

CHAPTER 5

CODE OF GOOD PRACTICE: DISMISSAL (SCHEDULE 8)

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5.1 Introduction

Employers have the right to discipline employees who are guilty of misconduct in the workplace. This right also includes the right to dismiss an employee.¹

This right of the employer also implies the employer's obligation to ensure that the dismissal is both procedurally and substantively fair. As has already been mentioned in chapter 4, everyone in South Africa has the right to fair labour practices, even though the LRA may not be applicable.² Every employee covered by the LRA also has the right not to be unfairly dismissed.³ In a constitutional sense, the right to fair labour practices is wide enough to cover the right not to be unfairly dismissed.⁴

A dismissal is deemed unfair if the employer fails to prove that the dismissal was effected in accordance with a valid reason and a fair procedure.⁵ However, the procedures that have to be followed to ensure that a dismissal is procedurally fair are not described in detail in the LRA.

As already mentioned in chapter 4, any commissioner who is required to determine if a dismissal was procedurally fair is compelled to take

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

² S 23(1) of the Constitution; The LRA in s 2(a) – (c) excludes the following categories of employees from the ambit of the LRA: the National Defence Force; the National Intelligence Agency; the South African Secret Service; the South African Academy of Intelligence and Comsec. In *Murray v Minister of Defence* (2006) 27 ILJ 1607 (C) a member of the Defence Force, excluded from the ambit of the LRA, convinced the High Court that based on the general constitutional right to fair labour practices, he had the right not to be constructively dismissed.

³ S 185(a) of the LRA.

⁴ *Murray v Minister of Defence* [2008] 6 BLLR 513 (SCA).

⁵ S 188(1)(b) of the LRA.

Schedule 8 into consideration.⁶ Items 1 to 4 of Schedule 8 provide guidance on procedural fairness of dismissal for misconduct. In this chapter, these items are analysed in depth to establish exactly what is required to ensure procedural fairness.

Procedural fairness in disciplinary enquiries can only be achieved if the employer has a clear understanding of the requirements as formulated in Schedule 8. The following questions are considered in the analysis below:

- i. To what extent does Schedule 8 stipulate what is meant by procedural fairness?
- ii. Is Schedule 8 a guideline or does it have the binding effect of legislation and how far can employers deviate from Schedule 8?
- iii. Is Schedule 8 clear and unambiguous to such an extent that it is easy to understand and to implement?
- iv. Does Schedule 8 prescribe formal, court-like procedures, or does it leave room for deviations?
- v. Is there any justification for the view that the labour dispute resolution bodies still require court-like procedures?

5.2 Item 1(1) – General in nature

The opening paragraph of Schedule 8 states the following:

“This code of good practice deals with some of the key aspects of dismissals for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper

⁶ S 138(6) and s 203(3) of the LRA.

circumstances. For example, the number of employees in an establishment may warrant a different approach.”⁷

The very first sentence of Schedule 8 makes it clear that this Code only deals with “some of the key aspects” of dismissals. This indicates that the Code is not intended to be comprehensive on all aspects relating to dismissals but only certain key aspects. This confirms that the Code serves as a legislative guide on how the dismissal provisions in the LRA are to be interpreted and applied.⁸

The very next sentence contained in item 1(1) states that “it is intentionally general”. This phrase explicitly confirms that Schedule 8 provides general guidelines and principles that must be followed by employers in the case of the dismissal of an employee for reasons relating to conduct or capacity. The generality of the Code can, however, also give rise to the argument that such a vast array of different interpretations are possible that decision-makers and employers may feel that it is too vague to be of any real assistance or guidance.

It is clear that the legislature did not intend to have a clearly defined, formal and fixed procedure. The generality of the Code confirms the flexibility of disciplinary enquiries and that the procedural requirements as stipulated in *Mahlangu v CIM Deltak* are no longer required.⁹

⁷ Item 1(1) of Schedule 8.

⁸ Cheadle “Over-proceduralising Misconduct and Capacity Dismissals: How Do We Get out of This Mess?” Paper delivered at SASLAW Conference Cape Town (2006) 3.

⁹ See discussion on this case in chapter 4 above.

5.3 Item 1(2) – Collective agreements

This part of Schedule 8 deals with the significance of collective agreements. It states that:

“[t]his Act emphasises the primacy of collective agreements. This Code is not intended as a substitute for disciplinary codes and procedures where these are the subject of collective agreements, or the outcome of joint decision-making by an employer and a workplace forum.”¹⁰

The following stands out in item 1(2):

- i. Collective agreements have primacy over the Code.¹¹
- ii. The same principle applies where disciplinary codes and procedures have not been included in collective agreements but have been agreed to in a joint-decision-making process in a workplace forum.

Most employers, especially larger employers, have adopted disciplinary codes and procedures that usually prescribe the procedures that must be followed when conducting a disciplinary hearing. Where these codes and procedures form part of the conditions of employment of an employee and are an essential part of the contract of employment, employers are obliged to follow them.¹²

In *Denel (Pty) Ltd v Vorster*, the Supreme Court of Appeal held that employers are obliged to follow their own adopted disciplinary codes and procedures and that they cannot under these circumstances rely on

¹⁰ Item 1(2) of Schedule 8.

¹¹ See legislative framework table 2 in par. 4.3.2 above.

¹² *Highveld District Council v CCMA & others* [2002] 12 BLLR 158 (LAC).

the guidelines given by Schedule 8.¹³ If the provisions of such disciplinary codes are not followed to the letter, this amounts to a breach of contract by the employer. Schedule 8 may, therefore not be seen as a replacement of the normal disciplinary codes and procedures adopted by some employers.

It is, however, also important to note that the codes and procedures that have been adopted and implemented by some employers must at least meet the minimum requirements laid down in item 4 of Schedule 8.¹⁴ In *Mckenzie v Multiple Admin CC*¹⁵ the commissioner accepted that an informal process does not automatically invalidate the result of a disciplinary procedure as the procedure adopted by the employer in this instance met the minimum requirements of Schedule 8.

The LRA defines collective agreements as written agreements concerning the terms and conditions of employment or any matter of mutual interest between a registered trade union and an employer or a registered employers' organisation.¹⁶

One aspect that should be borne in mind is that a large percentage of employees are not parties to collective agreements or the joint decision making processes of workplace forums. According to Grobler and Wörnich only approximately 40% of all employees in South Africa are

¹³ (2004) 25 ILJ 659 (SCA). In the *Highveld District Council* matter the Labour Appeal Court held that even if an employer deviates from a disciplinary code it could still constitute a fair procedure if the actual procedure followed could still be deemed to be fair. This is in contrast to the finding of the Supreme Court of Appeal in the *Denel* matter. These two cases illustrate the difference in attitude between the civil and labour courts.

¹⁴ This was also confirmed in *SACCAWU obo Sekgopi v Kimberley Club* [2000] 4 BALR 413 (CCMA). Even though Schedule 8 must be seen as a general guide and not as a substitute for negotiated disciplinary codes and procedures, in terms of s 188(2) any CCMA commissioner who must determine if a dismissal was fair is compelled to take the Code into consideration.

¹⁵ (2001) 22 ILJ 2753 (CCMA).

¹⁶ S 213 of the LRA; Le Roux "The Role and Enforcement of Collective Agreements" (2006) 15(6) *CLL* 51-58; Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 69.

members of registered trade unions.¹⁷ Only registered trade unions can enter into collective agreements with employers.¹⁸ By contrast workplace forums can only be established in workplaces where the trade union represents the majority of employees¹⁹ and there are more than 100 employees.²⁰

At first glance it would thus seem that almost 60% of employees are excluded from the primacy of collective agreements, which are often concluded at bargaining councils.²¹ The parties to a bargaining council are registered trade unions and registered employers' organisations. From this it follows that a collective agreement signed at the bargaining councils then applies only to all members of the registered trade unions and registered employers' organisations that are parties to the bargaining council.²² However, it is to be noted that the collective agreement concluded at a bargaining council may also be extended to non-parties of the bargaining council that fall within the registered scope of the bargaining council.²³ This may have the effect that more than the estimated 40% of employees are in fact covered.

The membership of registered trade unions reached a peak in 2001 with 3 939 075 members but declined to 2 935 864 members in 2005. This is in contrast to an increase in the number of employees covered by

¹⁷ Grobler and Wörnich *Human Resource Management in South Africa* (2006) 418.

¹⁸ See definition of collective agreements in section 213 of LRA.

¹⁹ S 78(b) of the LRA.

²⁰ S 80(1) of the LRA.

²¹ S 28(1)(a) of the LRA; Godfrey, Maree and Theron "Regulating the Labour Market: The Role of Bargaining Councils" (2006) 27 *ILJ* 731.

²² S 31(a) of the LRA.

²³ S 32(1) of the LRA. The collective agreement concluded at the bargaining council can only be extended to non-parties of the bargaining council by the Minister of Labour upon receiving a written request from the bargaining council.



bargaining council agreements, from an estimated 2 000 000 in 2002 to 2 358 012 in 2004.²⁴

Item (1)2 of the Code also gives effect to the constitutional right of all trade unions and employers' organisations to engage in collective bargaining.²⁵ It also gives effect to one of the main purposes of the LRA, namely to promote orderly collective bargaining.

5.4 Item 1(3) – Value statements

Item 1(3) of Schedule 8 does not set fixed requirements but establishes value statements that are neither concrete nor measurable and must be regarded as a contextual background that can assist with the interpretation of the Schedule 8. Item 1(3) reads as follows:

“The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.”²⁶

It is submitted that item 1(3) of Schedule 8 should have been item 1(1) as it forms the crux of any working relationship. All rules, codes and procedures established in the workplace should be based on the principles established in item 1(3). This item places a premium on mutual respect between employers and employees. It gives recognition to the common-law duties of both the employer and the employee already referred to in chapter 4. This item also recognises that, although

²⁴ Du Toit “What is the Future of Collective Bargaining (and Labour Law) in South Africa” (2007) 28 *ILJ* 1420.

²⁵ S 23(5) of the Constitution of the Republic of South Africa 108 of 1996.

²⁶ Item 1(3) of Schedule 8.

employment justice in the workplace is of paramount importance, the efficient operation of the business is just as important. (The concepts of employment and organisational justice have already been discussed in detail in chapter 2 above.)

This item acknowledges the common-law right of an employer to demand satisfactory conduct and work performance from employees. It simultaneously recognises the common-law duty of employees in this regard.²⁷

Procedural fairness in disciplinary enquiries cannot be achieved, irrespective of the most comprehensive codes and procedures, if both parties do not subscribe to these principles. It is submitted that if all parties in disciplinary hearings understand, support and adhere to these basic principles, procedural fairness may be achieved without falling into the trap of the so-called criminal justice model established by the unfair dismissal jurisprudence under the LRA 28 of 1956.²⁸

5.5 Item 2 – Fair reason for dismissal

The main focus of this study is procedural fairness. Item 2 deals mainly with substantive fairness, in other words, the fair reasons for dismissal. In view of the delimitations and scope of this research project, the researcher will only deal with those limited aspects in item 2 relating to procedural fairness. Item 2(1) states that 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”.

²⁷ Grogan *Workplace Law* (2007) 52-53. See paras 4.2.2 and 4.2.3 in chapter 4.

²⁸ Cheadle (2006) December SASLAW Newsletter 2.

Whether or not the procedure is fair, is determined by referring to the guidelines set out in Schedule 8 below.²⁹

The last sentence in item 2(4) is important because it states that:

“[I]f the employer fails ... to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.”³⁰

Even before the implementation of Schedule 8, Cameron, a former Industrial Court judge, stressed the principle that an employee must be afforded some kind of opportunity to answer the allegations or considerations, which would otherwise lead to a dismissal.³¹

At first glance, it would therefore seem that a fair procedure should be followed under all circumstances, irrespective of the reason for dismissal. However, it is important to take note of items 3(3) and 4(4) that deal with exceptions to this rule. These two items are discussed in more detail later in this chapter.

5.6 Item 3 – Disciplinary measures short of dismissal

The first two sentences of item 3(3) are important for the purposes of the current study:

“Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the most effective way for an employer to deal with minor violations of work discipline.”³²

²⁹ Item 2(1) of Schedule 8.

³⁰ Item 2(4) of Schedule 8.

³¹ Cameron “The Right to a Hearing before a Dismissal” (1986) 7(2) *ILJ* 183.

³² Item 3(3) of Schedule 8.

This could be interpreted to mean that:

- i. formal disciplinary hearings, with regard to strict procedural fairness, need not to be followed for minor infringements and in every single instance of misconduct; and
- ii. it is not necessary to have disciplinary hearings, as is required in item 4(1), when verbal warnings or even written warnings are issued.

It would therefore appear that labour relations and the application thereof in the workplace is flexible and should not be viewed and practised in line with the same strict procedures found in criminal matters.

The principles established in item 3(3) were also confirmed in *Price Busters Brick Company (Pty) Ltd v Mbileni and others*³³ when the court ruled that the right to be heard does not necessarily mean the right to a formal hearing.³⁴ However, in *MITUSA obo Clarke v National Ports Authority*,³⁵ a final written warning was issued to an employee without following the procedures contained in the employer's disciplinary code, which had been established in terms of a collective agreement. Therefore the arbitrator ruled that the disciplinary action taken against the employee was procedurally unfair and set the warning aside. This confirms that the flexibility approach does not apply where procedures have been set in collective agreements.³⁶

³³ (1998) Case number J978/98 (LC) 8 at [13].

³⁴ See also *Ngutshane v Ariviakom (Pty) Ltd t/a Arivia.kom & others* [2009] 6 BLLR 541 (LC) where the court ruled that where the employee was merely invited to make oral representations to the board of directors as to why she should not be dismissed, the employee has had an opportunity to state her case and that the dismissal was therefore procedurally fair.

³⁵ [2006] 9 BALR 861 (TOKISO).

³⁶ See the discussion on item 1(2) in chapter 5.3 above.



In *NUMSA obo Tshikana v Delta Motor Corporation*,³⁷ the arbitrator held that, while it was common cause that the employee had not been given a hearing before being suspended, Schedule 8 indicated that a formal procedure does not have to be followed each time discipline is imposed. The Memorandum that accompanied the Draft Labour Relations Bill in 1995 also incorporated the principles of flexibility:

“The Draft Bill requires a fair, but brief, pre-dismissal procedure ... It opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee.”³⁸

From this it is clear that it was the intention of the authors of the LRA and Schedule 8 that the principles of flexibility must be entrenched in the Act, as reflected in the wording of item 3(3). Whether this flexible approach has been implemented in disciplinary codes and procedures in the workplace is questionable. Van Niekerk states that “anecdotal evidence suggests” that the requirements of procedural fairness have contributed more than any other factor to perceptions about the inflexibility of South African labour law.³⁹

The rest of item 3(3) deals with other forms of disciplinary action, which can include written warnings, final written warnings, and any action short of dismissal. Unfortunately this item does not give any guidance as to the procedures that should be followed by an employer before a warning can be issued.

³⁷ [2003] 11 BALR 1302 (CCMA).

³⁸ As stated by Cheadle (2006) December SASLAW Newsletter,

³⁹ Van Niekerk “Regulating Flexibility and Small Business: Revisiting the LRA and BCEA – A Response to Halton Cheadle’s Draft Concept Paper” (2006) 28.

It is suggested that item 4(1), which is discussed below, does not require the employer to give an employee a formal disciplinary hearing, before a written or even a final written warning can be issued to an employee.⁴⁰ However, it would be unwise for an employer to dispense with pre-dismissal procedures if the status of the employee might be affected by the disciplinary action taken. This may happen, for example, when an employee is demoted, but not when a warning is issued.

5.7 Item 4(1) – Fair procedure (elements of procedural fairness)

5.7.1 Introduction

The only item in Schedule 8 that relates directly to the central research question of this study, namely pre-dismissal procedures and the elements of procedural fairness, is contained item 4 of Schedule 8.

Section 188(1)(b) of the LRA requires that a dismissal for misconduct must be effected in accordance with a fair procedure. Procedural fairness is measured by evaluating the procedures followed during a disciplinary enquiry.

As item 4 is central to this body of research, it is appropriate to quote it verbatim and then discuss and analyse each sub-item in detail sentence by sentence.

5.7.2 Investigation

The first sentence of item 4(1) states:

⁴⁰ *NUMSA obo Tshikina v Delta Motor Corporation* [2003] 11 BALR 1302 (CCMA).

“Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal.”⁴¹

It is significant that the sentence commences with “[n]ormally, the employer should ”.

This indicates that Schedule 8 is not prescriptive. The wording does not say the employer “must” under all circumstances conduct an investigation. It would therefore also appear that the flexibility approach discussed in paragraph 5.2 above is reflected in the wording of item 4(1).

The word “investigation” can lead to different interpretations. Does an “investigation” refer to an investigative process prior to a disciplinary enquiry or is the investigation just a different name for a disciplinary enquiry?

“Investigation” is defined as:

“[t]he act or process of investigating; a careful search or examination in order to discover facts.”⁴²

“Enquiry” is defined as:

“[t]o seek (information) by questioning; ask. See ‘inquire’.”⁴³

This researcher regards the “investigation” as the process which the employer should follow to gather the necessary information of the alleged misconduct before the enquiry.⁴⁴ After the necessary

⁴¹ Schedule item 4(1).

⁴² *Collins English Dictionary* (1979) 768.

⁴³ *Collins English Dictionary* (1979) 487.

⁴⁴ The failure to have an investigation will not necessarily result in a finding of a procedurally unfair dismissal., (see fn 52), but the failure to hold a disciplinary enquiry will inevitably do so.



information has been gathered, the employer notifies the employee of the allegations against him or her. If one reads item 4 of Schedule 8, as stated in the first sentence, carefully, it is apparent that the investigation takes place first and only then is the employee notified of the allegations. The employee is also given time to prepare a response at the enquiry that is still to be held. From the literature, it appears that it has become standard practice for employers to do a pre-liminary investigation and then hold the actual disciplinary enquiry.⁴⁵

The investigation need not be a formal investigation. This investigation is in actual fact the process that leads to the decision whether an employee should be charged with an offence or not. This part of the pre-dismissal procedure is, more often than not an informal gathering of information, interviewing witnesses and collecting documentary evidence.⁴⁶ The employee is not necessarily entitled to be heard or even represented during the investigation preceding the formal hearing.⁴⁷ This investigation relates to the investigation to be done by the employer prior to the disciplinary enquiry.⁴⁸

The term “enquiry” is a much wider term and implies something less formal than a hearing.⁴⁹

⁴⁵ Israelstam “Don’t underestimate the investigation process” (2008) *SA Labour Guide Newsletter* of 12 March downloaded from www.labourguide.co.za on 12 March 2008. See also *TGWU obo Joseph and others v Grey Security Services (Western Cape)(Pty) Ltd* (2004) 6 BALR 698 (CCMA). It appears that the investigation process is related to the determination of substantive fairness and it is not a requirement for procedural fairness.

⁴⁶ Grogan (2007) 189.

⁴⁷ *NUM & Others v RSA Geological Services (a Division of De Beers Consolidated Mines Ltd)* (2003) 24 ILJ 2040 (LC).

⁴⁸ Van Eck and Smit “Programme in Disciplinary Enquiries” [CE@UP](http://www.ce@up.ac.za) course material (2008) 16. See also Van Niekerk *et al* (2006) 58. No case law could however be found where the failure to have a pre-dismissal investigation resulted in a finding of a procedurally unfair dismissal at the CCMA.

⁴⁹ Van Eck “Latest Developments Regarding Disciplinary Enquiries” (2002) *South African Journal of Labour Relations* 26(3) 26.



It is clear that the employer should have an investigation before the disciplinary hearing. The actual disciplinary enquiry should not be used for investigative purposes. Schedule 8 is not prescriptive regarding the form of this investigation, but it follows naturally that larger employers will follow more formal investigating procedures. This is also confirmed in item 3(1) of Schedule 8, which states the following:

“In general, a larger business will require a more formal approach to discipline.”⁵⁰

In this instance, Schedule 8 does not stipulate what is meant by a more formal (or informal) approach to discipline. The only conclusion that can be drawn is that the principle of flexibility as discussed previously in this chapter is of paramount importance in Schedule 8. This is also reflected in the second sentence of item 4(1) of Schedule 8, which states that “[t]his does not need to be a formal enquiry.”⁵¹

5.7.3 Notice of allegation

It is generally accepted that any person accused of any wrong-doing of any nature has the right to know the nature of the accusations against him or her.

The particular portion in item 4(1) that deals with the notice of the allegation reads as follows:

“The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand.”⁵²

⁵⁰ Item 3(1) of Schedule 8.

⁵¹ Item 4(1) of Schedule 8.

⁵² Item 4(1) of Schedule 8.

This basically means that the employer must inform the employee of the charges or allegations against him or her.⁵³ It would be grossly unfair to summons an employee for a disciplinary enquiry, but leave him or her ignorant about the allegations that are going to be considered during the enquiry.⁵⁴ The employee should be told what conduct will be put in issue at the disciplinary enquiry. In *Num & another v Kloof Gold Mining Co*⁵⁵ the former Industrial Court stated that:

“if justice is to be done, it is essential that the employee should be informed before the holding of the enquiry of all relevant allegations and charges.”

All that is required in terms of Schedule 8 is that the notification must be in a form or language that an employee can reasonably understand. Schedule 8 does not state that it must be in writing although it has become common practice to give the employee notice in written form.⁵⁶

Employers are often uncertain as to the amount of information that must be contained in the notification of the allegations or charges against the employee. Schedule 8 gives no guidelines in this regard. In *Le Roux v GWK Ltd*⁵⁷ the commissioner held that a charge of “breaking the trust relationship” was too vague, as the employee was in the dark regarding the reasons for the hearing. There is no requirement in Schedule 8 that the allegations must be formulated to the same standard as a summons issued in criminal or civil matters.⁵⁸

⁵³ *Ntshangane v Speciality Metals CC* (1998) *ILJ* 584 (LC); *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd* (1998) *ILJ* 635 (LC); *Mohala v Citibank* (2003) *ILJ* 417 (LC); *Mhlambi v Matjhabeng Municipality* (2003) *ILJ* 1659 (O).

⁵⁴ *Cameron* (1986) *ILJ* (7) 2 at 201.

⁵⁵ (1986) 7 *ILJ* 375 (IC) at 384D.

⁵⁶ *Basson et al* (2007) 126. If the notice to attend the enquiry is issued in writing it also serves as proof for the employer at subsequent proceedings that the employee has in fact been notified.

⁵⁷ (2004) 25 *ILJ* 1366 (BCA).

⁵⁸ This was confirmed in *Avril Elizabeth Home for the Handicapped v CCMA* where the court stated that “[t]here is clearly no place for formal disciplinary procedures that incorporate ... technical and



In *Prakash Bissoon v Lever Ponds (Pty) Ltd and others*⁵⁹ the employee asked the Labour Court to grant an interdict against the employer, to prevent the employer from proceeding with a scheduled disciplinary enquiry, as the employee maintained that he did not have "the fullest and fairest information about the case he has to meet". The court held that there is no duty on the employer to supply the further particulars before the disciplinary enquiry. All that is required is that the charges should be sufficient to inform the employee of the case he or she is expected to meet.⁶⁰ In *ESKOM v NUMSA obo Galada and others*⁶¹ the arbitrator ruled that employees are not entitled, prior to disciplinary hearings, to be furnished with documentary evidence on which the employer intends to rely. All that is required is that employees be given a reasonable opportunity to examine such evidence during the hearing.

If the allegation against the employee is formulated in such away that it is clear and easy to understand, the employee will be able to prepare a case thoroughly in response to the allegations.

The employer would then also be able to establish that he or she has met the basic requirements with regard to the notification of the allegations as required in Schedule 8.

5.7.4 Opportunity to state a case in response to the allegations

Disciplinary enquiry procedures are based on the rules of natural justice. One of the most basic and significant rights of an employee in a

complex 'charge sheets', request for particulars" (2006) 11. See also *Zeelie v Price Forbes (Northern Province)* (2001) 22 ILJ 2053 (LC) where the Court stated that the charges should be sufficient to inform the employee of the case that the employee is expected to meet.

⁵⁹ Case number D242/03 (2003) at [5].

⁶⁰ *Zeelie v Price Forbes (Northern Province) (1)* (2001) 22 ILJ 2053 (LC).

⁶¹ [2000] 7 BALR 812 (IMSSA).

disciplinary hearing is the right to state his or her case in response to the allegations made by the employer.

This right is found in the Latin maxim *audi alteram partem* which basically means that both sides of the story must be considered before making a decision.⁶² According to Basson *et al*, the right of an employee to have a opportunity to state a case in response to the allegations levied against him or her forms the core of procedural fairness in the context of dismissal for misconduct.⁶³

Item 4(1) of Schedule 8 states the following:

“The employee should be allowed the opportunity to state a case in response to the allegations.”⁶⁴

The right to state a case in response to the allegations can be equated to the right to defend oneself against allegations. Schedule 8 does not give any guidance as to what the right to state a case means or entails. In the era before the implementation of Schedule 8, Redeker stated that it has become standard practice that the right to defend oneself means more than some *pro forma* meeting at which a supervisor politely listens to the excuses for the misconduct as tendered by the employee.⁶⁵ However, a major shift occurred after the implementation of the Schedule. This is confirmed by the *Avril Elizabeth Home for the Handicapped v CCMA* judgment, where the right to state a case is summarised by Van Niekerk J to mean the following:

⁶² See *JDG Trading (Pty) Ltd v Brundson* 2000 ILJ 501 (LAC); *OTK Operating Co Ltd v Mahlanga* [1998] 6 BLLR 556 (LAC).

⁶³ Basson *et al* (2007) 127.

⁶⁴ Item 4(1) of Schedule 8.

⁶⁵ Redeker *Discipline: Policies and Procedures* (1983) 26. In *Cycad Construction (Pty) Ltd v CCMA and others* (1999) case number J891/98 on page 8 the Court stated that requiring the employer to hear both sides of the story limits the harm that a wrong decision can cause.

“[I]t means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.”⁶⁶

Earlier on in this judgment, Van Niekerk J expresses the view that the rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model.

Grogan suggests that the checklist approach, as founded in the *Mahlangu v CIM Deltak*⁶⁷ matter should still to be followed to ensure procedural fairness.⁶⁸ This is in stark contrast to the views expressed by Van Niekerk J in the *Avril Elizabeth Home for the Handicapped v CCMA* matter. Grogan is, for example, of the opinion that the right to state a case automatically includes the right to call and cross-examine witness, even though this right is not mentioned in Schedule 8.⁶⁹ According to Basson *et al*, the right to call and cross-examine witnesses is not an automatic right but depends on the facts of the matter and it is up to the chairperson to decide whether witnesses will be called or not.⁷⁰

The right to call and cross-examine witnesses depends on whether the employer has an established procedure providing for a formal hearing that makes provision for this right.⁷¹ As was discussed earlier, employers are compelled to follow their own disciplinary codes as was

⁶⁶ (2006) 27 ILJ 1466. The views of Redeker were expressed before the advent of Schedule 8, and the break between the formalistic approach as was also expressed in the *Mahlangu v CIM Deltak* matter can clearly be seen in the *Avril Elizabeth Home for the Handicapped* matter.

⁶⁷ (1986) 7 ILJ 346.

⁶⁸ Grogan (2005) 274–301; Grogan (2007) 191–208.

⁶⁹ Grogan (2007) 196.

⁷⁰ Basson (2007) 127.

⁷¹ *OTK Operating Company Ltd v Mahlangu* [1998] 6 BLLR 556 (LAC).

clearly indicated by the Supreme Court of Appeal in *Denel v Vorster*.⁷² Cheadle agrees with Basson *et al* that the right to call and cross-examine witnesses, in the absence of an agreed procedure depends on the nature of the allegations.⁷³

If the allegations against the employee is such that the only way the employer can prove his or her case is by calling witnesses, then cross-examination is the appropriate way to respond to the allegations. Where the employer calls witnesses to testify at a disciplinary hearing, the employee also has the right to cross-examine those witnesses. Should the employer refuse the employee the right to cross-examine under these circumstances, it will in fact amount to denying the employee an opportunity to state a case in response to the allegations.

In *CEPPWAWU obo Limba v Consol Glass*,⁷⁴ the presiding officer of the disciplinary enquiry “interviewed” the witnesses in the absence of both parties after closure of the enquiry to verify certain statements made during the enquiry. The chairperson then invited the employer to question the witnesses. The arbitrator determined this to be a gross irregularity by the chairperson, as the applicant employee could not cross-examine them. I am in agreement with the views of the arbitrator in this regard.

In *OTK Operating Company Ltd v Mahlanga*,⁷⁵ the Labour Appeal Court held that the dismissal of the employee was procedurally unfair, as the

⁷² In *Rand Water Board v CCMA* (2005) 26 ILJ 2028 (LC) the court ruled that even where the employer has failed to comply with minor technical requirements of its own disciplinary code the enquiry can still be procedurally fair in the absence of loss or prejudice to the employee. This is also in contrast to the finding of the Supreme Court of Appeal in the *Denel v Vorster* matter discussed earlier.

⁷³ Cheadle (2006) December SASLAW Newsletter 24.

⁷⁴ [2009] 5 BALR 431 (NBCCI).

⁷⁵ [1998] 6 BLLR 556 (LAC).

employer did not allow the employee to cross-examine company witness and call his own witnesses.

Employer's should always remember that the employee will have an opportunity to challenge the evidence against him or her before an independent tribunal, namely at an arbitration hearing of the CCMA, in any event.

In the September 2007 issue of the *Espresso Newsletter* of Standard Bank Business Banking, Levy had the following to say with regard to the procedural requirements of a disciplinary hearing, following the judgment in the *Avril Elizabeth Home for the Handicapped v CCMA* case:

“Business owners must stop believing that they need to meet as high a standard of absolute justice in their (disciplinary) procedure as the High Court of South Africa. When there's a problem with discipline, you don't have hearings, you have a meeting. You don't read people their rights, you don't have cross-examination, you don't have prosecutors and defences. You have a disciplinary meeting at which you need to say to the guy ‘this is the nature of the complaint, what have you got to say for yourself?’”⁷⁶

Levy refers to Nerine Kahn, director of the CCMA, who said that the *Avril Elizabeth Home for the Handicapped v CCMA* judgment “reminded everybody that we've got caught up in procedural issues”. In the same article Levy expresses the view that employers should tear up and throw away the comprehensive disciplinary codes they currently use and replace them with one sentence: “we will manage our discipline in accordance with Schedule 8 of the Labour Relations Act.”

⁷⁶ Levy *Espresso News Letter* Standard Bank Business Banking (2007) 1-2.

It is submitted that Levy's statements are simplistic and I would suggest that in line with item 3(1) of Schedule 8 employers should adopt disciplinary rules that establish the standard of conduct required of their employees, and further that the disciplinary procedure contains at least the basic five principles contained in item 4 of Schedule 8.⁷⁷

From the above it would appear that many labour law specialists, which include a Labour Court judge and, the director of the CCMA, are in agreement that the right to state a case in a disciplinary hearing does not mean the same as in criminal matters. All that is required by Schedule 8 is an opportunity for the employee to state a case in response to the allegations. What this opportunity entails depends to a very large degree on factors such as the nature of the allegations, the size and nature of the employer's business and the nature of the employer's disciplinary code.

It is once again apparent that Schedule 8 is a guideline and not a strict Code, as even the right to state a case depends on various factors that are not described in Schedule 8.

5.7.5 Reasonable time to prepare a response

It is a well-established principle that any person accused of any wrong doing is entitled to time to prepare him- or herself in order to be able to answer the allegations. This right is also reflected in Schedule 8, which states:

“The employee should be entitled to a reasonable time to prepare a response to the allegations.”⁷⁸

⁷⁷ See proposals and suggestions in chapter 8 below.

⁷⁸ Item 4(1) of Schedule 8.

It is important to note that Schedule 8 does not stipulate a specific period for preparation, it merely requires a reasonable time. What is reasonable depends on the circumstances of each case. The question whether or not the employee was afforded sufficient time to prepare is a factual one.⁷⁹ Grogan mentions that the period that should be allowed can depend on various factors, namely:

- i. the employer's own disciplinary code;
- ii. the complexity of the charge;
- iii. the employee's knowledge of the circumstances giving rise to the offence; and
- iv. the time necessary for employee to obtain representation.⁸⁰

It has almost become an acceptable and unwritten minimum requirement by most employers that an employee should be granted at least 48 hours notice of the enquiry, as this is regarded as the minimum time necessary to prepare a defence. However, in line with the notion of flexibility, there is no fixed time limit.

In the *Shoprite Checkers (Pty) Ltd v CCMA and others*⁸¹ judgment, the Labour Court held that even where the employee had been given less than 24 hours notice, it was fair under the circumstances as the employee had not been prejudiced and participated fully in the disciplinary enquiry.

On the CCMA website, various information sheets can be accessed. There are also other information sheets that are displayed as posters against the walls of each CCMA office. In one of the guiding documents

⁷⁹ Basson *et al* (2007) 127.

⁸⁰ Grogan (2005) 277.

⁸¹ Case number J852/97 (1998) at [34].



issued by the CCMA, under the title *CCMA Information Sheets Disciplinary Procedures*, it advises that the employer should give an employee “no less than three days notice of the enquiry”.⁸²

The information sheet on the CCMA website states that three days are to be given, whereas the posters displayed at the CCMA state 48 hours to be the required period. These guidelines have no foundation in the LRA or more specifically in Schedule 8. However, the CCMA states at the bottom of the information sheet that it must be noted that labour legislation is not specific in terms of the steps to be followed when conducting a disciplinary enquiry. Despite this, there is a strong possibility that employers and employees who visit the CCMA offices, or access the CCMA website, might interpret this information as being a statutory requirement.

This could also mean that some CCMA commissioners, where the employer does not have a formal disciplinary procedure stipulating the notice period of a hearing, will accept the three days or 48 hours notice as found on the information sheet as the minimum notice required. It is not suggested that three days or 48 hours notice is not reasonable, but it is submitted that Schedule 8 does not stipulate a notice period. If the information contained in the information sheet with regard to a notice period is applied in the workplace as a standard rule, it can be argued that if less than three days or 48 hours notice of a disciplinary enquiry is given, the employee did not have a reasonable length of time to prepare a response and as such the disciplinary process should be deemed be procedurally unfair.

⁸² <http://ccma.org> CCMA Info Sheet: Disciplinary Procedures. Down loaded from the CCMA website on 20 October 2007. The applicable information sheet is attached to this study as Annexure 3.

Care must also be exercised, because following the agreed disciplinary code and procedure does not necessarily mean that the procedure is procedurally fair, as the agreed codes and procedures must always be measured against the requirements of the LRA.⁸³ It must also be remembered that disciplinary codes and procedures that were established in terms of a collective agreement take precedence over Schedule 8.

5.7.6 Assistance of a trade union representative or fellow employee

The next part of item 4(1) reads that the employee should be entitled:

“[t]o the assistance of a trade union representative or fellow employee.”⁸⁴

It is an accepted norm in South African workplaces that employees accused of misconduct are entitled to be assisted or represented by fellow employees or a trade union representative during a disciplinary enquiry.⁸⁵ The employee has the right to choose his or her own representative within the boundaries of the employer’s disciplinary code.⁸⁶ In practice a trade union representative,⁸⁷ will act as a representative for employees who belong to a trade union. The LRA

⁸³ Grogan (2005) 276. In the *Highveld District Council* matter the Court also stated in par 15 that the tribunal judging the fairness of the procedure followed must scrutinise the procedure actually followed; it must decide whether in all circumstances the procedure was fair. In this regard also see *Leonard Dingler (Pty)Ltd v Ngwenya* (1999) 20 ILJ 1711 (LAC).

⁸⁴ Item 4(1) of Schedule 8.

⁸⁵ In *Molope v Mbha NO & others* [2005] 3 BLLR 267 (LC) the court confirmed that the right of representation of an accused employee at a disciplinary enquiry by a colleague, trade union official or a lawyer as one of the fundamental requirements of procedural fairness.

⁸⁶ In *SACCAWU v Diskom Discount Stores* [1997] 6 BLLR 819 (CCMA) the arbitrator ruled that it was unfair for the employer not to allow the employee to choose a representative.

⁸⁷ S 213 of the LRA defines a trade union representative as a member of a trade union who is elected to represent employees in a workplace. A trade union representative is commonly referred to as a “shop steward”.

gives shop stewards the right to assist employees in disciplinary enquiries, if requested to do so by the employee.⁸⁸ Fellow employees normally represent non-union members from the same workplace.⁸⁹

The purpose of representation or assistance can be described as the assistance with the presentation in response to the allegations or charges and also to ensure that the actual procedure that is followed during the enquiry is fair.⁹⁰ It is submitted that assistance means more than the mere presence of a fellow employee. The role of the representative can, *inter alia*, include assistance with:

- i. obtaining witnesses for the employee;
- ii. obtaining documentary evidence;
- iii. preparing a defence;
- iv. interpretation or translation; and
- v. gathering background information.

Under the common law it is accepted that the right to representation conferred by contract does not automatically extend to representation by legal practitioners.⁹¹ Item 4(1) does not make any provision for the assistance by a legal practitioner such as an advocate or attorney.

As a general rule, legal representation is not allowed at internal disciplinary hearings. The Supreme Court of Appeal has suggested that the exclusion of legal representation may well be regarded as a breach of the constitutional right to fair labour practices and/or fair

⁸⁸ S 14(4)(a) of the LRA.

⁸⁹ In *NUMSA obo Thomas V M & R Alucast* [2008] 2 BALR 134 (MEIBC) the arbitrator held that the complexity of matter was not of such a nature that it entitled the employee to be represented by a shopsteward and not by a trade union official.

⁹⁰ Basson *et al* (2007) 127.

⁹¹ *Lamprecht v McNeillie* (1994) 15 ILJ 998 (A).

administrative action.⁹² It is important to note that these judgments dealt with disciplinary proceedings in the public sector and not the private sector. It is also not at all clear whether or not administrative law principles would also apply to private employee-employer relationships.

The labour courts are reluctant to accept that legal representation in disciplinary enquiries has developed into a clear right.⁹³ However, the chairperson of a disciplinary enquiry retains the discretion to permit legal representation if it is requested by the employee⁹⁴ and in complex and difficult cases relating to serious charges. In these circumstances the chairperson must exercise his or her discretion in a fair manner.⁹⁵

All that is required in terms item 4(1) of Schedule 8 is that the accused employee be allowed the right to be assisted or represented by a trade union representative, shop steward, or fellow employee.

5.7.7 Communicate the decision taken after the enquiry

The precise wording used in this particular sentence in Schedule 8 once again illustrates the generality and flexibility of Schedule 8.

“After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.”⁹⁶

⁹² *Hamata & another v Chairperson, Peninsula Technikon Disciplinary Committee & others* (2002) 23 ILJ 1531 (SCA). Also see *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* [2004] 25 ILJ 2311(SCA).

⁹³ *Grogan* (2007) 195; *Majola v MEC, Department of Public Works, Northern Province & others* (2004) 25 ILJ 131 (LC).

⁹⁴ In *Chamane v The Member of the Executive Council for Transport, Kwazulu-Natal & others* [2000] 10 BLLR 1154 (LC) the Court ruled that failure of a chairman of a disciplinary enquiry to apply his mind and consider a request for legal representation was enough to vitiate the outcome of the enquiry.

⁹⁵ *Basson et al* (2007) 128. Also see *Rust Andre Francois v Royal Yard Holdings II and others* Case number J4380/01 (2001).

⁹⁶ Schedule 8 item 4(1)

This portion of item 4(1) of Schedule 8 states that the employer “should communicate” the decision that has been taken. This indicates an obligation to inform the employee of the outcome of the enquiry. In *De Jager v Minister of Labour & others*,⁹⁷ the Labour Court, on application of the employee, ordered the employer to provide the employee with written reasons for his dismissal. The court noted that the applicable disciplinary code requires the chairperson of the disciplinary enquiry to inform the employee of the verdict and then permit the employee to make representations regarding the sanction. In this instance, the employer did not comply with the applicable disciplinary code.

It would serve no purpose to go through a disciplinary enquiry and then not inform the employee of the outcome.⁹⁸ Informing an employee of the outcome or decision taken in actuality means informing the employee of whether he or she has been found guilty or not guilty.

Schedule 8 suggests that if it is possible and practical, the decision taken must be given to the employee in writing. It is not obligatory to do so, but it is preferable. If the employee is illiterate, it is advisable to inform him or her of the decision verbally, with the assistance of an interpreter and also to give him or her a written report containing the outcome.

The Labour Court has held that the requirements for procedural fairness under the current LRA “demands less stringent and formal compliance than was the case under the unfair labour practice jurisdiction of the

⁹⁷ [2006] 7 BLLR 654 (LC).

⁹⁸ In *Gabaraane v Maseco Systems Integrators (Pty) Ltd* [2000] 11 BALR 1231 (CCMA), the employer waited for two weeks before informing the employee of the outcome of the enquiry and the arbitrator ruled that this was not unfair.

former Industrial Court”.⁹⁹ This would indicate that the requirements of Schedule 8 are not set in stone and that deviations are permissible.

5.8 Item 4(2) - Discipline against a trade union representative

Schedule 8 provides that disciplinary action against a trade union representative, office-bearer or an official of a trade union,¹⁰⁰ should not be taken without first informing and consulting with the trade union.

“Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.”¹⁰¹

Item 4 of Schedule 8 deals mainly with fair procedures relating to dismissal and it comes as a surprise that item 4(2) of Schedule 8 refers to “discipline” against a shop steward. It does not refer to pre-dismissal procedures. Discipline against any employee can include verbal warnings, written warnings, final written warnings and other forms of disciplinary action that go wider than dismissal.¹⁰²

If item 4(2) of Schedule 8 is interpreted literally, it means that an employer cannot give an employee, who happens to be a shop steward, even a verbal warning without first informing and consulting the trade union. This would remove the right of the employer to discipline and would give a shop steward a level of protection and status, far beyond

⁹⁹ See *Moropane v Gilbey's Distillers & Vintners (Pty) Ltd & another* (1998) 19 ILJ 635 (LC) and the *Avril Elizabeth Home* case cited earlier.

¹⁰⁰ S 213 of the LRA defines a trade union representative as a member of trade union elected to represent employees in a workplace, an official is defined as a person employed by a trade union as a secretary, an assistant secretary or an organiser. An office bearer is defined as a person who holds office in a trade union but who is not an official.

¹⁰¹ Item 4(2) of Schedule 8. This was confirmed in *Malelane Toyota v CCMA and others* [1999] 6 BLLR 555 (LC).

¹⁰² Item 3(2) – (3) of Schedule 8.



that of any other employee. This would also be totally impractical and time-consuming, not only for the employer, but also for the trade union.

A shop steward is an employee just like any other employee, and is subject to the same rules and regulations as any other employee. Thus a shop steward is not entitled to special treatment just because he or she is a shop steward. Shop stewards are, first and foremost, employees, and as such are obliged to serve their employers honestly and faithfully.¹⁰³ Shop stewards are not singled out for special protection by legislation. All employees are protected against unfair disciplinary action and unfair dismissal.

It is generally accepted that shop stewards must be protected against victimisation whilst performing their duties as shop stewards.¹⁰⁴ By the same token, it is also trite law that shop stewards cannot claim special protection or privileges against disciplinary action, which originates out of their role as employees.¹⁰⁵ Grogan regards the issue of discipline and shop stewards as being of such importance that he dedicated a whole chapter to this topic in his book on dismissal.¹⁰⁶

It is uncertain what the phrase “informing and consulting” means. This can also lead to different interpretations. Does it mean that the employer must first inform and consult with the union on every minute detail of the merits of the intended disciplinary action? Does it mean that the employer cannot issue a notice to attend a disciplinary enquiry before consultation with the union? In *CEPPWAWU obo Limba v*

¹⁰³ Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2007) 324.

¹⁰⁴ *IMATU v Rustenburg Transitional Council* (2000) 21 ILJ 377 (LC).

¹⁰⁵ See for example *Khumalo & another v Otto Hoffman Handweaving Co* (1988) 9 ILJ 183 (IC).

¹⁰⁶ Grogan (2007) 324 – 336.

Consol Glass,¹⁰⁷ the commissioner found that the rule requiring employers to inform unions before their shop stewards are subjected to disciplinary action is merely a guideline. Since the union was closed for the year-end holidays at the time of the disciplinary hearing, and since no identifiable union interest was involved in the matter, the respondent's failure to inform the union did not in itself constitute a procedural irregularity.

However, in *Silicon Smelters (Pty) Ltd v NUMSA obo Makhobotloane*,¹⁰⁸ the commissioner ruled that failure to inform and consult with the union before hand could not be corrected by a re-hearing or appeal. The dismissal was held to be procedurally unfair on those grounds.

In *SACWU obo Gabela & another v Afrox Ltd*,¹⁰⁹ the commissioner noted that the employer had not informed the union of the impending hearings against the shop stewards, but held that the omission would not render the dismissal unfair, because the shop stewards are capable of informing the trade unions themselves.

It seems that, at most, the employer is required to inform a trade union of any pending disciplinary enquiry against a shop steward and to provide the union with a copy of the notice to attend the hearing. In *FAWU obo Mbatha & others v SASKO Milling and Baking*,¹¹⁰ the commissioner stated that the requirement that employers must consult unions before disciplining a shop steward does not confer the right on the trade union to negotiate over whether disciplinary action should be taken or not. The commissioner stated that consultation means nothing

¹⁰⁷ [2009] 5 BALR 431 (NBCCI).

¹⁰⁸ [2000] 4 BALR 468 (IMSSA).

¹⁰⁹ [2009] 4 BALR 333 (NBCCI). This was also the view of the commissioner in *Mogorosi v Northern Cape Bus Services CC* [2000] 5 BALR 604 (IMSSA).

¹¹⁰ [2007] 3 BALR 256 (CCMA).



more or less than that the union must be made aware of the allegations levelled against the shop stewards.¹¹¹

Surely the intention of the authors of the LRA was not to protect shop stewards against any form of disciplinary action or discipline arising out of their duties as employees, but to protect them against victimisation arising from their role as shop stewards. Item 4(2) of Schedule 8 as it currently stands places an unnecessary burden on both the employer and the trade unions. It is also submitted that it can lead to abuse by over eager shop stewards and at the same time lead to unnecessary tension between employers, shop stewards and trade unions.

It is suggested that the only difference between the disciplinary procedures for any other employee and a shop steward should be that a shop steward has the right to be represented by a union official and that the union should be informed of the pending enquiry beforehand where this practically possible.

5.9 Item 4(3) - Reasons and reminder of right to refer

Item 4(3) of Schedule 8 requires the employer to provide reasons for his or her decision to dismiss the employee:

“If the employee is dismissed, the employee should be given the reasons for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.”¹¹²

¹¹¹ [2007] 3 BALR 256 (CCMA) at 52.

¹¹² Item 4(3) of Schedule 8.

This portion of Schedule 8 places two major obligations on the employer, namely:

- i. to provide reasons to the employee if he or she is dismissed; and
- ii. to inform the employee of the right to refer a dispute to a bargaining council or the CCMA.

By providing reasons for a dismissal the employer contributes towards the training of an employee, as he or she will learn that this particular kind of behaviour is not tolerated in a workplace. It seems only fair that if a person loses his or her work, the person should be entitled to know why.¹¹³ This could assist in ensuring that the employer will not decide on a sanction overly hastily and will apply his or her mind to the appropriate penalty. A dismissal would only be fair if it is dealt with in accordance with a fair procedure and if it based on a fair reason. The reasons (substantive fairness), of any dismissal, is ultimately tested at the CCMA by comparing it to item 7 of Schedule 8.¹¹⁴ The provision of reasons could also give greater credibility to the dismissal and may hence increase the acceptability of the dismissal.

Schedule 8 is silent on the right to an internal appeal hearing. The arbitration process at the CCMA is regarded as an adequate substitute for an internal appeal hearing. The arbitration hearing is also a *de novo* process where the employer in any event has to establish that the dismissal was fair, both procedurally and substantively fair.¹¹⁵

¹¹³ In *Madikane v Personnel Consultants* [1998] 3 BALR 283 (CCMA), the commissioner ruled that the dismissal of the employee was both procedurally and substantively unfair, as the employee was not informed of the reason for his dismissal.

¹¹⁴ Substantive fairness is determined by evaluating whether the employee has broken a rule, whether the employee knew about the rule, whether the rule is valid and fair, whether the rule been applied consistently and whether dismissal is the appropriate sanction.

¹¹⁵ *Malelane Toyota v CCMA* [1999] 6 BLLR 555 (LC); *Venture Holdings Ltd t/a Williams Hunt Delta v Biyana & others* (1998) 19 ILJ 1266 (LC).

It is clear that Schedule 8 does not provide an employee with the right to an internal appeal hearing. It is, however, unclear whether an employee has such a clear right if the employer's disciplinary code makes provision for the right to appeal. May an employee deviate from his or her disciplinary code and procedure under certain circumstances?

In *Denel v Vorster*,¹¹⁶ the Supreme Court of Appeal adopted the approach that employers are bound by their own codes and procedures to the same extent as a person would be bound by a contract. However, the labour courts have preferred to follow a more lenient and flexible point of view in respect of the interpretation of disciplinary codes when they relate to an internal appeal hearing.

In *Highveld District Council v CCMA & others*,¹¹⁷ the Labour Appeal Court held that even if an employer deviates from a disciplinary code, it could still constitute a fair procedure if the actual procedure followed could still be deemed to be fair. An employee therefore, has no statutory right to an internal appeal hearing unless the employer's disciplinary code and procedure makes provision for an appeal process.

In *Dell v Seton (Pty) Ltd & others*,¹¹⁸ the Labour Court preferred the *Highveld District Council* approach above the position that was adopted in *Denel v Vorster*. In this instance, the Labour Court held that the failure to grant the applicant an appeal hearing, even though it was required in terms of the employer's disciplinary code, was not procedurally unfair, as the employee had not been prejudiced in any way.

¹¹⁶ (2004) *ILJ* 659 (SCA).

¹¹⁷ [2002] 12 BLLR 158 (LAC).

¹¹⁸ [2009] 2 BLLR 122 (LC).



It is submitted that the approach in *Denel v Vorster* is too strict and rigid and that the approach adopted in *Highveld District Council* is to be preferred. It is further submitted that an employer's disciplinary code and procedure, as well as the contract of employment, must be a guideline to assist both the employer and the employee and that deviations are permitted under certain circumstances. The conflicting approaches by the Supreme Court of Appeal and the Labour Appeal Court can be overcome by the employer if it is clearly stated in both the contract of employment and the disciplinary code that it is just a guideline and that it can be deviated from under certain circumstances.

Schedule 8 states clearly that the employer is obliged to remind the employee of his or her right to refer a dispute to an appropriate bargaining council or the CCMA.¹¹⁹ This, in fact, is a reminder to the employee of his or her right to an external appeal against the dismissal to a higher authority.

5.10 Item 4(4) – Dispensing with pre-dismissal procedures

Item 4(4) of Schedule 7 states that, in exceptional circumstances the employer may dispense with pre-dismissal procedures:

“[I]n exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre – dismissal procedures.”

Schedule 8 does not stipulate what these exceptional circumstances are. However, two broad categories of exceptional circumstances have been identified by the former Industrial Court, namely: the crisis-zone

¹¹⁹ See article 8(1) of ILO Convention C158 and the discussion in par 3.2.2.

situation; and where employee waives his or her right to a pre-dismissal hearing.¹²⁰

A crisis-zone situation normally refers to a situation where an employer has to act immediately in order to protect life and property; for example in *Lefu & others v Western Areas Gold Mine*,¹²¹ employees engaged in strike action that was so violent that nine employees were killed and 304 were injured. The mine decided to dismiss 206 employees for misconduct during the strike without following any formal procedures. The mine argued that it would have been impossible to hold hearings. The Industrial Court accepted this argument and held that the question of whether or not the employer was dealing with a crisis-zone situation was one of fact.¹²²

In my opinion, the crisis-zone situation should only be accepted as an excuse by the CCMA and the labour courts in highly exceptional circumstances; and it is submitted that the onus to prove this should remain on the employer, who has to establish that the situation was so serious that the employer had no other choice.

Waiver in law occurs when a person, with full knowledge of a legal right, abandons it. This can occur where an employee has been duly notified to attend a disciplinary enquiry, but refuses to attend the proceeding or in the situation where an employee abuses the employer during the enquiry.¹²³

¹²⁰ Grogan (2007) 297.

¹²¹ (1985) 6 ILJ 307 (IC).

¹²² The facts in the *NUM v Buffelsfontein Gold Mining Co Ltd* (1988) 9 ILJ 341 (IC) were similar to that in the *Lefu* case. The court held that the dismissal was fair and that the failure to hold an enquiry was understandable under the circumstances. Also see Basson (2002) 197.

¹²³ Basson (2002) 198; *Food & Beverages Workers Union & others v Hercules Cold Storage (Pty) Ltd* (1990) 11 ILJ 47 (LAC).

The absence of an employee due to illness does not justify dispensing with an enquiry. In such circumstances, it is advisable to postpone the enquiry.¹²⁴ It would also serve the employer well to remember that an employee who fails to attend an enquiry without any valid reason only waives his or her right to state his or her case. The employee does not waive his or her right to a fair dismissal. The dismissal must still be procedurally and substantively fair; and it is advisable that the formal disciplinary enquiry, albeit in the absence of the employee, should still be conducted.¹²⁵

Even though Schedule 8 allows an employer to dispense with a pre-dismissal enquiry under exceptional circumstances, the employer should as far as possible conduct an enquiry. What an employer may consider to be exceptional circumstances may very well be regarded as less than a crisis-zone situation when viewed objectively by a CCMA commissioner.

5.11 Conclusion

In the period from 1980 to 1995, the former Industrial Court played a significant role in the development of dismissal law. For a long time the Industrial Court applied the “flexible package” with regard to dismissal and disciplinary enquiries. In *Mahlangu v CIM Deltak*, a formal checklist approach was required, which led to an almost court-like approach in the handling of discipline and disciplinary enquiries. Employers responded to this approach by adopting formal court-like disciplinary codes. With the adoption of the LRA and Schedule 8, the legislature

¹²⁴ *Hayward v Protea Furnishers* [1997] 5 BLLR 632 (CCMA).

¹²⁵ Basson (2002) 198. Also see *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] 8 BLLR 699 (SCA).

has tried to reverse this situation. There has since been a different and more informal approach towards the handling of disciplinary enquiries.

It is clear that Schedule 8 does not require a formal checklist approach. Schedule 8 attempts to ensure that justice is still done and explains what is meant by an “enquiry” in item 4(1). Schedule 8 is not a binding act or a fixed code, nor does it provide for a formal checklist. It is clear, but with some adjustments it can be clarified even further. This can include moving the item on mutual respect to the first part of Schedule 8, resolving the uncertainty with regard to what is meant by an “investigation” and an “enquiry”, giving examples of exceptions such as “crisis-zone” situations and explaining what is meant by “consulting” with a trade union when it comes to disciplining a shop steward.

It is submitted that employers are wrong when they claim that strict formal court-like procedures must be followed because such procedures are ostensibly, required by Schedule 8 or by the CCMA and the Labour Court. The judgments and rulings referred to earlier in this chapter, even before *Avril Elizabeth Home for the Handicapped v CCMA*, clearly show that it is not the case. It is inaccurate to claim that in terms of its content Schedule 8 is too strict.

The principles of flexibility and generality are clearly contained in Schedule 8 as it is not set in stone. The commissioners of the CCMA are compelled to take Schedule 8 into consideration when they arbitrate unfair dismissal disputes.¹²⁶ The guidelines on procedural fairness in disciplinary enquiries as contained in items 4(1) – (4) of Schedule 8 are vastly different from and much more flexible than the requirements as set out in *Mahlangu v CIM Deltak*.

¹²⁶ Section 138(6) of the LRA.

Schedule 8 must not be read as a strict code that must be followed under all circumstances. It is a guideline for employers, employees, trade unions and CCMA commissioners. Item 1(1) states that deviations and departures from the norms established by the code may be justified in proper circumstances. Schedule 8 merely requires the employer to:

- i. notify the employee of the allegations;
- ii. provide a notice in a form or language that the employee can reasonably understand;
- iii. provide the employee with reasonable time to prepare him- or herself;
- iv. allow the employee to be represented by a trade union representative or fellow employee; and
- v. inform the employee of decision taken and inform the employee of the right to refer a dispute to the CCMA or a bargaining council.

Where an employer's disciplinary code states that it is binding and forms part of the contract of employment, employers are obliged to follow that code, but if the employer's disciplinary code states that it is a guideline, deviations from it will be permissible in certain circumstances. This principle can also be included in Schedule 8 to provide greater certainty for employers and employees.

In the next chapter, a comparative analysis is done of the dismissal law in South Africa compared to Convention C158 and dismissal law as found in the Netherlands, the UK and the USA.

CHAPTER 6

SOUTH AFRICAN DISMISSAL LAW COMPARED TO INTERNATIONAL PERSPECTIVES

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6.1 Introduction

In chapter 3, an analysis of supranational instruments was presented, paying special attention to the procedural requirements for a dismissal as found in Convention C158. An overview of the dismissal regimes implemented in the Netherlands, the UK and the USA was also given, evaluating whether these jurisdictions comply with ILO principles. In chapter 4, the sources of law in South Africa pertaining to dismissal were discussed and, in chapter 5, a comprehensive analysis of items 1 to 4 of Schedule 8 was conducted.

It transpired from the investigation that was done in chapter 3 that three core principles with regard to requirements for a dismissal stand out, namely:

- i. there must be a valid reason before an employee can be dismissed;¹
- ii. an employee must have the right to defend him– or herself against the allegations made by the employer;² and
- iii. there must be a right to appeal.³

In this chapter, South African dismissal law is compared with the three core principles of Convention C158, because it is one of the stated purposes of the LRA:

“[t]o give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation.”⁴

¹ See article 4 of Convention C158 and the discussion in par 3.2.2 above.

² See article 7 of Convention C158 and the discussion in par 3.2.2 above.

³ See article 8 of Convention C158 and the discussion in par 3.2.2 above.

⁴ S 1(b) of the LRA.

Then the dismissal law of the Netherlands, the UK and the USA is compared with the current position in South Africa. It is submitted that the claim by employers, albeit anecdotal, that the CCMA and labour courts in South Africa over-emphasise the procedural requirements for disciplinary enquiries cannot be looked at in isolation.⁵

The purpose of the investigations in this chapter is to establish to what extent the position in South Africa adheres to the benchmarks established by the ILO and to determine whether South African labour law is in fact over-regulated and too stringent in respect of its dismissal law.

6.2 South African dismissal law and Convention C158

6.2.1 Valid reason for dismissal

As mentioned in chapter 3, article 4 of Convention C158 provides that an employee shall not be dismissed unless there is a valid reason for such termination. 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.⁶

As stated in chapter 4, 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

⁵ Wisskirchen “The Standard-setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience.” (2005) *International Labour Review* 144(3) 253.

⁶ Van Arkel (2007) 322; Kuip *Ontslagecht met Bijzondere Aandacht voor de Dringende Reden* (1993) 280; Sims “Judicial decisions concerning dismissals: Some recent cases” (1995) *International Labour Review* 134(6) 675.

- (ii) based on the employer's operational requirements;
and
- (iii) that the dismissal was effected in accordance with a fair procedure."

This is also reflected in Schedule 8 item 2(1) which stipulates that a dismissal is unfair if it is not effected for a fair reason. The reasons for a dismissal relate to substantive fairness (given the delimitations of the scope of this study, this topic is not dealt with in more detail). From the above it is clear that the first core principle as found in article 4 of Convention C158 has been given effect to in South African dismissal law.

6.2.2 Right of an employee to defend him- or herself against allegations

As discussed in chapter 3, article 7 of Convention C158 states that an employee may not be dismissed for reasons based on conduct or performance before he or she is provided with an opportunity to defend him- or herself against the allegations made.

This is the only pre-dismissal procedure required by Convention C158. A closer look shows that the employee must merely be afforded an opportunity to defend him- or herself against allegations. Article 7 does not provide any further guidance on details regarding pre-dismissal procedures and it can only be presumed that the intention was that it would be left to the devices of individual countries to establish their own guidelines in this regard. One aspect that is clear, however, is that formal procedures akin to court procedures were not envisaged when Convention C158 was introduced.

It has become standard practice in terms of most disciplinary codes and procedures that the right to defend oneself means more than some *pro forma* meeting at which a supervisor politely listens to the excuses for the misconduct as tendered by the employee.⁷ As discussed in chapters 4 and 5, in 1986 the former Industrial Court of South Africa in *Mahlangu v CIM Deltak*⁸ interpreted the right to defend oneself to include a checklist of strict court-like procedures.

However, with the implementation of the LRA and Schedule 8 in 1995, the South African legislature has made an attempt to move away from over-proceduralising disciplinary enquiries. Schedule 8 introduced a break with the traditional formalistic checklist approach, which had been developed for disciplinary enquiries by the Industrial Court.⁹

Schedule 8 item 4(1) states the following:

“The employee should be allowed the opportunity to state a case in response to the allegations.”

The wording in Schedule 8 in this regard is very similar to that found in Convention C158.

In the *Avril Elizabeth Home for the Handicapped v CCMA*¹⁰ judgment, the right to state a case was summarised by Van Niekerk J to mean the following:

⁷ According to Redeker *Discipline: Policies and Procedures* (1983) 26. See also *Cycad Construction (Pty) Ltd v CCMA and others* (1999) (LC) case number J891/98 on page 8, where the court stated that requiring the employer to hear both sides of the story limits the harm that a wrong decision can cause. It is also not a requirement for a disciplinary enquiry to strict and formalistic.

⁸ (1986) 7 *ILJ* 346 (IC) 365. See discussion in par 4.3.1 above.

⁹ Van Eck “Latest Developments Regarding Disciplinary Enquiries” (2002) *South African Journal of Labour Relations* (26) 3 26.

¹⁰ (2006) 27 *ILJ* 1466 LC.



“[I]t means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.”

The *Avril Elizabeth Home for the Handicapped* judgment indicates a clear and definite break with the court-like procedures of the formal Industrial Court and especially with the procedural requirements as laid down in the *Mahlangu v CIM Deltak* matter. It is submitted that the *Avril Elizabeth Home for the Handicapped* judgment interprets item 4(1) of Schedule 8 correctly. Convention C158 does not require a strict formal procedure either. The main reason for a disciplinary enquiry is to determine the real reason for a dismissal; and if the real reason can be determined in an informal disciplinary process, it is sufficient. This is exactly what the judgment in *Avril Elizabeth Home for the Handicapped* states.

The right of an employee to respond against the allegations of his or her employer is contained in South African dismissal law.

Item 4(1) of Schedule 8 expands on this principle and provides that before an employee can respond against the allegations made by the employer the employer merely has to:¹¹

- i. notify the employee of the allegations;
- ii. provide a notice in a form or language that the employee can reasonably understand;
- iii. provide the employee must have reasonable time to prepare him- or herself, and
- iv. provide the employee the opportunity to be represented by a fellow employee or trade union representative; and

¹¹ These pre-dismissal rights are discussed in detail in chapter 5 above.

- v. after the enquiry the employee must be informed of the decision taken and reminded of his- or her right to refer a dispute to the CCMA or a bargaining council.

In my view, these aspects have to be treated as guidelines and not as a fixed checklist.

Article 7 of Convention C158 also states that an employee must be given an opportunity to defend him- or herself “unless the employer cannot be reasonably be expected to provide this opportunity.”¹² Just as in article 7 of Convention C158, Schedule 8 item 4(4) also provides that in exceptional circumstances the employer may dispense with the pre-dismissal procedures.¹³

It is submitted that South African dismissal law, without doubt, complies with article 7 of Convention C158. Item 4(1) of Schedule 8 even goes beyond article 7 and provides guidance on how the right to respond against the allegations made by the employer should occur. Despite this, Schedule 8 retains an informal and reasonably open-ended character.¹⁴

6.2.3 Right to appeal

The third core principle contained in Convention C158 relates to the right to appeal. As mentioned in chapter 3, article 8 of Convention C158 states that an employee who feels that his- or her dismissal was unjustified “shall be entitled to appeal against that termination to an

¹² The complete Convention C158 is attached to this study as annexure 4.

¹³ These exceptional circumstances can include crisis-zone situations and where an employee waives his or her right to a disciplinary enquiry. See the discussion of item 4(4) in par 5.10 above.

¹⁴ One danger of being open ended is that it can lead to uncertainty and different interpretations as discussed in chapter 1.

impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.”

Article 8 refers to the right of appeal to an impartial body and it does not refer to a higher level of appeal within the organisation or a higher level of management after the opportunity to defend him- or herself has been given.¹⁵

As is the case with ILO principles, there is no explicit statutory right to an internal appeal hearing in South African dismissal law.¹⁶ However, item 4(3) of Schedule 8 provides that “the employee should be ... reminded of any rights to refer the matter to a council with jurisdiction or the Commission or to any dispute resolution procedures established in terms of a collective agreement.” This can be viewed as an external appeal.

From the above it is clear that the employer is obliged to remind the employee of his or her right to refer a dispute to an appropriate bargaining council or the CCMA.¹⁷ This in fact reminds the employee of his- or her right to appeal in accordance with article 8 of Convention C158 against his or her dismissal to an impartial body.

The arbitration process at the CCMA is a *de novo* process¹⁸ and is regarded as an adequate substitute for an internal appeal hearing.

From the above it is clear that South African dismissal law adheres to the third core principle as contained in article 8 of Convention C158.

¹⁵ See the discussion in par 3.2.2 above.

¹⁶ See the discussion in par 5.9 above.

¹⁷ See article 8(1) of Convention C158 and the discussion in par 3.2.2 above.

¹⁸ *Malelane Toyota v CCMA and others* [1999] 6 BLLR 555 (LC).

6.3 South Africa and the Netherlands

The analysis of the dismissal law of the Netherlands that was undertaken in chapter 3, has indicated that the Netherlands adheres to the first and third of the core principles, but not to the second requirement.¹⁹

In the Netherlands, the employer needs permission from the *CWI* to dismiss an employee, as the actual decision to dismiss an employee is not taken by the employer. The employer does not need to follow any procedural requirements in the case of a summary dismissal. The employee should only be given the reasons for the dismissal.²⁰ It is submitted that in the Netherlands substantive fairness, (the reasons for dismissal), is of greater importance than procedural fairness in dismissal disputes. No provision is made for internal disciplinary enquiries at the workplace. An employee who believes his or her dismissal to be unjustified can challenge the dismissal by lodging an application in the District Court.²¹

In terms of South African dismissal law, every employee has the right not to be unfairly dismissed,²² and a dismissal will be deemed unfair if it is not based on a fair reason and if it was not conducted in accordance with a fair internal disciplinary enquiry.²³ The procedural fairness of a dismissal is measured against the guidelines contained in Schedule 8 of the LRA. The decision to dismiss is taken by the employer, but an employee who believes that his or her dismissal was unfair can refer a

¹⁹ See the discussion in par 3.3.4 above.

²⁰ Coopers & Lybrandt (1995) 293.

²¹ Coopers & Lybrandt (1995) 294.

²² Ss 185(a) and 185(b) of the LRA.

²³ S 188 of the LRA and item 2(1) of Schedule 8.

dispute to the CCMA or bargaining council for conciliation and arbitration.

In South African dismissal law, the employer is obliged to have a pre-dismissal enquiry, which is not a requirement in the Netherlands. The right to a pre-dismissal enquiry in South Africa is also applicable to employees on probation, which is not the case in the Netherlands.

From the above it is clear that the dismissal law in the Netherlands places a heavy emphasis on the reasons for dismissal and no prescribed pre-dismissal procedure (such as an internal disciplinary enquiry), needs to be followed. The fairness of a dismissal in terms of South African dismissal law would be determined on both substantive and procedural grounds. Certain pre-dismissal procedures as provided for in item 4(1) of Schedule 8 need to be followed.²⁴ There are no clear similarities between the dismissal law of South Africa and that of the Netherlands regarding the internal disciplinary enquiries. However, there are similarities in respect of substantive fairness for a dismissal and the right to refer a dispute to the CCMA in South Africa and the District Court in the Netherlands. The procedural requirements for a dismissal differ vastly between the two countries.

6.4 South Africa and the United Kingdom

The analysis of the dismissal law of the UK that was undertaken in chapter 3 has indicated that the UK adheres to all three of the core principles of Convention C158.²⁵

²⁴ The pre-dismissal procedures that need to be followed have been discussed in detail in par 5.7 above.

²⁵ See the discussion in par 3.4.4 above.

In the UK section 98(1)(b) of the ERA stipulates that there must be a fair reason for dismissal. Section 98(2)(a-d) provides examples of fair reasons for dismissal. This can include, capabilities, conduct, redundancy and contravention of a statute. This is in compliance with the first core principle of Convention C158; and the same principle is found in section 188(1)(b) of the LRA in South Africa. Examples of fair reasons for a dismissal are found in item 3(4) of Schedule 8.

In compliance with the second core principle of Convention C158, the right to state a case in response to the allegations made by the employer, both the UK's and South Africa's labour legislation makes provision for a pre-dismissal enquiry to be conducted.²⁶ The pre-dismissal procedures in South Africa as stipulated in item 4(1) of Schedule 8 are very similar to the pre-dismissal procedures in the UK as found in Schedule 2 of the EA. However, it should be noted that in the UK, employees with less than one year of continuous service are not protected against unfair dismissal; and no pre-dismissal procedures need to be followed. South African dismissal law does not make this distinction and pre-dismissal procedures need to be followed even if the employee is employed on probation, as is stipulated in item 8(1)(h) of Schedule 8.

The third core principle of Convention C158, which makes provision for the right to appeal against a dismissal to an independent impartial body is embodied in both UK and South African labour legislation and is similar in nature. In the UK, the appeal is directed to the Employment Tribunal and to ACAS.²⁷ In South Africa, the appeal is directed to the

²⁶ In the UK the different steps to be followed in a pre-dismissal enquiry are found in Schedule 2 of the EA and in South Africa it is found in item 4(1) of Schedule 8 of the LRA see the discussions in par 3.4.3 and in par 5.7 above.

²⁷ See the discussion in par 3.4.4 above.

CCMA.²⁸ One important difference is that, in the UK, there is a compulsory internal appeal process, which is not the case in South Africa.

It is argued that it is not necessary for South Africa to include the right to an internal appeal in its unfair dismissal law. Such a change would introduce more formal requirements into the South African framework, a move that would go against the purpose of the amendments that were introduced in 1995.

It is submitted that the dismissal law in South Africa and in the UK are very similar in nature.

6.5 South Africa and the United States

From the analysis of the dismissal law in the USA that was done in chapter 3, it is clear that the USA does not adhere to any of the three core principles of Convention C158.²⁹

The first core principle of Convention C158, which requires a fair reason for a dismissal, is absent from USA dismissal law as the employment-at-will doctrine stipulates that an employee's services can be terminated for "good cause, for no cause or even a cause morally wrong."³⁰ This is in total contrast to the scenario in South Africa as item 2(1) of Schedule 8 states that a dismissal will be deemed unfair if it is not effected for a fair reason. Item 3(4) of Schedule 8 gives examples of forms of misconduct that may justify a dismissal.

²⁸ See the discussion in par 6.2.3 above.

²⁹ See the discussion in par 3.5.4 above.

³⁰ *Payne v Western & Atlantic Railroad Co (1884) Tenn. 519-520.*

The second core principle of Convention C158 makes provision for an employee to defend him- or herself against the allegations made by the employer. This principle is also absent from USA dismissal law, as no provision is made for any pre-dismissal procedures. However, private sector employees who are subject to a collective agreement, where the collective agreement includes a disciplinary procedure, enjoy some form of protection against arbitrary dismissals in general.³¹ In this regard, there is no similarity of any kind with South African dismissal law. Item 4(1) of Schedule 8 makes provision for certain guidelines to be followed when conducting a disciplinary enquiry, where the employee gets an opportunity to defend him- or herself against the allegations made by the employer.³¹ These pre-dismissal procedures that have to be followed are applicable to all employees in South Africa.³²

The third core principle of Convention C158 relates to the right to appeal against a dismissal. This principle is not adhered to in USA dismissal law. South African dismissal law, by contrast makes provision in item 4(3) of Schedule 8 for the right of an employee to appeal against his- or her dismissal to a bargaining council or the CCMA.³³

In terms of the dismissal law of South Africa and that of the USA there is no similarities of any kind with regard to the three core principles of Convention C158.

³¹ Busse *Your Rights at Work* (2005) 143.

³¹ See the discussion in par 5.7 above.

³² See the discussion in par 5.1 above for the categories of employees that are excluded from the ambit of the LRA.

³³ See the discussion in par 5.9 above.

6.6 Conclusion

South Africa, the Netherlands, the UK and the USA have not ratified Convention C158. This would suggest that these countries do not regard pre-dismissal procedures for misconduct as very important and that Convention C158 is not viewed as a core Convention of the ILO.

However, although Convention C158 has not been ratified by South Africa it can still be used as a guideline. The South African Constitution requires that cognisance must be taken of international law.³⁴ Convention C158 does not require the strict rules as spelled out in the *Mahlangu v CIM Deltak*³⁵ matter. The three core principles of Convention C158 are much closer to the *Avril Elizabeth Home for the Handicapped*³⁶ judgment. It is submitted that the *Avril Elizabeth Home for the Handicapped* judgment interprets Convention C158 correctly and has put South Africa on the right track again.³⁷ Convention C158 does not contain precise details, but provides general requirements, which would indicate that strict formalism is not required. The reason for a dismissal is important and the procedure followed during the disciplinary enquiry should merely assist in determining whether or not the reason is a valid and fair reason that justifies dismissal. It is submitted that, if the reason for a dismissal can be determined during an informal and flexible procedure, as is required by Convention C158 and Schedule 8, it is sufficient.

From the discussion above, it is clear that South Africa's dismissal law gives effect to the three core principles of Convention C158. The

³⁴ S 233 of Constitution of South Africa Act 106 of 1996.

³⁵ (1986) 7 ILJ 346 (IC) 375.

³⁶ (2006) 27 ILJ 1466.

³⁷ The *Avril Elizabeth Home* judgment is discussed in more detail in chapter 5 of this thesis.

comparison with the dismissal law in the Netherlands, the UK and the USA also indicates that South Africa's dismissal law is vastly different to that of the Netherlands and especially the USA, but that there are some similarities with the dismissal law in the UK.

It is further submitted that, contrary to popular belief, South Africa's dismissal law is not over-regulated and rigid in terms of disciplinary enquiries when compared to Convention C158, and the three international jurisdictions selected for comparison. It is further submitted that employers, employees, trade unions and CCMA commissioners alike have over-emphasised procedural fairness, which is not required, by either Convention C158 or South Africa's dismissal law.³⁸

In the next chapter, the research findings are analysed in terms of the results of the literature review and the peer review. The results are interpreted to show the different approaches towards procedural fairness and the circumstances to be considered in the assessment of procedural fairness.

³⁸ In *NUM obo Mathete v Robbies Electrical* [2009] 2 BALR 182 (CCMA) the commissioner stated the "criminal justice model" no longer applies to disciplinary proceedings in the workplace.