

Enshrined labour rights under s 65(1) of the 2013 Constitution of Zimbabwe: the right to fair and safe labour practices and standards and the right to a fair and reasonable wage

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INTRODUCTION

Pluralist scholars argue strongly that common law is heavily stacked against employees, by its placing a premium on the contract of employment. According to iconic labour law jurist, Otto Kahn-Freund, in doing so, common law inappropriately presumes an equality of power between the employer and employee. Whereas the reality is that, “... *the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power...*”¹

Common law frowns on collective bargaining and imposes strenuous duties on the employee and relatively light obligations on the employer. In real life the liberty of contract it presumes becomes merely illusory. This was aptly recognized in **S v Collet**,² where the court rejected the employer’s defence that he had inflicted corporal punishment on his employee for misconduct in terms of the contract of employment. The court held: In the relationship of master and servant the role of the master is, of course the dominant one and that of the servant is a subservient one. Even in the field of contract, it has long been recognized that public policy requires that he be protected from the disadvantageous consequences of agreements he may have felt obliged to enter into with his master, the reason being that as a servant he is not conducting on equal terms with his master.

Working struggles over the years have sought to place restraint on the arbitrary powers of the employers and infuse in the employment relationship, values based on notions of fairness, equity and social justice, including the right to fair labour practices and standards. For the first time in the history of labour relations in Zimbabwe, the right to fair labour standards and practices has become enshrined in the Declaration of Rights as a basic human right. Section 65 (1) of the Constitution provides:

“(1) Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.”

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¹ Cited in A Rycroft & B Jordaan, **A Guide to South African Labour Law** 2nd ed (Juta, 1992) 19

² 1978 (1) RLR 205 AD at 212D-E. For similar sentiments see also - **Nyambirai v NSSA & Anor** 1995 (2) ZLR 1 (S); **Highlands Football Club v Viljoen & Anor** 1978 (3) SA 191 (W) at 198E-H; and R. Pound, “Liberty of Contract” 18 *Yale L.J.* 454 (1909)

This section provides probably the most significant labour rights under the new Constitution. This is because of its all-encompassing nature covering the right to fair labour practices and standards, the right to safe labour standards and the right to a fair and reasonable wage. It has the potential for the dramatic overhaul of labour jurisprudence in the country by the incorporation of advances made by the working class regionally and internationally.³

In this article we analyse the extent of the rights provided under section 65 (1) and the potential impact on labour jurisprudence in Zimbabwe.

RIGHT TO FAIR LABOUR PRACTICES AND STANDARDS

The first labour right enshrined under s 65(1) is the right to fair labour practices and standards.” The Constitution does not define the terms “fair labour practices and standards.” This has given rise in conservative and unitarist quarters that there is therefore no exhaustive definition of the term “fair labour standards” and that the concrete parameters of its content has to wait for elaboration by judicial practice.

However, it is our contention that there are basic guidelines, which must guide the courts. The concepts are in fact entrenched in Zimbabwean and international labour jurisprudence, which must provide the basis on which judicial practice must be based.

Whilst the detailed content of what constitutes “fair” and “reasonable” in the Zimbabwean context will ultimately be shaped through judicial practice, cognisance must remain that the new Constitution is based on a substantive vision of equality as opposed to a vision of formal equality. As has been aptly put, the formal equality vision is based on the Aristotelian concept of equality in which all persons are equal bearers of rights - in which like is to be treated alike. It is blind to social and economic differences between groups and individuals.⁴

On the other hand, the concept of substantive fairness that underlies the Constitution “is sensitive to entrenched structural inequality, focussing on the results or effects of a particular rule rather than the form it takes.”⁵

It has been recognised that, unlike classical western constitutions like that of the USA, new constitutions like those of Zimbabwe, South Africa and Kenya, mark a radical and decisive departure from a “disgracefully racist, authoritarian” past, and instead have “a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos.”⁶

³ For similar views on an equivalent provision in the Constitution of South Africa, see – J. Grogan, **Workplace Law**, 10th ed, (Juta, 2009) at 6

⁴ O Dupper, “The current legislative framework”, in E M L Strydom (ed), **Essential Employment Discrimination Law** (Juta, 2004) 17

⁵ *ibid*

⁶ *State v Makwanyame* 1995 93) SA 391 (CC). in **S v Sithole** 1996 (2) ZLR 575 (H), DEVITTE J, eloquently put it thus: “*The present Constitution... is a radical departure from an authoritarian past in*

The new Constitution of Zimbabwe is clearly based on the vision of substantive equality as opposed to that of formal equality.⁷ The concept of fairness should be interpreted by reference to the norm or standard referred to in s 56 (5) of the Constitution by which conduct is judged as fair or unfair. Conduct can only be deemed as fair if it is justifiable under the norms of “... a democratic society based on openness, justice, human dignity, equality and freedom.”

Section 65 (1) of the Constitution should therefore be interpreted using a robust and purposive approach that ensures the realisation of substantive justice.⁸

What is called for is not to create the wheel afresh. The values of “a democratic society based on openness, justice, human dignity, equality and freedom”, are already firmly entrenched in the core international human rights documents and core international labour law instruments, which Zimbabwe has ratified.

Fair labour standards under domestic law

A starting point perhaps is to take the labour standards specified in section 65 itself as examples of fair labour standards. Firstly, these include the right to safe labour standards and to fair and reasonable wages under s 65 (1). Further are the various standards and practices specified in s 65 such as respect of organisational, associational and collective bargaining rights, the right to collective job action, the right to just, equitable and satisfactory conditions of work, the right to equal remuneration for similar work between men and women and the right to fully paid maternity leave.

Beyond this is to look at how the concept is treated in domestic and international law. The concept was already developed under the Labour Act. Part II of the Act provides under s 6 (1) for the right to fair labour standards as a fundamental right of employees. One of the purposes of the Act is to promote fair labour standards.⁹ Under section 6(1), no employer shall: pay any employee a wage which is lower than to fair labour specified for such employee by law; require any employee to work more than the maximum hours

which scant regard was paid to the rights of the individual and the role of the courts as guardians of the rights of the individual was marginalized. Our constitutional history enlightens us to the values on which the present constitution is premised – but more important, it should alert us to the dangers of retaining the authoritarian traditions of the past.”

⁷ See for instance s 46 (1) (a) and (b) of the Constitution compelling the purposive model of interpretation in order to give “full effect to the rights” enshrined in the Declaration of Rights and to promote the values and principles that underlie a democratic society. Section 85, providing that courts must not be “unreasonably restricted by procedural technicalities” and providing a broad based *locus standi* of persons who may bring action before the courts; sections 68 and 69 providing for the rights to administrative justice and the right to a fair hearing. Section 56 (6) and s 17 (2) compelling the State to take positive measures to promote the achievement of equality and advance people who have been disadvantaged by unfair discrimination.

⁸ *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (per Ackerman J). Also - *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC). See also - **S v Sithole** 1996 (2) ZLR 575 (H)

⁹ Section 2A (1) (d) of the Act

permitted by law or by agreement made under the Act; or fail to produce such conditions of employment as are specified by law or as may be specified by agreement made under the Act; or require any employee to work under any conditions or situations which are below those prescribed by law or by the conventional practice of the occupation of such employee's health or safety; or hinder, or prevent any employee from or penalizing her / him for seeking access to any lawful proceedings in order to advance or protect her / his rights.

It is our contention that the concept of "fair labour practices and standards" under s 65 (1) of the Constitution, should, in the least, be held to include the above five specified labour standards under s 6 (1) of the Act. This is because these have been recognised under Zimbabwean labour jurisprudence as fundamental rights of employees for a considerable historical time, starting with the Labour Relations Act, 1985.¹⁰ Further virtually all of them, with the possible exception of the one on working hours, are already provided for in s 65 (1) of the Constitution.

There is a difference however, in how the Act and the Constitution treat the concepts. The Act provides an explicit list of fair labour standards to be recognised. This has not changed from the pioneering Labour Relations Act.¹¹ Similarly and based on the old Act, the Labour Act defines the term "unfair labour practice" in an explicit manner.¹² An unfair labour practice:

".. means an unfair labour practice specified in Part III, or declared to be so in terms of any other provision of this Act."

Part III provides a list of unfair labour practices that may be committed by employers, trade unions or workers committees.¹³ The Minister may prescribe further acts as unfair labour practices.¹⁴ The courts have held this list to be exhaustive - **Olivine Industries (Pvt) Ltd v Jack & Ors.**¹⁵ Note that unlike its South African equivalent, the Zimbabwean Act does not provide a substantive definition of unfair labour practice in relation to acts or omissions that arise between the individual employer and employee.¹⁶ This is a major weakness in the Act.

The legislative approach hitherto had been a cautious one, whereby the terms "fair labour standards" and "unfair labour practices" were narrowly defined.

Section 65 (1) of the Constitution marks a radical departure from this in favour of a broader encompassing approach. The right under s 65 (1) is broadly worded. This enables

¹⁰ See s 2 as read with Part II of the Labour Relations Act, 1985, No. 16 of 1985. This defines the term "unfair labour practice" as – "... an unfair labour practice specified in Part III, or declared to be so in terms of any other provision of this Act."

¹¹ Section 6 (1), Labour Relations Act, 1985

¹² Section 2 of the Act. See s 2 Labour Relations Act, 1985

¹³ Sections 8 and 9 respectively

¹⁴ Section 10 of the Act

¹⁵ 2005 (1) ZLR 356 (S) at 358C. Also - **Muwenga v PTC** 1997 (2) ZLR 483 (S)

¹⁶ See definition under s 186 (2) of the Labour Relations Act, 1995 (SA)

the development of the right by the courts taking into account its domestic historical evolution as well as incorporating such standards that have assumed the status of basic labour standards under regional and international law, using the broad interpretation tools provided by the Constitution.¹⁷ Grogan, thus asserts that other forms of “unfair labour practices” may be recognised under the broader constitutional guarantee of fair labour practices and standards than those under the Act.¹⁸

Fair labour standards and practices under international law

A perusal of international law demonstrates that certain labour standards have indeed assumed the status of basic fair labour standards and practices which must inform the Zimbabwean courts in their interpretation of s 65(1) of the Constitution.

Certain instruments stand out in this regard. Firstly the standards and practices that are reflected in the Constitution of the ILO and core ILO conventions. These bind Zimbabwe as a Member State of the ILO. Secondly and inter-linked to this are the fair labour standards and practices recognised in the Charter of Fundamental Social Rights in SADC, 2003 [‘SADC Charter’].

The SADC Charter embodies those labour rights drawn from appropriate international law instruments, in particular those of the ILO, that have been recognised as basic human rights by governments, employers and workers in the SADC region. It provides:

Article 3

Basic Human Rights and Organisational Rights

- 1. This Charter embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples Rights, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments.*
- 2. Member States undertake to observe the basic rights referred to in this Charter.*

¹⁷ Section 46 (1) (c) and (e) of the Constitution which compel courts to use as interpretative guides, *inter alia*, international law and all treaties and conventions to which Zimbabwe is a party as well as relevant international law

¹⁸ J Grogan 10th ed (2009) 87 citing: *Simelela & ors v MEC for Education, Province of the Eastern Cape & Ors* (2001) 22 ILJ 1688 (LC); *National Entitled Workers Union v CCMA & Ors* (2003) 24 ILJ 2335 (LC). But Grogan proceeds to state that the South African Constitutional Court has also held that if certain forms of unfair practices are not covered by the legislation, parties cannot directly rely on the Constitution without at the same time successfully challenging the constitutional deficiency of the statute in question – *SA National Defence Union v Minister of Defence & ors* (2007) 28 ILJ 1909 (CC) at para [51]

The SADC Charter therefore gives a useful summary of the basic fair labour standards and practices recognised under international human rights instruments and ILO conventions, and which are so accepted by the three key players in industrial relations, labour, capital and the State.

The principal fair labour standards recognised under international law, with particular reference to the SADC Charter are:¹⁹

The equality and fair treatment principle,²⁰ and non-discriminatory practices.²¹ The gender equality principle and equal work opportunities between men and women standard. The inherent human dignity standard including freedom from slavery, forced labour and the right to just, favourable and safe conditions of employment – decent work standards; decent remuneration; safe and healthy working conditions.²²

Associational, organisational and collective bargaining rights including the right to strike. Rights to industrial and workplace democracy including the rights to information, consultation and participation and to worker education and training. Basic fair labour standards and practices in relation to the disabled, children, elderly persons and social protection.

The right to fair labour standards and practices thus potentially involves the incorporation into Zimbabwean labour jurisprudence of those standards already recognised under domestic jurisprudence and under regional and international law, as basic labour standards.

Equality and fair - non discriminatory treatment standard

At the onset, s 65 (1) of the Constitution compels fair labour standards and practices. This means that employers should treat employees fairly. This also invokes the equality principle under s 56 of the Constitution, which although not amongst the enumerated labour rights but is of direct relevance.

The right to fair labour standards means an employer has a duty to treat its employees fairly in the employment relationship.²³ The right to fairness connotes objectiveness and rationality, both substantively and procedurally. It therefore encompasses substantive and

¹⁹ See in general M Gwisai *et al*, “An outline of fundamental labour rights under international laws, national constitutions and Zimbabwean constitutional norms” (2009) 2 KMLJ 71

²⁰ Arts. 7 and 10 United Nations Universal Declaration of Human Rights, 1948 [UDHR]; Art. 14 United Nations International Covenant on Civil and Political Rights, 1966 [ICCPR], and Art. 3 African (Banjul) Charter on Human and People’s Rights, [ACHPR],

²¹ Art. 2 UDHR; Art. 2(1) ICCPR, Art. 2 ACHPR, and Art. 6 SADC Charter

²² Generally see Arts. 23, 24 and 25 UDHR; Arts. 6, 7 and 11 ICESCR; Art. 15 ACHPR and Art. 10 CEDAW

²³ J. Grogan 10th ed (2009) 6; *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA)

procedural fairness as recognised under the right to administrative justice in s 68 (1) of the Constitution.

Substantive fairness connotes objectiveness and rationality. On the other hand procedural fairness connotes objectiveness and impartiality. It includes but goes beyond the administrative law maxim, *audi alteram partem*. Section 68 (1) of the Constitution refers to the right to “lawful, efficient, reasonable,... impartial” administrative conduct and to be promptly given reasons for a decision. Section 69 of the Constitution refers to the right to “a fair, speedy, and public hearing within a reasonable time before an independent and impartial court, tribunal” and the right to be represented by a legal practitioner before such court or tribunal.

This standard is echoed in s 2A (1)(f) of the Labour Act which provides that as one of the objectives of the Labour Act as –
securing the just, effective and expeditious resolution of disputes and unfair labour practices.

The above has particular significance in dismissal law concerning the right of employees to be protected from unfair dismissal. Dismissal should be substantively and procedurally fair. Some recent decisions of the Supreme Court have taken such approach, correctly in our view. These include the decision in **Sagandira v Makoni RDC**,²⁴ and **ZIMASCO (Pvt) Ltd v Marikano**.²⁵

A contrary, and in our view incorrect approach, was that adopted by the Labour Court in holding that an employer can terminate on notice or at will, an employee’s contract of employment.²⁶ Such decision allows for dismissal without any reason whatsoever, in complete violation of the principle of substantive fairness, which require that termination of employment at the initiative of the employer be based on a valid reason pertaining to the conduct or capacity of the employee or operational reasons of the undertaking.

The equality principle is a basic human right recognised under the Zimbabwean Constitution and most international human rights instruments and in terms of which all persons are equal before the law and have the right to equal protection and benefit of the law.²⁷ The right to equal protection of the law is central to the concept of an open, democratic and law-governed society.²⁸

The right is also already provided for under s 6 (1) (e) of the Act, as a fundamental right of employees.

This provides that no employer shall:

²⁴ S-70-14 [*Garwe JA*], reversing a punitive transfer as unfair

²⁵ S-6-14, imposing a duty to consult before dismissal of an employee who has exhausted her / his sick leave days

²⁶ **Zuva Petroleum (Pvt) Ltd v Nyamande & Anor** LC/H/195/2014

²⁷ Section 56 (1) Constitution.

²⁸ **Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land Reform & Resettlement & Anor** 2008 (2) ZLR 343 (SADC)

hinder, obstruct or prevent any employee from, or penalise him for seeking access to any lawful proceedings that may be available to him to enable him lawfully to advance or protect his rights or interests as an employee.

The right must be read in conjunction with the employees' right to democracy in the workplace under s 7 of the Act which entitles employees to have access to trade unions and workers committees for the purposes of protecting their rights and advancing their interests.

Non discriminatory principle

The non-discriminatory standard means that every person has the right not to be treated in "an unfairly discriminatory manner" on the prohibited grounds other than in circumstances of special measures to achieve equality or advance people or groups who have been disadvantaged by unfair discrimination.²⁹

The standard is provided for in the SADC Charter,³⁰ core ILO conventions³¹ and other international human rights instruments.³²

The Constitution provides a very comprehensive list of prohibited grounds of unfair discrimination. Section 56 (3) provides:

Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.

The non-discriminatory right is also already provided as a fundamental right of employees under s 5 (1) of the Labour Act. This provides:

No employer shall discriminate against any employee or prospective employee on grounds of race, tribe, place of origin, political opinion, colour, creed, gender, pregnancy, HIV/AIDS status or subject to the Disabled Persons Act [Chapter 17:01] any disability referred to in the definition of 'disabled person' in that Act...

It will be noted that s 56 of the Constitution provides a wider and non-exhaustive list of prohibited grounds. The prohibited grounds are expressed as "... on such grounds as ...", meaning they could be broader. Additional grounds are added namely: "class, marital status, culture, custom, economic or social status or whether they were born in or out of wedlock."

Most of the extra grounds pertain to discrimination against women, showing the elevated status of women labour rights under the 2013 Constitution.

²⁹ Section 56 (3) and (6) Constitution

³⁰ Articles 5 and 6, SADC Charter

³¹ Discrimination (Employment and Occupation) Convention, 1958 (C 111); Equal Remuneration Convention, 1951 (C 100)

³² See footnote 22, *supra*

However, the Constitution has not included the ground of ‘HIV/AIDS status’ which is in the Act and regulations.³³ This is an important omission given the prevalence of AIDS/HIV stigmatisation in society. The ground is still not entirely excluded given the broad wording of s 56 (3) of the Constitution.

Another important difference is that s 56 (6) of the Constitution makes it mandatory for the State - “to take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination.” On the other hand under the Labour Act, such special measures are permitted only in relation to grounds of race, gender and disability, but are not mandatory on employers.³⁴

In relation to civil servants the equality and non-discriminatory principles are provided under the Public Service Act and Public Service Regulations. The Commission is required to have regard to these principles, including the merit principle, in the recruitment and promotion of employees, under section 18 of the Public Service Act:³⁵

18 Appointments and promotions

When considering candidates for appointment to or promotion within the Public Service, the Commission shall—

(a) have regard to the merit principle, that is, the principle that preference should be given to the person who, in the Commission’s opinion, is the most efficient and suitable for appointment to the office, post or grade concerned; and

(b) ensure that there is no discrimination on the ground of race, tribe, place of origin, political opinions, colour, creed, gender or physical disability.

As with the Labour Act, the prohibited grounds of discrimination are not as wide as under s 56 (3) of the Constitution and must be read with the necessary modification to ensure constitutional compliance.

Right to safe labour practices and standards

The second labour right enshrined under s 65 (1) of the Constitution is the right of every person to “fair and safe labour practices and standards...” Common law already recognises the employee’s right to safe and healthy working conditions - **Mpande v Forbes and Thompson (Bulawayo) (Pvt) Ltd & Anor.**³⁶ The definition of the right is not provided in the Constitution. Useful reference may be made to the Labour Act and international law treaties as well as common law.

The Labour Act recognises the right as one of the fundamental fair labour rights of employees. Section 6 (1) (d) of the Act provides that no employer shall –

... require any employee to work under any conditions or situations which are below those prescribed by law or by conventional practice of the occupation for the protection of such employee’s health or safety.

³³The Labour Relations (HIV & AIDS) Regulations, S.I. 2002 of 1998 prohibit discrimination on the grounds of AIDS / HIV and require protective clothing and other safety measures to prevent the spread of HIV / AIDS at the workplace

³⁴Section 5 (7) (c) (d) of the Labour Act.

³⁵See also s 3 (2) of the Public Service Regulations providing: “The recruitment, advancement, promotion or grading of members shall be on the basis of merit.”

³⁶1980 ZLR 302

Currently, there are various workplace safety laws that employers must comply with.³⁷ Harmful child labour and the employment of “any person under the age of eighteen years to perform any work which is likely to jeopardize that person’s health, safety or morals” are prohibited under s 11(4) of the Act and international law.³⁸

The ILO has several applicable conventions, although the most important one is the Occupational Health and Safety Convention.³⁹

The SADC Charter provides that Member States should endeavour to provide basic occupational health and safety standards as set out in ILO Convention No. 155.⁴⁰ Article 12 (a) of the Charter states that every worker in the Region has the right to health and safety at work and to a healthy and safe environment that sustains human health. It lays out various aspects of the right, which Member States should endeavour to establish, including:

The organisation of occupational health and safety shall be on the basis of bipartite and tripartite co-operation and full participation of all parties; Workers have a right to information on workplace hazards and the procedures being taken to address them, and to appropriate health and safety training in paid working time.

Workers have the right to stop work that they reasonably believe poses an immediate and serious risk to their health, safety or physical well-being according to ILO Convention No. 155;

Workers have the right to services that provide for the prevention, recognition, detection and compensation of work related illness or injury, including emergency care, with rehabilitation and reasonable job security after illness and adequate inflation adjusted compensation; Employers control and are liable for work related environmental risks according to the “polluter pays” principle;

*Workplace based health service for workers is accessible, affordable and equitable, and is provided on a professional ethical basis; and
Economic and investment measures take into consideration health, safety and environmental standards.*

³⁷ Some of the important ones include: the National Social Security Authority (Accident Prevention) (Workers Compensation Scheme) Notice, No. 68 of 1990; Factories and Works Act [*Chapter 14:08*]; Hazardous Substances and Articles Act [*Chapter 15:05*]; Smoking (Public Health) (Control of Tobacco) Regulations, S.I. 264 of 2002; and the Labour Relations (HIV & AIDS) Regulations, S.I. 2002 of 1998

³⁸ See the Labour Relations (Employment of Children and Young Persons) Regulations, S.I. 72 of 1997. Also see: Worst Forms of Child Labour Convention (C 182); the African Charter on the Rights and Welfare of the Child (1990), Art. XV and the Convention on the Rights of the Child, Art. 32

³⁹ Occupational Safety and Health Convention, 1981 (C 155). Other conventions ratified by Zimbabwe include: Prevention of Major Industrial Accidents Convention, 1993 (C 174); Safety and Health in Mines Convention, 1995 (C 176); Asbestos Convention, 1986 (C 162); Chemicals Convention, 1990 (C 170); Equality of Treatment (Accident Compensation) Convention, 1925 (C 19) and the Underground Work (Women) Convention, 1935 (C 45). Not yet ratified but important is the Maternity Protection (Revised) Convention, 2000 (C 183) which has provisions for the protection of pregnant women and un-born children

⁴⁰ Article 12 (c) SADC Charter

The SADC Charter sets out the right as an aspirational right but nonetheless provides a very useful guide to the legislature and courts in developing the substantive aspects of the right under s 65 (1) of the Constitution.

At a minimum though, the constitutional enshrinement of the right gives it a higher status as a basic human right. This has implications on common law. Precedents that provide a light duty on employers must be read restrictively. An appropriate example is the *volenti non fit injuria* doctrine, whereby employees in dangerous jobs are presumed to have voluntarily assumed risk of reasonably foreseen dangers that may befall them - **Kwaramba v Bain Industries (Pvt) Ltd.**⁴¹

Further common law does not make an explicit distinction between illness that may arise naturally and that which is work-related,⁴² but the s 65 (1) standard potentially may require such a distinction.

Dismissal for incapacity due to illness or injury arising from the workplace is only considered “fair dismissal” if it complies with the requirements of substantive and procedural fairness.⁴³ Substantive fairness imposes a duty of reasonable accommodation on the employer, before dismissing the employee, with the burden being more onerous where the injury has resulted from the employer’s breach of the duty of safety. This may be for instance by giving the employee alternative employment,⁴⁴ or granting them longer sick leave days than those specified in the Act.⁴⁵

Procedural fairness obliges the employer to carry out an investigation or inquiry as to the nature and extent of the incapacity of the worker and to consult the employee on the possibility of reasonable accommodation and the possibility of dismissal if these are not to be found.⁴⁶

The constitutional standard can also be read to now generalise to all employees, the right to withdraw labour in the face of an immediate occupational hazard which is provided under s 104 (4) of the Labour Act.

RIGHT TO A FAIR AND REASONABLE WAGE

The third and final labour right enshrined under s 65(1) of the Constitution is the right of every person with the right to be paid a fair and reasonable wage. It reads:

65 Labour rights

Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage. (emphasis added).

This provision marks a milestone in the Zimbabwean labour law regime.⁴⁷ Hitherto neither statutes nor common law had prescribed the quantum of wages payable to employees, let alone “a fair and reasonable wage.”

⁴¹ S-39-01. See also - *SARH v Cruywagen* 1938 CPD 219

⁴² **Kwaramba v Bain Industries (Pvt) Ltd** S-39-01

⁴³ Rycroft and Jordaan (1992) 214 – 15; Le Roux and Van Nierkerk, *The South African Law of Unfair Dismissal*, (Juta, 1994) 230 – 32; *FWC v SA Breweries Ltd* (1992) 13 ILJ 204 (IC); *Merseyside and North Wales Electricity Board v Taylor* (1975) IRLR 60

⁴⁴ *Carr v Fisons Pharmaceuticals* (1995) 16 ILJ 179 (IC)

⁴⁵ **ZIMASCO (Pvt) Ltd v Marikano** S-6-14

⁴⁶ *NUM & Anor v Libanon Gold Mining Co Ltd* NH 11 / 2 / 8332 (LAC).

The Constitution does not define the terms “a fair and reasonable wage.” To unravel the meaning of the term some reference will be made to common law, in particular public policy considerations as well as domestic legislation. The concept, however, has its origins in international law, and it is this, which provides the most useful guideline. Under common law, the quantum of wages is in terms of the contract of employment between the parties.⁴⁸ What the employer pays for is the availability⁴⁹ of the employee’s services and not the value of the product produced by the employee.⁵⁰ Increments are at the discretion⁵¹ of the employer. Considerations of equity, fairness or reasonableness are not relevant.⁵¹

The Public Service Act does not provide for the right of employees to “a fair and reasonable wage” but only an enforceable right to remuneration.⁵² Unlike common law and the Labour Act, there is though a requirement of objectivity and rationality in the setting of salaries for public servants. The employer cannot just arbitrarily set the remuneration levels but is required to do so by reference to, “academic, professional or technical qualifications or the attributes necessary for the efficient and effective execution of the tasks attached to the post.”⁵³

This may be a useful reference point that can be used in assisting determining the meaning of “fair and reasonable wage” under s 65 (1) of the Constitution, especially for employees earning above the basic minimum rates.

Under the Labour Act, s 6 (1) establishes a fundamental right of employees to the fair labour standard of not being paid a salary which is lower than the prescribed levels. It reads:

“No employer shall pay any employee a wage which is lower than that to (sic) fair labour standard specified for such employee by law or by agreement.”

But the section does not expressly compel payment of “fair and reasonable wages,” nor does it set an objective standard by which remuneration should be set as is done in the Public Service.

⁴⁷ M Gwisai, R Matsikidze & C Mucheche, “Labour Rights under Zimbabwe’s new Constitution: The right to be paid a fair and reasonable wage” (2014, Unpublished, Harare) 1

⁴⁸ *National Railways of Zimbabwe v National Railways Contributory Fund* 1985 (1) ZLR 16 (S); *Gladstone v Thornton’s Garage* 1929 TPD 116

⁴⁹ *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344; *Belmore v Minister of Finance* 1948 (2) SA 852 (SR)

⁵⁰ *Chiremba (duly authorized Chairman of Workers Committee) and Ors v RBZ* 2000 (2) ZLR 370 (S); *Chubb Union Zimbabwe (Pvt) Ltd v Chubb Union Workers Committee* S-01-01. Also: *Nare v National Foods Ltd* LRT/MT/38/02

⁵¹ R H Christie *The Law of Contract in South Africa* 5th ed (2009) 14

⁵² Section 22, Public Service Act

⁵³ Section 20 (2) Public Service Regulations, SI 1/2000

Neither of these requirements are set in the provisions of the Act providing for the establishment of statutory minimum wages or in collective bargaining.⁵⁴ In relation to collective bargaining though, the Act provides the Minister of Labour with authority to decline to register a collective bargaining agreement and order its renegotiation by the parties, if the Minister feels the collective agreement is or has become:⁵⁵

“(c) *unreasonable or unfair, having regard to the respective rights of the parties.*”

The Act, however, does not define what is meant by “unreasonable or unfair,” but leaves the discretion with the Minister.

The closest that domestic courts have dealt with the concept of “a reasonable wage” has been appeals to the Labour Court in compulsory arbitration matters or applications to set aside a wage increment award to the High Court in voluntary arbitration matters. In both situations, the aggrieved parties attacked the award as against public policy on the ground of gross unreasonableness.

Prior to section 65 (1) of the Constitution two approaches were evident from courts and arbitrators. In both approaches, there was a relative balancing of factors; business and economic on the one hand, and on the other, the human need factor of a dignified and poverty-free life for workers. The crucial difference was which of these was to be the “first and dominant” factor.

The first and preponderant approach took the employer’s business interests and general economic factors as the first and dominant factor - **Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of Zimbabwe.**⁵⁶

This approach held that “reasonable” wage increments are those: which do not threaten the survival or sustainability of the business;⁵⁷ are within the capacity of the employer to pay;⁵⁸ or are consistent with the prevailing rate of inflation.⁵⁹ In the **Tel-One (Pvt) Ltd** case, the *locus classicus* for this approach, the court reversed a 266% wage increment by an arbitrator as grossly unreasonable,⁶⁰ after the employer had demonstrated that such an

⁵⁴ Such as s 17 (3) (a) and s 20 (1) of the Act on statutory minimum wages and s 74 (3) and s 81 (1) on collective bargaining.

⁵⁵ Section 81 (1) Labour Act

⁵⁶ 2007 (2) ZLR 262 (H)

⁵⁷ **Zimbabwe Posts (Pvt) Ltd v Communication and Allied Services Workers Union of Zimbabwe** HH-60-14 [*Mutema J*] involving the reversal of a nominal \$25-00 increment because the employer had demonstrated that staff costs were already consuming 67% of company revenue.

⁵⁸ In **Detergent, Edible Oils & Fats Industry Employers Association v Detergent, Edible Oils & Fats Industry Trade Union**, the Labour Court reduced the award of 10% made by the arbitrator down to 2.5%, which the employer party had offered in the first place. In the **Baking Industry Workers’ Union v National Bakers’ Association of Zimbabwe**[2014] matter the arbitrator awarded a 2% increase of the basic minimum wage and refused to make an increase of the allowances.

⁵⁹ **Chamber of Mines v Associated Mineworkers Union of Zimbabwe** LC/H/250/2012, reversing a 20% increment award to the prevailing inflation level rate of 5%, because the “...inflation level ... should provide an essential guide for salary negotiations.”

⁶⁰ In terms of article 34 (2) (b) (ii), Arbitration Act [*Chapter 7:15*]

increment would result in 130% of its overall income going to wages. In setting aside the award, *HUNGWE J*, ruled:⁶¹

There is no doubt in my mind that the spirit of collective bargaining between employer and employee is to arrive by consensus or, if that fails, by arbitration, at what a fair wage is. The idea is to preserve the employer-employee relationship. The employee makes his labour available for a fair fee. The employer engages the employee on acceptable terms and conditions. The employer employs his resources to ensure that the goose that lays the eggs for their mutual benefit continues to do so. Society expects these mutually beneficial outcomes. The economy thrives and so does the community generally and its members in particular. An award that plunges the apple-cart over the cliff in my view could not be said to be in the best interest of the general good of Zimbabwe...

The court proceeded to place at the pinnacle of considerations to be made when determining whether a wage increment was reasonable, the ability of the employer to pay:

In all work situations, salaries and wages are limited by an employer's ability to pay. The courts and indeed all tribunals delegated with decisions of a financial nature would be failing in their duty if they were to will-nilly give awards whose effect would be to drive corporations into insolvency thereby destroying the economic fabric of the nation. Such awards would defeat the very purpose they are meant to serve. As such they are liable to be set aside as being in conflict with the public policy of Zimbabwe...

The potential harsh effect of this approach is shown in the decisions holding that increments must be held to the levels of the prevailing rate of inflation - **Chamber of Mines v Associated Mineworkers Union of Zimbabwe**.⁶² This has meant that where inflation is less than 0%, some arbitrators have awarded increments of 0% or even reduced prevailing minimum wages, even though such wages were less than 50% of the PDL.⁶³

The second approach took the human needs of the worker or a living wage as the first and dominant factor that could only be overcome if the employer provided concrete evidence why it cannot pay this - **City of Harare v Harare Municipal Workers Union**.⁶⁴

Workers had demanded a 330% increment in order to attain a living wage arguing that the employer could afford this as it was paying senior management astronomical salaries.

The employer offered 0% and refused to disclose the executive pay-roll arguing that it was irrelevant to look at what senior management earned. The arbitrator made an award of 120%. In upholding the award *CHITAKUNYE J*, held:

⁶¹ At p 266A-C

⁶² LC/H/250/2012

⁶³ Such 0% increments have indeed been awarded in the following cases: *Sweets & Confectionary Workers' Union v The Sweets & Confectionary Employers' Association* [2014]. In the Clothing Sector award [2014], an increment of 0% on basic wages for all employees was awarded, and minus 20% for newly engaged employees.

⁶⁴ 2006 (1) ZLR 491 (H). Applied in the Arbitral Award for the Brewing Distillers National Employment Council of the Brewing Distillers Industry (2014), where the arbitrators awarded a 6% increment on basic wages where the employer was offering a 0 per centum offer.

The arbitrator carefully considered the interests of both parties as portrayed by the parties before him. The applicant's argument of inability to pay was well considered... The substantive effect of the award was simply to awaken the applicant to the realities of today's economy... Applicants argued that respondents should not concern themselves with what is being awarded to other employees... of the applicant. But surely, the respondents are entitled to point out that those categories of employees ... are getting astronomical salaries which may in fact be eating more into the applicant's revenue than the paltry salaries ... the lowly paid workers are getting... surely if you have an entity that pays astronomical salaries to its top heavy management.. but ...is reluctant to pay its lowly paid workers a living wage, can such an entity sincerely cry bankruptcy if ordered to pay its lowly graded workers a meaningful salary? At 494D-F

We submit that the second approach comes closest to the meaning of “a fair and reasonable wage” under s 65 (1) of the Constitution. It is consistent with international law, where the concept originates, and which should be considered under sections 46 (1) and 327 (6) of the Constitution.

The first approach is too narrow in its focus on the business interest factor. Further it is distinguishable because the courts were not strictly dealing with the concept of “a fair and reasonable wage” *per se*, but gross unreasonableness. The constitutional standard involves considerations that go beyond reasonableness and address fairness and equity considerations which ordinarily do not concern civil courts.⁶⁵

Dealing with a similar provision the Industrial Court of Kenya held that:⁶⁶
The terms fair and reasonable are to be interpreted in the context of the standards at a particular work place, the national labour standards and with due regard to international labour standards.

The standard of a fair wage is well established under international law. Essentially, it means that the lowest-paid employees get a minimum wage that gives the employees and their family a dignified and poverty-free life worth of a human being in a civilized society, but subject to the prevailing enterprise and national economic and social considerations.

Thus the SADC Charter provides that:⁶⁷ :

Member States shall create an enabling environment so that:
(b) Workers are provided with fair opportunities to receive wages, which provide for a decent standard of living; ...

The same is provided in other international instruments,⁶⁸ including the Universal Declaration of Human Rights. The later provides that:⁶⁹

⁶⁵ As recognized in **Madhatter Mining Co v Tapfuma** S-51-14

⁶⁶ *VMK v CUEA* [2013] eKLR in interpreting s 41 (2) (a), Constitution of Kenya, 2010, which provides: “Every worker has the right – (a) to fair remuneration”

⁶⁷ Article 14 (b) SADC Charter

Everyone who works has the right to just and favourable remuneration ensuring for himself and herself existence worthy of human dignity...

ILO instruments provide the most comprehensive guidelines on the factors to be taken in fixing minimum wages that accord with a fair and just remuneration. The most relevant are the provisions of ILO Convention No. 131⁷⁰ and ILO Recommendation No. 135⁷¹ which set out the purpose and considerations in minimum wage-fixing. Although not ratified, the instruments are significant because they were made “with Special Reference to Developing Countries.”

As regards the purpose of minimum wage-fixing laws, Article 1 of Recommendation No. 135 states this to be:

1. *Minimum wage fixing should constitute one element in a policy designed to overcome poverty and to ensure the satisfaction of the needs of all workers and their families.*
2. *The fundamental purpose of minimum wage fixing should be to give wage earners necessary social protection as regards minimum permissible levels of wages.*

Convention No. 131 sets out the specific elements to be considered when determining wages:⁷²

The elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include –

The needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;

Economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

Three considerations are therefore important under the ILO instruments. Firstly, the needs of the workers and their families so that they do not live in poverty, taking into account factors like general levels of wages, the cost of living and relative living standards of other social groups. This is called the “human factor”, hence the term “living wage.” The Poverty Datum Line is the most scientific way of measuring poverty.⁷³

⁶⁸ See article 11 (1) of the International Covenant of Economic, Social and Cultural Rights providing: *Everyone has a right to a standard of living adequate for the health and well-being of himself or herself and his or her family including food, clothing, housing, medical care and necessary social services...*

⁶⁹ Article 23 (3) Universal Declaration Rights, 1948

⁷⁰ ILO Convention No. 131: Minimum Wage-Fixing (1970)

⁷¹ ILO Recommendation No. 135: Minimum Wage-Fixing (1970)

⁷² Article 3, Minimum Wage-Fixing Convention; article II (3) Minimum Wage-Fixing Recommendation

⁷³ ZimStat, “Poverty Analysis: Summary of International Labour Organisation (ILO) position on Poverty Datum Line in relation to wages and salaries” (2013)

Secondly, the human factor must be balanced against the business, economic and social factors like enterprise productivity, economic development and the need to maintain a high level of employment. Thirdly, is reference to prevailing “national practice and conditions,” in particular to wage levels achieved in sectors where there is effective collective bargaining and where workers are adequately organized.⁷⁴

Whilst the above shows that the “fair and reasonable wage” standard requires a balancing of factors, human and economic and social, the human factor takes primacy because of the overall purpose of avoiding poverty and that the worker lives a decent life worth of a human being.

This was aptly captured in by *Higgins J*, in interpreting the meaning of the term “fair and reasonable wage” in an Australian statute, which made granting of discounted tariffs subject to payment of “fair and reasonable wages.”⁷⁵ He held that the “first and dominant factor” in ascertaining a “fair and reasonable” wage for an unskilled employee are the “normal needs of the average employee, regarded as a human being living in a civilized community.” A wage cannot be regarded as fair and reasonable –

*if it does not carry a wage sufficient to insure the workman food, shelter, clothing, frugal comfort, provision for evil days, etc as well as reward for the special skill of an artisan if he is one.*⁷⁶

The standard is objective and not dependant on the profitability of the business *per se*:

... If the profits are nil, the fair and reasonable remuneration must be paid; and if the profits are 100 per cent, it must be paid. There is far more ground for the view that, under this section, the fair and reasonable remuneration has to be paid before profits are ascertained – that it stands on the same level as the cost of the raw material of the manufacture.

The above interpretation means that s 65 (1) of the Constitution has now set a general standard of remuneration, which for the lowest paid employees means a living wage. But which like all general rules, is subject to excerptions in appropriate circumstances.

Employees still have the onus to establish a *prima facie* case for what they consider to be “a fair and reasonable wage.” For the lowest paid employees this may be by reference to the PDL levels; cost of living and inflation; to past practice of the employer or industry; comparative sectoral, industrial and national wage increments and levels; the distribution

⁷⁴ Article 3 of the ILO Recommendation No. 30: Minimum Wage – Fixing Machinery as read with ILO Convention No. 26: Minimum Wage-Fixing Machinery

⁷⁵ *Ex Parte H.V. McKay* 1907 at p 4

⁷⁶ *Ibid.*, at 4

of the pay-roll between senior management and lower-paid employees;⁷⁷ and the standard of living of other groups in society. A useful reference point is the practice of the State, which is the largest employer in the country. For instance in 2014 wage negotiations resulted in a 26% increment to give a minimum wage of \$375-00 a month, set at a level of three quarters of a PDL of \$505.

Where workers have established a *prima facie* case, the onus shifts to the employer to give its defence, including what it considers fair and reasonable.

Because the right to a fair wage is now an enshrined fundamental constitutional right of employees, the burden on the employer who seeks to pay a minimum wage which is less than a living wage, is a heavy and onerous one. If the employer is pleading a threat of insolvency, un-sustainability, or incapacity to pay, then it must make full disclosure and provide evidence to sustain that defence. Disclosure may require availing things like financial statements, pay-roll documents; benefits to senior management; and performance projections. Evidence may be led from individual employers or an agreed representative sample of employers in the industry with sufficient measures taken to safeguard confidentiality of information provided as is normally done in applications for exemptions to pay National Employment Council minimum wages.

Sections 75 and 76 of the Labour Act on the duty of full financial disclosure where a party pleads incapacity to pay during collective bargaining is a useful but not mandatory reference point. In the above-cited High Court precedents, the court only reversed the awards as grossly unreasonable after employers had provided concrete evidence on their financial position, including the disproportionate effect of the increments on the overall finances of the business. Where an employer fails to provide such evidence, it risks having an adverse inference being drawn against it that it can pay the *prima facie* established wage, as was done in **City of Harare v Harare Municipal Workers Union**, *supra*.

Thus in determining “a fair and reasonable wage” there is a decided bias towards the needs of the worker and his or her family to live a poverty-free life with the PDL a crucial reference point, but within the context of prevailing “national practice and conditions” and other relevant economic factors, including the capacity of the employer to pay and the extra reward for a skilled worker.

This should guide collective bargaining parties, arbitrators and courts, that the essential guideline is not the rate of inflation, but increments that progressively move the lowest paid minimum wages to a PDL-linked living wage for the lowest paid employees.

⁷⁷ See for surveys of senior management salaries and benefits in Gwisai et al (2014), *supra* at 16-17

In current conditions where most employers are paying net remuneration of less than 50% of the PDL, this will mean minimum wage increments that are significantly above the prevailing inflation rates. Given the high levels of unemployment in Zimbabwe and the meager earnings of the informal sector, the earnings of the formally employed partner remain the biggest contributor to the family income. The argument that PDL calculations assume two adult earners is therefore of little relevance. The same applies to the argument that s 74 (4) of the Labour Act requires amendment of collective bargaining agreements where there have been changed circumstances. The enactment of the right to “a fair and reasonable wage” as a basic human right amounts to such circumstances for now, as long as wages remain considerably below PDL levels.

A survey of negotiated collective bargaining agreements in most industries in the period post-dollarisation, 2009 reveals cumulative wage increments well above the applicable inflation rates. The same applies to the 2014 public sector 26% salary increments by the State.

Several arbitration awards in 2014 - 2015 have taken a similar approach,⁷⁸ correctly in our view, but await testing before the Constitutional Court as a number have been challenged.

Political economy of wages

In conclusion the enshrinement of the right to “fair and reasonable wage” is an important reform of bourgeois labour law. However, it is not the ideal end. It does not free workers from the exploitation which is inherent in the wages system as argued by classical Marxist theories.

Engels argues that wages do not express a proportionate share of the wealth or surplus value created by workers in the process of production, but are payment for the cost of labour power as determined by the labour market.⁷⁹ But in the labour market as also recognized by HIGGINS J in *Ex Parte H.V. McKay, supra*, the contest between labour and capital is an unequal one because the former is always under “the pressure for bread.”

Or as Engels puts it, “*the workman has no fair start. He is fearfully handicapped by hunger.*” *With wages at most being an amount equivalent to the average human needs of a worker and their family and not the surplus value created, for Engels the result is “that the produce of the labour of those who work, gets unavoidably accumulated in the hands*

⁷⁸ Award in the Breweries and Distillers Industry (2014) – 6%; Award in the Soft Drinks Industry – 10% (2014); Award in the Millers Industry – 5% (2014).

⁷⁹ “*Now what does political economy call a fair day’s wages and a fair day’s work? Simply the rate of wages and the length and intensity of a day’s work which are determined by competition of employer and employed in the open market. And what are they, when thus determined? A fair day’s wages, under normal conditions, is the sum required to procure to the labourer the means of existence necessary, according to the standard of life in his station and country, to keep himself in working order and to propagate his race. The actual rate of wages, with the fluctuations of trade, may be sometimes below this rate; but, under fair conditions that rate ought to be the average of all oscillations - F Engels F “A Fair Day’s Wages for a Fair Day’s Work,” The Labour Standard 7 May 1881 in Inqaba ya Basebenzi 2 (Aug-Oct 1983) 7*

of those that do not work, and becomes in their hands the most powerful means to enslave the very men who produced it.”

It is these unequal and exploitative relations of production reflected in the wages system that lay the foundations for an equally unjust, unequal and oppressive social superstructure of society at large in politics, law, culture, gender relations and the intellectual spheres. Unjust against the majority that labours and in favour of a tiny minority that does not work but controls the means of livelihood.

Working class emancipation can only occur when the working class overthrows the wages-system that lies at the heart of capitalism and takes political control of society in a world-wide socialist revolution.

CONCLUSION

In the above analysis we have endeavored to demonstrate that s 65 (1) is the pivot of the labour rights entrenched under the 2013 Constitution. It has the potential to provide the basis for a dramatic overhaul of labour jurisprudence in the country by relegation of common law to the periphery as a source of labour law and for the incorporation of advances made by the working class internationally.

The need to uphold and promote these rights must of essence push further into the background the previous eminent importance of common law as a source of labour law, given its hostility to a normative social-justice based labour framework. *GUBBAY* CJ aptly referred to this in **Delta Corporation v Gwashu**⁸⁰ wherein he took a strict approach from any deviations from provisions of registered employment codes, holding:

... departures from these codes only serve to undermine the labour standards agreed by employees and employers and risk reviving the old master and servant laws of the common law. As the common law was tilted in favour of the employer, continued reliance thereon in labour matters is, in my view, retrogressive.

Grogan summarises well the potential implication of the constitutionalisation of the right to fair labour standards in the following salutary words with which we end this essay:⁸¹

The general guarantee of fair labour practices has far-reaching effects on the civil courts' approach to the interpretation of the rights of parties to employment contracts. ... The entrenchment of labour rights in general terms raises the prospect of a constitutional jurisprudence being developed by the civil courts and the Constitutional Court that may have far-reaching effect on the way the contract of employment and the employment

⁸⁰ S-96-00

⁸¹ J Grogan *op cite* at 6

relationship are approached in future. This could lead to a cross-fertilisation of the principles of labour law, the common law and public law.

