Minister for Justice and Constitutional Development v Tshishonga
2009 9 BLLR 862 (LAC)

Just and equitable compensation for non-patrimonial loss

1 Introduction

Section 23(1) of the Constitution of the Republic of South Africa 1996 guarantees a fundamental right in respect of labour relations by providing that "everyone has the right to fair labour practices". The Labour Relations Act 66 of 1995 (hereinafter "the LRA") gives effect to the right to fair labour practices in that employees have the right not to be unfairly dismissed or subjected to unfair labour practices. Section 193 of the LRA provides for remedies when an employee is unfairly dismissed. Reinstatement or re-employment is the primary remedy in cases of unfair dismissal except where the provisions of section 192(3) of the LRA apply, in which case reinstatement cannot be ordered by the labour court or an arbitrator. When an employee wishes not to be reinstated or re-employed, or the circumstances surrounding the dismissal would make the continued employment relationship intolerable, or it is not reasonably practicable to reinstate or re-employ the employee or the reason for dismissal is that it is only procedurally unfair, compensation would be the most appropriate remedy (s 193(2) LRA).

Under the 1956 labour dispensation, the Labour Relations Act 28 of 1956 granted the industrial court "an unfettered discretion" with regard to compensation in unfair dismissal cases. The amounts granted by the court on a case-by-case basis differed drastically (Grogan *Workplace Law* (2009) 177). The 2002 amendments to the LRA did away with the distinction between substantively and procedurally unfair dismissals but retained the ceiling of 24 months' compensation for automatically unfair dismissals (*ibid*) and 12 months' compensation for all other unfair dismissals. Section 194(1) provides:

> The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

The questions that arise are: When will compensation be "just and equitable" and how will the courts and arbitrators apply their discretion in order to determine "just and equitable" compensation.

2 Facts

The respondent, a deputy director-general, had made serious allegations to the media about his former employer, a former Minister of Justice and Constitutional Development. He was immediately suspended and subjected to a disciplinary inquiry. The chairperson of the disciplinary tribunal found that the information divulged to the media was a protected disclosure as defined in the Protected Disclosures Act 26 of 2000 (hereinafter "the PDA"). It was also found that there was no basis on which the respondent could be disciplined and that the respondent's suspension and disciplinary enquiry therefore qualified as occupational detriments as defined in section 1 of the PDA. The court a quo in *Tshishonga v Minister of Justice and Constitutional Development* [2007] 4 BLLR 327 (LC) posed an important question, namely whether disclosures to the media about impropriety in the workplace are protected under the PDA. The Labour Court awarded an amount equal to 12 months' remuneration to the plaintiff. The appellant submitted that the maximum award permitted by legislation should be made only in exceptional circumstances and that the award in this case was excessive. Although the court in *Tshishonga* held that an employee who suffers an "occupational detriment" is in a position similar to one who is victimised or discriminated against and that compensation awards for discrimination are therefore guidelines for these claims, it must be stressed that in the case of an unfair labour practice the employee would be entitled to a maximum of 12 months' compensation and in the case of automatically unfair dismissal to a maximum of 24 months' compensation. The compensation of 24 months is different from cases where the employer did not prove that the reason for dismissal was a fair reason related to the employee's conduct, capacity or the employer's operational requirements or because the employer did not follow a fair procedure or both. In these instances the compensation must be "just and equitable" but not more than the equivalent of 12 months' remuneration. On appeal in *Minister for Justice and Constitutional Development v Tshishonga* [2009] 9 BLLR 862 (LAC) the Labour Appeal Court was faced with the question what is just and equitable in circumstances where the compensation is for non-patrimonial loss.

3 Decision and Discussion

3 1 Compensation

Section 194 of the LRA sets out "how compensation must be calculated in different circumstances, not ... when and why compensation must be awarded" (Cohen "Exercising a Judicial Discretion – Awarding Compensation for Unfair Dismissals" 2003 *ILJ* 739). *Amalgamated Beverages Industries v Jonker (Pty) Ltd* 1993 *ILJ* 1232 (LAC) and *Alert Employment Personnel (Pty) Ltd v Leech* 1993 *ILJ* 655 (LAC) are relevant with regard to compensation although they were decided before the enactment of the LRA. In the *Amalgamated Beverages Industries* case the court held that compensation in its ordinary meaning comprises the payment of a sum of money to the injured to "make good a loss resulting from an unfair labour practice" (1256g). A claim for compensation for an unfair labour practice is "more akin to a delictual claim than a claim based on breach of contract" (*Alert Employment supra* 661c). Mischke ("Calculating compensation for unfair dismissal: Quantifying just and equitable compensation" 2005 *Contemporary Labour Law* 24) is of the view that:

> Compensation has its origin in the LRA, damages in common law, arise in respect of a delict (an unlawful act) or breach of contract. Statutory compensation is subject to an upper limit in terms of s 194 of the LRA; this limit does not apply in the case of common law damages. While common law damages usually relate to proven patrimonial loss in the context of breach of contract or a delict, statutory compensation is solace payment to the employee for an infringement of the employee's right not to be unfairly dismissed. As much as compensation in terms of s 194 may resemble damages, it is clear that an important distinction between the two forms of legal redress remains.

Before its amendment section 194(1) of the LRA dealt with the awarding of compensation in case of procedurally unfair dismissals while section 194(2) dealt with the awarding of compensation in case of substantively unfair dismissals. Factors taken into account in the calculation of the amount awarded in terms of procedurally unfair dismissals were very different from the factors taken into consideration when calculating the amount awarded for a substantive unfair dismissal (Cohen 2003 *ILJ* 740). Case law and precedents governing the interpretation of section 194(1) before its amendment were not binding on cases regarding section 194(2) and it was therefore difficult to calculate an award for a substantively unfair dismissal (*HM Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandes* 2002 *ILJ* 278 (LAC)). The amended section 194(1) now provides for the compensation of an employee for "either a procedurally unfair dismissal or a substantively unfair dismissal or both" but in calculating the amount the factors to be considered will still "vary according to whether the dismissal is substantively or procedurally unfair or both" (Cohen 2003 *ILJ* 741). Various factors can be taken into account when a court has to decide whether an employer should pay compensation. These factors are (a) the nature of the dismissal (whether it was automatically unfair); (b) whether

the dismissal is substantively or procedurally unfair or both; (c) the nature and extent of the deviation from the procedural requirements when a dismissal is procedurally unfair; (d) whether the employee was guilty of misconduct insofar as the reason for dismissal is misconduct (see also *Transnet Ltd v CCMA* 2008 *ILJ* 1289 (LC) where the court stated that the "offensive nature" of the misconduct of an employee must play a role in the quantum of compensation awarded (1300a) and that even when there are procedural irregularities, if the offence was of a "reprehensible nature", compensation would be inappropriate (1301a)); (e) the consequences for the parties when compensation is awarded and when it is not; (f) the need to provide a remedy where a wrong has been committed; (g) the impact of the conduct of the employee upon the employer or the business of the employer insofar as the employee may have done something wrong which gave rise to his dismissal but where it was not sufficient to warrant dismissal and the conduct by either party that undermines or promotes any objects of the LRA, for example, effective dispute resolution of disputes (*Kemp t/a Centralmed v Rawlins* 2009 *ILJ* 2677 (LAC) 2687f–2688e). It must also be noted that in calculating the amount to be awarded as a result of procedural unfairness, the court in *Chothia v Hall Longmore & Co (Pty) Ltd* [1997] 6 BLLR 739 (LC)) held that "compensation" in section 194(1) should be given its ordinary meaning, namely "the value, estimated in money, of something lost" (745a–c). However, the court in *National Union of Metalworkers of SA v Precious Metal Chains (Pty) Ltd* [1997] 8 BLLR 1068 (LC)) held that where an employee is entitled to compensation due to a procedurally unfair dismissal, such employee "does not have to prove his or her losses" (1073j–1075j). It must, however, be stressed that compensation in terms of the LRA is not the same as damages in terms of the law of delict but that several principles apply equally. The principle in *Johnson & Johnson (Pty) Ltd v CWU* 1999 *ILJ* 89 (LAC) "remains instructive despite the fact that the decision was based on the repealed s 194(2) of the LRA" because "it clarifies the difficulty and confusion that sometimes arise about the distinction between compensation in terms of the LRA and damages under the law of contract or delict" (*Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* 2008 *ILJ* 1564 (LC) 1576j–1577a).

3 2 *Solatium*

The Labour Appeal Court in *Tshishonga* was faced with the question as to what is "just and equitable" in circumstances where the compensation is for non-patrimonial loss. The court stated that assistance can be gained from the *actio iniuriarum* in terms of which a *solatium* is granted (par 18). *Solatium* can be described as an amount of solace money paid to a plaintiff by a defendant for the impairment of the personality interest of the plaintiff, (Neethling, Potgieter & Visser *Law of Delict* (2010) 251). The *actio iniuriarum*, the action instituted for the intentional infringement of a personality right, is used to "recover damages in the form of satisfaction" (Neethling, Potgieter and Visser *Neethling's Law of Personality* (2005) 59). The *actio iniuriarum* further has "the object of

effecting retribution for the injustice sustained by the plaintiff and of satisfying him for the feeling of injustice, injury and suffering which he (actually or presumably) sustained as a result of the defendant's conduct". For defamation, a form of *iniuria*, the award of damages as *solatium* is determined to "effect the reparation for the lowering of the plaintiff's esteem in the community" (Neethling, Potgieter & Visser *Law of Delict* 251). A person's *fama* or good name is the respect and status that he or she enjoys in society and the community and therefore any action that reduces a person's status in society or the community infringes on his or her good name and is an *iniuria*. For a person to claim damages for *iniuria* in the form of defamation, the infringement of his or her right to his or her good name, which injured his or her status, good name or reputation, must have been intentional (Neethling, Potgieter & Visser *Law of Delict* 331). *Solatium* further has no "fixed content" and can, amongst others, take on the meaning of "penance, retribution, reparation for an insulting act, or balm poured on a plaintiff's inflamed emotions or feelings of outrage at having to suffer an injustice" (Neethling, Potgieter and Visser *Neethling's Law of Personality* 59). In instances of defamation, the awarding of a *solatium* can be seen as having a penal function as it is not used only to right a wrong (Neethling, Potgieter & Visser, *Law of Delict* 251). It has been held that the primary object of the *actio iniuriarum* is to punish the defendant (*Masawi v Chabata* 1991 4 SA 764 (ZH) 772). It should, however, be mentioned that the *actio iniuriarum* covers a broad spectrum of rights being infringed upon and is not limited to an action in respect of defamation (*Viljoen v Nketoana Local Municipality* 2003 *ILJ* 437 (LC) 447a). Both *solatium* awarded under the *actio iniuriarum* and compensation awarded in terms of section 194(1) of the LRA deal with the awarding of an amount of money following the infringement of a right and it can further be concluded that in principle there is no difference between the two (*Viljoen v Nketoana Local Municipality* 2003 *ILJ* 437 (LC) 447c–d). The court in *Tshishonga* added that in cases of *solatium* "the award is, subject to one exception of a non-patrimonial nature, and is in satisfaction of the person who has suffered an attack on their dignity and reputation or an onslaught on their humanity" (par 18).

3 3 Quantum

In the case of a procedurally unfair dismissal, the objective of compensation is a *solatium* to compensate for the loss of the employee's right to a fair hearing or procedure prior to dismissal and not necessarily the actual losses suffered by the employee as a result of the dismissal (*Johnson & Johnson (Pty) Ltd v CWU supra* par 37). The court further held that "compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss" (par 41). Before the LRA came into force the situation was drastically different and it was imperative for a plaintiff to show proof of actual or patrimonial loss in order to receive an award for compensation (Cohen 2003 *ILJ* 742). In *Lorentzen v Sanachem (Pty) Ltd* 1999 *ILJ* 1811 (LC) the court held that "to weigh up patrimonial loss against a *solatium*

is illogical" (par 25). According to the court, *solatium* for the loss of the right has a punitive element in that the employer must "pay a fixed penalty for causing that loss" and in "the normal course a legal wrong done by one person to another deserves some form of redress" (*Johnson & Johnson* (Pty) Ltd v CWU *supra* par 41). Following the decision in the *Johnson & Johnson* case, the court in *Viljoen v Nketoana Local Municipality* 2003 *ILJ* 437 (LC) held that compensation awarded in terms of section 194(1) of the LRA includes both a penal element and an element of solace (446g). The court stated that it is "not an award of damages in the contractual sense, but rather a combination of *solatium* for the employee and punishment against an employer" (446g). The court followed the opinion held by Burchell (*Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 435) that "an award for damages under the *action injuriarum*, serves two broad purposes: vindication of the plaintiff's personality and providing him or her with a *solatium* (or solace) for wounded feelings" (446h–447a). In *Swart v Mr Video (Pty) Ltd* [1997] BLLR 249 (CCMA) the court held that compensation may in some sense be described as punitive because the arbitrator or Labour Court has a discretion, for example in cases of unfair discrimination, to apply a stronger sanction (253a). In *Market Toyota v Field* [2000] 583 BLLR 588 (LC) the court held that there is nothing wrong with distinguishing between the compensation awarded in terms of section 194(1) of the LRA and that awarded in section 194(3). Compensation awarded in terms of section 194(1) is punitive in nature in the form of a *solatium* whereas the section 194(3) compensation is given for something lost (par 8).

In general there is no "fixed formula" by which the calculation of the amount of *solatium* is done and the courts assess matters according to what is "right and fair" (Neethling, Potgieter & Visser *Law of Delict* 251; Neethling, Potgieter & Visser *Neethling's Law of Personality* 59). It can, however, be said that even without any "fixed formula", important elements in calculating the compensation to be paid include the seriousness of the defamation, the nature and extent of the publication, the plaintiff's reputation as well as the motives and conduct of the defendant (*Mogale v Seima* 2008 5 SA 637 (SCA) 642c–h). Awards of *solatium* by South African courts have been quite conservative. An action for defamation is seen as a way in which a plaintiff can vindicate his reputation, and that it is thus not "a road to riches" (*Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 590e). The amount of *solatium* awarded may not be insignificant. This point is emphasised in *Ramakulukusha v Commander, Venda National Force* 1989 2 SA 813 (V) where the court stated that when awarding damages, the court is tasked with the duty of "upholding the liberty, safety and dignity of the individual" (847c). In order not to jeopardise the confidence employers have in the courts, the award must also not be so high as to appear "arbitrary and unmotivated" (*Alert Employment Personnel (Pty) Ltd v Leech* 1993 *ILJ* 655 (LAC) 661a). In *Tshishonga* the court stated that in cases of *solatium* the award is subject to one exception of a non-patrimonial nature, and "is in satisfaction of the

person who has suffered an attack on their dignity and reputation or an onslaught on their humanity" (par 18). The court added that the exception is for the amount relating to the costs of R177,000 which were incurred by the respondent when he had to defend himself and are patrimonial in nature. The court stated that the respondent must be compensated for the R177,000 because he had to defend himself "against the wholly unwarranted onslaught launched against him" (par 19). It furthermore held that the following factors could be taken into account when quantifying compensation (par 16): (i) the embarrassment and humiliation the respondent had suffered by being summarily removed from his post without any reason given and thereafter being subjected to a suspension and subsequent disciplinary hearing, (ii) being called a "dunderhead" by the Minister of Justice on national television and being rapped over the knuckles for poor work performance (which was not true), (iii) gross humiliation by being moved to a position which was non-existent at the time and being thereafter for long periods without any work or without work instructions, (iv) the undisputed evidence of the respondent that, because of all the humiliation, victimisation and harassment by the appellant, he had to receive trauma counselling as a result of the way in which he was treated after the disclosures had been made to the media, (v) the employment of an attorney to defend him at the disciplinary hearing (where he was found not guilty) which cost him R177,000 to protect his interests and rights at the inquiry, to mention only a few.

In calculating the award of damages in cases of defamation and keeping in mind the penal function of damages in cases of defamation, the courts can consider aggravating and extenuating circumstances (Neethling, Potgieter & Visser *Law of Delict* 251). In *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 the court found that patrimonial damage can be claimed with the *actio iniuriarum*. However, this order was wrong as there was no claim for *solatium* for the infringement of the personality right and only patrimonial damages were claimed, and the *iniuria* occurred with the infringement of a personality right (7). In such instances the Aquilian action should be instituted to claim damages for patrimonial damage where such damage was caused by an *iniuria* (Neethling, Potgieter & Visser *Law of Delict* 322). In *Chemical Energy Paper Printing Wood and Allied Workers Union v Glass and Aluminium 2000 CC* 2002 *ILJ* 696 (LAC) the court also ruled that the awarding of compensation should have a "punitive element". The court further stated that the dismissal should "be dealt with in a manner that gives due weight to the seriousness of the unfairness to which the employee so dismissed has been subjected" (709a–c**)**. This is a far cry from the view expressed in *Ferodo (Pty) Ltd v De Ruiter* 1993 *ILJ* 974 (LAC) where the court stated that the compensation should not be calculated to "punish the party". In *Amalgamated Beverages Industries v Jonker supra*, following *Ferodo (Pty) Ltd v De Ruiter supra*, it was also stated that South African courts in following English law should award compensation which is "reasonable and fair" and that it should not be calculated to "punish the party". In

Ferodo (Pty) Ltd v De Ruiter (*supra* 981c–d) the court disagreed with the view that an employee should be compensated for injured feelings or for humiliation and injury of his pride. The court held that the correct approach is that of the English law, which entails that an "unfairly dismissed employee is to be compensated for the financial loss caused by the decision to dismiss him". The court further followed the opinion of Landman (*Compensatory Orders in the Industrial Court Labour Law Briefs vol 4 no 2* (1990) 9) that according to the common law, courts should not award compensation "for mere mental distress" following breach of contract unless "the mental distress results in some other loss" (980b–e). In *Christian v Colliers Properties* 2005 *ILJ* 234 (LC), which *inter alia* dealt with the awarding of damages in terms of section 50(1) of the Employment Equity Act 55 of 1998, the court ruled that when awarding damages the court should consider various factors, including "to redress the wrong caused by the infringement, the deterrence of future violations, the dispensation of justice which is fair to all those who might be affected" (240f–g). The court in *Christian v Colliers Properties supra* referred to *Alexander v Home Office* 1988 IRLR 190 (CA) where it was held that in awarding damages for compensation in instances of unfair discrimination, the "the object of an award for unlawful racial discrimination is restitution" and that it is impossible to define restitution and that "the answer must depend on the good sense of the judge and the assessors". In *Tshishonga* the court held that "a far more significant sum should be awarded as compensation for the indignity suffered, the extent of the publication of attack on the respondent (publication being on national television) and the persistent, egregious nature of the attacks upon the respondent which have been triggered because he had acted in the national interest" (par 22). The court awarded Tshishonga R277,000 in compensation (R100,000 for suffering the indignity and R177,000 in respect of costs incurred in his defence) as well as all his legal costs (parr 22–23).

In terms of section 194(1) the amount of compensation should be "just and equitable". When awarding compensation, the court or arbitrator must use its discretion and take guidance from the purposes of the Act together with the Constitution in order to calculate the amount fairly (*Victor and Picardi Rebel* 2005 *ILJ* 2469 (CCMA)). In *Transnet Ltd v Commission for Conciliation, Mediation and Arbitration* 2008 *ILJ* 1289 (LC) 1300d–e the court noted that section 194(1) applies in circumstances where compensation is awarded for a procedurally unfair dismissal and held that "the compensation must be 'just and equitable' in all circumstances". In calculating the compensation, the court will be required to make a "rational assessment of facts that are relevant and have been properly tendered in evidence" (Brassey *Employment and Labour Law vol 3* (1999) A8:73; Cohen 2003 *ILJ* 741). The "fact of whether or not an aggrieved dismissed employee has improved or sustained his employment prospects in consequence of the unfair dismissal" is also an important factor to be taken into account when calculating the amount of compensation (*Northern Province Local*

Government Association v CCMA 2001 *ILJ* 1173 (LC) par 60). Another factor the court may consider to be relevant in the calculation of damages is "whether or if at all the employee secured alternative employment or whether or not the employee was offered an alternative employment as well as whether or not the employee has secured any other income" (*Whitehead v Woolworths (Pty) Ltd* 1999 *ILJ* 2133 (LC) 2136g). In the *Johnson & Johnson* case the court held with regard to the previous section 194 that:

> [t]he nature of an employee's right to compensation under s 194(1) also implies that the discretion *not* to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of s 194(1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee (par 41).

The court in *Kemp t/a Centralmed v Rawlins* (*supra*) stressed the fact that the provisions of section 193(1) of the LRA does not give the Labour Court or an arbitrator "the kind of power which would enable it or him to grant or refuse an order of compensation on identical facts as it or he sees fit" (2689a). The court further stated that the word "discretion" is not a true or narrow discretion but a wide discretion because the question is "whether or not it is to award or not award compensation that would better serve the requirements of fairness in the matter" (2691g–i). The court further held that when it is decided to award or order payment of compensation in terms of section 193(1)(c), section 194(1) becomes relevant because it sets out the parameters for the amount of compensation that may be granted or determined (2696e–g). An employer therefore does not obtain a vested right to the section 193(1)(c) remedy but only has a right to be considered for that remedy (2697c).

Regarding the question whether the amount of compensation should also be punitive, the court in *Mogale v Seima* (*supra* 641g) followed the decision in *Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (T) 771g–i. The court in the *Mogale* case held that awarding of compensation should not be punitive in that in the civil courts, damages are awarded to console a plaintiff for his "wounded feelings" and not to "penalise or to deter the defendant for his wrongdoing, nor to deter people from doing what the defendant has done". It also held that "punishment and deterrence are functions of the criminal law, not the law of delict" (641h–j). In *Hoffmann v South African Airways* 2000 *ILJ* 2357 (CC) the court held that:

> The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of a constitutional right; second, to deter future violations, third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore,

> in determining the appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source' (par 45).

The spirit of the *Hofmann* case was carried on by the court in *Viney v Barnard Jacobs Mellet Securities* (*supra)* where it emphasised that when considering the term "just and equitable" compensation one must balance the interests of both the dismissed employee and the employer (1577h). An additional factor that needs to be considered is the infringement of the constitutionally protected rights of the plaintiff. The courts will thus give effect to the norms of the Bill of Rights in determining the "degree of 'aggravated' damages required to compensate the injured individual, rather than resort to an unacceptable award of 'punitive' damages to punish the defendant for what he or she has done" (Burchell *The Modern Actio Injuriarum* 436).

4 Concluding Remarks

The employee in *Tshishonga* was subjected to an "occupational detriment" by being suspended because he blew the whistle by making a "protected disclosure" in terms of the PDA. A potential whistle-blower faces a difficult choice in that he or she either reports the misconduct and takes the risk of potential retaliation from his or her employer or keeps quiet and retains his or her job (Mendelsohn "Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing" 2009 *Washington University Global Studies LR* 723). Due to the fact that this is a very important responsibility that is placed on such a person, the court must be severe in exercising its discretion when determining what is "just and equitable" compensation. When looking at the remedies for suffering an occupational detriment, the purpose of compensation is to provide redress for patrimonial and non-patrimonial losses. When determining the amount of compensation that is reasonable, fair and equitable, particular criteria must be taken into account. To reach the remedy stage means that the applicant must successfully prove that he had made a protected disclosure and that he was subjected to an "occupational detriment" (*Tshishonga v Minister of Justice and Constitutional Development* [2007] 4 BLLR 327 (LC) 375e–f). The actual amount to be awarded in cases of *solatium* is discretionary and there is "no tariff to which recourse can be made" (par 20). This illustrates the reintroduction of a judicial discretion when awards are made for compensation in labour law cases. When applying their discretion, the court or arbitrator must also take into consideration the factors illustrated in *Kemp t/a Centralmed v Rawlins* (*supra*). The fact that a far more significant sum of compensation was awarded in *Tshishonga* for the indignity suffered illustrates that employers cannot simply subject employees to unfair labour practices or unfairly dismiss them. Although

cases are individual in nature this case hopefully provided some guidelines (as discussed earlier under par 3 3), especially in cases dealing with *solatium* and where compensation also has a non-patrimonial component.

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