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It's not me, it's you: incompatibility as a ground for dismissal

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"*An employer has the prerogative to set reasonable standards pertaining to the harmonious interpersonal relationships in the workplace*" – words by Mokgoatlheng AJ in the case of *Jabari v Telkom SA (Pty) Ltd*[1] ("***Jabari***"). This case reveals the lesser known of the lawful grounds for dismissal in South African employment law – incompatibility.

The Labour Relations Act, 66 of 1995 ("**LRA**") recognises three grounds for dismissal, namely misconduct, incapacity and operational requirements. Whereas misconduct and incapacity (poor work performance) are often easily identifiable, incompatibility can be a more nebulous concept, and is not as easily identified as the appropriate reason for a potential dismissal, especially as it is not mentioned specifically as a ground for dismissal in the LRA. However, courts have given life to the concept and provided guidance as to when a dismissal for incompatibility may be fair.

Classified as a form of incapacity and defined by *Jabari* as relating to a subjective relationship between an employee and his/her co-workers and regarding "the employee's inability or failure to maintain cordial and harmonious relationships with his peers"[2], incompatibility has not actually come before our courts too many times. In fact, it has only once succeeded as a ground for dismissal in a case before the CCMA namely, *Miyeni v Chillibush Communications (Pty) Ltd*[3] ("**Miyeni**"). However, despite the fact that employers have often been unsuccessful in proving the fairness of an incompatibility dismissal, the overwhelming message communicated by the courts is that incompatibility is indeed a ground for dismissal in our law, and adherence to the correct procedure may result in a fair dismissal.

The correct procedure for an incompatibility dismissal has been set out in case law. In the case of *Wright v St. Mary's Hospital*[4] the Industrial Court, as it was at the time, explains that –

"*The employee must be advised what conduct allegedly causes disharmony; who has been upset by the conduct; what remedial action is suggested to remove the incompatibility; that the employee be given a fair opportunity to consider the allegations and prepare his reply thereto; that he be given a proper opportunity of putting his version; and where it is found that he was responsible for the disharmony, he must be given a fair opportunity to remove the cause for disharmony.*"[5]

In the case of *Jabari*, an employee was dismissed on the basis that his "attitude, behaviour and general personality" was incompatible with the employer's corporate culture.[6] The court held that the employer has the onus of proving not only that incompatibility exists, but that the employee is substantially responsible for the disharmony.[7] In addition, an employer must prove that they followed the correct procedure set out above with regard to counselling the employee and affording him/her with an opportunity to put his/her version to the employer and to correct the disharmony with the aim of restoring an amicable relationship.[8] In *Jabari*, the court held that the employer failed to discharge the onus proving the correct procedure was followed.

In the case of *Miyeni*, the employee resigned from the employer as managing director but wanted to remain employed as an ordinary employee. The board of the employer passed a resolution removing the employee which the Labour Court subsequently ruled constituted a dismissal.[9] The CCMA was tasked with determining whether or not such dismissal was procedurally and substantively fair.

In determining procedural fairness, the Arbitrator made reference to the Code of Good Practice: Dismissal (Schedule 8 to the LRA) which requires an investigation, which need not be formal, but which allows the employee an opportunity to address the allegations made against him. In *Miyeni*, the employee was given notice of a shareholder's meeting where certain concerns regarding the employee would be discussed. Despite the fact that the employee chose not to attend this meeting, the Arbitrator found that the employee was still afforded a reasonable opportunity to present his case.[10] The dismissal was found to be procedurally fair. *Jabari* adds to the procedure requirement that the employee be afforded counselling to remedy the incompatibility.[11]

With regard to substantive fairness, the Arbitrator found that the employer had proved a degree of incompatibility which was caused by the employee's conduct.[12] In particular, the Arbitrator made reference to words by John Grogan in his book "Dismissal" which states that compatibility may carry more significance in more senior employees.[13] On this basis, the Arbitrator found that the employee's "incompatibility to fit the corporate culture" of the employer constituted a reasonable justification for dismissal – making the dismissal substantively fair.[14]

This case, although only before the CCMA, shows the potential for a fair dismissal on the ground of incompatibility. This ground finds stronger applicability in the case of employees at higher levels. Despite this being the only case where incompatibility has succeeded as a ground for dismissal, other cases are aligned with *Miyeni* in the principles outlined by the court: incompatibility may succeed as a ground for dismissal if substantive and procedural fairness is followed.

In an environment where the workplace is becoming increasingly focused on interpersonal relationships, this ground of dismissal may grow in popularity. It is necessary, for this reason, that employers and employees alike are aware of the requirements with respect to reason and procedure which govern incompatibility.

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[1] *Jabari v Telkom SA (Pty) Ltd* [2006] 10 BLLR 924 (LC).
[2] *Jabari v Telkom SA (Pty) Ltd* at 937[1].
[3] *Miyeni v Chillibush Communications (Pty) Ltd* (2010) 19 CCMA 8.3.1.
[4] *Wright v St. Mary's Hospital* (1992) 13 ILJ 987 (IC).
[5] *Wright v St. Mary's Hospital* at 1004H and mentioned in *Jabari v Telkom SA (Pty) Ltd* at 937[6].
[6] *Jabari v Telkom SA (Pty) Ltd* at 928[1](d).
[7] *Jabari v Telkom SA (Pty) Ltd* at 938[8].
[8] *Jabari v Telkom SA (Pty) Ltd* at 938[9](b).
[9] *Miyeni v Chillibush Communications (Pty) Ltd* at 3-5.
[10] *Miyeni v Chillibush Communications (Pty) Ltd* at 119.
[11] *Jabari v Telkom SA (Pty) Ltd* at 938[9].
[12] *Miyeni v Chillibush Communications (Pty) Ltd* at 138.
[13] *Miyeni v Chillibush Communications (Pty) Ltd* at 151.
[14] *Miyeni v Chillibush Communications (Pty) Ltd* at 151.

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