unfair labour practice according to section 23(1) of the constitution. The unfair labour practices, according to the LRA, are not falling short of unfair dismissals.²⁹ The reasonable employer test is meant to provide guidance on how to determine procedural and substantive fairness with regard to other activities of employer action that may transgress or constitute unfair labour practices. The procedure in deciding whether or not the employer acted within the reasonable or unreasonable when dealing with misconduct remains to be tested using applicable legislation. This will show whether dismissal was required in dealing with matter. The sanction of the dismissal must be tested against the alleged misconduct with reference to the procedural fairness.

In terms of the ILO recommendations (No 119) concerning the termination of employment at the initiative of the employer (1963), section 2 of this

²⁶ Brassey et al *The New Labour Law* *1987)78

²⁷ Marais op cit 24

²⁸ Code of Good Practice: Dismissal in Schedule 8 of the LRA

²⁹ See definition of unfair labour practice contained in the LRA s 186(2)

recommendation states that:³⁰ ‘The termination employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service’. It is common that the focus is on the conduct of the employer which has effect on the outcome of such conduct. The conduct of an employer might be regarded to be reasonable and fair, but not necessarily fair to the employee. If the employer believes that he was fair in arriving at the decision to terminate the employee contract after the employee was found guilty by the tribunal, or even later, when it is discovered that the employee__did not really commit the alleged misconduct,³¹the action of the employer does not amount to unfair labour practice,

In terms of this approach, in The Industrial Court in *Lefu v Western Areas Gold Mining Co*³², the merits of the case were based on the fact that the employer dismissed 205 employees for influencing or taking part in a riot at the mine. The riot caused the deaths of nine people and as a result contributed to the employer suffering financial loss. The employer decided not to hold an enquiry because of the lengthy process which would have taken five days, which meant that the employer would have had to accommodate the employees during the process of enquiry. The decision for dismissal was found to be appropriate to ease tension which was already developing in the workplace. The employees who were dismissed maintained they were innocent and stated that they did not commit the alleged offences. The court found that the employer did not commit an unfair labour practice. The court finding was based on the English Law and made reference to the approval in *Ferodo v R Barnes*.³³ It was found that the courts should not focus on whether or not the employee has in fact committed the misconduct at the time of the alleged misconduct.

³⁰ ILO 1963

³¹ Idem

³² 1985ILJ 307 (IC)

³³ [1976] IRLR 302

The same decision was adopted in the Labour Appeal in *Yichicho Plastics (Pty) v Muller*,³⁴ where it was argued that the focus should be on what the employer did at the time and not what the employer might have done in a given situation. This is similar to the approach in the *Lefu* case which followed in the *National Union of Mine Workers v East Rand Gold Uranium Co Ltd*.³⁵ Here Bulbulia AM states that “An employer need not be satisfied beyond reasonable doubt that an employee has committed an alleged offence. The reality remains whether the employer believes that the employee has committed such an offence.” The employee has recourse to follow should it be found that the employer decision to dismiss the employee was only based on the selective information with the intention to finally dismiss the employee.

In the case of *Hoechst (Pty) Ltd v CWU & Another*³⁶ the view of the Labour Appeal Court was that the Industrial Court was that the re-hearing of the matter should be conducted and the information which was not made available during the time of the hearing should be provided to determine the fairness of the employer’s conduct. In this situation the employee gave information regarding the unlawful possession of property belonging to a co-employer which was withheld during the hearing. This evidence cleared him from the alleged misconduct.

In order to determine the fairness of the employer action the reasonable employer test is conducted based on the action of the employer and not on the results of the employer action. There may be situation where the employer’s conduct is found to be reasonable; the results therefore might be unfair to the employee. This normally happens when the employer’s reasonable decision is based on lack of facts, or bias to the facts. It is always important to have the evidence to the recourse always available at the time of dismissal. The court has the responsibility to find out whether the employee has committed the alleged misconduct or whether the employer relied only

³⁴ 1994ilj 593 (LAC)

³⁵ 1986 ILJ 739 (ic)

³⁶ 1993ILJ 739(IC)

on beliefs. The employee should be allowed access to all evidence which was not made available to the employer and used during the hearing. The employer will have the opportunity to prove the decision was not unfair to the employee.

In most situations the employer will try to provide evidence which was withheld during the employer's enquiry and at the court proceeding try to lead that evidence, but this will be regarded as procedural unfairness. This will be rendered a meaningless attempt which will impact negatively on both the employer and employee in terms of time and financial loss. The reasonable employer test is relevant to provide a better understanding of fairness. The level of discontent at the work place, which mostly is because of the imbalance of power, is influenced by unfair practice.

1.3.4 Economic Rationale Approach

The fundamental relationship that exists between the employer and employee is based on financial gain.³⁷ The legislature supports this notion and the economic rationale in this notion is accepted as not constituting to unfair labour practice. According to Brassey: *"A rationale employer dismisses an errant employee so as to get a better employee in his place. He aims at improving the quality of his workforce. If there are no better employees available dismissal is senseless; the employee would not sooner be dismissed than he would have to be recruited again, because he would be the most suitable applicant for the job. Dismissal look to the future of a better workforce-it does not look to the past. It is remedial, not punitive in our society being the prerogative only of the parent, the schoolmaster and the bench."*³⁸

In a situation where the worker is not productive based on the standard required, and the employer is suffering financial loss, the dismissal will be justified. The dismissal short of the disciplinary action may be accepted as based on the economic reason. The dismissal on the basis of operational

³⁷ Van Niekerk opn cit 65

³⁸ Brassey et al The New Labour Law(1987)70

requirements (retrenchments) will be regarded to be unfair if the employer is incurring financial loss. The dismissal based on the operational requirements is sometimes abused by the employer who wants to replace an employee who is not favourable to him. The extant of economic rationale is questionable when the employer is not willing to reveal privileged information. However, it is essential to always implement procedural fairness when dealing with the retrenchment that is not the employee's fault. The employee did not commit misconduct.

1.4 Who Can Rely On Section 23(1)

It is important to notice that not all workers are covered by section 23(1) of the constitution³⁹. The members of South African National Defence Force, Secret agents, etc., are excluded from the ambit of the LRA. The emphasis should be in analysing the term "everyone" in section 23(1) of the constitution. The employees are not only afforded the rights, but are also beneficiaries of the right to fair labour practice. The broader understanding of the word employee should be taken not only from the legislative framework but also from the constitutional interpretation.

In terms of the section 23(1), the term everyone should be understood to be including the relationship between workers, employers and the organisations⁴⁰. This section 23 includes the stakeholders, namely the employers, trade union and the organisations in the employment environment. To have a better understanding with regard to who qualifies to be a worker or not, it is important to make reference to the case of the *SA National Defence v Minister of Defence & Another*.⁴¹ According to the constitutional court, section 39 stressed the issue of duty as the foundation to understand the meaning of a worker. The court arrived at the decision that although the armed forces did not have relationship with the defence force, for the purpose of the constitution they qualified as workers. Cheadle states that the descriptive meaning ascribe to employee.⁴² The issue whether a

³⁹ The constitution of the Republic of South Africa no 108 of 1996

⁴⁰ The constitution of the Republic of South Africa no 108 of 1996

⁴¹ 1999 4 SA 469 (CC);ILJ 22659(cc)

⁴² S 213 of the LRA defines an employee as follows (a) any person, excluding an independent contractor , who works for another person or for the state and who receives , or is entitled to receive

person is recognized as a worker or not in terms of the section 23 of the constitution is that there must be a relationship in the form of a contract of employment.

1.5 Unfair Labour Practices

The employee enjoys certain rights in terms of the item 2(1) of the schedule 7 of the LRA which clearly states that the employees are protected against certain unlawful practices, e.g. dismissal, by the employer. In terms of 186(2) of the LRA an unfair labour practice refers to any unfair act or omission that arises between an employer and employee such as:

1. Unfair conduct of the employer relating to the promotion or demotion of an employee.
2. Unfair employer conduct with reference to the training of an employee.
3. The unfair suspension of an employee.
4. Disciplinary action short of dismissal which is unfair.
5. Failure or refusal by an employer to reinstate or re-employ a former employee in terms of an agreement.⁴³

The meaning of unfair labour practice and its application limit certain employees to benefit from section 23(1) of the constitution. Even though we have an internal process of addressing the procedural unfairness, the employer still has power to influence the outcome and it therefore becomes difficult to rely entirely on labour legislation.⁴⁴ The Basic Conditions of Employment Act gives the interpretation of the term of fair labour practices.⁴⁵ This means that we need other additional legislation to give better understanding of the interpretation of section 23(1) of the constitution.

, any remuneration and (b) any other person who in any manner assists in carrying on or conducting the business of an employer and employed and employment have meaning corresponding to that of employee.

⁴³ The provision contained in item 2 (1) of schedule 7 is now contained almost verbatim in s6 (1) of the Employment Equity Act 55 of 1998

⁴⁴ Grogan "Organizational Rights and the Rights to strike" 2002 11(7) Comp LL 92

⁴⁵ 75 of 1997

1.6 Compliance with Basic Conditions

The Labour Relation Act which serves as a legal document between the employer and employee gives us a guideline on how the working relationship should exist between the employer and employee. Section 2⁴⁶ clearly outlines the purpose and its intention to promote the rights of the workers or employees in the workplace. The workers are protected from being abused and bullied by employers. The fundamental right of any employee is to be provided with a written contract of employment. Section 4(c)⁴⁷ of the act protects employees against any forms of discrimination on the basis of gender, race, ethnicity, religion, creed, social or economic status, disability or politics. On the issue of ending the employment contract, section 63(1) of the act states that “The employment of a worker shall not be unfairly terminated by the worker’s employer”. Section 37(1a)-(c) provides an explanation of when a contract of employment may be terminated. It emphasises that the termination of contract of employment should be terminated when it is necessary, while chapter 5 (Termination of Employment) clearly outlines Notice of Termination and Remuneration from the employer to the employee.

The act clearly states that the employees are entitled to the annual leave with pay (section 20)⁴⁸, also with overtime work. The maximum working hours a day or forty (40) hours a week is prescribed by the Act. The employees are also granted a rest period at work as contained in section 20(1a) and (b). It is expected that these rights shall be upheld so as to give dignity and promote a healthy relationship in the workplace. Many of the employers disregard the rights of the workers which gives significant rise to the feeling of dissatisfaction from the employees.

The contract of employment and conditions of employment must include the remuneration, number of leaves, hours of work and termination of employment in accordance with the provision of the Basic Condition of Employment found in chapter three. The failure to comply with and promote the rights of employees will be regarded as the violation of the workers’

⁴⁶ Basic Conditions of Employment Act .75 of 1997

⁴⁷ Idem

⁴⁸ Idem

rights. Failure to effectively address this could impact negatively on the wellbeing of the workers and therefore lead to unrest at the workplace.

The aim of the legislation is aimed at bringing awareness to employees with regard to their employments rights. This will in turn influence the employees to learn more about employments rights as prescribed by the Labour Relation Act 1996 and the Constitution with the purpose of making them aware of the different forms of abuse and bullying. The workshops and training should be conducted with the aim of increasing awareness in the employees. This would mean that the welfare of the employees would be protected and productivity increased.

1.7 Employment Rights

The employment rights stem from the basic condition of employment and are conferred to an employee. They originate from the employment contract resources. Legislations have been passed around the wish to regulate the employment rights. The existence of the legislations does not guarantee the protection and promotions of employees. This is supported by the number of cases received annually by the commission (CCMA) about the infringements of employments rights. Many skilled and semi-skilled employees have little knowledge about their rights and this has resulted in abuse of their employments rights. It is imperative that we move towards protecting not only the business, but more towards the rights of the working people; the shift will minimize the abuse and exploitation of the workers.

1.8 Employment Rights as Human Rights

The employment is a contract entered into between two parties, namely employer and employee. In support Befort,2002 states that “An employee may be defined as a person in service of another under any contract of hire, expressed or implied, oral or written, where the employer has the right to control and direct the employee in the material details of how the work is to be performed. The reciprocal relationship comprises of the employee contributing his labour and expertise to the demand of the employer in exchange for the benefits package in the contract of employment. The right

to employment is limited to certain conditions which prohibit the employment of children, as well as forced labour practices. The Basic Condition of Employment Act (BCEA) defines the employment of a child as “*Child under the minimum school-leaving age in terms of any law, if this is 15 or older.*”⁴⁹ The employees are human beings and as such are entitled to employment rights. The fundamental rights to employment should be without discrimination to race, religion, and political belief, economic or social conditions. The employment grants dignity to individuals and promotes a sense of fulfilment when contributions like labour and skills are made for the good of the economy. The employer needs to commit to these standards so as to avoid rendering the employment intolerable.

1.9 Compliance with health and Safety Standards

The individual dignity at the workplace ought to be promoted and recognised not only based on legislation, but also in practice. Safe and decent working conditions must be implemented at all times in the workplace to afford the workers the dignity they deserve. Employers have the responsibility to ensure their workers are not exposed to unsafe and inhuman treatment, but rather to satisfactory and healthy working conditions. Steps should be taken to ensure that adequate safety appliances, availability of clean water and toilet facilities are provided. The employer who fails to meet these safe and healthy standards in the workplace should be liable for a fine or imprisonment or both.

The aim of this provision is to compel the employer to commit to the needed resources and so promote awareness and the realization of the dignity of their employees. The government has a role to play in ensuring that the legislation is implemented and that necessary action is taken to non-compliance by employers. The responsibility in ensuring safe and secure environment remains that of the employer. Nicole (2001) strongly argues that all employers have a statutory duty to take care of the health and safety needs of all their employees. For example, they should issue first aid kits and

⁴⁹ Section 3 (1) of the South African Schools Act (Act 84 of 1996) requires every parent to cause every learner for whom he or she is responsible to attend a school until the last school day of the year in which the learner reaches the age of 15 or the ninth grade, whichever is the first.

protective clothing. Buildings should have fire escape facilities, and the employers should make sure that proper training is provided to all employees before utilising any equipment. In support workers have basic rights to refuse working should they believe that their work presents danger to themselves or other worker (Palmer, 200). Every worker has the right to satisfactory, safe, healthy and good working conditions.

1.10 Conclusion

The decision of the court to provide explanation regarding the constitutionality of a right to fair labour practices indicates that it is a difficult concept, with limited definition, and with difficult criteria to the degree of fairness. The old Industrial Court conclusions provide meaningful precedents in helping the courts to decide what fairness in the context of unfair labour practices is. The conduct not be considered to be unfair it must be seen to be procedurally and substantially fair. In terms of 1991, definition of unfair labour practice was enforced at the time the constitution was formulated. It is relevant to suggest that in deciding on the fairness of the employers' behaviour the result of the employee should be taken into consideration. Based on this background the employer test should not be considered. The results should be compared against the employer conduct against justification with regard to economic approach. The unfair labour practice is a concept which includes both employer and employee, which include factors such as dismissals⁵⁰, redeployment and transfer of employees⁵¹. The difference between fairness and unlawfulness is a factor that should be determined on its own merit. The decision of the judge on what constitutes fairness is decided on given circumstances. In support Landman states that” The unfair labour practice has crept into the heart of our labour law jurisprudence and it may be expected that it will constitute to grow , by conventional and unconventional means , as long as lawful , unilateral action is regarded by the courts , in their capacity as custodians of industrial justice , as unfair and inequitable. This is according to Wiehan Commission.”

⁵⁰ Fedlife Assurance Ltd v Wolfaard supra.

⁵¹ Nelson & Others v MEC Responsible for Education in the Eastern Cape & Another supra

CHAPTER 2

THE REASONS FOR GRIEVANCE PROCEDURE

2.1 Introduction

The purpose of grievance procedure is aimed at promoting sound labour relations in the workplace. It is also intended to empower employees with the opportunity and procedure to be able to raise issues of dissatisfaction with the employer. The grievance procedure is in accordance with labour principles such as consistency, transparency and the resolution of grievances, as close to the point of origin as possible. The aim of grievance procedure is not only regarded as means of managing conflict in the workplace, but also to ensure labour harmony. Grogan advises that an employee should use the grievance procedure, before he or she pursues any other form of statutory relief.⁵² He refers to *Mackay v ABSA* and another⁵³: here the labour court held that grievance procedure should be used to promote labour peace. Mackay did not use the grievance procedure before seeking statutory relief. The Court held the view that the employer was not aware of Mckay's discontent and eventually found in favour of ABSA. The Court made it clear that the employer should not victimise, prejudice or dismiss any employee on the basis of grievance procedure. The increased dissatisfaction in the workplace is suitable to be addressed through grievance procedure. In terms of Nel et al it is stated that the "Dealing with grievances is a dynamic process of preventing grievances, handling grievances effectively when they arise and restoring the climate in the unit after resolution of the grievance in order to enhance labour peace and thus achieve the goals of the department."⁵⁴ Bandix states the objectives of the grievance procedure aimed to achieve the following:

- It creates the opportunity for the employee to communicate upward with management.

⁵² Workplace Law, 2003:89

⁵³ (2000)21 ILJ 2054(LJ)

⁵⁴ South African Employment Relation Theory and Practice 6th Edition

- It ensures that complaints are effectively dealt with by management.
- It prevents disputes from arising in the workplace.
- It renders disciplinary proceeding more acceptable since employees also have means of objecting to management performance.
- It creates awareness of employee problems or problem areas which management needs to address.
- It emphasises management's concern for the wellbeing of employees.⁵⁵

Bandix further emphasis that the following general principle should be used when dealing with grievance:

- Employees should be entitled to bring their grievance to the attention of management even if it is done in stages.
- The employee should be allowed representation by a fellow colleague or union representative.
- Management at various levels must consider the grievance carefully and make genuine attempts to resolve the grievance.
- The grievance will not be resolved until the employee indicates such.
- Time limits should be established for each of the steps within the procedure.
- Should the grievance remain unresolved, the employee has the right to declare a dispute.
- Grievance should generally be managed by the time line manager, but other staff, for example the Human Resources Manager, may act in an advisory capacity.⁵⁶

The purpose of grievance procedure is to promote labour peace in the working environment, as the court stated clearly in the case of Mackay v ABSA and another. The Court also emphasised that no employee should be victimised simply on account of utilising internal grievance procedure. Grogan encourages that an employee should try to resort to the grievance procedure, before he or she pursues any form of statutory relief.⁵⁷

⁵⁵ Industrial Relations in the new South Africa: 349

⁵⁶ Bandix , 1996 :350

⁵⁷ Grogan Workplace Law , 2003 : 89

The concern in handling the grievance in a proper manner and consistently is to promote and encourage the employees and management to have an open channel communication aimed at expressing dissatisfaction with the intention of resolving issues. The aim is to deal with the dissatisfaction before it rises to dangerous levels and encourages industrial action.

The management needs to create a culture of handling grievances immediately. The interaction between the employees and supervisors will assist in speedy resolution of misunderstanding amongst them. The proper implementation of grievance will assist in saving time and resources.

The principle of grievance procedure is to promote speedy, impartial and equitable dealing with grievances to establish sound labour relations with the intention of resolving grievance at the lowest point possible. The employer has the responsibility of making sure that the grievance is addressed fairly, impartially, and in an objective manner so that the principle of natural justice is observed. The perception that an employee lodging a grievance is limiting the chances of career path should be strongly dismissed. The effective manner in dealing with the grievance is supposed to achieve the following functions:

- a) It creates an opportunity for employees to be accountable to different levels of management. In other words, both management and employees will have the opportunity to communicate about the issues of dissatisfaction and progressive ideas.
- b) The management must view the grievances in a constructive manner to develop a positive approach in dealing with the problem. If management is aware of the root cause of the problem at early stage it will assist in resolving it from the point of origin. This objective approach will address the issues of unhappiness or dissatisfaction amongst the employees.
- c) The negative attitude in dealing with the grievance will affect the employee's performances and aggravate the situation.
- d) The working environment remains stable and a healthy working relationship is encouraged amongst the employees and employers.

- e) The workers become active participants in the decision- making and the policy of the company; therefore they don't feel alienated by management's decisions. The management will also understand how implementation of policies will affect the employees.

The effective grievance procedure promotes the credibility of the organization and serves as the reinforcement to employee perspective. It serves as an opportunity to the employees to raise employment matters that may be affecting them at work. This creates responsibility in supervisors to be consistent when implementing decisions to justify their actions. The grievance procedure has an effect on the operation of the organization. The effective grievance procedure should be handled and resolved internally. The potential and objective of grievance procedure can only be achieved if handled effectively. The grievance procedure also provides the employees with the communication channel to raise their issues with the management without fear of victimisation or retribution. It also provides for the equal and fair treatment process to identify and solve issues that cause complaint as efficiently and carefully as possible to the point of origin. If the employees feel that their complaints have been dealt with to their satisfaction they will develop confidence in the management and grievance procedure.

The implementation and characteristics of grievance procedure consist of the following:

- Communication of the Grievance Procedure
- Eligibility for Grievance
- Reasons of Grievance Procedure
- Fairness of Grievance Procedure
- Participation in Grievance Procedure

Communication is an important element in an attempt to resolve grievance or dissatisfaction. The employees should be given opportunity to raise their concern with their immediate supervisor if the problem is not directly related to them. This ensures that the employee uses the chain of command as required by the procedure. The supervisor will also be afforded opportunity to know and possibly solve

the problem before it becomes unmanageable. Communication of the grievance procedure is a cornerstone in attempt to resolve issues in the interest of both the employee and the employer. In most cases the grievance takes place because a lack of communication between the supervisor and the employees leads to misunderstanding of issues.

2.2 Definition of Grievance

Grievances manifest as a result of an interpretation of a perceived expectation from the organisation which is never fulfilled. This results in aggrieved employees usually becoming defiant. The ILO (International Labour Organisation) defines grievance as a complaint of one or more workers with respect to wages and allowances, condition of work and interpretation of service, job assignment and termination of service. The National Commission on Labour noticed that “complaints” affecting one or more employees regardless of their salaries, overtime, leave, transfer, promotion, work assignment and discharge have the potential of constituting grievances. It is essential to separate grievance lodge by the individual from collective grievance. If the issues raised are concerned with individual employees, they should be dealt with through grievance channels. However, if the issues involved are about the general issues which deal with the implementation of the policy and include broad interest, it can become the subject of collective bargaining. The grievance procedure is structured in a simple or user friendly structure to be accessible to all levels of employees. However, grievance cannot be used as an alternative, or appeal against disciplinary measures taken against the employee.

2.3 Issues contributing to Grievance Procedure

The employees register grievance because of various reasons such as not been given equal opportunity to compete for promotions, attend courses, access to resources and information, favouritism, sexual harassment and disciplinary action short of reason, unilateral change of the contract and the terms and conditions of employment,

promotions, safety environment, transfer, leave, medical benefits and victimisation. The list is indicative and comprehensive.

The main sources of grievance must not be made up, but always be real. This calls for a real analysis of looking into the policies, procedures, practices, structures, as well as operation of the organisation to conclude about the real causes of grievances. The style and way in which management functions can be some of the causes of grievances, especially when there is a lack of consistency and flexibility. Grievances are also caused by inter-personal problems between the individual employees and the manner in which the union conducts itself by reinforcing its bargaining powers. The lack of communication can be the fertile ground for promoting grievances.

2.4 Eligibility for Grievance

The grievance procedure should be available to all employees in the company. There are other instances where employees are employed on a temporary basis or probation. The employment contract should specify the benefits to which employees are entitled. The time frame in lodging a grievance determines the eligibility of the grievance. The time frame guides the employees and management to when a grievance should be registered following the incidents. The time frame provides the guidance to the responses of employees' grievance.

2.5 Participation in Grievance Procedure

The existence of a grievance procedure which is not effective is unacceptable, as it should be used by employees and management with the belief that positive outcomes will be achieved. The most important element is a free participation in a discussion without fear that it will at later stage be used against the party. The idea of the grievance is to encourage employees, union representation and management to work together to resolve conflict. This can only be achieved if all parties listen to each other and developed mutual response which is important for participation. The idea is to have less negative feeling or

dissatisfaction amongst employees, and positive employees who will contribute to the operation of the company.

2.6 Fairness of Grievance Procedure

The grievance procedure tries to establish a degree of fairness and impartiality. If the employees are treated impartially they will have an opportunity to present their side of the story without feeling prejudiced. If the employees believe that the handling of the grievance is to favour management decision the whole process will be futile. The process also applies if management believes that the decision is favouring the employees. This shows that the employees will not participate in the process that they feel to be unfair. If the employees believe that they are being treated equally they will develop confidence in the procedure. It is crucial to promote fairness when dealing with the issues that affect the employees, so that they can have faith in participating in the grievance procedure.

2.7 Victimisation

Many employees have a fear of raising their dissatisfaction with the management for fear of reprisal or punishment. The belief amongst these employees is that filing a grievance will limit the opportunity of being recognised for promotions and other benefits enjoyed by other employees. The employees are also under the impression that they will be labelled as trouble- makers and will gain the reputation of complaining about rather than just complying with the requirements of the job. Some managers also develop an attitude towards those who file grievance and regard them as bad workers. The management should be made aware that victimisation of any person who invokes the grievance procedure, or who provides assistance to any person wishing to file grievance, is not acceptable and in a case of discrimination or harassment may constitute unlawful conduct. The transfer of a member of staff who lodges grievance amounts to the act of victimisation, therefore this action should never be taken as a means to resolve

grievance. In some cases the aggrieved person may request to be transferred but the reasons need to be investigated thoroughly and be recorded for the fairness of the procedure. It is important for the aggrieved person to take note that should the complainant feel victimised at any stage, or find that the proceeding is failing to comply with the regulations, the matter be reported to the higher/ highest authority.

2.8 Representation

The aggrieved person and the affected people have the right to be represented by a recognised union which will attend to their rights. The representative will consult and communicate all the stages to the aggrieved person from the initial stage when the grievance is lodged until the finalisation of the grievance. In a workplace where there is no structure or union representation, and the grievance or dispute is dealt with by individual or collective grievance, a representative will be appointed by the group. The aggrieved person raises their concern with the representative who will then investigate the matter to see if it has merit to be challenged. Once there is a sufficient ground to challenge the issue involved, the representative will try to secure the meeting with the supervisor provided that the grievance is not against him/her. The purpose of the meeting will be to endeavour to resolve the issue as speedily and close to the origin as possible. The handling of the grievance should be treated with the strictest confidentiality, unless the concerned parties agree otherwise. If the aggrieved person on consultation between the union representative and the supervisor does not receive satisfaction the issue will be referred to the next level⁵⁸. The role of the representative is to ensure that the aggrieved person is protected throughout the process and that there is no undue pressure from the side of the management. The procedure should meet all the requirements as stated in the collective agreement and non-compliance should be reported immediately.

⁵⁸ SSSBC Agreement 3/2005

2.9 Conclusions

Grievances Procedure is an effective tool used by the employees to raise their concerns, complaints and the problems that employees have with their employer. The issues concerned should arise within the working environment. The effective manner in handling the grievances will improve working relations between employees and employer and also production.

CHAPTER 3

THE STRUCTURE, CONSEQUENCES AND OUTCOME OF A GRIEVANCE PROCEDURE

3.1 Introduction

The employee can follow different routes in raising grievance procedure, but it comes down to the basic principle of resolving the dissatisfaction of the employees in a fair manner. The issue of discontent should be allowed to reach the highest office in the endeavour of seeking remedy to the solution. The basic principle is to allow the aggrieved supervisor to resolve the case. If the problem cannot be resolved by the supervisor it must be referred to the senior management. Employers should make sure that attention is given to resolving the grievance immediately. The process is aimed at the employees reaching the level of satisfaction. The solution of many grievances can be reached quickly by correcting the misunderstanding or opening communication channels between employees and supervisors. The proper application of grievance procedure will save the organisation time and resources. Bandix⁵⁹ holds that the need arises from both employees' rights to a formal channel of communication through which dissatisfaction may be expressed to prevent the danger that grievance may escalate and encourage industrial unrest. If the employee at any given time is not satisfied with the process or the management not being able to resolve the problem to the satisfaction of the employee, the matter must be referred to a recognised forum such as CCMA/bargaining council to look into the matter from unfair labour practice to resolve dispute. The employees are encouraged to first

⁵⁹ Industrial Relations in the new South Africa 4th Edition ,2001: 331-335

make use of internal procedure before referring their issues outside. The dispute may not be referred to any Bargaining Council or CCMA unless the internal process has been exhausted and proof exists that a grievance has been exhausted. Proof that the matter was registered before referring the dispute will be needed from the member.

The employer has a duty in ensuring that the grievance is dealt with in a fair, impartial and objective manner and that the principle of natural justice is promoted.

If the sensitive nature of the grievance has potential of threats and confrontation it is advisable for the employee to be accompanied by a representative of a union or co-employee if he or she so chooses. The grievance procedure consists of a particular time frame unless both parties agree to the extension. The main aim of time limits is to make sure that the grievance procedure is resolved without delay.

Therefore this stage of the grievance is accompanied by time limits to make sure that the resolution of the grievance is not delayed. The main principle applicable to most grievance procedures is as follows:

- Grievance must be resolved as equitably and as speedily as possible.
- Grievance must be resolved as close as possible to their point of origin.
- The interest of the employer as well as its employees must be protected.
- Grievances must be addressed fairly and without fear of victimisation or prejudice.

The grievance procedure is often divided into an informal and a formal procedure. The informal procedure consists of the employee raising a verbal grievance to his or her immediate supervisor in an attempt to resolve it before pursuing formal steps. The formal procedure entails lodging of a formal grievance in writing on the prescribed form by the employee's immediate supervisor. However, if the prescribed grievance form comes from a higher level of authority, a copy must be delivered to the supervisor.

3.2 Common problems with grievance procedure

The good intention that lies behind grievance procedures does sometimes present challenges. These are some of the examples:

- The words which are used are sometimes complicated and hard to follow and is problematic to illiterate employees. The grievance procedure should consist of at least two official languages.
- Normally, when a grievance is reported to the first line of management, such person does not have mandate to settle the matter, therefore mostly refers the matter to the next level. The problem of referring matters that could have been settled by the first line manager is that it contributes to the backlog of cases. Some of the supervisors have either little understanding of company's policy, or are scared to challenge the policy which then results in the referral of grievance to the next level. Some issues, e.g. leave, can be resolved, while other issues such as temporary incapacity leave, transfer or ill health that result in deduction of money, must be referred to a higher authority. There should be a clear understanding of the issues in disputes which amount to unfair labour practice and which can be addressed at the relevant level. The issues include
 1. Promotion
 2. Demotion
 3. Training
 4. Provision of Benefits (Salary/Leave Pay / Overtime is not a benefit)
 5. Unfair Suspension
 6. Any disciplinary action short of dismissal
- Failure or refusal to re-instate or re –employ a former employee in terms of an agreement. While other issues may need to be referred to the SSSBC (Safety Security Sectoral Bargaining Sector) after being reported this includes the following: unfair dismissal, the application or interpretation of any collective agreement concluded in the council, any dispute of interest that arose in the provincial chamber that could not be resolved through a meeting by the parties or council, and Dispute about the Refusal to Bargain. Other disputes cannot be

referred to the SSSBC due to their nature, but must be referred to the CCMA (Commission for Conciliation, Mediation and Arbitration).

These disputes include :

1. Disclosure of information⁶⁰
 2. Organisational rights⁶¹
 3. Agency Shop disputes⁶²
 4. Closed shop disputes⁶³
 5. Interpretation or application of collective bargaining provision⁶⁴
 6. Workplace forum disputes⁶⁵
 7. Discrimination disputes⁶⁶
- There may be some of the employees who feel antagonism and irritation exuding from the management.
 - The employees state long reasons in the grievance forms where it could be summarised and simplified for the reader because some of the reasons stated may not be relevant to the grievance. The solution placed on the form as required by the relevant section of the grievance form is sometimes not assisting in reaching a solution. Example: the employee put down a grievance because the commander refused to grant him a rest day to attend a wedding. He decides to file for a grievance but by the time the grievance is attended the wedding might be long finished. This leads to confusion as to what the grievance is aiming to achieve.
 - The employees. Even though it is their choice to decide who their representative should be, they need to inform the person and their representative of their intentions. They also need to state what they have written on the form, so that the representative can familiarise himself or herself with the content of the grievance.
 - In the case where the employees feel that they are being victimised for putting grievance against the management (as it happened in the

⁶⁰ Section 16 and 89 of the Labour Relation Act ,no 66 of 1995

⁶¹ Chapter iii part A of the Labour Relation Act, no 66 of 1995

⁶² Section 25 of the Labour Relation Act no, 66 of 1995

⁶³ Section 26 of the Labour Relation Act , no 66 of 1995

⁶⁴ Section 63 (1) of the Labour Relation Act , no 66 of 1995

⁶⁵ Sections 85 and 94 of the Labour Relation Act , no 66 of 1995

⁶⁶ Section 6 of the Employment Equity Act

case of *Mackay v Absa Group & another* [1999] 12 BLLR 1317 (LC) where the dismissal was held to be an automatically unfair dismissal), they must follow the route of registering the case for criminal investigation.

- In many instances the grievant fails to make it clear as to what the reason for lodging the grievance is. For example, the employee will write at length about issues full of many incidents which don't support each other, only to find out that the whole piece is based on one idea.
- The grievant after raising the issues is not sure what should be the outcome of the grievance. For example, the employee complains of autocratic management style and states that the outcome needed to be achieved is to be transferred. The difficulty with this outcome is that the grievance cannot be used as the reason to obtain a transfer as there is process available for a transfer. The grievant should, or could, rather ask for the management to use a more people's person approach.
- In most cases some supervisors delay or decide on their own not to sign and submit the grievance forms. Some supervisors tend to apply the delay tactics to frustrate the employees because they interpret lodging of the grievance as an attack on their management. This interpretation is dangerous and does not help the attempt to restore harmony at work. Intervention is needed to remedy the situation. Workshops and induction to assist in endeavouring to restore healthy relations at work can be used.
- The abuse of power involves the unfair treatment of employees when filling a grievance followed by deliberate delays. This is a form of dictatorship rather than negotiating in good faith between the employer and employee.

This illustrates that to a certain degree that Bandix' views on the goals and general rules in which grievance is managed are somewhat narrow. Dealing and handling grievance within various departments has shown the following failure in the grievance process:

- Managers do not regard the grievance procedure as a mechanism for communication between the employees and themselves. The loss of respect in the communication process ultimately results in the breakdown of such communication between the employee and the manager. This becomes a burden to an already dissatisfactory situation and grievance process and perpetuates the idea of an “us versus them” experience.

Managers feel intimidated and undermined by grievance, as it exposes their lack of knowledge or management skills. They will then try to hide their inadequacy by resorting to hostility. This will often result in the grievance not receiving the attention it deserves.

- If this situation is not discouraged it will develop into a culture in which grievances are not dealt with respectfully. If this is allowed to continue the workers will lose their faith in resorting to internal processes as means of addressing their concerns.

3.3 Conclusion

The process of grievance procedure emerged as a result of discontent at the workplace. The employment contract raised an expectation which needs to be achieved and honored by the organisation. The discontent is caused by the difference between the employee's expectation and the style of the management. This process was designed to address various forms of conflict within the workplace. The aim was to deal with all the abuse and exploitation which could result in extreme unhappiness, victimization and unwarranted negative treatment, which could have a negative financial effect and destroy unity amongst the workers. The South African Police Services has a framework in place, namely the Agreement on Employment Relations Manual 3/2005⁶⁷. This policy is intended to give guidance to workers and can be utilized by them when they experience any unfair labour practices. The formulation and implementation of policies relating to employment or unacceptable conduct resulted from either a fellow colleague or a senior official, and any issues at work which raised concern and could be

⁶⁷ Agreement 3/2006 Annexure B : Safety and Security Sectoral Bargaining Council

addressed. According to L99 grievance resolution 'This approach helps minor concerns to be resolved speedily without recourse to formal action and is of benefit to both the individual and to the organisation'. However, the policy is limited to other forms of procedures such as misconduct and appeal procedure. This means that for the employee who had been charged with misconduct and taken through the process of disciplinary hearing⁶⁸, the outcome reached by this tribunal cannot be challenged through lodging of the grievance, but rather by appealing.

The purpose of this grievance procedure is to advance sound labour relations and address the matter by fulfilling the primary objective of this procedure in the SAPS. This implies that the officials have primary responsibilities to attend to the issues concerning official acts or omissions lodged by employees in the workplace, and give recommendation to appropriate remedies. This is supported by section 196(4) (11) of the constitution⁶⁹, as well as section 11 of the public service act, 1997 (Act no 1997), which empowers the commission to make rules to deal with grievance. This is one of the progressive clauses which mandate the public service commission (PSC) to deal with investigation in the public services and recommend remedies.

⁶⁸ Agreement 3/2006 Annexure B : Safety and Security Sectoral Bargaining Council

⁶⁹ The constitution of the Republic of South Africa no 108 of 1996

Chapter 4

Constructive Dismissal

4.1 Introduction

According to sections 186(1)(e) of the Labour Relations Act 66 of 1995 constructive dismissal takes place when an employee voluntarily terminates the contract of employment with or without a notice because the employer made employment condition intolerable. In terms of section 192(1) of the Labour Relations Act the onus is on the complainant to support claim on the balance of probabilities that the contract of employment was terminated. There are factors which should be considered when dealing with constructive dismissal. The first issue is whether the employee voluntarily terminated the contract. The second aspect focuses on whether the employer contributed towards continued employment and if this influenced the employee to have no choice but to terminate the contract of employment.

Many of these factors are the result of illness, pregnancy, and workload which can contribute to stress. Many employees who find themselves faced with this situation feel that the employment conditions have become intolerable; therefore they rely on constructive dismissal.

Dismissal in South Africa is common practice. This is influenced by many factors at work such as demoting an employee without valid reasons, such as

1. An employee returning from maternity leave to find her position being taken and replaced by another person and her responsibilities also

having changed. This leads to an intolerable position in *Gibbon v WF Rationale Built- Kitchens LTD (1986)*.⁷⁰

2. Instituting disciplinary procedure without following correct procedure. In this case the employee is informed of her unsatisfactory work. Two days this is followed by a letter suspending her without giving her opportunity to defend herself. The tribunal found the decision to be unfair. In *Dunne v Allied Legal Services (1996)*⁷¹
3. Change in job description where the employee's job is changed without proper consultation or agreement. The employee's transfer to one section of a job changes the responsibilities.
4. Harassment and Bullying: The employment should have a clear guideline that deals with incidents of sexual harassment and bullying in the workplace. This is to protect the employee who is being harassed at work by either employer or colleague and has complained to the employer who failed to take action to eventually prevent a constructive dismissal claim.

In the case of constructive dismissal the burden of proof relies on the employees to prove that they have been constructively dismissed. It is required they should prove that they have followed all the processes available internally before they resigned from their position. This means that they should register a grievance and bring it to the attention of their supervisor. The process of grievance procedure will take place according to the regulations and procedure. The failure of the employer to comply with, or follow procedure leads to the purpose not achieving the appropriate outcome. This makes the employees resign from their position. The failure to follow these procedures may influence the court rejecting the claim of constructive dismissal.

The courts are known for applying a test in cases of constructive dismissal. The questions remain whether it should be subjective or focus on the subjective perspective of the employer and employee. This follows on which

⁷⁰ UD 226/86

⁷¹ UD 79/96

test should South African courts apply when faced with constructive dismissal.

4.2 Issues leading to Constructive Dismissal

According to sections 186(1)(e) of the Labour Relations Act 66 of 1995⁷² constructive dismissal takes place when an employee voluntarily terminates the contract of employment with or without a notice because the employer made employment conditions intolerable. With regard to the employee who alleged to have been dismissed under section 186 (1)(e) of the LRA: it is irrelevant for the employee to show that the employer contributed to a breach of contract or the employer's actions led to a termination of contract of employment. It should be proven that the action of an employer created a condition which objectively created intolerable circumstances for the employee. The fact that there is a breach does not mean that there is a condition of intolerability⁷³. In this type of dismissal the employee needs to leave the contract, by either voluntarily resigning, or walking out of the place of employment with the intention of not returning.⁷⁴

Constructive dismissal as a form of termination was not known to common law unless when dealing with the cases where the employer made it difficult for the employee to be productive due to the fact that the employment relationship is intolerable,⁷⁵ because the employee claimed that he or she⁷⁶ was forced to leave the employment. In terms of common law there will be no assistance, unless it can be proven that the employer violated the contract or materially breached contract. In terms of the law of contract the employer

⁷² Labour Relations Act 66 of 1995 hereafter referred to as the LRA

⁷³ Grogan Dismissal 197.

⁷⁴ Grogan Dismissal 196

⁷⁵ Grogan Dismissal 196

⁷⁶ Where the word "he" is used it must be understood to refer to both male and female version.

should be the one who committed the breach. In this situation the employee had a choice. The employee is left with several choices such as to enforce the employer to the contract or secure an order to force employer to remedy the breach committed, or the employee could leave the contract and take legal action against the employer for damages sustained.⁷⁷

According to section 192(1) of the LRA the onus depends on the employee to provide proof on a balance of probabilities that he was dismissed from his employment contract. There are many factors which need to be proven in cases involving claims of constructive dismissal. The first issues are whether the employee ended the contract. When dealing with this matter the evidence in most cases becomes obvious, e.g. the submission of a letter for resignation, or signing to say that they no longer wish to be bounded by terms of the contract.⁷⁸ The second reason is whether the employer contributed in rendering the employment conditions intolerable to such extent that it contributed to the employee's action to abandon the employment. The second claim for it to be proven requires that the employee needs to supply evidence of unreasonable conduct from employer or factors contributing towards hostility at work. The conduct may be as a result of acts or omissions and may be the intention on the part of the employer to force the employee to resign.⁷⁹

The final option that needs to be explored is whether the employee had no other reasons or options to terminate the employment. The employee has a duty to prove that these requirements have been met to support the claim that he or she was dismissed. It is important to take note that for the claim to be successful all the requirements must be present to be considered constructive dismissal. The employee alone cannot make a claim that he or she was constructively dismissed, because the onus is on the employer to provide evidence that the employee was dismissed for a fair reason in terms of a fair procedure.⁸⁰

⁷⁷ Grogan Dismissal 197.

⁷⁸ Davel 2011 <http://www.solidaritylegalservices.co.za>

⁷⁹ Bouwer 2009 <http://www.retrenchmenttassist.co.za>

⁸⁰ Bouwer 2009 <http://www.retrenchmenttassist.co.za>

The issue should not be focused on the subjective feeling of the employee, but should rather take into consideration the belief of the employee which must be based on a reasonable belief. The employee must provide evidence that the employer deliberately created an environment that induced the belief. The claim from an employee that it was no use to continue with the employment is not sufficient to support the claim. The employee must reasonably support the belief with evidence. The employee must support the claim of the belief with proof that is aimed at justifying the claim that the situation existed. The onus is on the employee to provide evidence that the employer was responsible for creating a work environment that resulted in the employee's belief.⁸¹

The following discussion will then focus on the test that the courts will normally apply. The issue to be raised is the relevancy of this test which is to be applied. In the changing working environment where people are more prone to stressful situation, the court should introduce mechanisms to find out whether constructive dismissal does exist.

The constructive dismissal is difficult to prove; therefore it is imperative to conduct a test to see if dismissal indeed took place. It is crucial to see how the court applies the test to see whether constructive dismissal took place.

4.3 The test for constructive dismissal

The usage of a test is very important in understanding how the court approached this kind of case. It is important to understand how the court handles these cases for one to understand if there is a chance to succeed with the claim of constructive dismissal.

The test that is used in determining whether the constructive dismissal took place should be partly objective and partly subjective.⁸² The belief of the employee during the time of termination of a contract as well as the conditions in which the termination took place should be considered.⁸³ It is imperative that the belief of the employee should be regarded as the only factor which should be taken into account. The onus is on the employee to

⁸¹ Grogan Dismissal

⁸² Grogan Dismissal 199

⁸³ Grogan Dismissal 199

provide proof that he would still have continued working had it not been for the employer's conduct. This means that there should never have been any intention from the employee to resign. The employee should have the belief that the employer would never have changed unwanted conduct and be unreasonable and intolerable.⁸⁴

In the case of *Jooste v Transnet Ltd t/SA Airways*⁸⁵ the appellant was working as a senior manager in cargo operations at South African Airways. The appellant and the executive manager, who was the appellant's superior, did not have a good working relationship. The executive manager constantly faulted the appellant's work, and took away some of the projects from the appellant. The executive manager also informed the appellant that he wished him to resign and accept a retrenchment package. However, the appellant did not accept the offer. The appellant brought to the attention of the manager that he could not continue working with the executive manager, but did not disclose that the executive manager put pressure on him to resign. A meeting to include the relevant parties with their legal representatives was convened. In the meeting the appellant was informed of allegation of misconduct which could make him face the disciplinary proceeding and the possibility of being retrenched. After the meeting the executive manager continued to put pressure on the appellant to resign. The appellant who no longer wished to face further humiliation and harassment decided to resign. His letter of resignation was accepted, as were the details agreed upon. In section 43 the appellant agreed that he was put under pressure by the executive manager to submit his resignation and had also under pressure accepted the retrenchment package. This amounted to constructive dismissal which also was unfair. The court ordered for his interim reinstatement and the respondent and the respondent decided to pay the appellant his salary rather than allowing him to return to his work. In terms of section 49(9) the industrial court proceeding states that the appellant was not constructively dismissed, but resigned voluntarily. The appellant took the matter to the Labour Appeal Court.

⁸⁴ Davel 2011 <http://solidaritylegalservices.co.za>

⁸⁵ *Jooste v Transnet Ltd t/a SA Airways* 1995 16 ILJ 629 (LAC), par 638B-D

4.4 The court made the following statements

In a matter in the Industrial Court in which the applicant terminated contract, but refuted that he was constructively dismissed, the starting point is whether in resigning, the applicant did not have any intention to terminate employment relationship. The applicant needed to provide proof. Should the court prove that the intention did not exist in the matter then case closed...? Also, if the resignation forms part of the agreement between the applicant and his former employer to terminate the contract, can this agreement be proven or admitted by the employer? If so, the matter ends. The applicant should dispute and prove that there is no agreement binding them. The Industrial Court had jurisdiction to decide on the dispute regarding the allegation of unfair labour practice if the applicant failed to prove on the balance of probabilities. If the applicant proved the onus that he was constructively dismissed then did the employer constructively dismiss him? The burden is on the employee to prove that there was a constructive dismissal.

In the case of constructive dismissal, the employee terminates the employment contract by resigning, due to the conduct of employer. The court takes all factors into consideration, as well as the employer's conduct in general and decides whether the employee was put in a situation that he could no longer tolerate. The test is objective.⁸⁶

The aim is to establish whether a dismissal which took place in terms of the meaning of section 186(1) (e) is sometimes questionable. The former Labour Appeal Court put it to the test to find out whether the Industrial Court had jurisdiction to grant relief to the employee who relies on constructive dismissal.

4.4.1 In the case of Pretoria Society for the care of the *Retarded v Loots*⁸⁷ the Labour Appeal Court under the 1995 Act put down a test to decide on whether the termination of employee contract can be regarded as a constructive dismissal:

⁸⁶ Grogan Dismissal 199

⁸⁷ Pretoria Society for the Care of the Retarded v Loots 1997 18 ILJ 981 (LAC) PAR 72

If an employee decides to resign or terminate the contract as a result of constructive dismissal such an employee is stating that the condition has become so unbearable that the employee is unable to fulfil the employee's core function, namely production. The employee's position is clear: he or she would have continued working had it not been for the employer's conduct, which contributed to creating an unbearable working condition.

The employee cannot only claim that he believes the employment relationship was intolerable. The onus is on the employee to prove to the court or arbitrator that indeed at the time of termination of the contract he truly believed that the employer's conduct affected the continuance of the working relationship. The court in this situation applied the subjective test because it only focused on the role of employee and how he sees and understands an unbearable situation. In reality there are occasions where constructive dismissal is misused to end contracts, because the party has a better offer elsewhere. Therefore the employee can gain money from the employer by using the court. The difficulty in proving intolerable working condition is due to different working conditions and individual experiences.⁸⁸

4.4.2 The case of *Loubser v PM Freight Forwarding*⁸⁹ the commissioner issued the following statement: It is imperative to be careful when using a broad interpretation of what action by an employer contributes to constructive dismissal. Otherwise the danger will be to seem to be encouraging the employees who resign and then change and seek protection of the Act... Also, it will be unfair if the act implements a very strict interpretation. The section 186(1) (e) was aimed at protecting the employees who terminate their contract as a last resort because of the unlawful action of the employer that caused continued employment relationship to be intolerable. The employer has duty not to behave in a manner that is likely to destroy the employment relationship. The relationship between the employee and the employer, in how they relate to one another, plays an important role in determining the existence of constructive dismissal.

⁸⁸ Grogan Dismissal 199

⁸⁹ *Loubser v PM Freight Forwarding* (1998) 7 CCMA 6.13.13.

The understanding of the employee must be compared to the actual reasons that ended the contract of employment. If it appears that the employee had motives for ending employment contract, such as being made a better offer, the employee cannot rely on constructive dismissal.⁹⁰ The conduct of an employer can be considered if it can provide information on the behaviour and attitude just before the employee terminated the contract of employment or resigned.

In terms of section 186(1) (e) of the LRA the employer's conduct should not be regarded as the only breach of employment contract. The Act explains that the requirement for the alleged constructive dismissal is that the employer must create continued employment intolerable for the employee.⁹¹

The close analyses of term intolerable are required. In terms of the Legislature the incidence is not sufficient to rely on constructive dismissal. The incidence that the employee depends on should be given attention and must be of temporary nature. But even a single incident is enough to convince the reasonable employee to decide the employment relationship cannot be renewed or continued.⁹²

4.4.3 In the case of *Beets v University of Port Elizabeth*⁹³ it was concluded that the constructive dismissal occurred only when the employee resigned because of the employer's unacceptable and hostile conduct. Also, sometimes it is believed that the resignation must be because the continued employment was intolerable. Some of the other examples, amongst others, involved deliberately placing the managers in difficult situations without giving them the necessary support in their decision: harassment or humiliation especially in front of less senior staff; victimization of the staff member ; unilaterally changing the employee's job content or terms of employment; significantly changing the employee's job location at short notice ; falsely accusing an employee of misconduct or not being capable of carrying out their job; undue demotion or disciplinary procedures; sabotage of employee's

⁹⁰ Grogan Dismissal 200

⁹¹ Grogan Dismissal 200

⁹² Grogan Dismissal 200

⁹³ *Beets v University Of Port Elizabeth* 2000 8 BALR 871 (CCMA)

work product either directly or indirectly with repeated interruption; confusing or inaccurate direction; or excommunicated deadline changes ; vandalizing the employee's workplace; home or other personal property.⁹⁴

4.4.4 In the case of *CEPPAWU & Another v Aluminium*⁹⁵ the Labour Appeal Court provides definition of the meaning of Section 186(1)(e) and mentions that constructive dismissal is about resignation due to a working condition that has become intolerable as a result of the employer's conduct.

4.4.5 In the case of *Executive Council for the Department of Health, Eastern Cape v Odendaal and Others*,⁹⁶ the labour court concluded that the law regarding constructive dismissal is as follows:

In considering what action on the part of the employer contributes to constructive dismissal, it should be stated that constructive dismissal is not the only form of dismissal. In a normal dismissal it is the employer who puts an end to the contract of employment by dismissing the employee. In a constructive dismissal it is the employee who voluntarily terminates the employment relationship by resigning due to the action of an employer.

4.4.6 In the case of *Watt v Honeydew Dairies (Pty) Ltd*⁹⁷ the court declared that in order find out whether the cause for the resignation was intolerable working condition, the test to be applied is the objective test which does not depend on the understanding of the employer or personal opinion.

According to Grogan the test is partially subjective and partially objective provided the employer's perception was reasonable.⁹⁸ The employee must prove that he or she would have continued working had it not been for the employer's conduct.⁹⁹ This means that the employee should not have any intention of resigning. The employee should also have reasonably believed that the employer would not have changed and ceased the unreasonable and

⁹⁴ Claassen 2009 <http://bregmansattorenys.co.za>

⁹⁵ *CEPPAWU & Another v Aluminium* 2000 CC [2002] 5BBlr 399(LAC) para 30

⁹⁶ *Executive Copuncil for the Department of Health , Eastern Cape v Odendaal and Others* (P504/07)[2009] ZALC5 (13 january 2009)

⁹⁷ *Watt v Honeydew Dairies (Pty)Ltd*(2003)24 ILJ 24 466 (CCMA)

⁹⁸ Anon 2010 <http://solidaritylegalservices.co.za>

⁹⁹ *Jooste v Transnet Ltd t/a SA Airways* 1995 16 ILJ629 (LAC)

intolerable conduct.¹⁰⁰ It is important to have connection between the employer's action and what caused the employee to resign. It must be established whether the employer without intention and reasonable cause behaved in a manner calculated or likely to destroy, or seriously destroy the relationship of confidence and trust between employer and employee.¹⁰¹ It is important to establish whether the employee had other different options such as making use of an internal process like grievance procedure to obtain some relief, apart from resigning or leaving the contract of employment. Failure to use it would be fatal for the employee allegation.¹⁰² In a situation where the employee lodges a claim and the reason for the claim is distress or disappointment as a result of the actions of the employers, constructive dismissal will not have been proved.¹⁰³

The important part is for the employee to prove that a resignation took place. The employee needs to take this into consideration before resigning. The employee needs to take some reasonable steps to try to resolve the problem that led to the unbearable situation he currently faces. The employee firstly needs to make use of the workplace's internal grievance procedures. If there are no internal grievance procedures in the workplace, the employee needs to place his grievance on record and request the employer or HR department to address the grievance within a reasonable time. If the grievance still remains unresolved, the employee should then consider whether the resignation is a reasonable response to the employer's actions.¹⁰⁴

Section 186(1) (e) ¹⁰⁵clearly states that the reason for the resignation of the employee must be because of the employer's conduct, either personally, or that of one of the agents who has performed actions creating the intolerable conditions.¹⁰⁶

¹⁰⁰ Anon 2010 <http://www.solidaritylegalservices.co.za>

¹⁰¹ Anon 2010 <http://www.solidaritylegalservices.co.za>

¹⁰² Grogan Dismissal 201

¹⁰³ Grogan Dismissal 202

¹⁰⁴ Anon 2009 <http://www.retrenchmentassist.co.za>

¹⁰⁵ Section 186(1)(e) of the LRA

¹⁰⁶ Anon 2010 <http://www.worklaw.co.za>

4.4.7 In the case of *Nedcor Bank Limited v Harris*¹⁰⁷ the employee alleged that his resignation amounted to constructive dismissal. The resignation was triggered by his frustration with his immediate supervisor, Mrs Schroeder, and it was about the introduction of a performance improvement programme. The court issued the following remarks: In cases where an employee alleges constructive dismissal, the test is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract: The court's function is to look at the employer's conduct as a whole and determine whether its effect is such that the employee cannot be expected to put up with it. Secondly, the objective assessment of the employer's conduct that may have made the continued employment intolerable has to be assessed in its totality and not piecemeal. Thirdly, the mere fact that an employee resigns because work has become intolerable does not itself make for constructive dismissal, because the employer may not have control over what makes conditions intolerable. So the critical circumstances must be have been of the employer's making, but even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that do not necessarily make an employee's position intolerable. More is needed: the employer must be responsible in some way for the reasonable conditions. The conduct must have lacked reasonable and proper cause.¹⁰⁸

The alleged complaints of constructive dismissal, based on the conduct of a fellow worker, will not prosper unless the employer was aware of it and failed to take action to remedy the situation. Also, the employer cannot be blamed for creating intolerable working conditions for *an* employee if those conditions were caused by factors beyond the employer's control.¹⁰⁹

¹⁰⁷ *Nedcor Bank Limited v Harris* 2009 ZALC 123

¹⁰⁸ Anon 2010 <http://www.worklaw.co.za>

¹⁰⁹ Roets & Du Plessis Attorney Constructive Dismissal <http://www.roetsduplessis.co.za> (date of use 12 April 2011)

If an employee registers a complaint of constructive dismissal as a result of a conduct by a colleague, the complaint will not succeed unless the action of the co-worker comes to the attention of the employer who then fails to take the necessary action to address the conduct. This means the employer cannot take the blame for creating intolerable working conditions that was caused by the third party beyond his control.¹¹⁰

4.4.8 In terms of section 60(3) of the Employment Equity Act¹¹¹ it is stated that if the employer fails to take the necessary steps to eliminate alleged conduct, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to contravene that provision.

The last criteria that need to be proven in order for the allegation of constructive dismissal to succeed are whether the employee had no motives given the circumstances to resign from employment. If there were ulterior motive it is a degree of the motives.¹¹² In other instances the employees may rightfully conclude there is no action from their side to bring solution to the situation while in some situations the employee is expected to also attempt to remedy the situation. If it appears in other situations that the employer has capability of bringing solution to the situation involving the superior or colleague, the employee must register a complaint before taking decision to resign. It is important to show that the employee was not able to deal with the situation. In some instances it is difficult to find out if it was the conduct of the employee which was the cause of the termination of the employment relationship.¹¹³

4.4.9 In the case of *Murray v Minister of Defence*,¹¹⁴ the appellant, a commander in the military police, alleged that he was constructively dismissed, because he became the subject of investigations into allegations of serious misconduct. He was subsequently found not guilty. He was taken away from his post as commanding officer of the military police station at

¹¹⁰ Grogan Dismissal 203

¹¹¹ Employment Equity Act 55 of 1998

¹¹² Grogan Dismissal 203

¹¹³ Grogan Dismissal 197

¹¹⁴ *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA)

Simonstown and transferred to a supernumerary position at the Naval Staff College at Muizenberg. While the military police office headquarters in Simonstown were restructured and the appellant's post was downgraded from the rank of commander to that of lieutenant commander. The appellant was offered a post at military headquarters, which he declined. After two years at the staff college, the appellant took a decision to resign and filed a complaint in the High Court for damages for constructive dismissal. The court finding was that nothing in the situation that the appellant complained about caused him to resign, and that the employment relationship had not been rendered intolerable. The High Court dismissed the action with cost. The appellant then referred the matter to the Supreme Court of Appeal.

The court, amongst others, held as follows: In assessing whether the conduct of the employer made the relationship with the employer intolerable, the court should not separate the employee's issues, meaning to consider them separately or isolate them, and concludes that each was neither important to the decision of the employee's resignation nor rendered his position intolerable.

They also state that the action of the employer must be responsible in general and directly affect reasonable and sensible judgement, in a manner that the employee can be expected to tolerate it. The action that the employee alleged must be of the employer's conduct. The court also stressed the following: The fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes the condition intolerable, so the critical circumstance must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do to make an employee's position intolerable. More is needed: The employer must be culpably responsible in some way for the intolerable conditions; the conduct must have lacked 'reasonable and proper cause'. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case.

The court takes note that the employer has a responsibility to treat employees with dignity and create a more conducive working environment; failure to comply will be regarded as having ended the employment relationship by putting pressure on the employee to resign. The employee who claims to have been constructively dismissed must support the claim with evidence that the resignation was voluntary or intentional to terminate relationship. The moment the employee makes a claim it must be established whether the employer action damaged the relationship of trust and confidence with the employee. Once the relationship has been assessed fully the question to be asked is whether the employee was expected to tolerate the conduct. The court studied all the relevant facts and concluded that the appellant's work conditions were intolerable, and this was the result of the navy's conduct. Furthermore the court asks if the navy had reasonable intention of causing the employee's working life intolerable. The court mentioned that after studying all the facts, the navy did not have reasonable cause for making the intolerable condition and the court maintains that the appellant had been constructively dismissed, and was entitled to compensation for such issues as he could prove. The appeal was held with cost.

In the case of *Joordan v CCMA*¹¹⁵ the appellant was employee of an estate agent by the sixth respondent company under the leadership of Mr G, the majority shareholder of the company. Her husband managed, and was a minority shareholder in, a branch of the company. The gradually deteriorating of the relationship between Mr G and the appellant's husband, made Mrs G take the decision to conclude the restraint of trade agreement with all employees, which he gave them 30 days to consider. The appellant tried to find out what would happen if she refused to sign the restraint agreement. Mrs G responded that she will not be fired, but that there is a possibility that she would be retrenched.

The appellant kept asking Mrs G for the letter regarding her future, but her attempts failed and she was forced to resign. The appellant eventually

¹¹⁵ *Joordan v CCMA* 2010 31 ILJ 2331 (LAC)

considered the employment with her husband at an agency he had established in competition with the company. She referred the matter to CCMA for constructive dismissal. The commissioner found that she had failed to prove a case of constructive dismissal in terms of section 185(1)(e)(e) of the LRA 1995. The Labour Court dismissed her application and the appellant approached the Labour Court.

The court stated that there are clear sets of guidelines on how to deal with dispute involving constructive dismissal. The court mentioned that they had developed two stage approaches. Firstly, that the employee bears the initial onus of showing an objective standard. Secondly, that the employer has rendered the employment relationship so intolerable that no other option is reasonably available to the employee but for termination of their relationship. Then the court decided on whether the dismissal was unfair. The employee can only be left with no other alternative but to resign in order to rely on claim of constructive dismissal. The employee must show proof to support that she was left with no other option but to resign because the employment relationship had become intolerable. The court viewed all the available evidence and reasons pertaining to the case to find out whether the company has any reasons to act so intentionally that it left employee with no option but to resign. There was no proof to support the claim that there was threat of dismissal. The court stated that tension in the employment relationship did not justify constructive dismissal. The court dismissed the appeal with cost.

4.4.10 In the case of *Chablis v CCMA*¹¹⁶ the appellant tendered his resignation of notice on 1 April 2008, and on the same day the respondent accepted his resignation and informed him that he was not required to work out his month's notice. On 29 May 2008, the appellant referred a dispute to the CCMA, which informed him that the application was late and that he must apply for condonation. In the application for condonation the appellant stated the facts of the case as follows: On 1 April 2008 he tendered his application for resignation. The referral was accordingly 57 days late. Condonation was refused. On review the appellant claimed that he was given the incorrect date

¹¹⁶ *Chabeli v CCMA* 2010 4 BLLR 389 (LC)

of the dispute, as well as the fact that he had remained in the respondent's employ until 20 April 2008.

The Court held the views that if the employee resigned from employment and failed to disclose in his letter of resignation details about the employer's conduct which led to continued intolerable employment, he had failed the onus placed on him to prove that he had been dismissed constructively. The court further stated that the date of termination of employment was the date on which the employee resigned, not the date on which he received his last pay cheque, and that the referral to the CCMA was therefore out of line and required condonation.

4.4.11 The case of *Daymon Worldwide SA Inc v CCMA*¹¹⁷: the court looked into fundamental reasons that assist the employee to succeed in claiming constructive dismissal. The focus is on the employee to prove that the employer is to be blamed for contributing to factors that made the employment intolerable. When the employee failed to provide proof that these factors were not of the employer's conduct, the court came to the conclusion that the employee had failed to prove that she was constructively dismissed.

In the case of *Britz and Acctech Systems (Pty) Ltd*¹¹⁸ the employee alleged that her employment had been made intolerable by offensive remarks and by her employer's conduct, and that she had been constructively dismissed. The CCMA commissioner before delivering his award looked into a brief study of the stages of constructive dismissal, focusing on both the LRA 1956 and the LRA 1995 and the concept on which it was based. The commissioner compared this to the behaviour of the employer and had no doubt that the employee had no option but resign from her employment contract and that she was constructively dismissed.

¹¹⁷ *Daymon Worldwide SA Inc v CCMA* (2009) 30 ILJ 575 (LC)

¹¹⁸ *Britz and Acctech Systems (Pty)Ltd* (2009) 30 ILJ 1150 (CCMA)

In the case of *Vorster and BMC Management Trust*¹¹⁹ the employee terminated employment relationship as the result of a strained relationship with the third party. The court held the view that the employee cannot claim for constructive dismissal on the claim that was not of the employer's conduct because the intolerable working conditions might not have been of employer's conduct.

In the case of *Coetzee v A &D Tyer Manufacturing Tech (Pty) Ltd*¹²⁰ the applicant was working for the respondent as a CNC programmer and machinist for about three years. The applicant terminated his employment contract on 1 December 2008. He stated the reason as being constructively dismissed after several encounters with his new foreman. The applicant claimed that he was subjected to aggressive behaviour, tantrums and abusive language by his new foreman. He reported the incidents to his management but no action was taken. The applicant was informed by management that he would have to work hard to earn respect.

The applicant was subjected to various disciplinary hearings for alleged abuse of his sick leave, as well as staying out of work without permission. He had confrontation with the foreman who threatened to dismiss him. The commissioner tried to establish whether the applicant was constructively dismissed and the dismissal unfair.

The commissioner focused on the meaning of constructive dismissal in section 186(1) (e) of the act and the case law. He held the view that the employee who laid claims of constructive dismissal must reasonably prove that the employer's conduct had made continued employment relationship intolerable. Also, the employee must prove that he had no intention of ending his employment relationship. Lastly, the employer's action must be looked at objectively.

The commissioner found that the employee had failed to prove constructive dismissal. The respondent's conduct was looked at objectively, and it was decided that nothing on the part of respondent had contributed to rendering

¹¹⁹ *Vorster and BMC Management Trust* 2009 30 ILJ 1421 (CCMA)

¹²⁰ *Coetzee v A &D Tyer Manufacturing Tech (Pty) Ltd* 2009 JOL 23550 (MEIBC), hereafter referred to as the Coetzee case

continued relationship intolerable. It was found that the respondent was reasonable with the applicant to the fact that he allowed him to attend to his personal and health problems. The applicant failed to prove a constructive dismissal and therefore the commissioner concluded that the applicant was not constructively dismissed.

To summarise, the claim of constructive dismissal is not enough if the employee believed the employment relationship was intolerable. The onus is on the employee to prove to the court or arbitrator that the employer's conducts during the time of ending the contract of employment relationship were in such state that the working relationship was intolerable. The court applies the objective test because they only look into how the employee sees and experiences an unbearable situation.¹²¹

The employee is not expected to make claims based on the perceptions that the employment relationship was intolerable. The complainant must support the claims with sufficient proof that will be enough to convince the court or arbitrator that during the time of ending the contract of employment they were convinced that the employer's conduct intended making a working relationship intolerable. It is clear that the type of test that the court applies is subjective because it focuses on perception and the experiences of the employee in relation to an unbearable situation.¹²² The emphasis on the conduct of employer which could be interpreted to be contributing to constructive dismissal should not be generalized as it could invite the unintended consequence of attracting the employees to terminate their contract and seek aid of the Act. However, the strict application of the act will be disadvantaging innocent workers from gaining protection from the act which in terms of section 186(1)(e) states that the employee must be faced with a situation that does not provide option, but rather ends the employment contract, in order to be covered by the act. The employees should remember that they have the responsibility to avoid acting in a manner that would be likely to destroy or undermine the employment relationship.¹²³

¹²¹ Pretoria Society for the Care of the Retarded v Loots

¹²² Pretoria Society for the Care of the Retarded v Loots

¹²³ Loubser v PM Freight Forwarding

In order to find out whether the employment relationship had become intolerable the court applied the objective test. Subjective understanding of the applicant should not be regarded as the final results in determining whether the employer's conduct is intolerable. The court focused on the employer's conduct in general to find out whether it could be reasonably justified in expecting the employee to accept it. The conduct of the parties should be looked at as a whole and its cumulative impact assessed.¹²⁴

The claims with regard to employer's conduct which make the employment intolerable must be assessed fully and objectively. It is possible that the employer might not have power in what makes the working conditions intolerable. The reality is that the conditions which contribute to intolerable conditions must be the employer's doing. The role of the court in determining whether constructive dismissal took place is carefully applied. The employee is expected to provide the court with proof for the allegations of constructive dismissal to succeed. The claims of constructive dismissal which are only based on belief will not succeed if not supported by evidence.

4.4.12 In the case of *Kruger v CCMA & Another*¹²⁵ the employee claimed that she had been constructively dismissed. The commissioner found that there was no evidence to the allegations and it was important for the employee to make use of the internal process available to them before taking the decision to resign. The constructive dismissal as an alternative may not be used if there is another option available for the employee to utilise. It would be unfair to the employer to be accused of and subjected to incorrect perceptions in order to be penalized by the employee. The employees should not conclude the outcome of lodging a complaint against the employers through grievance procedure, especially if the employees considering resignation with allegation of constructive dismissal never consulted with the employer to raise issues of dissatisfaction. Also, where there were remedies available to the employee and these had not been followed, the employee has failed to prove that she was subjected to constructive dismissal.

¹²⁴ *Marsland v The new Way Motor & Diesel Engineering* 2009 30 ILJ 169 (LC)

¹²⁵ *Kruger v CCMA & another* (2002) 23 ILJ 2069 (LC)

4.4.13 In the case of *Old Mutual Group Scheme v Dreyer & another*¹²⁶ the respondent was employed by the applicant as its winemaker. In July 2009 the applicants received a complaint from an irate German customer that the container of Asara Ebony purchased from the applicant was oxidised. On Saturday 25 July 2009, before formal disciplinary charges had been laid, the applicant resigned. The court looked into the definition of Section 186(1) (e) and applied the test to determine whether the employee was constructively dismissed. The court held that when an employee resigns or terminates the employment as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil his/her duties. The employee is in fact saying that he or she would have carried on working indefinitely had the unbearable situation not been created. He does this on the basis that he does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If he is wrong in the assumption and the employer proves that his/her fears were unfounded, then he has not been constructively dismissed and his/her conduct proves that he has in fact resigned. The employee who failed to use the internal process available for such grievance procedure can succeed with the claim of constructive dismissal.

4.6 Conclusion

It is clear that the South African courts use the test to determine whether indeed a constructive dismissal took place, and that the test is partly subjective and partly objective.¹²⁷ The understanding of the employee during the time of ending the contract, as well as the manner in which termination took place should be considered.¹²⁸

In succeeding with the claim of constructive dismissal the employee should be in a position to provide evidence to convince the court or arbitrator that the conduct of the employer was such that it made the continued relationship of employment intolerable. The court applies the test based on subjective

¹²⁶ *Old Mutual Group Schemes v Dreyer & another* (1999) 20 ILJ 2030(LAC)

¹²⁷ Grogan Dismissal 199

¹²⁸ Grogan Dismissal 199

because the court only looks at how the employee sees and experiences an unbearable situation.¹²⁹

It should be taken into consideration that the purpose of section 186(1) (e) was purely to protect the employees that end their contract as a last resort due to the conduct of an employer that makes continued employment relationship intolerable. There must be a link between the employee decision to resign and the employer's behaviour in order to prove constructive dismissal. The employer's behaviour must have provided proof without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy it, or seriously damaged the relationship of confidence and trust between employer and employee.¹³⁰

It is clear that the courts are using the objective test to determine whether the resignation was due to the employer's conduct. The legal systems state clearly that the employer and employee have a duty to treat each other with mutual respect in the workplace. The employer has the responsibility of creating a working environment conducive to the employee's well-being. The employees also have the responsibility to communicate if their employer's conduct makes it unbearable to continue with normal duties. The intervention strategy in dealing with issues of constructive dismissal with the aim of cutting legal cost and production will be to train the employees and employers to know and understand their limits in the workplace.

¹²⁹ Pretoria Society For the Care of the Retarded v Loots

¹³⁰ Anon 2010 <http://www.solidaritylegalwiseservices.co.za>

CHAPTER 5

AN EVALUATION OF THE GRIEVANCE PROCEDURE IN THE SAPS

5.1 INTRODUCTION

This paper sets out to examine the main sources behind grievance procedure in detail. The focus will be on the South African Police Services, the labour movements and the acts regulating the handling of grievance procedure within the departments.

The methodology of this paper will be to first look into the theories of grievance procedure such as looking at the purpose and role of in- house grievance procedure, secondly management of grievance procedure within the departments, thirdly what issues are raised in grievances, and fourthly the agreement on the Employment Relations Manual 3/2006 and case studies and recommendations.

The dynamic employment relationship attracts different personalities to the workplace environment. The interactions amongst these personalities bring with them issues like personal problems, complaints against immediate supervisors, fellow colleagues and dissatisfaction with their working conditions. Grievance is widely defined. The rationale for such definition is the fact that members of the SAPS perform an essential service and as such have no other avenue of protest action at their disposal and therefore make use of the prescribed procedure.

The International Labour Organisation definition of the essential services means 'A service the interruption of which endangers the life, personal safety or health of the whole or part of the population'¹³¹. The SAPS appoints its members under the police act, which means they are being regarded as performing essential services, so they may not strike. Those appointed under the public act may strike. These workers perform support functions such as administration, Human Resources¹³², Finances and supply chain management. These workers are not included in the definition of essential services. To deal effectively with any form of dissatisfaction it must be possible to bring within the definition of a grievance. In support Michael Jucius states that 'A grievance can be any discontent or dissatisfaction, whether expressed or not, whether valid or not, and arising out of anything connected with the company that an employer thinks, believes or even feels unfair, unjust or inequitable'¹³³. The employees have rights to raise issues against their supervisors, fellow colleagues and dissatisfaction about their working conditions. On many occasions the SAPS members work overtime with the understanding that they will be remunerated as stated in their contract, but the organization will simply not pay them or payment of money due will be delayed. This affects the morale of the works negatively and leads to dissatisfaction. In most instances the high ranking officer would go as far as instituting the disciplinary steps to junior officers for refusal to work. This matter will be brought to the attention of the union representative who

¹³¹ ILO 1963

¹³² Rothwell,W,J &Kazanas , H,C .(1994) Human Resource Development: A Strategic Approach(Revised) ,HRD Press Inc: Masahusetts.

¹³³ Agreement 3/2006 Annexure D : Safety and Security Sectoral Bargaining Council

will then challenge the decision through the labour relation act. This coincides with Derber's reference to grievance handling patterns. In particular, 'Aggressive pattern (Derber's type A) states that in this situation the workers feel much dissatisfaction which they articulate as grievance and both parties see most of the issues as zero-sum. Workers do not trust or respect management and vice versa, because grievant possess a good deal of influence which is expressed in the form of threats and the use of force¹³⁴. It is not only the individual disputes that can be addressed by the grievance procedure, but also collective disputes that are of direct concern to each individual.

The only qualification to this definition is that dissatisfaction must arise within employer-employee relationship in the SAPS. If the matter does not fall within the employment relationship it cannot be addressed in terms of this procedure¹³⁵. The matters that will normally fall within employment relationship include promotions, transfer and working conditions. In support Hunter and Kleiner (2004) explains that the most common complaints by employees include unfair treatment by the employer, broken employment agreement and employer communications, and defamation which shows that unfairly treated employees may complain about discrimination or personnel decisions such as promotions, bonuses, financial rewards¹³⁶ or discharge where employee felt discrimination was present.' The word dissatisfaction is defined as anything that disturbs an employee, whether or not work related. The employees have the right to raise issues about their supervisors, colleagues and working conditions and unacceptable treatment. They may lodge complaints about issues related to employment without fear of victimization. It has come to the attention of the unions that employees are hesitant to use the grievance out of fear of victimization or lack of information, especially if it involves the immediate supervisor.

The police culture which emphasizes the rank system which protects the senior officer from being challenged by junior officer contributes to the

¹³⁴ South Africa(1995) South African Police Act , Act 65 of 1995 Government Printers: Pretoria

¹³⁶ South Africa (1999). Public Finance Management Act 1 1999 Government Printers :Pretoria.

problem. Some supervisors use this process negatively to silence the junior members from raising their concerns. The victimization is applied in different forms such as rating of performances, being overlooked for attending developmental courses and overloaded with work to create a difficult working environment. The dispute relating to the grading or rating of an employee could be raised by completion of a form, SAPS 557(Pep Disagreement form)¹³⁷. This process also consists of steps and time frames to be followed with intention of addressing dissatisfaction. The guideline that regulates the rating of an employee is made clear by the policy document on how the procedure should be followed. The problem arises from some managements not adhering to the policy. The procedure states clearly that the member, followed by the immediate supervisor, must rate him/herself. The final rating is a consolidation of the two ratings and requires a meeting between the employee and the supervisor to finalize the rating. If there is a disagreement regarding the two ratings, the meeting gives both parties the opportunity to give each other reasons or evidence to support the disagreements.

5.2 Internal remedies available to the members

Most of the problems relating to the performance enhancement program are that it is not executed in good faith because some of the supervisors do not sit with the employees when they finalize the agreed ratings. The member tends to sign the PEP document without seeing the final rating from the supervisor, which means the members will mostly find out about the final rating when they have to apply for promotions that they do not qualify for because of the poor rating. However, there are remedies available to the members should they not be satisfied with the above procedure.

Step 1

The aggrieved employee completes the section and also attaches all relevant documents to support why he/ she should be given a better rating. At this level it is problematic because some expectations are created. In a situation where the member has no record of evidence to support his claim except that

¹³⁷Cardy , R & Dobbins , G (1994) Performance Appraisal: Alternative Perspective. South Western Publishing Co: Cincinnati

the supervisor led him to believe that he will be rated average, it becomes his word against that of the supervisor. In most cases it is unlikely for the supervisor to admit her/his wrongdoing. It therefore again becomes a wasteful and fruitless exercise. This shows that the adherence to the instruction regulating the PEP¹³⁸ will minimize the rise and confusion regarding the procedure.

Step 2

It required the response of the supervisor to motivate the rating he/she gave the employee. This process must be attended to within three days. If the matter is still not resolved it must be forwarded to the next level of supervisor. Once more, if the supervisor already signed the final rating it will be unlikely for him/her to change the decision, especially if the junior member has already signed without knowing the final rating score. In the situation where the supervisor has raised the expectation he is not going to be willing to agree to have raised the expectation. The senior management is reluctant to challenge one of their own, especially if the complaint involves the lower officers. The situation is worsened by the management deliberately ignoring numerous grievances¹³⁹ about the same topic. One of the common reasons is caused by office politics determining how managers should act. An example of this reluctance is a situation in which management is not willing to take action against a fellow manager who treats employees with a lack of respect. It becomes clear that the management is aware of the problem, but for reasons known to them chooses not to take action against the perpetrator. The other challenges lie in a situation where the supervisor is transferred to another unit or province, resulting in the matter remaining unresolved as it will be shifted to the supervisor. Mostly these grievances are unlikely to be resolved and will spread in organizations and, while latent, become conflicts waiting to flare up.

Step 3

¹³⁸ Agreement 3/2006 Annexure B : Safety and Security Sectoral Bargaining Council

¹³⁹ Agreement 3/2006 Annexure D : Safety and Security Sectoral Bargaining Council

The supervisor has ten days to deal with and respond to the matter. All the documents and findings used in the previous stages will be attached. If the matter still cannot be resolved it must be referred to the next high level. The lodging of the grievance is supposed to draw attention to a particular problem, but the management's lack of action contributes to the problem.

Step 4

It is dealt with by a counter officer who has ten days to address the matter. The documents used in other stages will be attached for thorough perusal by the high ranking officer. In the final phase, step five, the supervisor will comment on the decision which will state clearly the action taken to either change or keep the rating unchanged. If the aggrieved still feels that the problem is still not resolved or resolved satisfactorily the aggrieved must resort to the route of grievance procedure. This process takes place and is finalized within a particular station or unit. The process is still being handled internally so it is unreasonable for the process to be dragging on. Much time and many resources could be saved if communication is maintained from the beginning to avoid the lengthy, financially and emotionally exhausting process. This is where the objectivity of principle of fairness is questioned as the senior management look after their interests. In most cases this is interpreted by the high ranking officers as a challenge to their authority. The SAPS is still a force organization so it relies on ranking structure as protocol. The instruction disseminates from the top management to the lower officers and in most cases challenging the instructions could lead to the departmental charges of a lower ranking officer.

If the reason for questioning was related to being overlooked for promotion, the matter is resolved even if it will be to the member's advantage and will not necessarily mean that the member will be promoted as he/she will have to wait for the next circle of promotions. Therefore there is a need to inform union members about the skills to empower themselves and about their rights to recourse and how to use these. It is a fact that sometimes the

employee abuses the process to fulfill certain needs. For example, a member seizes the opportunity for promotion to another station/ unit where he/she knows that based on the skills, qualifications or equity he/she will be eligible for promotion. The person will proceed to accept a transfer voluntarily to another station/unit with the belief that he/she will be eligible for promotion to the next level. If this does not materialize the member voices the resulting frustration by complaining about issues that were not relevant before.

It is important that in order for the relationship between the employer and employee to remain healthy the grievance procedure¹⁴⁰ plays an effective role which is fair, consistent and equitable for employees.

The current labour relations systems in South Africa is dynamic, because of the constant environmental reforms that affect the various workplaces and impact positively on the organization. There are many factors that impact on the activities and attitudes of various role players in the working environment.

5.3 Effective Manners in Dealing with Grievance Procedure within the SAPS

The speedy resolution in dealing with the grievances plays an important role in developing a positive result which promotes a healthy working environment in the SAPS. The biggest challenge the organization is facing is the resolution of grievance in a speedy manner within the time frame of 30 days, in terms of which grievance should be resolved departmentally.

5.3.1 Literature Review

It is important that in order to promote sound Labour Relations the managing of grievance should be implemented in terms of proper procedures when handling grievances. The grievance procedure¹⁴¹ should promote the rapid resolution of grievances. The content of effective grievance procedure may differ from one context to the other, but should consist of the following issues,

¹⁴⁰ Agreement 3/2006 Annexure D : Safety and Security Sectoral Bargaining Council

¹⁴¹ Agreement 3/2006 Annexure D : Safety and Security Sectoral Bargaining Council

in terms of the 'Guide to designing and implementing grievance mechanism for development projects':

- *The grievance procedure should be transparent when grievance is lodged and proof in the form of a receipt should be in place when registering a complaint.*
- *The grievance should be assessed on merits in order to identify issues and concerns raised by the aggrieved party. The gathering and obtaining of information should take place. This is followed by looking into how the matter could be resolved.*
- *The ability to resolve grievance procedure is crucial to investigating the cause of the problem. The procedure should be implemented in terms of the approved standards and criteria.*

5.4 Time Frame

The communication should take place from the initial stage of lodging a complaint to building up the grievance resolution process. The aggrieved party should be given feedback continually to update him /her on the progress in an attempt to resolve grievance. It is important that the organization adheres to the issue of time frames when grievance is being lodged. The inability to comply with the time frame may result in negativity, which will impact on lower production and lack of confidence (Page 9) in the organization's commitment to the grievance procedure. The continual communication of grievances needs to be effective in an attempt to resolve disputes. The management needs to empower their employees who are dealing with grievance while training to create a sound working environment.

5.5 Communicating the grievance procedure

It is a fact that the effectiveness of grievance procedures relies heavily on adequate communication throughout an organization. This means that if the employees are not informed about the roles of the grievance procedure, they would resort to other measures to seek satisfaction for their dissatisfaction. To empower the employees and improve their knowledge, it should be made

compulsory to include a clause in their employment contract to explain grievance procedure. The induction and working course should aim at dealing with the complex matters of grievance procedure in the workplace rather than serve as an introductory course. The top managers face challenges of availing programs to the managers on how to deal with grievance procedures. According to Swan JP (1981) "senior managers are responsible for advertising the existence of the grievance procedure to educate and make other supervisors and managers know how to implement it appropriately". The information can be spread in various forms, such as grievance procedure wall post charters, intranet, entry into registers such as IB¹⁴² (Information Book), notice boards and union post newsletters aimed at promoting awareness. Rollison et al state that as early as 1996 that legislation in the United States of America has been requiring that new employees be informed of grievance procedure applicable in the organization. This would make potential employees know what steps to take when experiencing grievance.

The grievance procedure should form part of the SAPS basic training curriculum¹⁴³. This will ensure a better understanding of the concept. Bendix (2005) stresses the importance of training on the grievance procedure applicable to the workplace either during the induction process of a new employee or in other training session.

'The barriers of failing to communicate this process will result in a failure on the part of organisation to promote a sound labour practice in the workplace. The poor communication regarding grievance procedure has placed most supervisors in a difficult situation when faced with the issues of grievance procedure to be resolved. In the organization where grievance is approached by means of authority rather than solution, it has made many supervisors to either ignore or use their rank to influence the outcome of the decisions. This left the aggrieved with few options to challenge the decisions due to fear that this will be translated as challenging the status of a supervisor. In addition Phillip NJ (2003) states that training on performance

¹⁴² South African Police Service :Register Book

¹⁴³ Philip jj "Return on investment in training and performance Programs"2nd edition 2003

improvement programs may reduce the numbers of grievances lodged which in turns is a reflection of the success of such programme.

The grievance procedure can be lodged individually or collectively. The collective grievance takes place where more than one of the members is affected by the same issues, such as deduction of danger service allowance for members who were working at the stations, but who are now transferred or promoted to basic training SAPS Academy because of the nature of the work which does not expose them to any danger, thus forfeiting their danger allowances. Contrary to that is the fact that any police official who wears a uniform is exposed to danger. It is important that the organization implements a tracking system on the progress of cases reported to ensure that the cases are dealt with within the prescribed timeframe. In the SAPS the handling of grievances which are reported are mostly dealt with at the station or component and are processed in such a way that they are resolved at that level, even if it is not to the satisfaction of the employee, because the referral of the matter to high authority will reflect negatively on the management of the component. Therefore it becomes difficult for the organization to keep track of the number of cases dealt with at a particular component. The department can address this matter by placing every case on a database linked to either the provincial or national database. This will ensure that progress as well as feedback is monitored effectively. The grievances lodged from different units need to be compiled on a monthly basis to see the similarities and differences, as well as the resolutions of those cases. The handling and the conclusions of the cases which are similar can be used as precedents of other matters.

The grievance follows a certain procedure to enable the aggrieved employee to resolve the matter according to his or her satisfaction. In other words, grievance procedure provides a hierarchical structure for presenting and resolving differences in the workplace. The procedure outlines different stages¹⁴⁴ to be followed when parties engage each other in finding meaningful solution to the perceived problem. The individual or group has

¹⁴⁴ Republic of South Africa: Public Service Commission rules for dealing with the grievance of employee in the Public Service. Government gazette

the responsibility to monitor the development of each stage by being in possession of necessary evidence, the time frame and the steps the grievance followed. The grievance procedure consists of formal or informal processes which are intended to promote the rule of natural justice. Employees are allowed to state their side of the story and be free of intimidation in terms of the *audi altarem partem* rule. This allows the complaints to be resolved in a timorously and less expensive manner to avoid litigation. It also encourages the grievance to be resolved during the informal discussion stage. It is important that remember that when a grievance is lodged it should at all times be treated with fairness and confidentiality before the commencement of a hearing, as well as during and after the grievance hearing according to the procedure.

The union has an important role to play in making sure that the management followed and observed the process, and most importantly, that the employee is protected¹⁴⁵. It is important that any employee raising a grievance should continue working normally while a procedure is being followed, unless the aggrieved feels that due to the nature of the grievance and the person to whom the grievance is directed, the working environment is no longer positive.

During the stages of the procedure an employee has the right to be accompanied by shop stewards or a colleague of their choice. The usage of the shop stewards does not take away the right of the employee from meaningfully contributing to the hearing. The records and documents used during the proceeding should be kept confidential.

5.6 Informal Stage

An employee who wants to raise concerns or complaints must first discuss these with his/her immediate supervisor. If it involves the supervisor, the most high ranking officer must be approached. If the high ranking officer (commander of the unit/station) is also involved the designated officer should refer the matter to an external high senior officer for investigation. The

¹⁴⁵ Agreement 3/2006 Annexure D : Safety and Security Sectoral Bargaining Council

supervisor and the employee must look into the allegation and if possible decide on the corrective measure. The supervisor may give a report to the aggrieved person/s. It should be taken into consideration that the less serious grievance can be dealt with by using an informal route. However, a more serious and sensitive grievance requires a formal hearing. A knowledgeable and skillful supervisor will understand the meaning of lodging a grievance because the effective handling of grievance might also change the face of the working environment. By listening to the complainant the supervisor might also realize that the employee just needed somebody at a senior level to listen and does not necessarily have a concern. If the employee still feels that the matter has not been resolved to his/her satisfaction, a written concern can be raised formally.

Stage 1

The grievance officer will try to assist the employee in collecting sufficient evidence on the basis of the grievance. The prescribed form will be completed and submitted to the Human Resource¹⁴⁶. The form must be completed with care and full details of the grievance must be submitted. The desired outcome should be specified clearly on the form. The desired outcome should also be reasonable and achievable. For example, if a complainant is aggrieved for not being promoted after he applied, a grievance can be lodged. In reply to the intended outcome which is to be achieved he cannot say that he must be promoted, because the authority to carry out that mandate might be with the promotional committee. The member can request that the criteria and selection procedure be explained to him as a required outcome. If the grievance has been lodged against any party or member that party or member should also be given documents to allow them the opportunity to respond to the allegation. The parties involved will be given opportunity to present their evidence, call witnesses and also cross question the witness to prove their case. If the matter involves a group of employees a spokesperson should be identified to raise the matter with the supervisor. During this stage the employee will be invited to a meeting to

¹⁴⁶ Nel PS et al: Human Resources Management "Fifth Edition 2005

discuss the matter and will be allowed to serve suggestions on how the matter should be resolved. This process will normally take place within ten working days or as soon as possible, depending on the grievance.

The senior officer will then respond to the grievance in writing within three working days of the meeting. If the supervisor is unable to do so, or fails to resolve the grievance within 3 working days, or such extended period as agreed upon between the parties, the grievant may proceed to lodge the grievance with the Grievance Office¹⁴⁷. If the grievance is found to be invalid the findings must be recorded in writing and signed by the aggrieved party. The employee has the right to appeal the decision if not satisfied with the outcome.

Stage 2

If the matter still remains unresolved at this stage, the union representative or the spokesperson of a group and the grievant may refer the matter in writing to the next level of management within 7 working days. The employee will be invited to a meeting to look into how best the matter can be resolved. The response and suggestions must be entertained seeking to arrive at the corrective measures. In the event of the parties being unable or failing to resolve the grievance within the stipulated 7 days, the grievant may proceed and refer the grievance to the joint grievance resolution team whose report shall serve as the basis for processing the grievance.

The grievant officer is obliged, before the grievant refers the matter to the joint grievance resolution process, to compile a comprehensive report outlining the reason why the grievance could not be resolved. This report must be submitted to the joint grievance resolution team, and shall serve as the basis for processing the grievance. The joint Resolution Team which consists of the FTSS¹⁴⁸ (full time shop stewards)/shop stewards) and the LRO (labour relation officer) will work together in an attempt to resolve the grievance. This process should take 10 working days or less to be finalized

¹⁴⁷ Republic of South Africa: Public Service Commission: Guidelines on new grievance rules 12 August 2004

¹⁴⁸ Agreement 3/2006 Annexure D : Safety and Security Sectoral Bargaining Council

after the referral. The manager will then write a letter within ten working days of the meeting. The chairperson must try to advise the employee on the most effective and best corrective measures. This should be done in writing, stating the decision that was taken. The letter will also include details of the employee's rights to appeal if still dissatisfied. The employee can raise the grievance at the next level.

Stage 3

If the matter remains unresolved at this stage, the spokesperson or the group may refer it in writing to the next level of management within ten working days. The labour relation officer, employee, union representative and SAPS management (joint grievance resolution team) will be involved at this level. The union representing the employee will lead the meeting and give reason for the dissatisfaction with the stage 2 response. The employee will be invited to a meeting to discuss the matter and provide suggestions on how to resolve the problem. This will normally take place within ten working days or less, depending on the grievance. The manager will then write a response (letter) within ten days. In the event of the grievance officer being unable to resolve the matter the grievant can request an internal mediation.

Step 4

The joint grievance resolution team shall refer the grievance, in consultation with the grievant, to a mediator for resolution. This report must be submitted to the joint grievance resolution team and will serve as basis for processing the grievance. This will also depend on the nature of the grievance as it might also take long. In the event of the grievance still not being resolved it shall be referred for internal mediation. A report by the joint grievance resolution team outlining the reasons why the grievance could not be resolved must be submitted to the internal mediator; the report shall serve as the basis for processing the grievance.

5.7 Internal Mediation Proceedings

The mediation is a process that will follow after conflict has started due to differences and conflict between the employees and employer. When conflict and differences arise, the relationship at work will be affected and therefore the process of mediation will start with the aim of finding a solution to these problems. The mediation process involves a third party who serves as a neutral facilitator during the dispute, with the intention of reaching a solution that is amicable to the parties involved. Unfortunately, in the South African Police Services, the mediator is normally employed by the organisation and in most cases they carry the mandate of the organisation as the decision is already made on what outcome to achieve. This denies the member a fair equal opportunity to participate in an unprejudiced process. The solution to the problem will be that the mediator, as it specified, should be a neutral person not attached to the organisation. As such, the mediator will be objective in addressing the matter in disputes.

Although in terms of the Agreement 3/2005¹⁴⁹ this is the last stage after all the other processes were exhausted, it technically takes place at the beginning once initiative is taken to resolve the conflict. Conflict is part of employment relationship in an organisation such as the SAPS, where the members are working under constant pressure to deliver good quality services with very limited resources. Long working hours which are constantly being reviewed without consultation result in stress which affects the performance of the workers. The process of addressing conflict becomes costly to the department. This is due to management and employees who have to take time off from their work to address the conflict, as well as the morale of employees who are at work, but not productive due to the stress level. The problem sometimes escalates to where their personal lives are being affected, resulting in dysfunctional family life. This point is reached because the processes to resolve grievance were not successful in the first place.

¹⁴⁹ Agreement 3/2005: Safety and Security Sectoral Bargaining Council;

The appointment of a mediator is the result of the organisation's initiative in resolving the problem. The mediator is the third party appointed to assist the aggrieved and the employer in resolving the conflict. The mediator is an employee who is accredited to act as an internal mediator. According to ACAS 'Mediation: An Approach to Resolving Workplace Issues, it is stated that the mediation distinguishes itself from other approaches to conflict, such as grievance procedure and the employment tribunal process, in a number of ways that are less formal, flexible, voluntary, morally binding, but has no legal status, confidentiality and are owned by the parties.' The independence of the tribunal should be respected. It is difficult to maintain independence in the organisation, as in most cases the decision is already being decided on since the employees are from the organisation. The unions find themselves in the most difficult situation to protect the fairness of the procedure.

If the matter is still not resolved at this level, attempts must be made to finalise it. The need then arises to involve the expertise of a person who was not involved in the grievance from the beginning, but still worked for the organisation as the internal mediator. The joint grievance resolution team shall seek a mandate to refer the matter to a mediator for resolution. The aggrieved person shall be kept informed of all the processes involved, as well as consensus should this be reached on every decision to be implemented. The joint resolution team and the aggrieved need to meet with the mediator to try and reach an agreement on conditions that will follow the mediation.

These conditions shall include the terms of referring the matter and the date must not exceed ten working days from the date of referral. The mediator shall have the opportunity to interrogate all the information provided and if still no agreement is reached, the matter will be referred to the next level. The mediator shall make sure that there are *bona fide* attempts by the parties at the mediation to resolve the disputes. In the event that the agreement to the disputes is unlikely to be reached the mediator will issue a certificate to refer the matter within three working days after the mediation. In terms of the Labour Dispute Resolution: 'A dispute is a highly formalised manifestation of

conflict in relation to workplace matters which may include the failure to address a grievance. Taking into consideration all the factors that took place, a grievance procedure should not be just a platform to be used for capturing the matter from one level to the other, but rather an effective process aimed at reaching the resolution to the problem in a fair manner. Hence it is important that the role players who are involved in the process are well equipped, able and willing to deal with matter professionally. This process should not be used as the way to get to arbitration. Only when all the channels were followed, but still no resolution was reached, should the mediators advise the parties of their obligation in terms of the grievance procedure, as well as the cost involved for the referral of the matter for arbitration.

5.8 Conclusions

The South African Police Services renders an essential services as such the members may not strike in terms of the labour relations act 65(1)(d)(i)¹⁵⁰. The grievance procedure becomes a mechanism available to the members to raise out their dissatisfaction without any fear of victimization. The internal structure available should be exhausted before a member may seek intervention of the courts.

¹⁵⁰ Section 65(1)(d)(i) of the LRA

CHAPTER 6

RECOMMENDATION FOR IMPROVEMENT

6.1 Introduction

In most instances the process is a successful mechanism for dealing with responses to employee complaints with the intention of reaching a solution to the problem. However, it may fail to adequately address the situation in a way that meets the needs of the employer and employee. On the other hand, this may present other options to find a resolution, especially in a situation where there is no clear solution. The following is an example to

illustrate that an employee with a good standing track record, who applied for the advertised post within the department, is not being recognised for the post because the person who employs believes that the person is less qualified to be appointed.

The employee's standard suffered as a result of disappointment and he started to believe that the employer does not consider him as being promotable. On the other hand the employer considers the employee a valuable asset in his current position and does not want to lose his experience. The lack of opportunity to obtain more information regarding the appointment of somebody else, led the employee to conclude that it is time to leave the organisation. He may lodge a grievance, alleging discrimination in the promotion decision in an attempt to learn why he was not considered suitable for the post.

The employer on the other hand may become angry and disappointed at the accusation and begin to justify on other grounds. This will impact negatively on the relation between the employer and employee. The lack of opportunity to share information with each other will lead to wrong conclusions regarding the motivation of the other. The management should try to avail itself to the employees when there are dissatisfactions and try to resolve the problem in good faith.

This is a clear example that sometimes management perceive lodging of a grievance¹⁵¹ as an attack on their integrity and question their ability to manage. There needs to be a shift in the mindset to accept and acknowledge that every employee has a right to complain, that his or her complaint should be considered and that reason should be given with the intention of resolving the complaints. A happy employee will be able to be productive in the workplace. The management need to be equipped with skills such as problem solving to enable them to look at the nature of the complaint, rather than the individual who lodges a complaint. The shift in the mindset will assist in decreasing the backlog of complaints to be addressed, because it will mean that the problem is dealt with at the point of origin instead of transferring it to next person or process.

¹⁵¹ Republic of South Africa: Public Service Commission: Guidelines on new grievance rules.

The fundamental aim of the procedure is to find a solution which is acceptable to all parties. In most instances the parties moved forward on an agreed basis. If the manager dealing with the grievance was able to apply facilitation and mediation skills through a much more informal interactive approach, the grievance procedure may more often achieve the objective of resolving the problem. This will require the parties to obtain the necessary facilitation or mediation skills and also a mind shift away from the formalistic, traditional approach to the grievance.

I believe that the fundamental problem leading to the ineffectiveness of many grievances is the procedure and that this is caused by the way it is perceived by both the employees and management using the procedure. All the parties often view the procedure more like an arbitrary function in all cases where some decision is required from the manager hearing the grievance about the validity of the grievance. The grievance, unlike discipline which is descending from the top to the bottom, is moving from the bottom to the top which means an employee can decide whether or not the solution has been reached. As the decision clearly is not final and binding, the employee has a right to take the grievance further if unhappy with the outcome. In many cases this adds little value and just leads to the next stage in the process. This perceived need for a decision affects the way in which parties approach the process which involved witnesses being required to give statements. The process becomes formal when recorded or when minutes are taken.

6.2 Case studies

A. The employee¹⁵² applied for annual leave but it was not approved by the station commander. The employee subsequently lodged a grievance. The employee must first raise a verbal grievance with his or her immediate supervisor to attempt resolving the grievance. If the supervisor is not the station commander, the supervisor must engage the station commander in an effort to resolve the grievance. This

¹⁵² South African Police Service training manual 2001

process is informal and no documentation needs to be completed in terms of this procedure. If the grievance cannot be resolved through this process the employee must lodge a formal grievance in writing. Under normal circumstances the grievance will be lodged with the immediate supervisor, but in this case the grievance is against the supervisor, so it has to be lodged with the next higher level of authority. A copy of the grievance must be handed to the supervisor. The next level of authority (e.g. area office or provincial office) has three working days within which to resolve the grievance. If it is not resolved within these three days, the employee may lodge the grievance with the grievance officer. The grievance officer has seven working days within which to resolve the grievance. If it is not resolved within the stipulated period, the grievant may refer the matter to the joint grievance resolution team. Before such referral, the grievance officer must compile a comprehensive report outlining the reasons why the grievance was not resolved and thereafter have to submit it to the grievance resolution team.

B. Sergeant Y is dissatisfied with regard to the non-payment of his wife's medical account by Polmed. The definition of a grievance is any dissatisfaction that arises out of the employment relationship in the South African Police Services. The question posed is whether or not this grievance can be entertained by the employer.

The above entails that the employer in the employment relationship must have the prerequisite authority to resolve the subject matter of the grievance. If the employer does not have the authority, the grievance cannot be resolved by the employer and therefore falls outside the definition of a grievance.

Sergeant Y's dissatisfaction is the result of an action or lack of action by Polmed. Polmed is an independent legal entity, registered in terms of the Medical Scheme Act. The employer does not have control over decisions of Polmed and cannot interfere in the matter in which the medical scheme runs its business.

In the light of the above, Sergeant Y's dissatisfaction cannot form the subject matter of the grievance because the employer does not have any authority over the matter. It is not suitable for the employer to entertain the matter.

C. Captain X, stationed at Forensic Science Laboratory, KZN, unsuccessfully applied for a promotion to the Superintendent and lodged a grievance within this regard.

As a captain stationed at the Forensic Science Laboratory, which is a national component, the joint grievance resolution team will have to be constituted at the national office of the FSL and not the branch. The reason for this is the fact that promotions are ratified at national level.

In this case the joint grievance resolution team will have ten working days within which to resolve the grievance. If the grievance remains unresolved, the matter must be referred for internal mediation.

The joint grievance resolution team must compile a comprehensive report on the reasons for non-resolution of the grievance. The report must be submitted to the internal mediator.

The joint grievance resolution team and the grievant must try to agree to the terms of reference of the mediation. The internal mediation must commence within ten days.

Once the mediation is finalised, the mediator must issue a certificate to the parties. If the grievance is not resolved, the grievant may refer the dispute to the relevant Council within thirty days of the certificate being issued. The role players need to be capacitated with knowledge and skills to be able to deal with the process fairly.

6.3 Suggestions That May Assist In Making The Grievance Procedure More Effective

1. It is always important that the format of a grievance is checked to see if it falls within the level of the employees. Example: Will all employees understand it? Must it be translated into other languages to accommodate those employees who are not using English as their

first language? Is it free from any legal language? Are there steps illustrated by means of a diagram for the employee to understand the different steps involved?

2. The grievance¹⁵³ should be encouraged to be described in clear terms. A vaguely worded grievance (e.g. "I feel I was treated unfairly in the promotion process.") Must be made specific: ("I feel I was treated unfairly in the promotion process, because my recent qualifications were not taken into account"). When you reach a mutual understanding of the precise nature of the grievance, it is easier to find a way to resolve it.
3. The grievant¹⁵⁴ should be encouraged to be clear as to what specific outcome and solution are needed to resolve the dispute. It should be understood that a grievance is not a one way process, but one which requires input and ideas from both sides
4. The nature of the grievance should be carefully considered, as well as which processes are best suited to resolve it. Is it a dispute of interest or dispute of right? How does it affect the choice of what problem solving techniques or processes would maximize the possibility of resolving the dispute?
5. Acquire a mandate to settle, if you are the manager of the grievance process. Also, would you require a mandate before proposing or agreeing to a solution to a grievance? Under what circumstances do you think you have to obtain a prior mandate? What are the consequences if you agree to something without a mandate?
6. Find out what happens if a grievance is not resolved. Can you impose an outcome on the grievant without his or her consent? What happened in a situation where there is no agreement or solution? Make a grievant do a 'reality check' – e.g. Consider the prospects of getting a better solution in another forum, such as arbitration, before rejecting a suggested solution that may currently be available.

¹⁵³ Agreement 3/2005: Safety and Security Sectoral Bargaining Council

¹⁵⁴ Agreement 3/2006 Annexure D : Safety and Security Sectoral Bargaining Council

7. Consider ways to break a deadlock.

The following options can be considered in breaking a deadlock:

- Suggest that the parties review their mandates.
- A minor concession might get the process on track again.
- Reframe the issues in dispute.
- Remove a particularly thorny item from the discussions and schedule that for a separate forum.
- Involve new individuals who have fresh ideas.
- Review progress and emphasize good progress made.
- Keep talking and believe that a settlement is eventually possible.
- Appoint a sub-committee to investigate and make recommendations.
- Involve a mediator, conciliator or arbitrator (e.g. a process solution).
- Re-schedule the process for another day and sleep on it.
- Do a reality test by discussing the consequences of a failure to settle.

This illustrates that to a certain degree that Bandix' views on the goals, and general rules for the manner in which the grievances are managed, are somewhat narrow. Dealing with and handling grievances in various departments have shown the following failure in the grievance processes:

- Managers do not regard the grievance procedure as a mechanism for communication between the employees and themselves. The loss of respect in the communication process ultimately results in the breakdown of such communication between the employee and the manager. This becomes a burden to an already dissatisfactory situation and the grievance process and perpetuates the idea of "us versus them" experience.

Managers feel intimidated and undermined by a grievance, as it exposes their lack of knowledge or management skills. They will then try to hide their inadequacy by resorting to hostility, which will result in the grievance not receiving the attention it deserves.

- If this situation is not discouraged it will become a culture in which grievances are not dealt with respectfully. If this is allowed to

continue, the workers will lose their faith in resorting to the internal process as method of addressing their concern.

These are some of the suggested skills that the grievance officer or facilitator should possess:

1. Be a good listener, without making any interruptions.
2. Clarify uncertainties, such as: “What exactly do you mean when you say ...”
3. Show sensitivity: “You seem to be unhappy about ...”
4. Suspend judgement. Do not make conclusions based on what you think you know about the grievant before hearing the entire grievance.
5. Ask questions: “Where were you when Mr Nkosi...?”
6. Take responsibility. Encourage the employer to participate in solving the grievance.
7. Think creatively. Find new ways of solving the grievance.
8. Show empathy: “I can understand how you felt when...”
9. Be knowledgeable about the grievance, e.g. The grievance procedure – SSSBC Agreement 3/2005.
10. Know the rights of the employer.

6.4 Conclusion and recommendations

In conclusion, the South African courts conduct the tests to determine whether constructive dismissal has taken place and if it was partly objective and partly subjective.¹⁵⁵ It is very important to consider the perceptions of the employee during the time of the termination of contract, as well as the circumstances in which the termination took place.¹⁵⁶

An enquiry consisting of two ways needs to be conducted. The first, a factual enquiry, is to find out whether, before resigning, the applicant had no other option but to terminate the employment relationship. However, the onus is on the applicant to prove this point. If it is proven by the court that the applicant did have the intention to resign, the enquiry then should be held at

¹⁵⁵ Grogan Dismissal 199

¹⁵⁶ Grogan Dismissal 199

the end. However, if the applicant is unable to prove on the balance of probabilities, this will fall outside the jurisdiction of Industrial Court to follow up the dispute concerning the alleged unfair labour practice. If the applicant proves the onus, the following enquiry will be the case in which the applicant insists he was constructively dismissed or the employer constructively dismissed him.¹⁵⁷

The employee should not just state that he or she believes that the employment relationship was intolerable, as this would not be an adequate reason. The employee needs to convince the court, as well as the arbitrator, that at the time of termination of the contract he genuinely believed that the employer's conduct was of such a nature that it contributed in making the employment and working relationship intolerable. The test which the court applies at this stage is of a subjective nature, because it mainly looks at how the employee saw and experienced an unbearable situation.¹⁵⁸

It is imperative to be careful when interpreting a conduct by an employee, which would constitute constructive dismissal, because the danger is in encouraging the employee to resign and then repent, therefore wanting to seek protection from the act. The courts should remember that adopting a restrictive interpretation of the act will result in a failure of the Act.

The definition of section 186(1) (e) was specifically aimed at protecting the employees who resign in desperation and as a last resort, because of the continued unlawful or unfair conduct of the employer, making an employment relationship intolerable. Employers have the responsibility not to act in a manner that will destroy and undermine the employment relationship.¹⁵⁹

It is not a requirement that the employer's conduct should be a breach of the employment contract. The meaning of section 186(1)(e) of the LRA describes the conduct which is needed to justify a claim of constructive dismissal, as conduct by an employer which makes continued employment intolerable for the employee.¹⁶⁰ To find out whether there was a breakdown in the employment relationship that had rendered the situation intolerable, the

¹⁵⁷ Jooste v Transnet Ltd SA Airways

¹⁵⁸ Pretoria Society for the Care of the Retarded v Loots

¹⁵⁹ Loubser v PM Freight Forwarding

¹⁶⁰ Grogan Dismissal 200

courts need to apply an objective test, and the subjective understanding of the applicant should not be the outcome of whether or not the employer's conduct is intolerable. There is no need for the employee to show that the employer intended any repudiation of the contract. The role of the court is to assess the employer's conduct as a whole and determine whether its impact, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties must be evaluated holistically and its impact assessed.¹⁶¹

It is necessary to remember that the objective assessment of the employer's conduct may influence the continued employment as intolerable and therefore to be assessed as a whole and not a piecemeal. In most cases the employer may not have control over what makes the conditions intolerable. Therefore, the critical circumstances must have been due to the employer's contribution. Even if the employer has contributed, he cannot be entirely blamed. The employer can fairly and reasonably contribute to making the employee's position intolerable. The employer must be blameworthy for the intolerable conditions in either one way or another. The conduct must be short of reasonable and with proper cause.¹⁶² The courts should take note not to single out the employee's complaints individually.¹⁶³ It is clear from the discussion that the courts are very careful when determining whether a case of constructive dismissal took place. The employee must provide sufficient evidence for the claim of constructive dismissal to succeed. Although it is enough for the employee to only claim that there was no reason in continuing with the employment relationship, the employee must still support his belief with evidence that this was the problem from the beginning.

In terms of the South African law it is not relevant to prove that the employer intended any repudiation of the contract. As mentioned before, it is the function of the court to consider the employer's conduct as a whole and determine whether its effect, judged reasonable and sensibly, was of such a nature that it was impossible for an employee to deal with it any longer. The

¹⁶¹ Marsland v The new Way Motor & Diesel Engineering 2009 30 ILJ 169 (LC)

¹⁶² Anon 2010 <http://www.workplace.co.za>

¹⁶³ Murray v Minister of Defence

court will focus on whether the conduct of the employer's was intentional and without justification in creating a situation in which the employee was unable to perform his duties. However, if the employer's conduct is of such a manner, even the court cannot expect the employee to tolerate it. All that is needed is to determine the outcome by focusing on all the facts before making an objective assessment.

The grievance procedure is considered to be the first step used by the aggrieved to normalise the working environment and ensure stability and labour peace. A grievance at its heart remains nothing but part of the organisational conflict which needs to be addressed by management and employees. In terms of *Grogan* the internal mechanism, such as invoking a grievance, must first be used before the employee can seek external interventions. The basic principle of this procedure is to manage conflict between the employer and employees as closely as possible to the point of its origin. It is to create conditions that are conducive to serious engagement between the parties in an effort to resolve grievances and furthermore encourages a joint approach. In terms of the findings this research needs to be completed by creating an awareness of the grievance procedure, its prevalence and consequences, and to establish effective recourse mechanisms to promote accountability aimed at respecting the process of the grievance procedure. In general, management should accept that employees also have problems, for which they at some point need the intervention of a higher authority to listen to and discuss the issues which are affecting them.

THE END