

Employment Law

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SOUTH AFRICA

- Employer's failed plan results in unfair labour practice finding
- Can gross procedural unfairness mutate into substantive unfairness?

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Employer's failed plan results in unfair labour practice finding

In *IEC v CCMA* [2026] 2 All SA 343 (LC), the Labour Court considered whether the Independent Electoral Commission's (IEC) failure to implement an organisational organogram that increased employees' remuneration amounts to an unfair labour practice.



Factual background

In 2016, the National Education, Health and Allied Workers' Union (NEHAWU) demanded an organisational review at the IEC following alleged disparities concerning employees' positions and terms associated therewith. The IEC then embarked on a job evaluation process in 2018 and appointed Lekoko Consulting to conduct a job grading exercise. Lekoko Consulting issued a report (Lekoko report) which recommended that certain positions be upgraded, while some remained unchanged and others were abolished. The Lekoko report also recommended changes to the salary structures. Following that exercise, the IEC approved the Lekoko report and resolved that a new organisational organogram be implemented in phases. The IEC also communicated to its employees that the new organogram had been approved but issues concerning remuneration and job grading would be dealt with after the 2019 national elections.

NEHAWU vehemently opposed this phased approach and demanded that the new organogram be implemented immediately, including the changes to the employees' remuneration.

An agreement was later concluded between the IEC and NEHAWU, recording that the new organogram would be implemented on 1 September 2019 and that a task team would consult on the salary structure and job grading to be implemented. Once the task team met, it emerged that there were affordability and financial sustainability challenges with implementing the new organogram. Shortly thereafter, the IEC resolved to remain with its existing job grading and remuneration structure and the employees were informed that the new structure was not feasible due to financial constraints. NEHAWU referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 186(2) (a) of the Labour Relations Act 66 of 1995.





Legal issue

The issue before the CCMA commissioner was whether the CCMA had jurisdiction to adjudicate the matter and whether the conduct of the IEC amounted to an unfair labour practice.



Labour Court's findings and analysis

Jurisdiction

On review, Itzkin AJ upheld the jurisdiction of the CCMA. The Labour Court found that the IEC and NEHAWU had concluded an agreement regarding the implementation of the new organogram which increased employees' remuneration. Accordingly, the dispute related to an employer's failure to comply with a contractual obligation relating employees' benefits. In supporting this stance, the Labour Court relied on *Apollo Tyres SA (Pty) Ltd v CCMA and Others* (2013) 34 ILJ 1120 (LAC), where the Labour Appeal Court held that the CCMA has jurisdiction to adjudicate an unfair labour practice dispute where such dispute arises from an employer's failure to comply with a contractual obligation affecting employees' benefits.

Merits

On the merits, the Labour Court held that the IEC had already agreed to implement the new organogram. The further consultation process was limited to the salary structure and job grading that would apply once the organogram was implemented. It did not give the IEC the ability to resile from the agreement, nor a discretion to decide whether implementation should proceed. The agreement expressly recorded 1 September 2019 as the implementation date. The IEC's reliance on budgetary constraints did not undo that commitment or cure the unfairness caused by its failure to implement it. Itzkin AJ therefore found that the commissioner's conclusion that the IEC had committed an unfair labour practice was sustainable.



Key takeaways

This judgment is a reminder that employers must exercise caution when communicating organisational changes, especially where those changes relate to remuneration or benefits. If an employer adopts resolutions, agrees to implement or communicates a plan to employees, a later failure to implement that plan may result in an unfair labour practice finding. Employers should clearly record whether implementation is subject to affordability, budget approval or any other condition.

Aadil Patel and Mbulelo Qotoyi

Can gross procedural unfairness mutate into substantive unfairness?

The Labour Appeal Court (LAC), in *Universal Product Network (Pty) Ltd (UPN) v Mbatsana N.O.* (JA31/25) [2026] ZALAC 14, addressed the "important legal question of whether gross procedural unfairness can mutate into substantive unfairness". The case arose from the dismissal of approximately 256 employees following a protected strike for breach of picketing rules, contravention of a court order, and operational disruption. The Commission for Conciliation, Mediation and Arbitration (CCMA) found the dismissals substantively fair but procedurally unfair, awarding one month's compensation. On review, the Labour Court held that the procedural defects were so serious that they vitiated the outcome, morphing the dismissals into substantively unfair dismissals. The employer appealed.

The LAC definitively confirmed that, under the Labour Relations Act 66 of 1995 (LRA), no matter how gross, procedural unfairness cannot transform into substantive unfairness. An important qualification, however, is that in dismissals relating to operational requirements (retrenchments), issues of procedural unfairness may be inextricably intertwined with substantive unfairness to the point that a dismissal may be found to be substantively unfair.





The bifurcation of procedural and substantive fairness

Section 188(1)(a)(i) of the LRA provides that a dismissal is unfair if the employer fails to prove a fair reason. Section 188(1)(b) provides that a dismissal is unfair if not affected in accordance with a fair procedure. These are two separate enquiries.

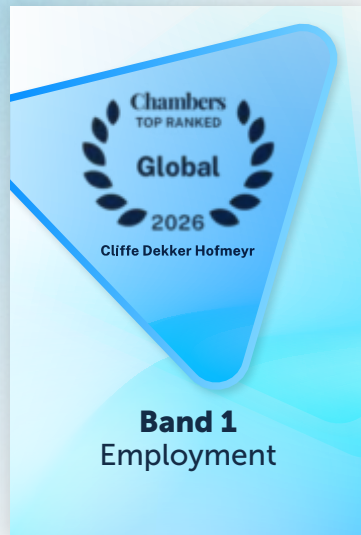
Thus, no matter how gross a procedural defect, procedural unfairness cannot morph into substantive unfairness. As the LAC illustrated, if the contrary were true, a dismissal for theft without any hearing would become substantively unfair, even where the employer had a fair reason to dismiss. Such an outcome would be “*unsustainable and inconsistent with the LRA*”.

This bifurcation is reinforced by section 193(2)(d), which excludes reinstatement where a dismissal is unfair only because the employer did not follow a fair procedure. CCMA arbitration is a hearing de novo, thus defects in the internal disciplinary hearing are of no moment at arbitration. There is no room in the current statutory scheme for the concept of “*gross*” procedural unfairness.

The Labour Court relied on *Yichiho Plastics (Pty) Ltd v Muller* [1994] 15 ILJ 593 (LAC) and *CVO School VIVO v Christoffel Daniel Pretorius and Others* (JR1006/15; JR1004/15) [2017] ZALCJHB 412 as authority that gross procedural failures could vitiate the outcome and render a dismissal substantively unfair.

In 1994 (prior to the enactment of the LRA), the LAC in *Yichiho Plastics*, held that a dismissal will generally be fair only where a fair procedure was applied and the decision itself was a fair one. The court went on to find that procedural and substantive fairness are effectively “*two elements of what is in truth a single enquiry*”. The LAC in UPN distinguished this on the basis that it was decided under the old Labour Relations Act 28 of 1956, which knew only of an “*unfair labour practice*” and did not contain the substantive and procedural fairness bifurcation. Accordingly, it cannot be transposed into the current regime.

In *CVO School*, the Labour Court held that gross procedural irregularities could in themselves vitiate an outcome, relying on *Yichiho Plastics*. The LAC confined this principle to its proper scope: it is correct only insofar as it refers to a gross irregularity in **arbitration** proceedings that denies a party a fair hearing (rooted in *Ellis v Morgan*; *Ellis v Desai* [1909] TS 576). It is not authority for the proposition that gross procedural unfairness in an **internal disciplinary** enquiry renders a dismissal substantively unfair.



The exception: Operational requirements

The LAC recognised a limited exception for dismissals based on operational requirements, where procedural unfairness may be “*inextricably intertwined*” with substantive unfairness, in line with the authorities of *Woolworths (Pty) Ltd v SACCAWU and Others* [2018] 39 ILJ 222 (LAC) and *Atlantis Diesel Engines (Pty) Ltd v NUMSA* [1994] 15 ILJ 1247 (A).

In the retrenchment context, section 189 prescribes a mandatory consultation process directed at exploring whether dismissal can be avoided altogether and ensuring it is genuinely a measure of last resort. In *Atlantis Diesel Engines*, the Appellate Division held that consultation is “*an integral part of the process leading to the final decision on whether or not retrenchment is unavoidable*”. A failure to consult meaningfully may therefore demonstrate that the employer has not exhausted alternatives, which goes to the heart of substantive fairness.

Critically, however, the LAC circumscribed this exception: it “*does not extinguish the bifurcation between substance and procedure as known in the current LRA*”. An egregious departure from section 189 shall never turn a dismissal supported by genuine operational needs into a substantively unfair dismissal, unless the dismissal is not a measure of last resort.



Key takeaways

- Gross procedural unfairness cannot mutate into substantive unfairness.
- The bifurcation of procedural and substantive fairness is absolute for misconduct and incapacity dismissals.
- The narrow exception for operational requirements dismissals remains, but only where procedural failure shows dismissal was not a last resort.

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