

**DISCIPLINARY ENQUIRIES IN TERMS OF
SCHEDULE 8 OF
THE LABOUR RELATIONS ACT 66 OF 1995**

by

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DECLARATION

I, Paul Andries Smit, declare that *Disciplinary Enquiries in Terms of Schedule 8 of the Labour Relations Act 66 of 1995* is my own unaided work both in content and execution. All the resources I used in this study are cited and referred to in the reference list by means of a comprehensive referencing system. Apart from the normal guidance from my study leaders, I have received no assistance, except as stated in the acknowledgements.

I declare that the content of this thesis has never been used before for any qualification at any tertiary institution.

I, Paul Andries Smit, declare that the language in this thesis was edited by Idette Noomé (MA English Pret).

Paul Andries Smit

Date:

Signature

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ABSTRACT

DISCIPLINARY ENQUIRIES IN TERMS OF SCHEDULE 8 OF THE LABOUR RELATIONS ACT 66 OF 1995

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One of the most dramatic events in any employee's working career is to be dismissed and even more so if the employee regards the dismissal as unfair. The right not to be unfairly dismissed is considered one of the most basic workers' rights in South Africa and is also contained in Convention C158 of the International Labour Organization (ILO).

Section 23(1)(a) of the South African Constitution states that: "[e]veryone has the right to fair labour practices." Labour legislation gives effect to this right in section 1(a) and 1 (b) of the LRA which states: "to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution; to give effect to the obligations incurred by the Republic as a member state of the ILO."

Section 185(a) of the Labour Relations Act also states that: "[e]very employee has the right not to be unfairly dismissed." Section 188(1)(a) – (b) expands on this protection against unfair dismissal by providing

that a dismissal will be unfair: “if the employer fails to prove ... that the dismissal was effected in accordance with a fair procedure”.

The pre-dismissal procedures that must be followed by the employer have been codified to some extent in the Code of Good Practice: Dismissal, contained in Schedule 8 of the LRA. In terms of section 138(6) and section 203(3) of the LRA, commissioners who are required to determine if a dismissal was procedurally fair are compelled to take Schedule 8 into consideration.

The main objectives of this thesis were to critically evaluate the content and application of those provisions of Schedule 8 that establish procedural requirements to disciplinary enquiries and to recommend possible changes to the Code of Good Practice: Dismissal. It is apparent that the procedural requirements for a disciplinary enquiry in terms of Schedule 8 are vastly different from those that still form the basis of most disciplinary codes and procedures implemented by employers after the *Mahlangu v CIM Deltak* judgment of the former Industrial Court in 1986. It is also clear that the principles of ILO Convention C158 are given effect in South Africa’s dismissal law. Procedural fairness in disciplinary enquiries does not lie in elaborate, complex and rigid court-like procedures but in flexibility and in adhering to the *audi alteram partem* principle. A disciplinary enquiry is not a court case and the workplace is not a court of law.

The belief that South Africa’s dismissal law is rigid and inflexible is inaccurate. A comparative analysis of South African dismissal law with ILO Convention C158 and three other international jurisdictions clearly demonstrates that the dismissal regime in South Africa makes provision for flexibility. Employers, employees, trade unions, labour consultants and lawyers are all to blame for the formal court-like procedures that

form the basis of most disciplinary enquiries in the workplace in South Africa today.

The guidelines provided by Schedule 8 are in line with the ILO's principles. Consequently disciplinary enquiries should be handled according to those principles. The disciplinary codes and procedures of employers should be amended to reflect the core principles of ILO Convention C158 and the five basic guidelines contained in Schedule 8. Furthermore disciplinary codes and procedures should not be used as an inflexible set of rules but as a guideline from which some deviation is permissible in certain circumstances.

LIST OF ABBREVIATIONS

| | | |
|-------|---|---|
| ACAS | - | Advisory Conciliation and Arbitration Service |
| BCEA | - | Basic Conditions of Employment Act |
| CC | - | Constitutional Court |
| CCMA | - | Commission for Conciliation Mediation and Arbitration |
| COIDA | - | Compensation for Occupational Injuries and Diseases Act |
| CWI | - | <i>Centrale Organisatie Werk en Inkomen</i> |
| EA | - | Employment Act |
| EC | - | European Commission |
| ECJ | - | European Court of Justice |
| EP | - | European Parliament |
| ERA | - | Employment Relations Act |
| EU | - | European Community |
| ILO | - | International Labour Organization |
| LAC | - | Labour Appeal Court |
| LC | - | Labour Court |
| LRA | - | Labour Relations Act |
| OHSA | - | Occupational Health and Safety Act |
| SADC | - | Southern African Development Community |
| SCA | - | Supreme Court of Appeal |
| UIF | - | Unemployment Insurance Fund |
| UK | - | United Kingdom |
| USA | - | United States of America |
| WDFEA | - | Wrongful Discharge from Employment Act |