

CHAPTER 1

INTRODUCTION TO THE RESEARCH TOPIC AND DESIGN

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1.1 Introduction

In the modern business environment, organisations need to adapt to increasingly complex and uncertain technological, political, economic and cultural changes. Organizations must also meet numerous legal requirements that emanate from a variety of disciplines such as, Company Law, Tax Law, Health and Safety Laws, Social Security Law and Labour Law.¹

John Donne's famous saying "no man is an island upon himself"² is even more relevant today than it was in 1624 especially in the world of international trade, globalisation, international treaties and the United Nations. Globalisation and the increasingly unrestricted movement of capital and labour across international borders are creating a situation where laws in general and labour laws in particular are obtaining an international character. In view of increasing globalisation, the Conventions of the International Labour Organization (hereafter the ILO) have assumed greater prominence in recent years.³ Internationalisation and globalisation have had a growing impact in many areas especially on legal and economic relations.⁴

Employers have to comply with a vast array of rules and regulations and similarly employees must perform their given tasks in accordance with pre-determined standards contained in contracts of employment and codes of conduct in the workplace.

¹ Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) 46.

² Donne "Mediations XVII" (1624) *Devotions upon Emergent Occasions and Several Steps in my Sickness s.p.* Downloaded from <http://www.online-literature.com/donne/409> on 20 February 2010.

³ Biffle and Isaac "Globalisation and Core Labour Standards: Compliance Problems with ILO Conventions 87 & 89 comparing Australia and other English-speaking Countries with EU Member States" (2005) *The International Journal of Comparative Labour Law and Industrial Relations* 21(3) 405.

⁴ Wisskirchen "The Standard-setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience" (2005) *International Labour Review* 253.

As they are only human all employees cannot perform perfectly to standard all the time. At some stage an employee may be guilty of misconduct in the workplace because he or she transgresses against a given code of conduct. When that happens, it is the employer's prerogative to discipline the employee who is guilty of misconduct in the workplace.⁵

In order to exercise their right to discipline employees, South African employers must comply with a number of legal principles that establish procedural requirements for disciplinary enquiries. The most important source of these requirements is Schedule 8 of the Labour Relations Act⁶ (hereafter the LRA), which was published under the title "Code of Good Practice – Dismissal" (hereafter Schedule 8).

The procedures that employers follow when they discipline or even ultimately dismiss employees are subject to scrutiny by the Commission for Conciliation, Mediation and Arbitration (hereafter the CCMA), Bargaining Councils and the Labour Court, which may overturn decisions taken by employers.⁷

The trade union movement⁸ in South Africa also plays a significant role in ensuring, either directly or indirectly, that disciplinary enquiries conducted by employers comply with the requirements of the LRA and other legislative instruments.⁹ A major challenge for an employer who engages in a disciplinary enquiry is that the term "fairness" is not

⁵ The right to discipline is discussed in chapters 4 and 5 below.

⁶ 66 of 1995. Also see Basson, Christianson, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* (2007) 111.

⁷ Grogan *Workplace Law* (2007) 129.

⁸ The impact of trade unions in the work place has not diminished even though there has been a decline in union membership in the last couple of years. See Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw *Labour Relations Law a Comprehensive Guide* (2006) 57- 58; Grobler and Wörnich *Human Resources Management in South Africa* (2006) 418.

⁹ In terms of item 4(1) of Schedule 8 an employee has the right to be represented by a trade union representative in a disciplinary enquiry. S 200 of the LRA also stipulates that a registered trade union is entitled to be a party to any proceedings instituted in terms of the LRA.

comprehensively defined in the LRA especially with regards to disciplinary enquiries.¹⁰ The CCMA, the Bargaining Council or the Labour Court may well determine that what an employer perceives to be fair is, in fact, unfair.¹¹ Employees also have their own perceptions of fairness and of procedural justice; and these perceptions may differ vastly from the perceptions held by the employer.¹²

The legal costs that an employer can incur in defending an unfair dismissal claim can be vast. In addition, it is time-consuming to defend such a case. Witnesses have to be called away from work to testify and employers run the risk of re-employment of an unfairly dismissed employee. It is in the best interest of both employers and employees to ensure that the disciplinary processes that are followed in the workplace will stand up to the scrutiny of organisations such as trade unions, and in some cases also to the scrutiny of the labour dispute resolution institutions in South Africa. Employers must therefore ensure that the application of discipline and the disciplinary enquiry comply with the laws of the country.¹³

The employer will determine, through the disciplinary enquiry whether an employee should be dismissed. However, in a large number of cases, the employer's decision is ultimately challenged by the employee at the CCMA, the Bargaining Council or even in the Labour Court.¹⁴

¹⁰ Guidelines are provided in Schedule 8 as to when a dismissal is considered to be fair and is discussed in detail in chapter 5.

¹¹ In *NEHAWU v University of Cape Town and others* (2006) 24 ILJ 95 (CC) the Constitutional Court held that fairness must be applied to both employees and employers.

¹² The concept of procedural justice is discussed in chapter 2 below.

¹³ The application of discipline and disciplinary enquiries in terms of the legislative requirements in South Africa is discussed in chapter 5 below.

¹⁴ According to the *Tokiso Review* 2005/2006 there has been a 47% increase in the number of referrals to the CCMA from about 80 000 per year in 2000 to approximately 125 000 referrals in 2005. The *CCMA Annual Report* of 2006/ 2007 states that almost 80% of the 123 472 disputes that were referred to the CCMA in 2006/2007 were related to unfair dismissals.

1.2 The quest for fairness in the workplace

One of the most basic labour rights of any employee in South Africa is the right to be treated fairly and also to have his or her legal rights respected.¹⁵ The rules of natural justice have been made applicable to the workplace.¹⁶ This concept is also endorsed and enshrined in the manifesto of the International Labour Organization (hereafter the ILO) of which South Africa is a member.¹⁷

On the other hand, employers are entitled to satisfactory conduct and work performance from their employees.¹⁸

Section 23(1) of the Constitution¹⁹ of the Republic of South Africa states that:

“[e]veryone has the right to fair labour practices”.

The right to fair treatment by their employers in the workplace is therefore one of the fundamental rights conferred by the Constitution on every employee in South Africa.

However, the concept of fairness is not comprehensively defined in either the Constitution of South Africa or in any labour legislation promulgated by parliament. Fairness is a concept that is determined by a wide variety of variables such as the economic status, cultural background, political opinion, educational level, religious beliefs, personal circumstances, work status of a person on the one hand and

¹⁵ South Africa is one of the few countries in the world where labour rights are regarded as a human right, and is therefore also contained in the Constitution. The constitutional right to fair labour practices in South Africa is discussed in chapter 4 below.

¹⁶ The rules of natural justice and its application in the workplace are discussed in chapter 4 of this thesis.

¹⁷ The ILO principles are discussed in chapter 3 below.

¹⁸ Item 1(3) of Schedule 8. A comprehensive analysis of Schedule 8 is presented in chapter 5 below.

¹⁹ 108 of 1996.

the content of legislation on the other.²⁰ South Africa's labour legislation gives effect to section 23(1) of the Constitution in that the legislator has attempted to give effect to the broad notion of fair labour practices by promulgating labour legislation that regulates unfair dismissal,²¹ amongst other things.

Ultimately it is CCMA commissioners and judges of the labour courts that have the final say regarding the boundaries of this illusive concept in respect of the dismissal of employees.

One of the most complex issues, and also one of the most difficult challenges in the workplace, is to strike an appropriate balance between the interpretations and perceptions of the concept of fairness held by employers, employees and the state.²²

The primary objective of the LRA, namely "to advance economic development, social justice, labour peace and the democratisation of the workplace"²³ can be achieved if fairness is entrenched in the workplace. However, this is, easier said than done.

Fairness in the workplace, as the legislator sees it, can only be achieved by ensuring compliance with the applicable legislative measures and codes. Not only must all legal requirements be adhered to, but the employer must also comply with his or her own set of workplace rules, which are often contained in a disciplinary code.²⁴

²⁰ Gleason and Roberts "Worker Perceptions of Procedural Justice in Workers' Compensation Claims: Do Unions Make a Difference?" (1993) 97 *Journal of Social Psychology* 133.

²¹ S 188 of the LRA describes that for a dismissal to be considered fair, the dismissal, must be for a fair reason and in accordance with a fair procedure.

²² The *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 *BLLR* 1097 (CC) matter clearly indicated that the perception and interpretation of fairness differs vastly not only between the employer and employee but also between the labour courts and the civil courts and ultimately the Constitutional Court.

²³ S 1 of the LRA.

²⁴ Item 3(1) of Schedule 8.

It is of the utmost importance that every employer has an understanding and knowledge of the rules of natural justice and specifically Schedule 8 of the LRA. This is especially true when it comes to the disciplinary process.

Fairness in the workplace will contribute towards labour peace, harmony and could ultimately result in an increase in productivity. However, the quest for fairness in the workplace is not easy and requires a lot of input from both employer and employees.²⁵

1.3 The business owner's (manager's) role as labour law specialist

To become successful in business, it is no longer sufficient to have the ability to sell a product at a profit. For any businessman, employer or organisation to survive in the long term a wide variety of skills, knowledge and expertise must be acquired.

In the modern business environment it appears that an employer must also be a labour law specialist in order to manage discipline in the workplace. This situation can, in itself, have a negative impact on the attitude of investors when they decide where to establish businesses.²⁶

It is not uncommon to read in the business media of employers complaining that the South African labour laws are restrictive and that

²⁵ Employee perceptions on fairness and procedural justice are discussed in chapter 2 below.

²⁶ Israelstam "You Cannot Dismiss without Following Procedure" (2007) 1 *Labour Guide Newsletter* July. Israelstam states that sooner or later the labour law catches up with employers who fail to follow proper disciplinary procedure and to provide good reason for dismissals and that the labour courts seems to be most intolerant of employers who do not follow their own disciplinary policies and who cannot justify their dismissal decisions based on the facts of the case at hand. This was also clearly illustrated in *Riekert v CCMA and others* (2006) 4 *BLLR* 353 (LC).

the country's labour market is over-regulated.²⁷ There is a common perception that South African labour law does not encourage organisations to employ large numbers of people.

Some employers argue that they are faced with procedural requirements akin to court proceedings when they conduct a disciplinary enquiry.²⁸ They contend that they are hesitant to take disciplinary action against employees, as they believe that the procedures that they have to follow are of such a complicated legal nature that the procedures can only be used by labour law specialists.²⁹

Some employees may also believe that employers are rendered powerless by rigid regulations and that employees cannot be dismissed regardless of what they have done.

The question arises whether these views are correct when measured against the wording and content of Schedule 8 and the decisions of the dispute resolution institutions of South Africa.

1.4 Key focus of the study and background to the problem

This research focuses on a critical analysis of the content and application of the procedural requirement that must be followed by an employer in disciplinary enquiries in terms of the guidelines of

²⁷ The World Bank publication "Doing Business in 2006" (2006) 152 ranks countries according to a number of criteria associated with the ease of doing business including "hiring and firing workers". South Africa was ranked 60 out of 100 in the difficulty of firing index.

²⁸ The legislative requirements for a disciplinary enquiry are discussed in chapter 5 below.

²⁹ According to Van Niekerk *Regulating Flexibility and Small Business: Revisiting the LRA and BCEA – A Response to Halton Cheadle's Draft Concept Paper* (2006) 11, the World Economic Forum's 2005-2006, Global Competitiveness Index places South Africa 115th out of 117th with regard to flexibility in hiring and firing practices.

Schedule 8.³⁰ In other words when will a dismissal be determined to be procedurally fair according to Schedule 8? For labour intensive companies “hiring and firing” comes with the territory and one of the most basic requirements for a fair dismissal is that a fair procedure must have been followed as provided for in Schedule 8.³¹ How formalistic are these requirements and are they applied correctly in South Africa?

Schedule 8 in the LRA provides guidelines and procedures that must be taken into consideration by the CCMA when a determination is made about the fairness of a dismissal.³² The LRA also provides for remedies such as re-instatement or compensation, where a dismissal is found to be unfair.³³

Item 1 of Schedule 8, states that:

“[i]t is intentionally general”.

This phrase in itself suggests that Schedule 8 provides general guidelines and principles that must be followed by employers in the case of the dismissal of an employee for reasons related to conduct or capacity.

From the above it appears that there is an anomaly in so far as Schedule 8 is intentionally set out in general terms but at the same time adjudicators are compelled to take it into consideration before they make their determinations. This could result in adjudicators

³⁰ The scope of this research does not include dismissal on the grounds of poor work performance or illness and injury.

³¹ According to the CCMA Annual Report (2005/2006) 12 almost 81% of the 125 065 disputes that were referred to the CCMA were related to unfair dismissals. The same percentage was reflected in the CCMA Annual Report (2006/2007) 14.

³² S 203(3) of the LRA.

³³ See s 194 of the LRA.

interpreting the code and guidelines differently and applying their own interpretation and discretion, because Schedule 8 is not clearly codified.³⁴

The following highlighted words and phrases are examples of words and phrases contained in Schedule 8 that could possibly cause confusion and uncertainty amongst employers, employees, commissioners and judges who are used to a formalistic rigid approach:

- i. Item 1(1) “Departures from the norms established by this Code **may be** justified in proper circumstances.”
- ii. Item 2(2) “The Act recognises three grounds on which termination of employment **might be** legitimate.”
- iii. Item 3(1) “All employers **should** adopt disciplinary rules ... and are made available to employees. Some rules or standards **may be** so well established and known that it is not necessary to communicate them.”
- iv. Item 3(3) “Formal procedures **do not have to be invoked** every time a rule is broken.”
- v. Item 4(1) “This **does not need** to be a formal enquiry ... the employee should be allowed a **reasonable time** to prepare a response.”
- vi. Item 4(4) “In exceptional circumstances, if the employer cannot be **reasonably be expected to comply** with these guidelines, the employer **may** dispense with pre-dismissal procedures.”

In the period from 1980 to 1995, prior to the promulgation of the LRA and Schedule 8, the former Industrial Court laid down strict

³⁴ According to the *Tokiso Review* (2006/7) 24 it would appear that CCMA commissioners are more likely to find in favour of employees with regards to procedural unfairness than commissioners of bargaining councils or private arbitration would be.

procedures for disciplinary enquiries. In the absence of the current Schedule 8, many employers incorporated these strict procedures into their own disciplinary codes, which are difficult to amend. Decision-makers, such as, CCMA commissioners, have also become used to the strict formalistic disciplinary procedures established by the Industrial Court.

As a result, CCMA commissioners seem to expect a standard of procedural fairness akin to court procedures. In the *Tokiso Review* it is stated that:

“[I]t is commonly held that in order to effect a procedurally fair dismissal, the employer must ape the procedures of the High Court, and meet the same standard of justice”.³⁵

There is a widely held belief at present, albeit anecdotal, that procedural fairness is being interpreted and applied by the CCMA in a far more rigorous manner than is actually required by Schedule 8.³⁶ The former Industrial Court, the predecessor of the CCMA and the current Labour Court, laid down these strict rules under a broad definition of unfair labour practices. It was one of the main purposes of Schedule 8 to move away from the legalistic approach, and to provide legislative guidance on how the dismissal provisions in the LRA are to be interpreted and applied.³⁷ However, South Africa continues to be hamstrung by an unnecessary costly and largely irrelevant notion of procedural fairness, as most employers have not adapted their

³⁵ *Tokiso Review* First Annual report (2005/6) 38. It would also appear that in almost 74% of all arbitration awards delivered in this period elements of procedural unfairness were present.

³⁶ *Tokiso Review* (2005/6) 38.

³⁷ Cheadle “Over-proceduralising Misconduct and Capacity Dismissals: How do we Get Out of this Mess” Paper delivered at SASLAW Conference Durban (2006)2.

disciplinary codes to reflect the more flexible and general approach of Schedule 8.³⁸

This research therefore focuses primarily on an analysis of the content and application of the pre-dismissal procedures prescribed by Schedule 8 in the light of the jurisprudence established by the CCMA and the labour courts and to determine whether South Africa's dismissal law is as rigid and formalistic as employers often claim.³⁹

1.5 The research aim, focus, scope and delimitations

1.5.1 Aim of the study

With due consideration to the background to the problems identified above, the main aims of the study are the following:

- i. to critically evaluate disciplinary enquiries under the auspices of item 4 of Schedule 8 of the LRA in relation to the required procedural requirements; and
- ii. to recommend possible changes and amendments to Schedule 8 of the LRA.

To accomplish these aims the following actions were followed:

- i. A review of international standards was conducted regarding the right to discipline and dismiss. Special attention was paid to the ILO, two countries in the European Union (hereafter the EU) namely the Netherlands and the United Kingdom (hereafter the

³⁸ *Tokiso Review Annual Report (2006/7)* 28. In 34% of the 2000 arbitration awards from 2005 that were screened by Tokiso it appears that there was an element of procedural unfairness.

³⁹ Unlike the Tokiso Review the CCMA annual reports do not give a break down of substantive- and or procedural fairness in the disputes referred.

- UK) and the United States of America (hereafter the USA) in order to develop an informed international perspective with which to compare the current position in South Africa.
- ii. Research was done on South African sources of law in respect of principles regulating disciplinary hearings.
 - iii. Schedule 8 of the LRA was analysed.
 - iv. Numerous CCMA awards and judgments of the Labour Court and Labour Appeal Court were analysed to identify and interpret the views held by arbitrators and judges, amongst others.
 - v. Publications on procedural requirements in terms of Schedule 8 of the LRA were reviewed.
 - vi. A comparative analysis was done between international standards and South African standards on the right to discipline and dismiss.
 - vii. A peer review was done by a panel of commissioners of the CCMA based at the Pretoria office to test the validity of the research.

1.5.2 Focus

A review was undertaken of the ILO standards and how they have been applied in other countries. The research has focussed on the current jurisprudence in terms of procedural fairness as established by CCMA rulings and Labour Court judgments. A critical reflection was done on the established jurisprudence and then it was compared with the general guidelines found in Schedule 8 of the LRA.

The focus was also on the current views expressed by labour law and labour relations specialists such as Cheadle, Van Niekerk, Andrew Levy and others as well as various articles or publications found in Labour Law journals and in newspapers. The focus was not to simply

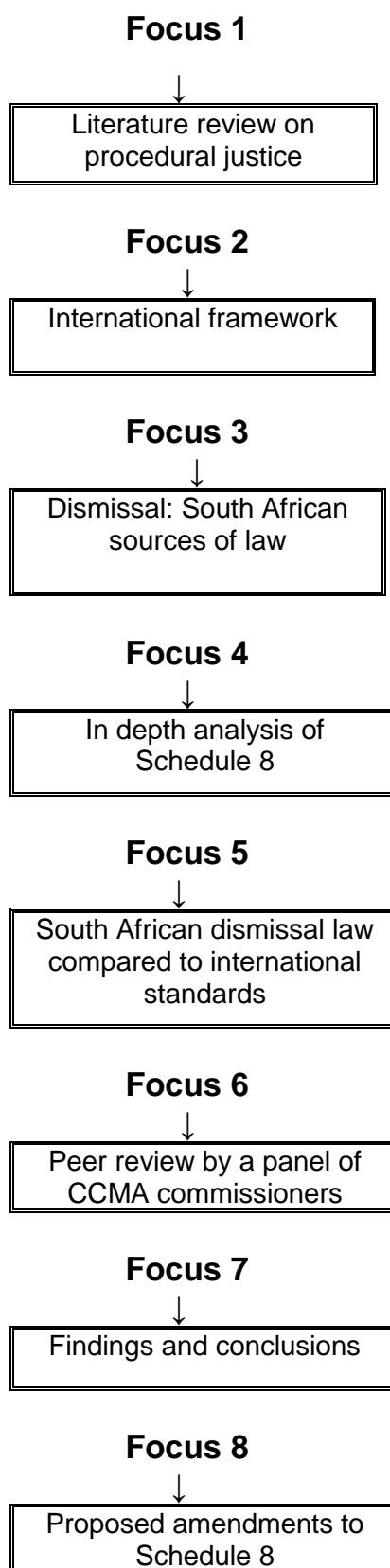
gather all this information but to evaluate the views expressed critically in terms of the current guidelines found in Schedule 8.

This research has not in any way focussed on the substantial fairness of a dismissal. Substantive fairness deals with the proof that misconduct has been committed and as such the reasons for dismissal. Schedule 8 item 7 provides the guidelines to determine whether or not a dismissal for misconduct was unfair. This research also does not deal with dismissal due to incapacity, operational requirements or strike action. This thesis only deals with the procedural requirements related to disciplinary enquiries.

1.5.3 Scope and delimitations

The basic scope of the research can be illustrated by means of the table on the next page:

Table 1: Scope of the research



1.6 Literature review

This research has involved literature from a number of disciplines, such as the literature on procedural justice, ILO standards, labour law, labour relations and business strategy and management. In view of the interdisciplinary nature of the study, the following areas have been reviewed:

- i. the concept of procedural justice;
- ii. international standards as established by the ILO;
- iii. South African labour law and jurisprudence developed by labour courts and CCMA arbitration awards;
- iv. norms and procedures as established by decisions of CCMA commissioners; and
- v. labour relations in practice.

The purpose of the study of the literature is to research the problem to develop a clear understanding of the current situation and to formulate recommendations regarding problems that have been identified.

1.7 The research approach and research method - qualitative as opposed to quantitative research

Researchers have long debated the relative value of qualitative and quantitative enquiries.⁴⁰ Qualitative research uses a naturalistic approach that seeks to understand phenomena in context – in specific settings. By contrast, quantitative research uses experimental methods and quantitative measures to test hypothetical generalisations. Each therefore represents a fundamentally different

⁴⁰Patton *Qualitative Evaluation and Research Methods* (1990) 285.

enquiry paradigm, and researcher actions are based on the underlying assumptions of each paradigm. Whereas quantitative researchers seek causal determination, prediction and generalisation of findings, qualitative researchers seek illumination, understanding and extrapolation to similar questions.

The primary goal of qualitative research is therefore generating theory, (based mainly on inductive reasoning), rather than testing theory, (based mainly on deductive reasoning). According to this view, theory is not a “perfect product” but an “ever developing entity or process”.⁴¹

Several considerations are taken into account when a researcher adopts a qualitative research methodology, such as the following:

- i. Qualitative methods can be used to understand any phenomenon about which little is yet known better, but can also be used to gain new perspectives on things about which much is already known.
- ii. More in–depth information can be gained that may be difficult to convey quantitatively.
- iii. The ability of qualitative data to describe a phenomenon more fully contributes to understanding by the reader and makes the research data more meaningful.
- iv. Several writers, like Bogdan and Biklen, Lincoln and Cuba, Patton and Eisner, have identified what they considered to be the most prominent characteristics of qualitative research, or naturalistic research. The descriptions below represent a synthesis of these authors’ descriptions of qualitative research:

⁴¹ Strauss and Corbin *Basics of Qualitative Research. Grounded Theory Procedures and Techniques* (1990) 79.

- a. Qualitative research uses the natural setting as the source of data. The researcher attempts to observe, describe and interpret settings as they are, maintaining what Patton calls an “emphatic neutrality”.⁴²
- b. The researcher acts as the “human instrument” of data collection.
- c. Qualitative researchers predominantly use inductive data analysis.
- d. Qualitative research reports on descriptive, incorporating, expressive language and “presence of voice in text”.⁴³
- e. Qualitative research has an interpretive character, aimed at discovering the meaning of events has for the individuals who experience them, and the interpretations of those meanings by the researcher.
- f. Qualitative researchers pay attention to the idiosyncratic, as well as the pervasive, seeking the uniqueness of each case.
- g. Qualitative research has an emergent (as opposed to pre determined) design and **researchers focus on this emerging process as well as the outcomes or product of the research.** Because the researcher seeks to observe and interpret meanings in context, it is neither

⁴² Patton *Qualitative Evaluation and Research Methods* (1990) 55.

⁴³ Eisner *The Enlightened Eye Qualitative Inquiry and the Enhancement of Educational Practice* (1991) 36.

possible nor appropriate to finalise research strategies before data collection has begun.⁴⁴

- h. Qualitative research is judged using special criteria for trustworthiness.

Qualitative research is much more suitable than quantitative research for the field of Labour Relations and Labour Law. It must also be kept in mind that Labour Law and Labour Relations are two separate fields of study but that it is impossible to do the one without a sound knowledge and understanding of the other. These two fields of study are inter-related and keeping in mind the title of this thesis the researcher has deemed it more appropriate to use the qualitative research method.

It was decided that the following six steps with regard to research methods and techniques for organising and conducting the research would be followed:

- i. select the literature and determine the data gathering and analysis techniques;
- ii. prepare to collect the data;
- iii. collect data in the field;
- iv. evaluate and analyse the data;
- v. peer review; and
- vi. prepare the thesis.

Step 1: Determine data gathering and analysis techniques. The researcher has determined, in advance what evidence to gather and the analysis techniques to use with data, in order to answer the

⁴⁴ Patton (1990) 65.

research questions. Data gathering has largely been qualitative. Tools to collect data have included in depth discussions, documentation reviews, archival records, and direct observation. Throughout the design phase the researcher has ensured that the study was well constructed to ensure **construct validity, internal validity, external validity and reliability**. In this regard the following procedures have been applied:

- i. **Construct validity.** The researcher has ensured that the correct measures for the concepts being studied were used. To counter the possible subjectivity of the investigator, multiple sources of evidence (court cases, discussions and documents) were used.
- ii. **Internal validity.** The researcher allowed for multiple pieces of evidence from multiple sources to uncover the convergent lines of enquiry – thereby establishing a chain of evidence forward and backward.
- iii. **External validity.** To ensure that findings can be generalised beyond the immediate case, the researcher made provision for variations, places, people and procedures, to prove that the same findings emerged. This examination, along with the literature review and the peer review of the research, by a panel of Commissioners of the CCMA, ensures external validity.
- iv. **Reliability.** The procedures were thoroughly documented so that the study can be repeated to confirm the accuracy and reliability of the findings.

Step 2: Prepare to collect the data. Because a qualitative research method usually generates a large amount of data from multiple sources, the data had to be organised systematically. Advance preparation enabled the researcher to handle large amounts of data and to document it in a systematic fashion.

Step 3: Collect data in the field. The researcher collected and stored multiple sources of evidence comprehensively and systematically, in formats that can be referenced and sorted in order for converging lines of enquiry and patterns to be uncovered. The researcher carefully observed the objectives of the research and identified the factors associated with the observed phenomenon. Evidence was documented, classified and cross-referenced.

Step 4: Evaluate and analyse the data. The researcher used multiple interpretations in order to find linkages between the research objectives and the outcomes with regard to the original research questions. Throughout the evaluation and analysis process the researcher has however, remained open to new opportunities and insights. This provided an opportunity to triangulate the data in order to strengthen the research findings and conclusions.

Step 5: Do a peer review. In peer review, researchers meet with one or more impartial colleagues in order to review the implementation and evolution of their research methods critically. The role of a peer reviewer is to facilitate the researcher's consideration of methodological activities and provide feedback concerning the accuracy and completeness of the researcher's data collection and data analysis procedures. The ultimate purpose of peer review is to

enhance the credibility, or truth value of a qualitative study by providing an external check on the inquiry process.⁴⁵

Step 6: Prepare the research findings. The report on the research findings forms an integral part of chapter 7 of the research.

1.8 Ethical issues

There were no ethical issues that had to be considered for the purpose of executing the study. Apart from simple professionalism in gaining access to the various locations for data gathering, no specific formal codes of conduct/ethics applied. This research obtained the necessary ethical clearance from the Ethical Committee of the University of Pretoria in July 2007.

1.9 Chapter outline

This thesis consists of eight chapters:

- Chapter 1 Introduction to the research topic and design
- Chapter 2 The concept of fairness and organisational justice
- Chapter 3 The right to discipline and dismiss: An international framework
- Chapter 4 Dismissal: South African sources of law
- Chapter 5 Code of Good Practice: Dismissal (Schedule 8)
- Chapter 6 South African dismissal law compared to international perspectives
- Chapter 7 Research findings
- Chapter 8 Conclusions and recommendations

⁴⁵ Patton (1990) 300.

Each chapter commences with a table listing the contents of the particular chapter. The chapters were designed to exhibit a tripartite structure each consists, of an introductory section, a main body section and a concluding or summarising section. Pagination includes the particular chapter number and title as per the header of each page. For reader's convenience, headers indicating the chapter have been added. Footnotes containing the references and additional points appear at the bottom of each page.

CHAPTER 2

THE CONCEPT OF FAIRNESS AND ORGANISATIONAL JUSTICE

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2.1 Introduction

The concept of fairness is an elusive concept, what may be perceived to be fair by Person A may well be perceived to be unfair by Person B. In the LRA, the legislator provides legal guidelines to be followed to enhance the fair treatment of employees, especially with regard to dismissal procedures. Fair treatment is often identified with procedures that generate relevant, unbiased, accurate, consistent, reliable and valid information. The central research question in this thesis relates to procedural fairness in disciplinary enquiries and employee perceptions of fairness and organisational justice will undoubtedly influence their attitudes towards the procedures adopted by the employer.

Many employers have adopted specific disciplinary codes and procedures to assist in the achievement of fairness in the organisation. Employees' perceptions of fairness in the workplace will also influence their behaviour and attitudes towards the employer, for example perceptions of fair treatment have been linked to motivation, which can influence employee behaviour beneficially.¹

The notion that fair procedures are the best guarantee for fair outcomes is a popular one. People feel affirmed if the procedures that are adopted treat them with respect and dignity, making it easier to accept even outcomes they do not like.² Many believe that procedural justice is not enough. Reaching fair outcomes are far more important than implementing fair processes. Others maintain that insofar as fair

¹ Zapata-Phelan, Colquitt, Scott and Livingston "Procedural Justice, Interactional Justice and Task Performance: The Mediating Role of Intrinsic Motivation" (2009) *Organizational Behaviour and Human Decision Processes* 93.

² Deutsch "Justice and conflict" in *The Handbook of Conflict Resolution: Theory and Practice* (2000) 45.

procedures are likely to “translate” into fair outcomes, they are of central importance.³

Fair procedures tend to inspire a sense of loyalty to one’s group, to legitimise the authority of leaders, and to help ensure voluntary compliance with rules.⁴

2.2 Organisational justice

The theoretical roots of organisational justice as a concept lie in the legal literature and in the literature on social psychology, organisational behaviour and political science.⁵ In an attempt to describe and explain the role of fairness as a consideration in the workplace, a field of study known as organisational justice has emerged.

Organisational justice refers to people’s perceptions of fairness in organisational settings and can be divided into distributive, procedural and interactional fairness.⁶

Organisational justice can be illustrated schematically as set out in Figure 1.⁷

³ Nelson “The Very Idea of Procedural Justice” (1980) *Ethics* 90(4) 506.

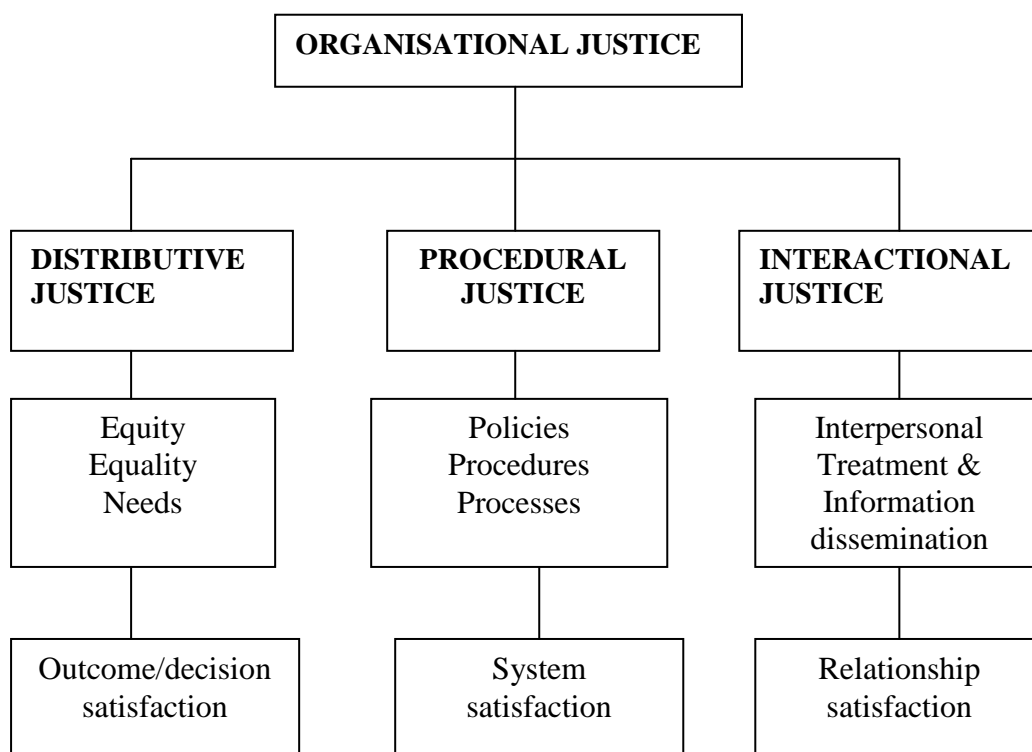
⁴ Tyler and Belliveau “Tradeoffs in Justice Principles: Principles of Fairness” in Bunker and Deutsch *Essays in Conflict, Cooperation and Justice: Essays Inspired by the Work of Morton Deutsch* (1995) 297.

⁵ Vermeulen “Perceptions of Procedural Justice in the Retrenchment of Managers” (2005) *South African Journal of Industrial Psychology* 31(2) 40 – 48.

⁶ Vermeulen and Coetzee “Perceptions of the Dimensions of the Fairness of Affirmative Action: A Pilot study” (2006) *South African Journal of Business Management* 2.

⁷ Greenberg “Organizational Justice: Yesterday, Today and Tomorrow” (1990) *Journal of Management* 399.

Figure 1: Organisational Justice



In the last two decades, managers in human resources have come to recognise the importance of the relationship between organisational justice and organisational effectiveness.⁸ People tend to make fairness judgments by looking at the actual decisions or the procedures used to reach a decision. Employees use organisational justice judgments to evaluate the quality of their relationship with groups and authorities. Three relational judgments stand out, namely:

- i. neutrality, involving assessments as to whether decision-making procedures are unbiased, honest and based on evidence;
- ii. trust in benevolence, judging the trustworthiness and the motives of the decision-maker; and

⁸ Tang, Baldwin and Linda “Distributive and Procedural Justice as Related to Satisfaction and Commitment” Paper delivered at the annual meeting of the South-western Psychological Association in Houston (1996) 4.

- iii. status recognition, evaluating the politeness, dignity and respect with which a person is treated by the authority.⁹

It would appear that cultural, economic and political factors influence people's perceptions of fairness and justice, but that the importance accorded to just procedures, the preservation of self-worth and respect for people in groups is universal.¹⁰ The issue of justice is a dominant theme in organisational life. Employees talk about and negotiate on issues related to questions such as whether the appropriate outcomes have been reached (distributive justice) and whether management has used correct and fair procedures to arrive at those outcomes (procedural justice).¹¹

2.2.1 Distributive justice

Traditionally the study of fairness in organisations has been dominated by a distributive justice orientation.¹² Distributive justice deals with the ends achieved (what the decisions are) or the perceived fairness of the outcome of the decision.¹³ Fair and equal treatment of employees increases job satisfaction, improves relationships between supervisors and employees, encourages organisational citizenship behaviour. It is therefore beneficial to the organisation.

According to *Leventhal* people use three main justice rules to determine the justice of an outcome, namely:

- i. the contributions rule (equity rule);

⁹ Tyler "The Psychology of Procedural Justice: A Test of the Group-value Model" (1989) *Journal of Personality and Social Psychology* 338.

¹⁰ Cooper and Robertson (eds) *International Review of Industrial and Organizational Psychology* (2001) 166.

¹¹ Tyler (1989) 341.

¹² Vermeulen and Coetzee (2006) 2.

¹³ Tang *et al* (1996) 4.

- ii. the needs rule; and
- iii. the equality rule.¹⁴

From an employer's perspective, the purpose of outcomes or decisions that are based on the equity rule is to achieve productivity and high levels of performance. It seems that the equality rule is used when the goal is maintaining social harmony. The needs rule is applied when the goal is promoting personal welfare.¹⁵

Distributive justice is often referred to, as the "bottom line" of justice, in other words, was the outcome of a decision fair? This assessment of fairness generally involves a comparison between what an employee is experiencing and what is happening to others in the organisation.¹⁶ Cropanzano and Ambrose stated:

"[d]istributive justice has been loosely equated with economic benefits."¹⁷

It is submitted that the only link between distributive justice and the central theme of this thesis, namely procedural fairness in disciplinary enquiries, relates to the consistent application of discipline and the fact that employees want to be treated equally and fairly in this regard.¹⁸

¹⁴ Leventhal "Fairness in Social Relationships" (1976) *Contemporary Topics in Social Psychology* 211.

¹⁵ Coetzee (2004) 4.6.

¹⁶ Johnston "Interactional Justice: The Link Between Employee Retention and Employment Lawsuits" *Work Relationships* downloaded from <http://www.workrelationships.com/site/articles/employeeretention.htm> on 27 October 2009.

¹⁷ Cropanzano and Ambrose "Procedural and Distributive Justice are More Similar Than What You Think: A Monistic Perspective and a Research Agenda" (2001) *Advances in Organizational Justice* 125.

¹⁸ Item 3(1) of Schedule 8. One of the main aims of disciplinary rules and procedures is to create certainty and consistency in the application of discipline.

2.2.2 Procedural justice

The term procedural justice is used to refer to perceptions of the fairness of processes that culminate in an event, decision or action and it is related to the means or procedures followed to reach that outcome.¹⁹

Procedural justice is fostered when decision-making processes adhere to a number of specific rules. According to *Leventhal* procedures should:

- i. utilize accurate information;
- ii. be consistent across persons and time;
- iii. be unbiased;
- iv. offer mechanisms for correction;
- v. represent key groups' concern; and
- vi. adhere to prevailing ethical standards.²⁰

Procedures should offer individuals some control over the decision-making process, in the form of giving them a voice or input, and some control over the eventual outcome, in the form of allowing them to influence the decision by presenting their perspective.²¹ These procedural criteria are particularly relevant to the “should” and “could” components of fairness theory. If an authority enacts procedures that fail to adhere to the rules of accuracy, ethicality, bias suppression, consistency, representativeness and correctability then it is easy to believe that the event and its outcomes should have been different. When decision-making procedures are inconsistent across persons and

¹⁹ Vermeulen (2005) 4.

²⁰ Leventhal “What Should be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relations” (1980) *Social Exchange: Advances in Theory and Research* 27.

²¹ Thibaut and Walker “A Theory of Procedure” (1978) 66 *California Law Review* 541- 566.

time, the individual people affected by those procedures can easily claim that the event could have played out differently. In the language of fairness theory, a violation of procedural justice rules also violates basic moral tenets.²²

Employees judge the fairness of procedures according to two types of control, namely:

- i. the amount of control they have over the procedures that are used to reach a decision; and
- ii. the amount of control they have over influencing the decision.²³

People want procedures that allow them to feel that they have participated in paving the way for a decision that will affect them. Being able to make their opinions known thus enables them with an opportunity to influence others' decision. It would seem that employees regard procedures that provide them with an opportunity to influence the decisions that are made as fairer than procedures that deny them such an opportunity.²⁴

People consider procedures that allow them to express their opinions to be fair, because it makes them feel that they are participating in the process, even if their opinion does not in the end produce a favourable outcome. Opportunities to express an opinion enhance people's perception that they have received procedural justice. The positive effect or consequences of procedural justice include:

- i. organisational commitment;

²² Folger and Cropanzano "Fairness Theory: Justice as Accountability" (2001) *Advances in Organizational Justice* 21.

²³ Coetzee (2004) 4.6.

²⁴ Coetzee (2004) 4.7.

- ii. the intent to stay with the organisation;
- iii. organisational citizenship;
- iv. trust in supervisors;
- v. satisfaction with the decisions made;
- vi. work effort; and
- vii. performance.²⁵

Furthermore, research on fairness has demonstrated that procedural justice has emotional consequences. Employees' perceptions on fairness and procedural justice have been associated with more frequent positive emotions, such as happiness.²⁶

Research has indicated that procedural justice is multidimensional. The four procedural justice dimensions that have been identified are:²⁷

- i. bilateral communications;
- ii. familiarity with the situation of individuals;
- iii. the ability to refute decisions; and
- iv. consistent application of procedures.

The term bilateral communications refers to the ability of an individual employee to participate in two-way discussions during the decision-making process. It can also be seen as the opportunity given to an employee to state his or her case or to respond to the allegations made about him or her.

²⁵ Folger and Skarlicki "Fairness as a Dependent Variable: Why Tough Times can Lead to Bad Management" (2001) *Justice in the Workplace: From Theory to Practice* (II) 65.

²⁶ Murphy and Tyler "Procedural Justice and Compliance Behaviour: The Mediating Role of Emotions" (2008) 38 *European Journal of Social Psychology* 652.

²⁷ Chan "Organizational Justice Theories and Landmark Cases" (2000) 8 *International Journal of Organizational Analysis* 1-13.

The second dimension familiarity relates to an individual employee's perceptions of the perceived knowledge of the decision-maker of the employee's personal circumstances. The greater the perceived knowledge of the decision-maker the fairer the employee will believe the process to be.

An employee's perceived ability to refute a decision has an impact on his or her perceptions regarding the fairness of the process. Employees like to have an opportunity to challenge the decision taken. This can be equated to an appeal hearing in a dismissal dispute.

The dimension of consistency refers to employees' desire to feel that the same rules and procedures apply to all of them and that the rules are applied consistently.

It is clear from what has been said above that employees' commitment is a direct consequence of fair treatment. Perceptions of procedural justice are influenced by factors that go beyond the formal procedures used to resolve disputes. Judgments of procedural justice are influenced by two other important factors namely, the interpersonal treatment people receive from the decision-makers and the adequacy with which formal decision-making procedures are explained to the people involved.²⁸

It would appear that there are a number of principles of fairness that are central to the concept of procedural justice. The employer should:²⁹

- i. provide advance notice of intent or decisions;
- ii. provide accurate information and adequate feedback;

²⁸ Bies and Moag "Interactional Justice: Communication Criteria of Fairness" (1986) *Research on Negotiations in Organizations* (I) 48.

²⁹ Vermeulen (2005) 6.

- iii. support two-way communication;
- iv. explain and justify decisions;
- v. allow employees to influence the decision process;
- vi. consider the interests, views and concerns of all recipients;
- vii. treat employees with dignity, respect and sensitivity; and
- viii. apply administrative procedures consistently.

2.2.3 Interactional justice

Research on the conceptualisation of procedural justice indicates that the perceptions of procedural justice are influenced by factors that go beyond formal procedures. It appears that judgments of procedural fairness are influenced by two important factors, namely:

- i. the interpersonal treatment people receive from decision-makers; and
- ii. the adequacy with which formal decision making procedures are explained.³⁰

These justice appraisals based on the quality of interpersonal treatment are known as interactional justice. The following four attributes of interpersonally fair procedures have been identified as forming the basis of interactional justice:

- i. truthfulness;
- ii. respect;
- iii. propriety of questions; and
- iv. justification.³¹

³⁰ Bies and Moag (1986) 44.

³¹ Bies and Moag (1986) as stated by Coetzee (2004) 4.9.

The first three attributes deal with the nature of the communication while it is happening. The last attribute, justification, deals with the reducing of any discontent that might arise from what is perceived to be an unfair procedure.

Truthfulness refers to deception versus candidness. Employees like most people, do not like being deceived. They want to be treated in a forthright manner. It is therefore clear that organisations should provide employees with accurate and realistic information. It is also generally accepted that individuals expect to be treated politely and respectfully, the questions asked should not be of an improper nature and should not involve prejudicial statements.³² It may also be possible to rectify a sense of an injustice, which an employee might experience, with an adequate justification.³³

The fairness heuristic theory developed by *Van den Bos* states that interactional justice is a potent factor in reactions to unfairness.³⁴ People expect events that affect them to be explained and often an employee's sense of injustice can be reduced or eliminated by providing an employee who feels that he or she has been treated unfairly with a social account such as an explanation.³⁵

If employees feel that they have been treated with dignity and respect during the disciplinary process and if an explanation has been given for the disciplinary action that has been taken the employees are more likely to accept the outcome even though they may have been

³² Coetzee (2004) 4.9.

³³ De Cremer "Procedural and Distributive Justice Effects Moderated by Organizational Identification" (2005) 20 *Journal of Managerial Psychology* 5.

³⁴ Van den Bos "What are we Thinking About When We Talk About No-voice Procedure? On the Psychology of the Fair Outcome Effect" (1999) 35 *Journal of Experimental Social Psychology* 572.

³⁵ Coetzee (2004) 4.10.

dismissed. The link between interactional justice and the disciplinary process is also clearly visible in this regard.

2.3 Conclusion

Links between procedural justice and disciplinary procedures, contained in item 4 of Schedule 8 of the LRA,³⁶ on the one hand the principles of fairness as stated by Vermeulen³⁷ on the other hand can be clearly seen:

- i. giving notice of intent or decision;³⁸
- ii. providing accurate information and adequate feedback;³⁹
- iii. supporting two-way communication;⁴⁰
- iv. explaining and justifying decisions;⁴¹
- v. allowing employees to influence the decision process;⁴²
- vi. considering the interests, views and concerns of all recipients;⁴³
and
- vii. permitting appeals.⁴⁴

Perceptions of fairness and organisational justice have a definite effect on employee behaviour. From a labour relations perspective employers should pay attention to the different dimensions of organisational justice, as doing so will contribute towards the achievement of procedural fairness in the disciplinary process.

³⁶ Schedule 8 is analysed and discussed in detail in chapter 5 below.

³⁷ (2005) 6.

³⁸ Item 4(1) of Schedule 8 requires the employer to notify the employee of the disciplinary enquiry and also provide reasons for decision taken.

³⁹ The notification to attend a disciplinary enquiry given to an employee must contain the allegation.

⁴⁰ Employee must have an opportunity to state his case against the allegations.

⁴¹ Employer must provide employee with a written notification of decision taken after enquiry.

⁴² Employee has an opportunity to respond against allegation.

⁴³ Item 3(5) of Schedule 8 requires the employer to take into consideration the employee's personal circumstances.

⁴⁴ Employee must be reminded of right to refer the matter to the CCMA.

Distributive justice, procedural justice and interactional justice and the application thereof in the workplace can greatly contribute towards the achievement of the value statements contained in item 3 of Schedule 8:

“The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of the business. While employees should be protected against arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.”⁴⁵

In the next chapter an analysis of the right to discipline and dismiss from an international perspective is done.

⁴⁵ Schedule 8 is discussed in detail in chapter 5 below.