

CHAPTER 3

THE RIGHT TO DISCIPLINE AND DISMISS: AN INTERNATIONAL FRAMEWORK

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3.1 Introduction

The second phase in this study involves an overview of the literature pertaining to the international sources of procedural fairness for disciplinary enquiries and the origins of the employer's right to discipline and dismiss on an international level.

Every labour dispute resolution system is tailor made for the country in which it is meant to be used. It is a formidable task to understand fully how another country's system functions, where it originates from and how it has changed over time. As already has been mentioned in chapter 1, South Africa's legal system has to function in an increasing globalised and inter-connected world. Comparative research was deemed to be a necessary of this project for a number of reasons. First gaining an international perspective is relevant because it enables a comparison that can show how similar South Africa's system is to that used in other countries,¹ and how different it is from them. Second, international perspectives on labour dispute resolution may also assist in finding some solutions to the difficulties experienced in the South African system.

In a study of this nature, it is important to establish the nature and content of standards set by supranational institutions such as the ILO, the European Union (hereafter the EU) and the Southern African Development Community (hereafter SADC) with regard to the right to discipline and dismiss. The application of the ILO's principles in three foreign countries has also been investigated. The three countries in question are, the Netherlands, the UK and the USA. The reasons for selecting them are discussed in more detail later in this chapter.

¹ Mischke "International Perspectives" *Tokiso Review Annual Report* (2006/2007) 50. A comparative analysis of South African and international dismissal law is presented in chapter 6 below.

3.2 Supranational instruments

3.2.1 Introduction

During the Industrial Revolution, industrialists became aware of the significant impact of the mass production of goods on the working conditions of workers, which also led to the exploitation of workers. The exploitation of workers included very long working hours, unsafe and unhealthy working conditions and also the exploitation of child labour. This undermined their competitive position in an international context. As early as 1897, a private organisation was set up in Brussels (Belgium), namely the *International Association for the Legal Protection for Workers*. Its main purpose was to serve as a link to promote co-operation between groups of workers in different industrialised countries.² One of the aims of this organisation was to protect workers from exploitation and to ensure better working conditions. However, this was a private organisation, that had no impact on the governments of the day. Nevertheless, it established a number of international principles, which arguably makes it the forerunner of the ILO and other standards generating bodies such as the EU and SADC.

3.2.2 The International Labour Organization

The ILO was established after the end of the First World War as part of the Peace Treaty of Versailles, which was signed in France in 1919. It was one of the goals of the ILO to create international labour standards, establish social justice and to correct some of the negative effects of international competition. One of the main objectives of the ILO, as

² Van Arkel *A Just Cause for Dismissal in the United States and the Netherlands* (2007) 7.

contained in its constitution, is to assist in establishing protective values for profit and social peace through equal working conditions.³

Member countries of the ILO are expected to subscribe to and adhere to the international labour standards set by the ILO. By 15 May 2009 no fewer than 183 countries worldwide were members of the ILO. The Netherlands and the UK became members of the ILO on 28 June 1919. The USA only became a member in 1934 and abandoned membership in 1977 and rejoined the ILO again on 18 February 1980.⁴ South Africa was a founder member of the ILO in 1919 and remained a member until 1964, when the South African government withdrew from the ILO because the government's policy on apartheid became a major point of discussion at the International Labour Conference.⁵ South Africa rejoined the ILO on 26 May 1994 after the first fully democratic elections in post-apartheid South Africa.⁶

South Africa, as a member of the ILO, incurs particular obligations in so far as national law and practice are concerned, simply on account of its membership. The LRA states that one of its purposes is to give effect to South Africa's obligations as a member state of the ILO.⁷ It further requires anybody engaged in the interpretation of its provisions to comply with South Africa's international law obligations.⁸ The Constitutional Court adheres to this principle. Consequently in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* the Court held that:

³ The ILO believes that this can be achieved for by example abolishing child labour, and protecting workers against unsafe and unhealthy working conditions. See Van Niekerk, Christianson, McGregor Smit and Van Eck *Law@work* (2008) 19 -26.

⁴ See www.ilolex.org downloaded on 20 May 2009.

⁵ Van Niekerk et al (2008) 20; Van Arkel (2007) 300.

⁶ The www.ilolex.org website contains a complete list of all member states of the ILO as well as all Conventions and recommendations and information on which Conventions have been ratified by which countries.

⁷ S 1(b) of the LRA.

⁸ See s 3(c) of the LRA; Van Niekerk "The International Labour Organisation (ILO) and South African Labour Law" (1996) *CLL* 5(12) 112.



“[a] plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator. Article 8 of the International Labour Organisation Convention on Termination of Employment 58 of 1982 (ILO Convention) requires the same.”⁹

The Governing Body of the International Labour Office, which meets annually in June for the International Labour Conference, is considered to be the legislative body of the ILO. This conference can be regarded as the “world parliament of labour” in which social and labour questions from all member countries are discussed.¹⁰ At these conferences, Labour Conventions are adopted which spell out the ILO’s view on important labour principles and international labour standards. Individual conventions are not automatically binding on all member states of the ILO. They will only become binding once a particular member state has ratified a particular convention.¹¹ Ratification of a Convention has the consequence of submission to the ILO’s supervisory bodies.¹²

For purposes of this study, it is of the utmost importance to take cognisance of the relevant ILO Conventions that relate to the central research topic namely, pre-dismissal procedures for the termination of employment. On 2 June 1982, the Governing Body of the International Labour Office met for the 68th time in Geneva, Switzerland, and adopted Convention C158.¹³ The main theme of this conference and Convention C158 as it was agreed upon was *Termination of Employment at the Initiative of the Employer*. Of the 183 member states of the ILO as on 20 May 2009, Convention C158 has only been ratified by 34 countries.

⁹ [2007] 12 *BLLR* 1097 (CC) at para 61.

¹⁰ Chebaldi *The ILO: A Case Study on the Evolution of U.N. Specialised Agencies, International Organizations and the Evolution of World Society* (1989) 151.

¹¹ Van Niekerk *et al* (2008) 21; Wisskirchen (2005) 258.

¹² Van Niekerk *et al* (2008) 21.

¹³ See Convention C158, downloaded from the ILO website at www.ilo.org, on 17 May 2007.

Neither South Africa, nor the UK, USA or the Netherlands has ratified Convention C158.

Articles 4 to 8 of Convention C158 deal directly with pre-dismissal requirements. These articles are discussed in more detail later in this chapter. Article 2 excludes certain categories of employees from protection against dismissal, namely: fixed-term contract employees; employees employed for a probation period; and employees employed on a casual basis.¹⁴ Article 2(5) also states that member countries can exclude other categories of employees from certain provisions of Convention C158 by taking into account the size and nature of the employer's business.¹⁵

Article 4 of Convention C158 states the following:

“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”

Article 4 states that the dismissal of an employee can only take place for a valid reason; and this reason must be related to the capacity or the conduct of the employee or for reasons based on the operational requirements of the employer.¹⁶ From this, it is clear that the ILO only recognises three broad categories of permissible grounds upon which an employee's services may be terminated.

¹⁴ South African employees on probation and fixed term contract employees are also entitled to protection against unfair dismissal. South Africa's compliance with Convention C158 is discussed in chapter 6 below.

¹⁵ Article 3 states that the terms “termination” and “termination of employment” mean termination at the initiative of the employer.

¹⁶ Van Arkel (2007) 322; Kuip *Ontslagrecht met Bijzondere Aandacht voor de Dringende Reden* (1993) 280; Sims “Judicial Decisions Concerning Dismissals: Some Recent Cases” (1995) 134(6) *International Labour Review* 675.

Article 5 of Convention C158 states the following:

“The following, inter alia, shall not constitute valid reasons for termination:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave.”

Article 5 lists a number of examples of reasons that will not be regarded as valid reasons for dismissal, such as union membership, absence from work due to maternity leave and discrimination on various grounds.¹⁷ It is clear from the inclusion of the phrase “inter alia” that this list does not constitute a closed list and that member countries are free to include more grounds.¹⁸

Article 6 of Convention C158 stipulates the following:¹⁹

- “1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.
2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this

¹⁷ For the underlying principles and Conventions and recommendations of this article see *Protection Against Unjustified Dismissal* (1995) ILO par102 and also Governing Body Paper 2001, Appendix 1 (short survey) par 9; Heerma van Voss *Ontslagrecht in Nederland en Japan* (1992) 238. Article 5 is also reflected in South African legislation and is discussed in more detail later in this thesis.

¹⁸ So, for example, South Africa has included in its list of automatically unfair reasons for termination the dismissal of employees who engage in strike action, persons who are dismissed on grounds of the transfer of a business as a going concern, any reason related to pregnancy and discrimination. See s 187 of the LRA.

¹⁹ Article 6 is also reflected in South African legislation and is discussed in chapter 6 below.

Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.”

Article 7 of Convention C158 is the most significant part of Convention C158 for the purposes of this study, in that it relates directly to the central theme of the thesis, namely pre–dismissal procedures.

Article 7 provides that:

“The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.”

The opportunity to defend him- or herself against the allegations made by the employer is the only pre–dismissal procedure required by Convention C158. The Convention does not provide any details in respect of notification periods, the right to call witnesses or to cross-examine them or the right to legal representation. From this it can be deduced that the authors of Convention C158 did not envisage member countries’ introducing formalistic and court–like procedures as a pre–dismissal requirement.

It is not clear from article 7 whether or not this defence must take place before the employer at the workplace or before an independent body or person.²⁰ However, it is submitted that there are two indications that employers should grant employees this opportunity. The first of these indications is found in the second part of article 7, which states that an employer may dispense with this “opportunity” to defend him- or herself against the allegations if it appears that it cannot reasonably be expected of “the employer” to provide the employee with this

²⁰ See discussion of article 8 below.

opportunity. The second indication is the fact that article 8, which is discussed in more detail below, specifically mentions that an independent body should consider any appeal against the decisions to terminate an employee's services as referred to in article 7. If the drafters of article 7 had intended the employee's opportunity to a defence to take place before an independent body it would surely have been mentioned in article 7, as it had been done in article 8.

Article 7 permits an employer to dispense with this pre-dismissal right of an employee to defend him- or herself against the allegations made by the employer if it appears reasonable to do so.²¹ Unfortunately article 7 does not expand on this important issue. Convention C158 does not give any further guidance on pre-dismissal procedures.

Article 8 of C158 provides that:

- “1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.
2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.
3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.”

Article 8 of C158 deals with the procedures that an employee can follow if he or she wants to appeal against his or her dismissal. It is clear that this appeal must be directed to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.²² It does not refer to

²¹ This is also reflected in item 4(4) of Schedule 8 of the LRA, which is discussed in detail in chapter 5 below.

²² See *Protection against Unjustified Dismissal* ILO (1995) par 149-151; Heerma van Voss (1992) 290; Simms (1995) 134(6) *International Labour Review* 698-700.

an internal appeal hearing against a dismissal at a higher level of management in the work place.²³

When one considers ILO Convention C158 as a whole, the three core principles of Convention C158 that stand out are the following:

- i. There must be a fair and valid reason for dismissal.
- ii. An employee must have an opportunity to defend him- or herself against the allegations made by the employer.
- iii. The employee should have the right to appeal to an impartial body.²⁴

In chapter 6 of the thesis, South African dismissal law is evaluated against these core principles to determine whether the requirements of Convention C158 are adhered to. The three foreign jurisdictions under review, namely, the Netherlands, the UK and the USA that are also evaluated against these three core principles.

3.2.3 The European Union

The EU is South Africa's second biggest trading partner after Asia and it plays an important role on all aspects of our economy, as well as in the political and social arena.²⁵ The EU consists of various countries with diverse backgrounds, different languages, different cultures and legal systems. For the purposes of this research, it was deemed sufficient to consider the functioning of EU structures and to determine to what

²³ See *Protection Against Unjustified Dismissal* ILO (1995) par 175-178; Heerma van Voss (1992) 290-291.

²⁴ An international perspective on South African dismissal law in terms of these three core principles is presented in chapter 6 below.

²⁵ See the website of Department of Trade and Industries <http://www.dti.gov.za> as accessed on 13 January 2010.

extent the EU countries have agreed on standards regarding pre-dismissal procedures.²⁶

The primary institutions of the EU are:

- i. the Council of Ministers;
- ii. the European Commission (hereafter the Commission);
- iii. the European Parliament (hereafter the EP); and
- iv. the European Court of Justice (hereafter the ECJ).

The Council of Ministers is the decision-making institution within the EU and it is comprised of ministers from the different member states. When employment law matters are discussed, the Council is made up of the Ministers of Labour from the different member states.²⁷

The Commission consists of a member from each member state. The Commission is responsible for the proper functioning and development of the EU. The role of the Commission includes monitoring compliance with the various treaties, enforcing treaties, making recommendations and/ or expressing opinions on Council matters.

The EP was established to provide an element of democratic accountability within the legislative and executive systems of the EU. Representation on the EP is proportionate to the population size of each member state. The main function of the EP is advisory and supervisory. The EP also has the authority to establish a commission of inquiry to investigate any alleged breaches or misadministration of EU law.²⁸

²⁶ Coopers and Lybrand *Employment Law in Europe* (1995) 1 – 8.

²⁷ Coopers and Lybrand (1995) 2.

²⁸ Coopers and Lybrand (1995) 3.

The main function of the ECJ is to ensure that member states observe EU law in terms of the interpretation and application of the different treaties. The ECJ is seated in Luxembourg and consists of 13 judges appointed by agreement between the member states.²⁹ According to Blanpain³⁰ the ECJ has a threefold impact on labour law in the EU, namely:

- i. making European labour law binding and effective on member states;
- ii. furthering and promoting the community goals of integration; and
- iii. acting as a constitutional court.

It is clear that the EU has had an impact on the development of labour law principles in Europe. During 1975, the EU adopted a directive on collective redundancies. It adopted a directive on the transfer of enterprises in 1977, and one on insolvencies in 1980.³¹ The role of the ECJ in enforcing these directives was clearly illustrated in two subsequent court cases:

- i. In the *Francovich* matter³² the ECJ ruled that even though Italy had not implemented the Insolvency Directive an individual has to be compensated and protected against insolvency. The ECJ also stated that the full effectiveness of community law would be undermined and the rights of individuals will be diminished by any infringement of community law by individual member states.³³

²⁹ Coopers and Lybrand (1995) 3.

³⁰ Blanpain and Weiss *Changing Industrial Relations and Modernisation of Labour Law* (2003) 59 – 65.

³¹ Blanpain and Weiss (2003) 61.

³² *V Italy* C- 479/93, ECR (1995) 3843.

³³ Blanpain and Weiss (2003) 61.



- ii. In *Commission v UK*³⁴ the ECJ made a judgment against the UK for not complying with the collective redundancies directive. The court held that “[e]mployers face a statutory obligation to inform and consult with employees when they are planning collective redundancies, or if they transfer employees from one business to another.”

The ECJ is also obliged to take cognisance of ILO Conventions, as it forms part of the general principles of law that the ECJ has to respect and apply. At a European level, the ECJ seeks inspiration in the ILO instruments, when it comes to employment law.³⁵

Despite substantial diversity in the circumstances of member states of the EU, in respect of their levels of unemployment, the extent of decentralisation, employee representation and union forms, union power and density, collective bargaining and links to political parties, to name only a few, the central bodies of the EU have generally remained active institutions. The social partnership and social wage concepts continue to influence labour relations. A kind of supra-national labour relations system has emerged in the EU.³⁶ Another feature of European integration has been the establishment of social partnerships at the EU level through the European Trade Union Confederation (hereafter the ETUC).³⁷

For the purposes of this research, it is deemed significant that the European Council of Ministers has ratified no formal cross-sectoral

³⁴ C-382/92 (1994); Blanpain and Weiss (2003) 61.

³⁵ Blanpain and Weiss (2003) 64.

³⁶ Biffle and Isaac (2005) 429-430.

³⁷ Biffle and Isaac (2005) 433. The ETUC has signed three cross-sectoral European framework agreements with the European employer counterparts on parental leave, part-time work and fixed term contracts. These agreements have been ratified by the European Council of Ministers and are now part of European legislation. Other agreements that have been ratified include individual rights, democracy, free collective bargaining, social welfare and social solidarity.

agreements on dismissal procedures that resemble ILO Convention C158. The member states of the EU rely for guidance on dismissal mainly on the ILO principles. Most of the agreements that have been ratified by the European Council of Ministers only have an indirect influence on dismissal.

For the discussion below, two member countries of the EU have been selected to evaluate whether they have elected to include principles that resemble ILO Convention C158. These countries are the Netherlands and the UK.

3.2.4 The Southern African Development Community

In 2003 SADC adopted a Charter on Fundamental Social Rights (hereafter the Charter) that seeks to entrench the institution of tripartism as the preferred means to promote the harmonisation of legal, economic and social policies and programmes, and to provide a framework for the recognition of regional labour standards.³⁸

The Charter contains provisions on freedom of association, the right to organise and bargain collectively and basic labour rights.³⁹ Article 5 requires member states to prioritise ILO Conventions on core labour standards so as to take the necessary action to ratify and implement these standards.⁴⁰ Other articles of the Charter are related to equal treatment of men and women, the protection of children, protection of

³⁸ Van Niekerk *et al* (2008) 29.

³⁹ Art 4.

⁴⁰ Van Niekerk *et al* (2008) 29. Dismissal procedures are not regarded as a core labour standard of the ILO.

health, safety and the environment,⁴¹ employment and remuneration⁴² and education and training.⁴³

The Charter cannot be directly enforced on member states and unlike with the ILO Conventions there is no independent supervisory mechanism to monitor members' compliance with or breaches of the Charter.⁴⁴ Even though the SADC requires member states to prioritise ILO Conventions on core labour standards and to take the necessary steps to ratify and implement these standards, the ILO has not identified ILO Convention C158 as one of its core conventions. It follows that member states have not been encouraged to follow guidelines with regards to procedures for dismissal. Some authors have suggested that there should be coherent labour principles and that labour law should be harmonised on a regional basis in the SADC countries.⁴⁵

3.3 The Netherlands

3.3.1 Introduction

The Dutch have played an important role in South Africa for much of its history since 1652. The Cape Province is a former Dutch colony and the Dutch language was spoken by a substantial part of the white population for about two and half centuries. As a result, the Dutch have also contributed towards principles still found in South Africa's legal

⁴¹ Art 12.

⁴² Art 13.

⁴³ Art 14.

⁴⁴ Van Niekerk *et al* (2008) 30.

⁴⁵ Van Eck and Borraine "A Plea for the Development of Coherent Labour and Insolvency Principles on a Regional Basis in the SADC Countries" (2008) *International Insolvency Law: Themes and Perspectives* 267-273; Hepple "Harmonisation of Labour Law: Level the Playing Field or Minimum" paper delivered at the Society of Law Teachers of Southern Africa Pretoria (2008) 1-13.

system. This is especially true of principles that relate to the common-law contract of employment that emanates from Roman-Dutch law.⁴⁶

Because of the close historical, cultural and legal ties between the Netherlands and South Africa, the Netherlands was selected for inclusion in this investigation of the implementation of the ILO Convention C158.⁴⁷

In order to determine the application of Convention C158 in the Netherlands, it is important to start with a brief overview of dismissal law, or *ontslagrecht*, as it is known in the Netherlands.

3.3.2 Historical background

In the Netherlands the government is obliged to respect labour standards generally by virtue of its membership of the United Nations, the ILO, the Council of Europe and the EU.⁴⁸ In December 2000 the European Community adopted a Charter on Fundamental Rights, which was included in the Constitution of Europe, which was adopted in 2004 by member states of the EU. Article 30 of the Charter, at present Article 11-90 of the European Constitution, states:

“Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.”⁴⁹

⁴⁶ Kleyn and Viljoen *Beginners Guide for Law Students* (2009) 82-84.

⁴⁷ A comparison between the Netherlands and South Africa is done in chapter 6.

⁴⁸ Van Arkel (2007) 150.

⁴⁹ Van Erp and Smits *Bronnen Europees Privaatrecht* (2001) 37-46; Hendrickx “10 jaar Europees Arbeidsrecht: Diversiteit Gekoppeld aan Sociale Grondrechten” (2006) 3 *Arbeid Integraal* 59; Bercusson, Clauwaert and Schömann *European Labour Law and the EU Charter of Fundamental Rights* (2002) 7; Blanpain *European Labour Law* (2003) 35.

It is therefore clear that in the Netherlands, with regards to dismissal, cognisance must be taken of ILO standards and Conventions as well as of EU directives that relate to dismissal.

The principles of *ontslagrecht* emanate from the contract of employment, or the *arbeidsovereenkomst*, as it is known in Dutch. All employers are compelled to provide their employees with particulars of employment in writing.⁵⁰ Up to the end of the Second World War, all dismissals in the Netherlands were dealt with on purely contractual principles as determined by the specific contract of employment.

During and after the Second World War, the Netherlands, like almost every other country in Europe, experienced extremely high levels of unemployment and in an effort to prevent further unemployment the Dutch government issued emergency decrees. The most famous of these was the *Buitengewoon Besluit Arbeidsverhoudingen van 1944*.⁵¹ Today it is known as the BBA. Even after numerous amendments in the 1980's and 1990's it still plays a vital role in dismissal law in the Netherlands. In terms of this decree, in the first years of its existence, both employers and employees needed permission from the Director of the District Employment Office, (*Directeur van het Gewestelijk Arbeidsbureau*), to terminate an employment relationship. In the first decade after the Second World War, the purpose of this decree was to protect the labour market from instability. Even though this decree was emergency legislation in view of the special circumstances of the war, it is still in existence today.⁵² Nowadays, however, it only obliges the employer to obtain permission to terminate a contract of employment. Consequently it is now perceived as a protective measure for employees.

⁵⁰ Burgerlijke Wetboek 1945 artikel 7: 655.

⁵¹ Van Arkel (2007) 173.

⁵² Van Arkel (2007) 175.

3.3.3 Legislative framework for dismissals

The Dutch law recognises various grounds on which a contract of employment can be terminated. These are discussed below.⁵³

- i. The end of a contract of employment on legal grounds (*einde van een arbeidsovereenkomst van rechtswege*): this can include: the death of an employee; the expiry of a fixed-term contract; or the termination of employment before the expiry date of a fixed-term contract. If one of the parties ends a fixed-term contract before the term is due, he or she has to pay damages equal to the salary that would have been paid if the contract had not been ended. A *kantonrechter* of the District Court can mitigate this.⁵⁴ The employer requires no formal procedures, as the termination of the contract occurs automatically. If the employer wants to terminate a contract of employment before the expiry date of a fixed-term contract he or she should get permission before hand from the Central Organisation of Work and Employment (*Centrale Organisatie Werk en Inkomen*) (hereafter the CWI) or a *kantonrechter* from the District Court.⁵⁵ The CWI is the modern equivalent of the Director of the District Employment Office, as established at the end of the Second World War.
- ii. Termination by mutual agreement (*wederzijds goedvinden*): there are no legal requirements in this instance, and no permission is required from the CWI or the District Court. The employer has to ascertain that the employee knows all the consequences of waiving his rights that the employee would have had in case of

⁵³ Diebels *De Kleine Gids voor het Nederlandse Arbeidsrecht* (2007) 109 – 134; Koevoets *Wangedrag van Werknemers* (2006) 101 – 123.

⁵⁴ Genderen, Dragstra, Fluit, Stefels, Steverink, Witte and Wolf *Arbeidsrecht in de Praktijk* (2006) 183.

⁵⁵ Diebels (2007) 111.

unilateral dismissal, most importantly his or her social security rights.

- iii. End of the probationary period (*einde in de proeftijd*). Dismissal during the probationary period only requires the employer to notify the employee in writing before the expiry of the probation period that his or her services will be terminated on the expiry date. If the employer wants to terminate the employment during the probationary period, he or she can also simply inform the employee of such termination in writing. The duration of probationary periods is determined by statute and generally an employee cannot claim unfair dismissal if his or her services are terminated while he or she is on probation. No permission is required from the CWI or the District Court. In Dutch law, the probation period is regarded as a period during which an employee has no protection from dismissal. Genderen *et al* comment as follows:

“daarom spreekt men wel van een voor de werknemer rechteloze periode gedurende de proeftijd.”⁵⁶

- iv. Unilateral cancellation of the employment contract (*opzegging van de arbeidsovereenkomst*). Either the employer or the employee can undertake this type of termination, but normally the employer needs permission from the CWI. An employee can terminate his or her contract of employment by simply giving notice. No permission is needed from the CWI. The employer must submit a written request with a motivation to the CWI or the District Court as to why the employer wishes to terminate the employment contract. Sometimes the District Court will grant a

⁵⁶ Genderen *et al* (2006) 221.

dismissal that the CWI cannot allow, because the Court can force the employer to pay a severance fee. Permission to end the employment contract can be granted on grounds of operational requirements or misconduct by the employee. When an employee wishes to terminate the contract but believes that the employer should pay him or her damages or a fee, he or she will not simply give notice, but will ask the District Court to annul the contract. Both parties must adhere to the notice periods as stipulated in the contract of employment. The cancellation of the employment contract can only take place after the CWI has given its permission. Most terminations of employment in the Netherlands are dealt with in this manner.

- v. Summary dismissal (*ontslag op staande voet*).⁵⁷ The law requires an urgent reason (*dringende rede*) for a termination, in other words, the situation has to be of such a serious nature that the employment relationship has to be terminated immediately. It appears from an analysis of Dutch labour law that this type of termination is almost without exception, due to misbehaviour, such as gross misconduct by or the incapacity (poor work performance) of the employee. The following types of misconduct have been held to justify summary dismissal in the Netherlands: providing false information in a job application; serious incapacity; alcohol abuse despite warnings; theft; fraud; assault; and gross insubordination.⁵⁸

In practice, an employer can dismiss an employee for any of the above reasons without following any formal disciplinary procedures. The employer does not need the permission of the CWI, and the only

⁵⁷ Diebels (2007) 130 –131.

⁵⁸ Burgerlijke Wetboek 1945 artikel 7: 678.

requirement is that the employer should have a valid reason for dismissal. The employer must inform the employee of that reason and must be able to substantiate it in further legal proceedings, if any.

Although the employer is not bound to any prescribed pre-dismissal procedure in the case of a summary dismissal, the CWI and various District Court judges have ruled that the employer must be able to prove that other disciplinary measures, such as written warnings, have failed.⁵⁹

Where an employer has requested permission from the CWI to terminate the employment contract of an employee, the employer must first have a valid reason or just cause. The CWI investigates and the employee gets an opportunity to respond to the allegations made by the employer, to the CWI. Ultimately the decision to dismiss or terminate a contract of employment is taken by the CWI or the District Court. The most significant is the so-called summary dismissal where the employer one-sidedly dismisses an employee for serious misconduct on the spot without getting permission from the CWI. If the employee believes that the employer could not have justified the summary dismissal, he or she can take legal action by issuing a summons to the employer to appear before a judge in the District Court or at the CWI.⁶⁰

3.3.4 Compliance with Convention C158

Although no pre-dismissal procedures are required for a summary dismissal (*ontslag op staande voet*) it would appear that the employer must be able to justify such a dismissal and provide substantive reasons for the dismissal.

⁵⁹ Diebels (2007) 111.

⁶⁰ Diebels (2007) 144–152.

If one compares this with the first core principle of Convention C158, which requires a fair and valid reason to terminate the services of an employee, it is clear that effect is given to article 4 of Convention C158 in Dutch labour legislation. However, interestingly, the second core principle of Convention C158, which requires an opportunity for the employee to defend him- or herself against the allegations levelled by the employer before the employee is dismissed, is clearly absent from the labour legislation in the Netherlands.

From an overview of the Dutch labour legislation, it is apparent that Dutch law places much more emphasis on the reasons for the dismissal than on the pre-dismissal procedures that employers must follow. In the majority of cases, the opportunity to respond occurs before the neutral CWI. It could be argued that this is in line with the third core principle of Convention C158, which refers to an opportunity for an appeal before an impartial body.⁶¹

3.4 The United Kingdom

3.4.1 Introduction

The second country that has been selected for the purposes of analysis is the UK. It is submitted that no other single country has had such a large influence on the development of South African society and the country's legal framework as the UK. For many years, South Africa was a British colony, and many of the traditions in the South African legal

⁶¹ A comparison between Dutch and South African dismissal law is done chapter 6 below.

and education system has British roots.⁶² Today the *lingua franca* in South Africa is English, even though the country has eleven official languages.

Aside from Germany, the UK is also South Africa's second biggest trading partner in the EU.⁶³

3.4.2 Historical Background

In order to reach an understanding of the implementation of Convention C158 in the UK, it is necessary to provide a brief overview of the UK's labour legislation, or employment law, as it is known in the UK.

In the period from 1870 to 1970, employment legislation in the UK provided a framework within which trade unions were able to expand and the unions became powerful. Successive governments adopted a hands-off *laissez faire* approach to much of the area of employment law.⁶⁴ The central purpose of labour law was seen as maintaining a balance between employers and employees to ensure the effective operation of a voluntary system for collective bargaining.⁶⁵

For many years, the subject of employment law was approached through collective bargaining. However, this situation changed when the Conservative government headed by Margaret Thatcher came to power in 1979.⁶⁶ In a series of legislative reforms, the freedom of trade unions to regulate their own conduct and organise industrial action was

⁶² Kleyn and Viljoen (2009) 36-37. It is generally accepted that English law has had a permanent influence in certain areas of South Africa's legal system especially through legislation and precedent.

⁶³ See the website of Department of Trade Industries <http://www.dti.gov.za> downloaded on 13 January 2010.

⁶⁴ Bendix (2007) 711. The governments of the day, in keeping with the principle of voluntarism, left it to the unions and employers to reach agreements on labour issues.

⁶⁵ Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 2.

⁶⁶ Bendix (2007) 708.

severely curtailed, resulting in a considerable drop in trade union membership, and an equally considerable drop in the number of working days lost through strike action.⁶⁷

In 1972, the UK joined the then Common Market, which evolved into the EU. Numerous laws regulating aspects of anti-discrimination in the employment relationship were adopted. These included the Equal Pay Act,⁶⁸ the Race Relations Act⁶⁹ and the Sex Discrimination Act.⁷⁰ In 1996 the Employment Rights Act (hereafter the ERA) was introduced. It requires employers to recognise trade unions under certain circumstances and also contains sections on disciplinary enquiries and dispute settlement procedures.⁷¹ In 2002 the Employment Act (hereafter the EA)⁷² was introduced, which establishes a statutory dispute resolution procedure, that affects both the employer and the employee. It also expanded on the disciplinary procedures contained in the ERA.⁷³

3.4.3 Legislative framework for dismissals

An unfair dismissal in the UK is a statutory concept that is consolidated almost wholly within the ERA. Section 94(1) of the ERA provides that:

⁶⁷ Bell *Employment Law* (2006) 2-3.

⁶⁸ Equal Pay Act 1970. This Act came into force on 29 December 1975 and prohibits any less favourable treatment between men and women in terms of pay and conditions of service. It has been amended numerous times and the most recent amendments in 2003 were to incorporate a more simplified approach under European Union law. Currently it is in line with European Union directive 2006/54EC that regulates equal treatment between men and women.

⁶⁹ Race Relations Act 1976. This Act prohibits discrimination on any arbitrary grounds like race, colour, nationality, ethnic and national origin in the field of employment.

⁷⁰ Sex Discrimination Act 1975. This Act states that it is unlawful for an employer to discriminate or fail to prevent discrimination against a worker because of his or her gender, marital or gender reassignment status.

⁷¹ Employment Rights Act 1999. Chapter 18 Part X of the ERA contains a complete section on the rights of an employee during a disciplinary hearing. These rights are discussed in more detail further in this chapter.

⁷² Employment Act 2002.

⁷³ See Schedule 2, part 1 of chapter 1 and chapter 2. This is discussed in detail further on in this chapter of the current study.

“[a]n employee has the right not to be unfairly dismissed by his employer.”

This section in the ERA is expanded on in section 98(1)(b), which states that there must be a fair reason for dismissal. The reasons can be: capabilities or qualifications; conduct; redundancy; contravention of a statute; and some other substantial reason.⁷⁴

Sections 94(1) and 98(1)(b) of the ERA, regulate the right of an employee not to be unfairly dismissed and state that there must be a fair reason for the dismissal.

Certain categories of employees are not afforded protection against unfair dismissal,⁷⁵ as can be seen in sections 94(1) and 98(1)(b) of the ERA. The exclusions are the following:

- i. employees over the normal retirement age of 65;⁷⁶
- ii. members of the armed forces and the police; and
- iii. employees with less than one year of continuous service.

Section 110 of the ERA of 1996 states that employees who are covered by collective agreements regulating dismissal procedures may also be excluded. However, such procedures must be approved by the Secretary of State to operate as a substitute for the statutory requirements of the ERA.⁷⁷

Schedule 2 of the EA regulates procedural fairness with regard to dismissal in the UK.⁷⁸ Section 98 of the ERA of 1996 was also

⁷⁴ S 98(2)(a-d) of the ERA of 1996.

⁷⁵ Bell (2006) 138-139.

⁷⁶ S 109 (1) ERA of 1996.

⁷⁷ S 110 ERA 1996; Bell (2006) 139.

⁷⁸ EA 2002 Schedule 2.



amended by the introduction of Regulation number 2004 of the EA 2002 (Dispute Resolution), which introduced a statutory dismissal and disciplinary procedure.⁷⁹ The standard statutory dismissal and disciplinary procedure consists of three basic steps:⁸⁰

- i. The employer sets out in writing the issues, that have caused the employer to contemplate taking action, and sends a copy of this statement to the employee inviting him or her to attend a meeting.
- ii. The meeting should take place before action is taken. After the meeting, the employer should inform the employee of the decision and notify him or her of his or her right of appeal.
- iii. If the employee wishes to appeal, a further meeting should be arranged which the relevant parties should attend. After the meeting, the employee should be notified of the outcome.⁸¹

For a dismissal to be deemed fair in the UK, it has to be for a fair reason and has to be dealt with in accordance with a prescribed statutory dismissal and disciplinary procedure.

In the UK, the Employment Tribunal⁸² and the Advisory Conciliation and Arbitration Service⁸³ (hereafter ACAS) deal with most disputes relating to claims related to allegedly unfair dismissals. ACAS is an impartial body that endeavours to resolve the dispute between employers and employees first through conciliation and then, if no settlement agreement is reached, by means of a full hearing.⁸⁴ Provision is also made for further appeal processes. The different levels of appeal are

⁷⁹ Bell (2006) 157.

⁸⁰ Goolam Meeran “The way forward for labour dispute resolution – Comparative perspectives” Paper delivered at the 2007 SASLAW conference in Cape Town.

⁸¹ Schedule 2 of EA sets out in detail the different steps to be followed.

⁸² Employment Tribunals Act 1996 (Tribunal Composition) Order 2009 No 789.

⁸³ Statutory Instrument 1998 No14 *The Employment Protection Code of Practice (Disciplinary Practice and Procedures)* Order 1998.

⁸⁴ Bell (2006) 7-8.

made to the Employment Appeal Tribunal, the Court of Appeal, the House of Lords and ultimately the European Court of Justice.⁸⁵ Parties to a dismissal dispute can also agree to take the case to arbitration, rather than to ACAS. The arbitrator is then appointed by ACAS who will decide if the dismissal was fair or unfair.

3.4.4 Compliance with Convention C158

The first core principle of Convention C158, which requires a fair and valid reason to terminate the services of an employee, is clearly reflected in the UK's labour legislation. Section 98(1)(b) of the ERA stipulates that there must be a fair reason for dismissal, while section 98(2)(a-d) provides examples of fair reasons for dismissal. This can include amongst others, capabilities, misconduct, redundancy and the contravention of a statute.

The second core principle of Convention C158, which requires an opportunity for the employee to defend him- or herself against the allegations, levelled by the employer before the employee is dismissed, is contained in UK labour legislation. Chapter 18 part X of the ERA and Regulation number 2004 of the EA provides for a statutory dismissal and disciplinary procedure. An employee who faces dismissal in the UK is informed in writing of the allegations against him or her and is invited to attend a meeting where these allegations are discussed and the employee can respond to them. This discussion and meeting have to take place before any action is taken against the employee.

In the UK the Employment Tribunal and ACAS give expression to the third core principle found in article 8 of Convention C158, which requires that an employee can appeal to an impartial body against his or her

⁸⁵ Meeran (2007) 10.

dismissal. The statutory dismissal and disciplinary procedure in the UK makes provision for a statutory internal appeal process, which is not a requirement in article 8 of Convention C158. Provision is also made for further appeal processes, which can go up to the ECJ.⁸⁶

The protection against unfair dismissal in terms of reasons, procedure and the right to appeal afforded to an employee in the UK as measured against the three core principles of Convention C158 is more comprehensive than required by Convention C158.

3.5 The United States of America

3.5.1 Introduction

Many consider the USA to be the most powerful and wealthiest country in the Western world. It may be argued that no other single country has had such a major influence on the global economy in the last two centuries. Many see the USA as the icon of individualism, capitalism, a free market economy and democracy. For these reasons, the USA was selected as the third country to evaluate the implementation of ILO Convention C158.

3.5.2 Historical background

In the USA, there are 50 states, each with its own executive, legislative and judicial power, besides a federal government with the same powers.⁸⁷ Hence, it would be more accurate to speak of 51 legal

⁸⁶ See footnotes 83 – 86.

⁸⁷ Klik *Onderzoek na de Amerikaanse Recht* (1994) 11.

systems in the USA.⁸⁸ The USA does not have national or federal legislation on the termination or dismissal of employees.

The words “you’re fired” are considered the most infamous words in USA employment relations. During the nineteenth century, the doctrine of employment-at-will emerged in the USA in a climate of unbridled, laissez-faire expansionism, social Darwinism and rugged individualism.⁸⁹

The employment-at-will doctrine is often referred to as “Wood’s rule” because Wood articulated the doctrine in an 1877 paper.⁹⁰ Wood stated that an employee must be free to quit his or her job at any time and that an employer must have the right to terminate an employee’s services at any time. In its narrowest sense the employment-at-will doctrine meant that either party could terminate the contract of employment for any reason.⁹¹

The most frequently quoted case of the employment-at-will doctrine is the 1884 *Payne* judgment in Tennessee where the court held the following:

“All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being guilty of legal wrong.”⁹²

By the beginning of the twentieth century, the employment-at-will doctrine was well established throughout the USA. It still prevails in almost every state in the USA, even up to the present times.⁹³ Given the

⁸⁸ Van Arkel (2007) 17.

⁸⁹ Standler *History of the At-Will Employment Law in the USA* (2000) 3.

⁹⁰ Wood *Master and Servant* (1877) 272-273.

⁹¹ Standler (2000) 4.

⁹² *Payne v Western & Atlantic Railroad Co* (1884) Tenn. 519-520.

⁹³ Busse *Your Rights at Work* (2005) 3.

strong individualist ethic that prevails in the USA, successive governments have opted for minimal interference in labour relations.⁹⁴

During the Great Depression of the 1930's, the USA faced an increasingly high unemployment rate and a rapid decline in the standard of living.⁹⁵ The USA government under President Franklin Roosevelt realised the need to restrict the harsh applications and abuse of the employment-at-will rule. In an effort to stabilise labour relations and stimulate the economy, the New Deal economic recovery plan was adopted.⁹⁶

The New Deal government adopted the National Labour Relations Act (also known as the Wagner Act) in 1935. The main aims of the Wagner Act were to:

- i. encourage a rationalisation of commerce and industry;
- ii. establish minimum wages and maximum hours of work;
- iii. establish the National Labour Relations Board with the power to investigate and decide on charges of unfair labour practices;
- iv. encourage collective bargaining; and
- v. protect freedom of association.⁹⁷

In the *Peterman* judgment, the California District Court of Appeal established the public-policy exception to the employment-at-will doctrine when it ruled that an employee could not be dismissed because he or she refused to commit perjury when asked to do so by

⁹⁴ Bendix (2007) 704.

⁹⁵ Wikipedia http://en.wikipedia.org/wiki/National_Labour_Relations_Act downloaded on 7 August 2009.

⁹⁶ Standler (2000) 5 – 6.

⁹⁷ Millis *From the Wagner Act to Taft-Hartley; A Study of National Labor Policy and Labor Relations*(1950) 73.

the employer.⁹⁸ The concepts of wrongful discharge and public-policy exception resulted in numerous pieces of legislation that whittled away at the all-powerful employment-at-will doctrine.

In 1964, the USA Congress adopted the Civil Rights Act⁹⁹ and both Congress and many of the state legislatures enacted numerous anti-discrimination laws. Chapter VII of the Civil Rights Act, or Title VII, prohibits discrimination against any person in terms of conditions of employment, privileges of employment with respect to race, colour, national origin, sex and religion.

Other federal statutes that protect employees against discrimination include the Equal Pay Act,¹⁰⁰ which prohibits employers from paying different wages based on gender for the same work. Congress also passed the Americans with Disabilities Act,¹⁰¹ the Family and Medical Leave Act¹⁰² and the Age Discrimination in Employment Act.¹⁰³ In practice, it means that if an employee can prove that he or she was dismissed on any of these discriminatory grounds, the dismissal is deemed wrongful and the employee can claim damages.

During the late 1970's and early 1980's courts in the USA became responsive to the cry for just cause protection.¹⁰⁴ The judiciary in the USA tried to find ways to whittle away at the employment-at-will doctrine.¹⁰⁵ In New Hampshire, the Supreme Court ruled in 1974 that an employee who was dismissed for refusing to date her supervisor had

⁹⁸ *Peterman v International Brotherhood of Teamsters* (1959) 344 P 2d (Call App).

⁹⁹ Civil Rights Act of 1964.

¹⁰⁰ Equal Pay Act of 1963.

¹⁰¹ Americans with Disabilities Act of 1990.

¹⁰² Family and Medical Leave Act of 1993.

¹⁰³ Age Discrimination in Employment Act of 1967.

¹⁰⁴ Barber "Comparison of International and US Employment Termination Procedures: How Far Have We Come? A Step in the Right Direction" (1993) 165 *Journal for International Law* 3.

¹⁰⁵ Weinstein "The Limitations of Judicial Innovation: A Case Study of Wrongful Dismissal Litigation in Canada and the United States" (1993) 14 *Comparative Labour Law* 7.

been wrongfully discharged.¹⁰⁶ In 1980, the Supreme Court in California ruled that an employee who was discharged after eighteen years of service, without good cause and for union activity, could bring an action against the employer in contract and tort (delict) for wrongful discharge because the termination offended the implied covenant of good faith that rests on the employer and fair dealing that attended the employment contract.¹⁰⁷ All these court judgments dealt with substantive reasons for dismissal and do not refer to pre-dismissal procedures at all.

3.5.3 Legislative framework for dismissals

As mentioned earlier, the USA has no national or federal legislation that regulates dismissal, with the exception of numerous anti-discrimination laws. Most states have developed their own rules recognising a small exception to the employment-at-will principle and the public policy of “wrongful discharge” was formulated.¹⁰⁸ Overall, courts have used the public policy exception in situations to protect employees: who have been discharged for serving on a jury;¹⁰⁹ for filing claims for workplace injuries;¹¹⁰ for refusing to join in the employer’s illegal practices;¹¹¹ for objecting to their superiors about legal violations;¹¹² for refusing to lobby the legislature for legislation sought by their employer;¹¹³ for refusing to submit to the sexual advances of a supervisors;¹¹⁴ and for refusing to participate in games involving indecent exposure.¹¹⁵

¹⁰⁶ *Monge v Beebe Rubber Co* 316 A2d 549 (N.H.1974).

¹⁰⁷ *Clearly v American Airlines Inc* 168 Cal Rptr722 (1980).

¹⁰⁸ Busse (2005) 31.

¹⁰⁹ *Nees v Hocks* 536 P 2d 512(Or1975).

¹¹⁰ *Frampton v Central Ind.Gas Co* 297 NE 2d 425 (Ind 1973).

¹¹¹ *Peterson v Browning* 832 P 2d 1280 (Utah 1992).

¹¹² *Sheets v Teddy’s Frosted Food Inc* 427 A 2d (Conn 1985).

¹¹³ *Novosel v Nationwide Ins. Co* 721 F 2d 894 (3d Cir 1983).

¹¹⁴ *Lucas v Brown & Root Inc* 736 F.2d 1202 (8th Cir 1984).

¹¹⁵ *Wagenseller v Scottsdale Memorial Hospital* 147 Ariz 370 710 P 2d 1025 (Ariz 1985).



By 2001, the judicial public policy exception was recognized by 41 of 49 states (Montana excluded).¹¹⁶ In the USA, with the exception of the state of Montana, the remedy for an arbitrary dismissal still generally depends on finding an exception to the termination-at-will rule.

In 1987, Montana passed its Wrongful Discharge from Employment Act (hereafter the WDFEA).¹¹⁷ The WDFEA acknowledges that employees have the right not to be wrongfully discharged. This Act applies only to employees. It excludes independent contractors, as well as employees on probation and employees on fixed-term contracts. Employees covered by a collective agreement between the employer and a trade union is also excluded.¹¹⁸

Section 39-2-904 of the WDFEA provides that a discharge will be deemed wrongful if:

- i. the termination was in retaliation for the employee's refusal to violate public policy;
- ii. the discharge was not for good cause and the employee had completed the employer's probationary period of employment; and
- iii. the employer violated the express provisions of the employer's own written personnel policy.

Private sector employees in the USA who are subject to a collective agreement enjoy protection against arbitrary dismissal in general.¹¹⁹

¹¹⁶ Autor "Outsourcing at Will: The Contribution of Unjust Dismissal Doctrine to the Growth of Employment Outsourcing" Massachusetts Institute of Technology Department of Economics Working Paper Series (01-32) (2001) 7.

¹¹⁷ Montana Wrongful Discharge from Employment Act of 1987.

¹¹⁸ Bennet "Montana's Employment Protection: A Comparative Critique of Montana's Wrongful Discharge from Employment Act in Light of the United Kingdom's Unfair Dismissal Law" (1996) 57(1) *Montana Law Review* 4-5.

¹¹⁹ Van Arkel (2007) 140.

These collective agreements normally include disciplinary procedures and codes that would stipulate possible reasons for dismissal and the procedures to be followed.¹²⁰ However, only approximately 10% of the total work force in the USA is covered by collective agreements.¹²¹

3.5.4 Compliance with Convention C158

The first core principle of ILO Convention C158, which requires that the employment of an employee may not be terminated without valid reason and that the reason must be related to the conduct or capacity of the employee or based on the operational requirements of the employer, is clearly absent from USA labour legislation. The employment-at-will principle in the USA, and even the exceptions to the at-will principles adopted by almost all the states in the USA, do not reflect article 4 of Convention C158. Nor does the public policy of wrongful discharge do so. Most employees in the USA have no protection against unfair dismissal based on their conduct or capacity, but they do enjoy protection against unfair dismissal based on public policy principles and anti-discriminatory legislation.¹²²

The second core principle of ILO Convention C158 states that an employee's services shall not be terminated before he or she has been given an opportunity to defend him- or herself against the allegations made by the employer. In the USA procedural fairness plays no part in the concept of discharge for good cause. This is not only true of Montana, but also in the whole of the USA.¹²³ No federal or state law contains any provision regarding procedural requirements to be

¹²⁰ Busse (2005) 143.

¹²¹ Van Arkel (2007) 35.

¹²² Busse (2005) 214.

¹²³ Bennet (1996) 11.

followed prior to dismissal. Clearly, in the USA, the principles of article 7 of Convention C158 have not been given effect to.

The third core principle of ILO Convention C158, which deals with the opportunity for an external appeal, is not complied with in the USA. No provision is made in USA dismissal law for an employee to appeal against his or her dismissal to an impartial body. It would seem that an employee in the USA who believes his or her dismissal to be unlawful or wrongful can only claim restitution by means of a civil action against the employer. The principles of article 8 of Convention C158 have not been given effect to in USA dismissal law.

3.6 Conclusion

In this chapter, supranational instruments and their influence on an employer's right to discipline and dismiss have been reviewed. The dismissal law in two European countries, namely the Netherlands and the UK, has been analysed, and of the USA has been evaluated in order to obtain a broader picture of dismissal law from an international perspective.

There are various supranational institutions that have the potential to establish standards in labour law and labour relations. These institutions do not have the same influence on all member states as not all standards set by the supranational institutions are adopted by member states. It would also appear that some of these standards are regarded as more important than others.

It can be concluded that ILO Convention C158 is not seen as an important or core convention. None of the three countries under review have ratified it indeed, only 34 countries out of a possible 183 have

ratified ILO Convention C158. However it is not necessary for a country to ratify an ILO Convention to implement its principles. Nevertheless, only one of the countries under investigation, namely the UK, has implemented the principles of ILO Convention C158.

It can also be concluded that SADC has had almost no influence of any kind with regards to the implementation of labour standards, in Southern Africa.

The EU plays an important role in the implementation of labour standards but has had no direct influence on the establishment of requirements for disciplinary procedures.

It is clear that the ILO has the biggest potential to influence member states to implement standards with regards to procedural requirements for dismissal. This was the case in the UK, and as will be seen later with South Africa, even though ILO Convention C158 has not been ratified by either. By reviewing all the articles of ILO Convention C158 from a broader perspective three core principles stand out, namely:

- i. there must be good reason for dismissal;
- ii. employees must be given an opportunity to respond against the allegations made by the employer; and
- iii. employees must have an opportunity to appeal against the dismissal to an impartial body.

From the way these core principles are phrased it is clear that they are not applicable to employees who are on probation or who are subject to a fixed-term contract of employment. A lot of detail is provided with regard to reasons for which an employee may not be dismissed. It is, however, important to take cognisance of the fact the ILO is not

prescriptive in any way with regards to the nature of the disciplinary enquiry that precedes dismissal. There is no requirement that the disciplinary enquiry must be of a formal nature or that it should have a court-like character. It can thus be concluded that an informal, general non-prescriptive approach would be in order.

In the Netherlands and the UK, both members of the EU and the ILO, strong emphasis is placed on the reasons for dismissal, which is in line with the first core principle of Convention C158 but the pre-dismissal procedures that need to be followed in these countries differ.

In the UK, the onus is placed on the employer to ensure that a very specific pre-dismissal procedure is followed in the workplace before the decision to dismiss is taken. The employee is also given an opportunity to respond to the allegations made by the employer. If the employee believes the dismissal to be unfair, he or she can appeal to the Employment Tribunal. This is in compliance with the second and third core principles of Convention C158.

In the Netherlands, no pre-dismissal procedures have to be followed in the workplace. However, the employer must obtain permission from the *CWI* to dismiss an employee. The right to respond to the allegations made by the employer, *audi alteram partem*, does not take place in the workplace but at the *CWI*. If the employee believes the dismissal to have been unfair, he or she can refer the matter to court. This is not in compliance with the second core principle of Convention C158, as an employee in the Netherlands does not have right to respond against the allegations made by the employer directly to the employer.

Both the Netherlands and the UK are in compliance with the third core principle of Convention C158, which makes provision for the right to an appeal against dismissal to an impartial body.

The USA, also a member of the ILO, has a system that, is totally unique, in the sense that most employees in the USA have no protection against arbitrary dismissals. The employment-at-will principle is still applied. Employees are, however, protected against unlawful dismissal if the reason for dismissal is related to any of the anti-discrimination laws.

The above findings indicate that national legislation, while reflecting some principles contained in supranational instruments, tends to be unique, and illustrate the independence and unique national character of every country. They also indicate that protection against dismissal has not so far be deemed to be of such importance that it has been made a core ILO convention that has to be applied by all members.

In the next chapter, the sources of law in South Africa relating to principles regulating dismissal are discussed. A comparative analysis of South Africa's dismissal law with that of the Netherlands, the UK and the USA is presented in chapter 6.

CHAPTER 4

DISMISSAL: SOUTH AFRICAN SOURCES OF LAW

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4.1 Introduction

In a study of this nature, it is important to understand the sources of labour law and to determine whence the right of an employer to dismiss an employee or terminate a contract of employment originates. In South Africa, the law relating to employment has undergone frequent and dynamic changes over the last number of decades.¹

In this chapter the following South African sources of law are discussed:

- i. the Common-law contract of employment;
- ii. the South African Constitution 108 of 1996;
- iii. the Basic Conditions of Employment Act 75 of 1997 (hereafter the BCEA); and
- iv. the LRA.

4.2 The common-law contract of employment

4.2.1 General

The relationship between an employer and an employee is based on a contract of employment, which needs not be in writing,² although the BCEA requires employers to furnish employees with written particulars of employment.³ For many years this relationship was governed and ruled solely by the individual parties' right to enter into a contract. It was therefore left to the common law to regulate this relationship between the employer and employee.⁴ Originally the common law, which emphasised freedom of contract and the ability of the parties to regulate

¹ See the Industrial Conciliation Act 11 of 1924; the LRA 28 of 1956 and the LRA 66 of 1995.

² Bendix *Industrial Relations in South Africa* (2007) 100.

³ S 29 of the BCEA. The particulars required are, in practice, reflected in a contract of employment. Also see Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2008) 106.

⁴ Basson, Christianson, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* (2007) 9.

their respective rights and duties, has been progressively whittled down by statutory intervention.⁵ In terms of the common law, the employer has the right to terminate a contract of employment at will, as long as the required notice period in the contract is adhered to.⁶ However the BCEA allows either of the parties to terminate a contract of employment without notice for any reason recognised by law.⁷

Under the common-law no reference is made to procedures that must be followed in the case of a dismissal, as dismissal can take place at will. The relationship between employers and employees was seen as one of a solely individual nature and the regulation of this relationship was best left to the contract of employment.⁸

The origins of the South African common-law contract of employment can be traced back to the *locatio conductio* (letting and hiring) species of contracts emanating from Roman law. There are three types of *locatio conductio* contracts, namely:

- i. *locatio conductio rei*, the letting and hiring of a specified thing for monetary payment;
- ii. *locatio conductio operis*, the forerunner of the independent contractor's agreement; and
- iii. *locatio conductio operarum*, the letting and hiring of personal services in return for remuneration.⁹

⁵ Grogan *Workplace Law* (2007) 1.

⁶ This is the same as the employment-at-will principle encountered in the USA as discussed in chapter 3 above. See also *Payne v Western & Atlantic R.R.* 81 Tenn.507 (Tenn.1884); *Van Arkel A Just Cause for Dismissal in the United States and the Netherlands* (2007) 88-89.

⁷ S 37(6)(b) of the BCEA.

⁸ Mischke "Contractually Bound: Fairness, Dismissal and Contractual Terms" (2004) *CLL* 13(9) 81 states that "[m]uch like the proverbial bad penny, the contract of employment keeps coming back (not that it really went away) – it may be eclipsed by labour legislation and considerations of fairness, but it retains its fundamental role of establishing the employment relationship."

⁹ Grogan (2007) 3. See also Finnemore *Introduction to Labour Relations in South Africa* (2006) 163.

The modern contract of employment developed from the *locatio conductio operarum*. This contract was not used much in Roman times, as Roman society made extensive use of slaves who were regarded as property or objects under the law applicable at that time.

The essential elements of a contract of employment in terms of the common law can be summarised as follows:¹⁰

- i. it is a voluntary agreement;
- ii. it is between two parties (employer and employee);
- iii. in terms of it, the employee places labour potential at the disposal and under the control of the employer; and
- iv. it is done in exchange for some form of remuneration.

During the industrial revolution, large numbers of people were employed in factories. As a result of this, the modern contract of employment rapidly developed into the form of contract we know today. As time went by it became clear that the common law lagged behind the conditions of modern commerce and industry. The common law paid no heed to the collective relationship between employees and employers. The common law also did not cater for the inherent inequality in the bargaining power of employers and that of their employees. It was apparent that the common law did not discourage the exploitation of employees; and one of its most significant shortcomings was that it did not provide effective protection of employees' job security.¹¹ In terms of the common law an employer is free to terminate the contract at any time, for any reason, as long as it is in accordance with the provisions of the contract. Traditionally, the civil courts would not intervene merely because the dismissal was unfair.

¹⁰ Grogan (2007) 30.

¹¹ For criticism of the common-law position, see Brassey, Cameron, Cheadle and Olivier *The New Labour Law* (1987) 2-9.

However, all of this has changed over the last decade.¹² The Supreme Court of Appeal has now confirmed that the common law contract of employment has developed to include the right not to be unfairly dismissed.¹³

Due to the apparent shortcomings of the common law to regulate the relationship between employers and employees, statutory modifications of the common law took place over time. As has also happened in other places in the world, the South African legislature has taken steps to redress the inherent inequality between employers and employees by:¹⁴

- i. imposing minimum conditions of employment, as regulated in the BCEA;
- ii. promoting the concept of collective bargaining, as found in the LRA;
- iii. protecting employees against unfair dismissal in the LRA; and
- iv. developing specialist tribunals to create equitable principles for the workplace.¹⁵

It is important to discuss the common-law duties of both the employer and the employee in this study, as it is one of the most important foundations of any employment relationship. Ultimately, the right of an

¹² In *Key Delta v Marriner* [1998] 6 BLLR 647 (E) the court stated that the concept of fairness could be incorporated as an implied term in a contract of employment.

¹³ The *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA) judgment was the first significant case where the overlap between the common law and unfair dismissal provisions were highlighted. In *Boxer Superstores Mithatha and Another v Mbenya* [2007] 8 BLLR 693 (SCA) and also in *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2008] 8 BLLR 699 (SCA) the Court in essence stated that the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing. For a detailed discussion on these judgments and the common-law right to a pre-dismissal hearing see Van Eck “The Right to a Pre-Dismisal Hearing in Terms of Common Law: Are the Civil Courts Misdirected?” (2008) *Obiter* 339 – 351.

¹⁴ Legislative intervention in the employment relationship was originally motivated by the recognition that contractual rules ignore the fact that the bargaining power between employer and employee is inherently unequal. See Van Niekerk *et al* (2008) 3 – 4.

¹⁵ Grogan (2007) 5.

employer to take disciplinary action against an employee arises from the common-law duties of an employee.

4.2.2 Common-law duties of the employer

The duties of the employer in the employment relationship become the reciprocal rights of the employee. According to Grogan, the three principal common-law duties of the employer are:¹⁶

- i. to receive the employee into service;
- ii. to pay the employee's remuneration; and
- iii. to ensure that the working conditions are safe and healthy.¹⁷

The relevance of the common-law duties of an employer in relation to the topic under investigation is that where an employer fails to fulfil his or her duties, the employee has the right to terminate the contract of employment.¹⁸ It should also be noted that where an employee refuses to work because the employer has not fulfilled his or her common-law duties the actions of the employee would not justify his or her dismissal.

The employer's obligation to receive the employee into service automatically becomes the duty of the employee to take up employment and render services. The rendering of service is a prerequisite for remuneration in any employment contract. The contract of employment does not, as a general rule, come into existence if the employee is not

¹⁶ Grogan (2007) 59; Bendix (2007) 100 also includes as common-law duties of employers not to allow an employee doing work of junior status for which the employee was employed and not to contract the employee's services to another employer without the employee's consent. The Supreme Court of Appeal cases mentioned earlier have now established that the employer also has a common-law duty to have a pre-dismissal hearing for an employee prior to dismissal.

¹⁷ Also see Finmore (2006) 162.

¹⁸ This cancellation of the contract of employment can be without notice to the employer in the event of the employer being in breach of contract.

employed.¹⁹ To receive into service does not necessarily mean that the employer must provide work to the employee. However, it seems unlikely that an employer would pay an employee and not provide him or her with work.²⁰

It is also trite law that where an employee makes his or her labour capacity available to the employer, and the employer does not make use of that labour capacity, the employer is obliged to remunerate the employee. The right to remuneration does not normally arise from the actual performance of work, but from the tendering of service.²¹

The payment of remuneration is the primary duty of an employer in terms of a contract of employment. It can be argued that where there is no agreement on remuneration, the courts will assume that there is no contract of employment.²² The common-law rule with regard to remuneration is clear: “no work, no pay” for example, where employees are absent from work without permission or when they engage in strike action.²³ Generally, remuneration must be in cash, although the common law allows for remuneration in kind as well.²⁴

It is also an accepted common-law duty of employers to provide their employees with safe and healthy working conditions. The common law therefore requires the employer to provide a safe place of work, safe machinery and tools and to ensure that safe work processes are

¹⁹ In *Wyeth SA (Pty) Ltd v Manqele & others* [2005] 6 BLLR 523 (LAC) the Labour Appeal Court stated that the definition of an employee must be extended to a person who has concluded a contract of employment which is to commence at a future date.

²⁰ *Kinemas Ltd v Berman* 1932 AD 246.

²¹ *Johannesburg Municipality v O’Sullivan* 1923 AD 201.

²² *Brown v Hicks* 1902 19 (SC) 314.

²³ S 67(3) of the LRA.

²⁴ S 1 of the BCEA defines “remuneration” as “any payment in money or in kind”. See also s 35(5) of the BCEA.

followed.²⁵ If the employer fails to remunerate employees and to provide safe working conditions and the employees refuse to work, that refusal is not deemed a breach of contract.²⁶

As time went by, it became clear that the common law is unclear and imprecise with regard to the common-law duty of the employer to provide safe working conditions. This prompted the legislature to intervene. In South Africa, numerous occupational health and safety laws have been passed to regulate health and safety in the workplace.²⁷

In addition to the abovementioned common-law duties of an employer, employers are also obliged to adhere to the requirements of all applicable labour legislation, which includes the BCEA and the LRA.²⁸ Among these duties is the employer's obligation to provide a hearing to an employee prior to his or her dismissal.²⁹

4.2.3 Common-law duties of the employee

Just as the employer has certain common-law duties towards the employee in terms of a contract of employment, the employee from his or her side also has certain common-law duties towards the employer. If an employee is in breach of contract, it gives the employer the right to cancel the contract of employment.

²⁵ Basson *et al* (2005) 47. Also see Van den Berg *The Management of Occupational Health and Safety in the Security Industry: A Case Study* (2008) 35.

²⁶ Grogan (2007) 63.

²⁷ The Occupational Health and Safety Act 6 of 1993 (hereafter the OHSA) is an example of such a legislative instrument. See also the Mine Health and Safety Act 29 of 1996. The most important legislation that provides for the compensation of employees for work-related injuries, death and illness is the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereafter the COIDA).

²⁸ The South African Constitution has amended the common-law because everyone has a constitutional right to fair labour practices. It seems that the Supreme Court of Appeal is eager to develop and not to degrade common-law principles. In this regard see Van Niekerk *et al* (2008) 98. This is discussed in more detail later in this thesis.

²⁹ See s 188(1)(b) of the LRA.

The principal common-law duties of employees under a contract of employment are:³⁰

- i. to enter and remain in service;
- ii. to remain reasonably efficient;
- iii. to promote the employer's business interest;
- iv. to be respectful and obedient; and
- v. to refrain from misconduct generally.³¹

One of the most basic and primary obligations of employees under a contract of employment is to place their personal services at the disposal of the employer. This can be traced back to the *locatio conductio operarum*, as found in Roman law. To render services is a prerequisite to the employee's right to claim payment of wages. In terms of the common law an employee who does not tender service is not entitled to receive wages, irrespective of the reason or failure to tender service.³² The opposite is, however, also true. Where an employer prevents an employee from working, that employee is still entitled to payment of wages.³³ There can also be other instances where employees may not be working, but will still get paid. Some examples are where the employee is on paid vacation or sick leave. These periods of authorised absence do not emanate from the common law but are rights conferred by statute and are also agreed upon in the contract of employment.³⁴

Employees are deemed by law to guarantee by implication that they are capable of performing the tasks for which they have been employed and

³⁰ Grogan (2007) 51.

³¹ However, employees are protected against unfair dismissals, as the first instance of disrespectfulness and disobedience by the employee towards the employer will not necessarily justify dismissal. Also see Schedule 8 item 3(4).

³² *Potchefstroom Municipal Council v Bouver NO* (1958) (4) SA 382 (T).

³³ *Toerien v Stellenbosch University* (1996) 17 ILJ 56 (C) at 60C-D.

³⁴ See ss 18, 21 and 22 of the BCEA.

that they will perform these tasks reasonably efficiently.³⁵ The standard of competence that employers can expect from their employees depends on the capacities in which the person have been employed and also their level of seniority. Where employees have warranted that they possess a particular degree of skill and have made representations in terms of their skills and qualifications, they must under common-law satisfy these representations. The common-law duty to remain reasonably efficient was prior to the 1956 LRA also regarded as grounds for summary dismissal in South Africa.³⁶ This right to summary dismissal for inefficiency by the employee has, however, been restricted in terms of the procedures laid down and jurisprudence established, not only by the LRA of 1956 but also by the LRA of 1995.³⁷

The relationship between employers and employees is of a fiduciary nature.³⁸ It is an accepted common-law principle that employees are obliged to devote their energies and skills to promoting the employer's business interests. The employee owes his or her employer a fiduciary duty: this means that the employee may not work against his or her employer's interests.³⁹

During normal working hours, employees must devote all their attention to the business of the employer. Employees may not place themselves in positions where their own interests are in conflict with those of the employer. Employees may not compete with their employer's business for their own account. The employment relationship is based on trust and confidence, as the former Appellate Division (now the Supreme

³⁵ *Friedlander v Hodes* (1944) CPD 169. Also see *Basson et al* (2005) 48.

³⁶ *Negor v Continental Spinning & Knitting Mills (Pty) Ltd* (1954) (2) SA 203 (W).

³⁷ *Van Niekerk et al* (2008) 260 – 266; Item 8(2) of Schedule 8 of the LRA.

³⁸ For a comprehensive discussion on the fiduciary duties see *Phillips v Fieldstone Africa (Pty) Ltd & another* (2004) 25 ILJ 1005 (SCA).

³⁹ *Basson et al* (2005) 40.

Court of Appeal) confirmed in *Council for Scientific & Industrial Research v Fijen*:⁴⁰

“[I]t is well established that the relationship between employer and employee is in essence one of trust ... and confidence and that, at common law, conduct clearly inconsistent therewith entitles the ‘innocent party’ to cancel the agreement. It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from *naturalia contractus*.”

Respect and obedience are generally accepted as *naturalia* of the contract of employment and the absence thereof negatively affects the interpersonal relationship between the parties. This undermines the employer’s right to decide how his or her employees will work.⁴¹ The duty of the employee to be respectful and obedient towards the employer is one of the most basic principles found in the common law. The employee is under the control and supervision of the employer.⁴²

It is not necessary to spell out explicitly in the contract of employment that the employee is under the control of the employer. The right of the employer to control the manner in which the employee works, the place at which he or she works and other matters are all implied terms of the common-law contract of employment. The Master and Servant Laws in force in South Africa until 1974 had a definite effect on judicial attitudes towards the employment relationship. In some earlier cases under the Master and Servant Laws race played a definite role in determining the gravity of the breach in the South African context. As time went by and after legislative amendments the dignity of the employee became an important factor. The decisions of the Industrial Court in South Africa

⁴⁰ (1996) 17 *ILJ* 18 (A) at 26D-E.

⁴¹ Grogan (2007) 55.

⁴² *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A) at 56-7.



after 1980 clearly illustrate a radical change in attitude towards the former Master and Servant Laws.⁴³

Employees are employed in a subordinate position and as such have a duty to show respect and obedience. The former Industrial Court in *Commercial Catering & Allied Workers Union of SA v Wooltru Ltd t/a Woolworths (Randburg)*⁴⁴ emphasised the duty of all employees to show a reasonable degree of respect and courtesy to their employers and to obey all reasonable and lawful instructions. This duty of respect is also reflected in the current LRA.⁴⁵

Employees also have a common-law duty to refrain from misconduct generally. It is trite law that an employer has the right to terminate a contract of employment where the misconduct of an employee is of such a nature that it makes the continued employment relationship intolerable. Under common law, the following types of misconduct have been held to justify dismissal: dishonesty; drunkenness; gross negligence; insolence; fighting; revealing of trade secrets; and absenteeism.⁴⁶

It is therefore clear that an employee who makes him- or herself guilty of misconduct in the workplace can be dismissed. Theft can be regarded as a breach by employees of their duty to act in good faith towards their employer and insubordination may be seen as a breach of the duty of an employee to obey his or her employer. These respective breaches of contract may justify dismissal.

⁴³ Grogan (2007) 55-6.

⁴⁴ (1989) 10 *ILJ* 311 (IC).

⁴⁵ Item 1(3) of Schedule 8 states that the “key principle in this Code is that employers and employees should treat one another with mutual respect”. It also states “employers are entitled to satisfactory conduct and work performance from their employees”. A comprehensive analysis of Schedule 8 is presented in chapter 5 below.

⁴⁶ Grogan (2007) 57; also see Van Niekerk & Linström *Unfair Dismissal* (2006) 46 – 53. See also item 3(4) of Schedule 8.

From the above it is clear that both the employer and the employee have certain common-law duties and responsibilities in terms of a contract of employment. The right of an employer to dismiss or terminate a contract of employment flows from the common-law duties and the breach thereof by the employee.

4.3 The South African legislative framework

4.3.1 Historical development

The historical development of South African labour law reflects the socio-political history of South African society. Apart from the normal conflict between employees and their employers, group conflict between different racial groups, became more frequent with the discovery of diamonds and gold.⁴⁷

Industrial conflict, especially after the Rand Revolt of 1922, led to the promulgation of the Industrial Conciliation Act of 1924. This Act made provision for the establishment of industrial councils, the forerunner of the present-day bargaining council system.⁴⁸ This Act also entrenched racial discrimination in labour legislation, as the primary focus at the time was to protect the interests of white skilled workers. At that time black employees were, for all practical purposes, excluded from the ambit of labour legislation, and black trade unions were discouraged.⁴⁹

This led to labour unrest and conflict. Black employees used the trade union movement as a means to show their discontent with the political

⁴⁷ Basson *et al* (2007) 5.

⁴⁸ Basson *et al* (2007) 5.

⁴⁹ Ehlers *Labour Relations Systems, Procedures and Practice* (2007) 25.

dispensation of apartheid. By the late 1970s, the black trade unions were large and powerful and had a huge influence in the workplace.

In 1978, the government appointed the Wiehahn Commission to investigate the labour relations system in South Africa. The resulting report is considered the cornerstone of modern labour relations and legislation in South Africa. The Wiehahn report stated that all workers should have the following six basic rights,⁵⁰ namely:

- i. the right to work;
- ii. the right of freedom of association;
- iii. the right to collective bargaining;
- iv. the right to withhold labour;
- v. the right to protection; and
- vi. the right to develop.

The Industrial Court was established in 1980 and it played a significant role in the development of South African labour law. Under its jurisdiction to determine unfair labour practices, it amongst others laid down guidelines for the dismissal of employees.⁵¹ Initially, the former Industrial Court had a flexible approach towards disciplinary enquiries that developed under the broader notion of unfair labour practices. In *Bosch v THUMB Trading (Pty) Ltd* the court stated that:

“[t]he rules to the holding of disciplinary enquiries cannot and should not be applied mechanically to every single situation.”⁵²

⁵⁰ Ehlers (2007) 25.

⁵¹ See Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* (1994) 18 – 25 for a discussion on the development of the concept of unfair labour practices under the jurisdiction of the former Industrial Court. In *Van Zyl v O’Okiep Copper Co Ltd* (1983) 4 *ILJ* 298 (IC) the Industrial Court accepted that a dismissal must be both procedurally and substantively fair.

⁵² (1986) 7 *ILJ* 341 (IC).

Cameron also confirmed this approach when he stated that the right to a hearing is not an inflexible package.⁵³

The flexible approach of the former Industrial Court was again confirmed in *NAAWU v Pretoria Precision Castings (Pty) Ltd* when it ruled that:

“[t]he whole field of proper labour relations is characterized by an inherent flexibility, and natural justice should not be led into the trap of strict legalism.”⁵⁴

This flexible approach towards labour relations and disciplinary enquiries of the former Industrial Court came to an almost abrupt end when a formal checklist approach was adopted in *Mahlangu v CIM Deltak*⁵⁵ in which the court laid down numerous requirements for procedural fairness, as follows:

“The other important ingredients of a fair disciplinary hearing would include:

- 24.1 the right to be told the nature of the offence or misconduct with relevant particulars of the charge;
- 24.2 the right of the hearing to take place timeously;
- 24.3 the right to be given adequate notice prior to the hearing;
- 24.4 the right of some form of representation ...;
- 24.5 the right to call witnesses;
- 24.6 the right to an interpreter;
- 24.7 the right to a finding ...;
- 24.8 the right to have previous service considered;
- 24.9 the right to be advised of the penalty imposed (verbal warnings, written warnings, termination of employment); and
- 24.10 the right of appeal, ie usually of a higher level of management.”

⁵³ Cameron “The Right to a Hearing before a Dismissal” (1985) *ILJ* 7(2) 185.

⁵⁴ (1985) 6 *ILJ* 369 (IC).

⁵⁵ (1986) 7 *ILJ* 346 (IC) 375.

In *Mahlangu v CIM Deltak* the court thus opted for a more formal checklist approach, which stipulated the components of a disciplinary enquiry, and the court came close to equating an internal disciplinary hearing with a criminal trial.⁵⁶ In its judgment, the court referred to Convention C158 in coming to its conclusion.⁵⁷ It should be noted that the requirements laid down by the court in *Mahlangu v CIM Deltak* matter are much more comprehensive than the requirements found in Convention C158.⁵⁸ The three core principles of Convention C158, as discussed in chapter 3 above, do not require a formal checklist approach.

For many years, the guidelines spelled out in *Mahlangu v CIM Deltak* formed the basis of many disciplinary enquiries. These guidelines were referred to as the ten commandments of disciplinary enquiries and employers incorporated them into their disciplinary codes and procedures.

4.3.2 Primary sources of current labour law

The legislative framework that has an impact on the relationship between employers and employees should not be applied and understood in isolation.

The different sources of labour law include common-law principles, as discussed above, the Constitution, statutes, collective agreements and determinations and codes of good practices.⁵⁹ The legal framework developed out off established common-law principles as discussed in

⁵⁶ Van Niekerk and Linström *Unfair Dismissals* (2006) 58.

⁵⁷ See chapter 3 section 3.2.2 for a discussion on Convention C158.

⁵⁸ A comparative analysis of the current South African dismissal law with Convention C158 is done in chapter 6.

⁵⁹ Van Niekerk *et al* (2008) 3. Also see Kleyn and Viljoen (2009) 42-94; Grogan (2007) 10-12; Ehlers (2007) 30.

paragraphs 4.2.1 to 4.2.3 above. The legal framework for labour relations in South Africa is illustrated in Table 2.

Table 2: Legislative Framework for Labour Relations

<p style="text-align: center;">Constitution of the RSA</p> <p>All legislation in South Africa must comply with the Constitution.</p>
<p style="text-align: center;">Statutes</p> <p>These are the laws enacted by parliament to regulate and govern specific areas of labour, which include the LRA, the BCEA, the EEA,⁶⁰ the OHSA, the COIDA, and the UIA.⁶¹</p>
<p style="text-align: center;">Collective Agreements and Determinations</p> <p>These are agreements and determinations made in terms of statutory provisions and include recognition, substantive and other collective agreements (in terms of the LRA) and also sectoral and ministerial determinations and agreements (in terms of the BCEA and OHSA).</p>
<p style="text-align: center;">Codes of Good Practice</p> <p>These are codes of good practice issued by the State to regulate and govern specific areas of labour relations, for example the Code of Good Practice: Dismissal (Schedule 8 of the LRA).</p>

The Constitutional Court, the High Court, the Labour Court and the CCMA provide interpretations of all these different sources of labour law through their findings, judgments and awards. Therefore, case law is also an important source of dismissal law.

⁶⁰ Employment Equity Act 55 of 1998.

⁶¹ Unemployment Insurance Act 63 of 2001.

4.3.3 The South African Constitution

The Constitution of the Republic of South Africa, 1996 has had a major and profound effect on all branches of the law. The Constitution entrenches certain fundamental rights and provides for mechanisms that citizens can use to challenge legislation and actions by the State which infringe on those fundamental rights.⁶²

Chapter 2 of the Constitution contains several provisions that have a direct impact on employment and labour law. Section 23(1) – (6) of the Constitution deals specifically with labour relations. The relevant sections provide as follows:

- “(1) Everyone has the right to fair labour practices;
- (2) Every worker has the right -
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right -
 - (a) to form and join an employer’s organisation;
 - (b) to participate in the activities and programmes of an employer’s organisation.
- (4) Every trade union and employer’s organisation has the right -
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employer’s organisation and an employer have the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

⁶² Grogan (2007) 13; Van Niekerk *et al* (2008) 34 states that “[s]ection 8(3) of the Constitution requires that when applying a provision of the Bill of Rights to a natural juristic person, a court, in order to give effect to a right, must apply or if necessary develop the common law to the extent that legislation does not give effect to that right”.

- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right contained in this Chapter, the limitation must comply with section 36(1).⁶³

The LRA was promulgated as the “national legislation” referred to in section 23(5) and 23(6) to give effect to, amongst others, the right to fair labour practices. The current BCEA and the EEA also form part of the national legislation that gives effect to the entrenched rights contained in the body of section 23 of the Constitution.

Chapter 2 of the Constitution calls for a reconsideration of some of the assumptions underlying the common-law contract of employment, in particular the employer’s power of command and unencumbered rights in respect of promotion and dismissal.⁶⁴

For the purposes of this study, the most important subsection in section 23 of the Constitution is subsection 1. This section states that “[e]veryone has the right to fair labour practices.”⁶⁵

The Constitution does not provide any guidance on what is determined to be fair labour practices or for that matter what is to be deemed to be unfair. For more information and guidance in this regard one must look at national legislation, especially at the LRA. Section 23(1) does not distinguish between different types of employee or employer, such as permanent employees, casual employees, fixed-term contract employees and probationary employees. The important concept here is

⁶³ S 36(1) and s 39(1) of the Constitution permits that the rights contained in the Bill of Rights may be limited. These limitations can only be in terms of law of general application.

⁶⁴ In this regard, take note of Brassey “The Common-law Right to a Hearing before Dismissal” (1993) 9 *SAJHR* 177.

⁶⁵ South Africa is one of the few countries in the world where the right to fair labour practices is guaranteed and protected by the Constitution.

that the right applies to “everyone”.⁶⁶ Labour practices can only exist in an employment relationship and section 23(1) clearly states that every person who is involved in an employment relationship is entitled to fair labour practices.⁶⁷

Section 39(2) of the Constitution also states that:

“[w]hen developing the common-law, every court, tribunal or forum must promote the spirit and objects of the Bill of Rights.”

In *Boxer Superstores Mthatha and another v Mbenya*⁶⁸ the court stated that the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing. This means that every employee now has a common-law contractual claim, not merely a statutory unfair labour practice right, to a pre-dismissal hearing.

Although this development is controversial, according to the Supreme Court of Appeal, an employee’s entitlement to a pre-dismissal hearing is well recognised in South African law. Such a right may have, as its source, the common-law or a statute. It is clear that that these rights are now protected by the common-law by section 39(2) of the Constitution to the extent necessary as developed by the constitutional imperative.⁶⁹

⁶⁶ This does not entail that labour law applies to independent contractors. Cheadle has argued that the emphasis should be placed on “labour practices” rather than “everyone”. See in this regard Cheadle “Labour Relations” in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2006) at 18-3.

⁶⁷ In *NEHAWU v University of Cape Town* [2003] 5 BLLR 409 (CC) at paras 33-40 the court held that the definition is incapable of precise definition, that it involves a value judgment and that there is nothing in the definition that suggests that employers are not entitled to that right.

⁶⁸ [2007] 8 BLLR 693 (SCA).

⁶⁹ Cheadle “Labour Law and the Constitution” Paper at SASLAW Conference, October 2007, Cape Town, 3-6.



The spirit of section 23(1) of the Constitution reverberates in section 185 of the LRA which states in section 185(a) and 185(b) that:⁷⁰

“[e]very employee has the right not to be –
(a)unfairly dismissed; and subjected to unfair labour practice.”

Section 185 of the LRA, just like section 23(1) of the Constitution does not distinguish between different types of employees. Irrespective of job status or the nature of employment, every employee is entitled to fair labour practices in terms of the Constitution, and this fundamental right is expanded in the LRA in section 185, which protects all employees against unfair dismissal and unfair labour practices. This also applies to employees who are on probation and who work under fixed term contracts of employment.

The constitutional right to fair labour practices as found in section 23(1) includes much more than just the right not to be unfairly dismissed. It includes organisational rights of trade unions, employers’ organisational rights, and the right to collective bargaining. The strong emphasis on employees’ rights and the rights of trade unions in the South African Constitution can be traced back to the role the trade union movement and their leaders played in the creation of a new democracy and Constitution in South Africa.⁷¹

The Constitution requires the application of international law when interpreting South African legislation and in particular, the Bill of Rights. Section 232 of the Constitution provides that “[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.” Section 233, which regulates the application of international law, provides that:

⁷⁰ S 185 of the LRA.

⁷¹ Bendix (2007) 93-4.

“[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is consistent with international law.”⁷²

Section 39(1) of the Constitution further provides that:

“[w]hen interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) must consider foreign law.”

Section 2 of the Constitution adds that:

“[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

The scope of this study does not allow for a comprehensive and detailed analysis of all the labour laws in South Africa. Instead it deals with specific labour laws, particularly with those sections that have a direct bearing on the procedures to be followed during the dismissal of employees on the grounds of misconduct.

4.3.4 The Basic Conditions of Employment Act

The purpose of the BCEA is found in section 2 of the Act, which states that:

“[t]he purpose of this Act is to advance economic development and social justice by fulfilling the primary objectives of this Act which are

⁷² Also see Van Niekerk *et al* (2008) 26-9.

- (a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution –
 - (i) by establishing and enforcing basic conditions of employment; and
 - (ii) by regulating the variation of basic conditions of employment;
- (b) to give effect to obligations incurred by the Republic of South Africa as a member state of the International Labour Organisation.”

The correlation between section 23(1) of the Constitution, ILO Convention C158 and this Act is immediately apparent from section 2 of the BCEA, as South Africa must comply with its ILO obligations. Chapter 5 of the BCEA deals with termination of employment and regulates mainly the notice periods that must be given by a party who wants to terminate a contract of employment.⁷³ The required notice periods depend on the length of service of the employee. The longer the service of an employee, the longer the notice period that is required.⁷⁴

The BCEA does not deal with the fairness of a termination as stated in section 23(1) of the Constitution or articles 4 and 7 of ILO Convention C158 or as regulated in terms of the LRA. Note must be taken of the requirements of section 37(6) of the BCEA, which states the following:

- “[n]othing in this section affects the right –
- (a) of a dismissed employee to dispute the lawfulness or fairness of the dismissal in terms of Chapter VIII of the LRA 66 of 1995, or any other law.”⁷⁵

This section immediately draws attention to section 188 of the LRA and item 2(1) of Schedule 8, which states the following:

⁷³ Bendix (2007) 102-3.

⁷⁴ S 37(1)(a) – (c) of the BCEA. During the first six months of employment notice of one week must be given, two weeks notice must be given if the employee has been employed for more than six months but less than a year, and four weeks notice must be given if the employee has been employed for longer than a year.

⁷⁵ S 37(6) of the BCEA.

“A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment.”

Section 37(6) of the BCEA refers to the protection and rights of employees against unfair dismissal as stipulated in section 23(1) of the Constitution, articles 4 and 7 of ILO Convention C158 and the provisions of the LRA. It is therefore abundantly clear that common-law principles, ILO Conventions, the Constitution and other pieces of national legislation cannot be looked at in isolation in a study of this nature. Fundamental rights and international labour standards have a significant impact on a wide variety of labour laws as can be seen above.⁷⁶

4.3.5 The Labour Relations Act

Section 1 of the LRA contains the purpose of the Act, namely:⁷⁷

“[t]o advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

- (a) to give and effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
- (b) to give effect to obligations incurred by the Republic as a member state of the ILO.”

Just as in the BCEA, the LRA embraces and gives effect to the fundamental rights of every employee in terms of section 23 of the Constitution and the standards set by the ILO. Special note must be taken of section 210(1) of the LRA, which states that:

⁷⁶ See Finnemore (2006) 162; Bendix (2007) 90; Van Niekerk *et al* (2008) 26-30.

⁷⁷ S 1(a) – (d) of the LRA. It is to be noted that the LRA still refers to s 27 of the Interim Constitution, which has since been replaced by s 23 of the final Constitution.

“[i]f any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.”

Section 185(a) of the LRA states that every employee has the right not to be unfairly dismissed, and the LRA requires two criteria to be met before a dismissal can be deemed as a fair dismissal, namely a valid or fair reason and a fair procedure.

Section 188(1) of the LRA provides that:

“[a] dismissal that is not automatically unfair, is unfair if the employer fails to prove-

- (a) that the reason for dismissal is a fair reason-
 - (i) related to the employee’s conduct or capacity; or
 - (ii) based on the employer’s operational requirements;and
- (b) that the dismissal was effected in accordance with a fair procedure.”

As has been mentioned earlier in terms of section 37 of the BCEA, an employer can terminate a contract of employment by simply giving notice, but this seems to be in conflict with section 188(1) of the LRA.

The BCEA contains no such requirements relating to fairness. However, section 210 of the LRA states that, if there is any conflict between the LRA and any other law, excluding the Constitution, the provisions of the LRA prevail. The BCEA gives recognition to this and states that a dismissed employee has the right to dispute the lawfulness or fairness of his or her dismissal in terms of chapter VIII of the LRA.⁷⁸

⁷⁸ S 37(6)(a) of the BCEA.

The LRA itself does not provide any guidelines regarding the requirements of a fair procedure before dismissal. These principles have to some extent been given guidance to in the LRA by the issuing of “Codes of Good Practice”.⁷⁹ For the purposes of this study the most important Code of Good Practice is Schedule 8⁸⁰, which is discussed and analysed in detail in chapter 5. In terms of the LRA labour tribunals, the CCMA and the Labour Courts, were established to deal with disputes and to handle dispute resolution related to, amongst other issues, unfair dismissals.⁸¹

Section 188(2) and section 203(3) of the LRA place an obligation on any person who must determine whether or not a dismissal was substantively and procedurally fair to take into account any relevant Code of Good Practice issued in terms of this Act.⁸² These tribunals must ensure that the employer’s conduct meets the requirements of the applicable legislation and also Schedule 8.⁸³

It is trite law and an internationally acceptable principle that an employer has the right to and is entitled to demand satisfactory conduct and work performance from his or her employees. An employee can be dismissed in the absence of appropriate conduct or competence. This right is also confirmed in item (1)(3) of Schedule 8. To exercise this right, the employer must, however, comply with the standards with regard to fair procedures as established by Schedule 8.

⁷⁹ S 203 of the LRA.

⁸⁰ Schedule 8 is titled “Code of Good Practice: Dismissal”.

⁸¹ Ss 112–150 of the LRA deals with the functions of the CCMA and ss 151 – 184 deal with the functions of the Labour Court system.

⁸² S 188 (2) of the LRA.

⁸³ In *Sikhosana & others v Sasol Synthetic Fuels* (2000) 21 *ILJ* 649 (LC) at 661I- 662F, the Labour Court summarised the purpose of equity-based dismissal law when it stated that: “ the object of the unfair dismissal regime ... is the pursuit of acceptable standards of conduct in the workplace ... the spirit in which the protection against dismissal for misconduct and incompetence has been enacted ... [T]he Act endeavours to create a climate in which employees can work without fear of unjust treatment and freely exercise their legitimate rights ... fair dismissal regime is a powerful antidote to dismissal”.

4.4 Conclusion

The sources of law in South Africa in respect of the principles regulating disciplinary enquiries and the right to dismiss an employee are found in:

- i. the common-law contract of employment;
- ii. the Constitution of South Africa;
- iii. South African labour legislation, especially the BCEA and the LRA; and
- iv. case law.

In terms of the common-law principles in a contract of employment an employer can demand satisfactory conduct and work performance from his or her employees. The employer has the right to terminate a contract of employment where the employee has made him- or herself guilty of misconduct. This means that an employer must have a reason to terminate. Initially the common law did not make provision for any requirements for disciplinary enquiries.

The former Industrial Court laid down guidelines for the dismissal of employees under its jurisdiction to determine unfair labour practices. Initially, the Industrial Court had a flexible approach towards disciplinary enquiries, which came to an end with the formal check list approach adopted in *Mahlangu v CIM Deltak* in 1986. The court came close to equating an internal disciplinary enquiry with a criminal trial.

With the adoption of the Constitution and the LRA specific requirements for disciplinary enquiries were laid down which resulted in an adaptation of the common law to include the right to a disciplinary enquiry before dismissal. The common law did not provide any indication if a disciplinary enquiry should be formal with a court-like procedure. It is,

however, a common law principle that valid contracts are enforceable and if an employer prescribes extensive and court-like disciplinary procedures then it must be complied with in terms of common law. Although controversial, the Supreme Court of Appeal has developed the common-law contract of employment to include the right to procedural fairness. This could cause jurisdictional problems, but for the moment, most employees still refer their disputes to the CCMA, bargaining councils and the Labour Court for resolution.

The Constitution of South Africa provides for certain fundamental rights of which section 23 is of the utmost importance for the purposes of this study. It states that everyone has the right to fair labour practices. South African labour legislation embodies common-law contract of employment principles, ILO standards and the right to fair labour practices as enshrined in the Constitution. This is to be found in the LRA and the BCEA. For a dismissal to be fair, an employer has to meet two important requirements: the employer must be able to prove, first, that the dismissal was for a fair reason and, second, that it was in accordance with a fair procedure.

It is apparent that employers, before dismissing an employee, must take cognisance not only of their own rules, regulations, codes and procedures, but also of everyone's constitutional right to fair labour practices. Employers must also pay attention to the requirements of the LRA, the BCEA and Schedule 8. Commissioners of the CCMA will ultimately, in the vast majority of dismissal disputes, determine whether a dismissal was fair or not. The commissioners of the CCMA must therefore take note of the sources of South African dismissal law, paying specific attention to Schedule 8 as is required in section 188(2) of the LRA. In the next chapter, Schedule 8 is analysed in depth.