BIBLIOGRAPHY

Anon. CCMA (2006) *Annual Report 2005 / 2006*. CCMA, Johannesburg.

Anon. CCMA (2007) *Annual Report 2006/2007.* CCMA, Johannesburg.

Anon. CCMA Info Sheet: Disciplinary Procedures. http://ccma.org. (downloaded 20 October 2007).

Autor, DH (2001) *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. Boston, MA: MIT Press.

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

Basson, A, Christianson, M, Garbers, C, Le Roux, PAK, Mischke, C and Strydom, EML (2002a) *Essential Labour Law. Volume 1: Individual Labour Law.* Johannesburg: Labour Law Publications.

Basson, A, Christianson, M, Garbers, C, Le Roux, PAK, Mischke, C and Strydom, EML (2002b) *Essential Labour Law. Volume 2: Collective Labour Law.* Johannesburg: Labour Law Publications.

Basson, A, Christianson, M, Garbers, C, Le Roux, PAK, Mischke, C and Strydom, EML (2007) *Essential Labour Law.* Johannesburg: Labour Law Publications.

Bell, AC (2006) *Employment Law*. London: Sweet & Maxwell.

Bendix, S (2007) *Industrial Relations in South Africa.* Landsdowne: Juta.

Bennet, M (1996) "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". *Montana Law Review* 57(1).

Bercusson, B, Clauwaert, S and Schömann, I (2002) *European Labour Law and the EU Charter of Fundamental Rights.* Brussels: European Trade Union Institute.

Bies, R and Moag, JS (1986) "Interactional Justice: Communication Criteria of Fairness" in Lewichi, Sheppard, Bazerman (eds) *Research on Negotiations in Organizations*. Greenwich: JAI.

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

Blanpain, R (2003) *European Labour Law.* The Hague: Kluwer Law International.

Blanpain, R and Weiss, S (2003) *Changing Industrial Relations and Modernisation of Labour Law*. The Hague: Kluwer Law International.

Bogdan, RC and Biklen, SK (1982) *Qualitative Research for Education: An Introduction to Theory and Methods*. Boston, MA: Allyn and Bacon.

Brand, J and Lötter, C (1997) *Labour Dispute Resolution*. Kenwyn: Juta.

Brassey, MSM (1993) *The Common-law Right to a Hearing Before Dismissal.* Johannesburg: Ravan.

Brassey, MSM Cameron, E, Cheadle, H and Olivier, M (1987) *The New Labour Law.* Landsdowne: JUTA.

Busse, RC (2005) *Your Rights at Work*. New York: Sphinx.

Cameron, E (1986) *"*The Right to a Hearing Before a Dismissal (Part 1)". 7 *ILJ* 183.

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

Cheadle, H (2006a) "Over–proceduralising Misconduct and Capacity Dismissals: How Do We Get out of this Mess?". SASLAW Newsletter December.

Cheadle, H (2006b) "Labour Relations". In Cheadle, H, Davis, DM and Haysom, N (eds) (2006). South *African Constitutional Law: The Bill of Rights*. Landsdowne: JUTA.

Cheadle, H (2006c) "Regulating Flexibility: Revisiting the LRA and BCEA". 27 *ILJ* 663.

Cheadle, H (2007) "Labour Law and the Constitution". Paper presented at SASLAW Conference, October, Cape Town.

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

Coetzee, M (2004) *The Fairness of Affirmative Action: An Organisational Justice Perspective.* Unpublished PhD thesis. Pretoria: University of Pretoria.

Collins English Dictionary (1979) London & Glasgow: Collins.

Cooper, GL and Robertson, IT (eds) (2001) *International Review of Industrial and Organizational Psychology*. Volume 16. New York: Wiley.

Coopers & Lybrand (1995) *Employment Law in Europe*. London: Gower.

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

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

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

Deutsch, M (2000) *Justice and Conflict. The Handbook of Conflict Resolution: Theory and Practice*. New York: Wiley.

Diebels, M (2007) *De Kleine Gids voor het Nederlandse Arbeidsrecht*. Den Haag: Kluwer Law International.

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

Du Toit, D (2007) “What is the Future of Collective Bargaining (and Labour Law) in South Africa?”. 27 *ILJ* 1405.

Du Toit, D, Bosch, D, Woolfrey, D, Godfrey, S, Cooper, C, Giles, G, Bosch, C and Rossouw, J (2006) *Labour Relations Law: A Comprehensive Guide.* Durban: LexisNexis.

Ehlers, L (2007) *Labour Relations, Systems, Procedures and Practice*. Pretoria: EAMS.

Eisner, EW (1991) *The Enlightened Eye. Qualitative Inquiry and the Enhancement of Educational Practice.* New York, NY: Macmillan.

Feagin, T, Orum, A and Sjoberg, G. (eds). (1991) *A Case for Case Study*. NC: University of North Carolina Press.

Finnemore, M (2006) *Introduction to Labour Relations in South Africa*. Durban: LexisNexis, Butterworths.

Folger, R and Cropanzano, R (2001) *Fairness Theory: Justice as Accountability*. In J. Greenberg and R. Cropanzano (eds). Advances in Organizational Justice. Stanford: Stanford University Press.

Genderen, DM Dragstra, HA Fluit, PS, Stefels, ME, Steverink, EATM, Witte, WGMJ and Wolf (2006) *Arbeidsrecht in de Praktijk.* Den Haag: SDU.

Gleason, SE and Roberts, K (1993) “Worker Perceptions of Procedural Justice in Workers Compensation Claims: Do Unions Make a Difference?”. *Journal of Social Psychology*.

Godfrey,S, Maree, J and Theron, J (2006) “Regulating the Labour Market: The Role of Bargaining Councils”. 19 *ILJ* 27.

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

Greenberg, J. (1990) “Organizational Justice: Yesterday, Today and Tomorrow”. *Journal of Management*. Volume 16.

Grobler, P and Wärnich, S (2006) *Human Resources Management in South Africa.* London: Cengage Learning.

Grogan, J. (2003) *Workplace Law*. Landsdowne: JUTA.

Grogan, J. (2007) *Dismissal Discrimination & Unfair Labour Practices*. Landsdowne: JUTA.

Hendrickx, F (2006) “10 Jaar Europees Arbeidsrecht: Diversiteit Gekoppeld aan Sociale Grondrechten”*. Arbeid Integraal* 3.

Hepple, B (2008) “Harmonisation of Labour Law: Level the Playing Field or Minimum”. Paper delivered at the Society of Law Teachers of Southern Africa. Pretoria.

Israelstam, I (2007) “Hearings Must be Formal, and Also Fair”. *Labour Guide* Newsletter. www.labourguide.co.za (downloaded on 24 January 2007).

Israelstam, I (2007) “You Cannot Dismiss Without Following Procedure”. *Labour Guide* Newsletter July (1) www.labourguide.co.za (downloaded 17 July 2007).

Israelstam, I (2008) “Don’t *Underestimate the Investigation Process*”. *Labour Guide* Newsletter. www.labourguide.co.za. (downloaded on 12 March 2008).

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

Kleyn, D and Viljoen, F (2009) *Beginner’s Guide for Law Students*. Cape Town: JUTA.

Klik, J (1994) *Onderzoek naar de Amerikaanse Recht.* Den Haag: Jongbloed Juriddische Boekhandel.

Koevoets, MM (2006) *Wangedrag van Werknemers*. Den Haag: Boom Juridische Uitgevers.

Kuip, SW (1993) *Ontslagecht met Bijzondere Aandacht voor de Dringende Reden*. Den Haag: Kluwer Law Interantional.

Lawshe, CH (1975) “A Quantitative Approach to Content Validity”. *Personnel Psychology* . Volume 17(3).

Le Roux, PAK (1998) “The CCMA Reviewed: The Labour Court Lays Down the Law for Commissioners”. *CLL* 7(7).

Le Roux, PAK and Van Niekerk, A (1994) *The South African Law of Unfair Dismissal*. Kenwyn: JUTA.

Leventhal, GS (1976) “Fairness in Social Relationships”, in Thibaut, JW, Spence JT, Carson, RC (eds). *Contemporary Topics in Social Psychology*. General Learning Press. Morristown.

Leventhal, GS (1980) “What Should be Done With Equity Theory? New Approaches to the Study of Fairness in Social Relations”. *Social Exchange Theory*. Volume 11(3).

Levy, A (2007) *Espresso News Letter*. Standard Bank Business Banking.

Levy, A (2009) *Rewriting your Dismissal Procedures.* Master Class Seminar. Durban: LexisNexis.

Miles, MB and Huberman, MA (1984) *Qualitative Data Analysis: A Source Book of New Methods*. Beverly Hills, CA: Sage.

Mischke, C (2004) “Contractually Bound: Fairness, Dismissal and Contractual Terms”. *CLL* 13(9).

Mischke, C (2006) “Dispensing with the Disciplinary Hearing”. *Editorial*. http://www.irnetwork.org.za (downloaded on 18 February 2008).

Mischke, C (2007) “International Perspectives”. *Tokiso Review* Annual Report 2006/2007.

Murphy, K and Tyler, T (2008) “Procedural Justice and Compliance Behaviour: The Mediating Role of Emotions”. *European Journal of Social Psychology.* Volume 38.

Nelson, W (1980) “The Very Idea of Procedural Justice.” *Ethics*. Volume 90(4).

Patton, MQ (1990) *Qualitative Evaluation and Research Methods*. (2nd ed.) Newbury Park, CA: Sage.

Redeker, JR (1983) *Discipline: Policies and Procedures*. Johannesburg: Bna Books.

Simons, H (1980) *Towards a Science of Singular. Essays about Case Study in Educational Research and Evaluation.* Norwich: University of East Anglia, Centre for Applied Research in Education.

Sims, E (1995) “Judicial Decisions Concerning Dismissals: Some Recent Cases”*. International Labour Review*. Volume 134(6).

Stake, R (1995) *The Art of Case Research.* Newbury Park, CA: Sage.

Standler, W (2000) “History of At-Will-Employment in the USA”. http://www.rbs.2.com/atwill.htm (downloaded on 18 November 2009).

Strauss, A and Corbin, J (1990) *Basics of Qualitative Research. Grounded Theory Procedures and Techniques.* Newbury Park, CA: Sage.

Tang, TLP, Baldwin, S and Linda, JJ (1996) *Distributive and Procedural Justice as Related to Satisfaction and Commitment.* SAM Advanced Management Journal. Volume 61(3).

Thibaut, J and Walker, L (1978) "A Theory of Procedure". *California Law Review*. Volume 66.

TOKISO (2006) *Tokiso Review* 2005 / 2006. Johannesburg: Tokiso Dispute Settlement (Pty) Ltd.

TOKISO (2007) *Tokiso Review* 2006 / 2007. Johannesburg: Tokiso Dispute Settlement (Pty) Ltd.

Tyler, TR (1989) "The Psychology of Procedural Justice: A Test of the Group-value Model". *Journal of Personality and Social Psychology.* Volume 57.

Tyler, TR and Belliveau, MA (1995) "Tradeoffs in Justice Principles: Principles of Fairness" In Deutsch, M and Bunker, BB (eds) *Essays in Conflict, Cooperation and Justice: Essays Inspired by the Work of Morton Deutsch*. Jossey-Bass: San Fransico, CA.

Van Arkel, EG (2007) *A Just Cause for Dismissal in the United States and the Netherlands.* Den Haag: Boom Juridische Uitgevers.

Van den Berg, D (2008) *The Management of Occupational Health and Safety in the Security Industry: A Case Study.* Unpublished M Com Mini-dissertation. Pretoria: University of Pretoria.

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

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

Van Eck, BPS (2008) “The Right to a Pre-Dismissal Hearing In Terms of Common Law: Are The Civil Courts Misdirected”*. Obiter.*

Van Eck, BPS and Boraine, A (2008) “A Plea for the Development of Coherent Labour and Insolvency Principles on a Regional Basis in the SADC Countries”. *International Insolvency Law: Themes and Perspectives*.

Van Eck, BPS and Smit, PA (2008) *Programme in Disciplinary Enquiries*. CE@UP course material. University of Pretoria.

Van Erp, JHM and Smits, JM (2001) *Bronnen Europees Privaatrecht*. Den Haag: Boom Juridische Uitgevers.

Van Jaarsveld, SR and van Eck, BPS (2005) *Principles of Labour Law.* Durban: LexisNexis Butterworths.

Van Niekerk, A (1996) “The International Labour Organisation (ILO) and South African Labour Law”*. CLL* 5(12).

Van Niekerk, A (2006) *Regulating Flexibility and Small Business: Revisiting the LRA and BCEA – A Response to Halton Cheadle’s Draft. Concept Paper.* (Paper delivered at SASLAW Conference).

Van Niekerk, A and Linström, K (2006). *Unfair Dismissal*. Cape Town: Siber Ink.

Van Niekerk, A, Christianson, MA, McGregor, M, Smit, N and Van Eck, BPS (2008) *Law@work.* Durban: LexisNexis.

Van Voss, H (1992) *Ontslagrecht in Nederland en Japan.* Den Haag: Kluwer Law International.

Vermeulen, LP (2005) "Perceptions of Procedural Justice in the Retrenchment of Managers". *South African Journal of Industrial* Pschology. Volume 31(2).

Vermeulen, LP and Coetzee, M (2006) "Perceptions of the Dimensions of the Fairness of Affirmative Action: A Pilot Study". *South African Journal of Business* Management. Volume 37(2).

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

Wikipedia. http://en.wikipedia.org/wiki/National Labour Relations Act (downloaded on 7 August 2009).

Wisskirchen, A (2005) "The Standard-setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience". *International Labour* Review. Volume 144(3).

World Bank (2006) *Doing Business in 2006*. New York: World Bank Publication.

www.ilo.org. and www.ilolex.org. (Downloaded May 20, 2009).

Zapata-Phelan, CP, Colquitt, JA, Scott, BA and Livingston, B (2009) "Procedural Justice, Interactional Justice and Task Performance: The Mediating Role of Intrinsic Motivation". *Organizational Behaviour and Human Decision Process*.

TABLE OF CASES

Administrator, Transvaal & others v Zenzile & others (1991) (1) SA 532 (A).

Avril Elizabeth Home for the Handicapped v CCMA & Others [2006] 9 BLLR 883 (LC).

BMW (SA) (Pty) Ltd v Van der Walt (2000) 21 *ILJ* 113 (LAC).

Bosch v T H U M B Trading (Pty) Ltd (1986) 7 *ILJ* 341 (IC).

Boxer Superstores Mthatha and Another v Mbenya (2007) 8 BLLR 693 (SCA).

Brandfort v Metrorail Services (Durban) & others (2003) 24 *ILJ* 2269 (LAC).

Brown v Hicks (1902) 19 (SC) 314.

CEPPWAWU obo Limba v Consol Glass [2009] 5 BALR 431 (NBCCI).

Chamane v The Member of the Executive Council for Transport, Kwazulu-Natal & others [2000] 10 BLLR 1154 (LC).

Clearly v American Airlines Inc (1980) 168 Cal Rptr.722.

Commercial Catering & Allied Workers Union of SA & others v Rondalia Vakansie – Oorde Bpk t/a Buffelspoort Vakansie –Oord (1988) *ILJ* 871 (IC).

Commercial Catering & Allied Workers Union of SA v Wooltru Ltd t/a Woolworths (Randburg) (1989) 10 *ILJ* 311 (IC).

Commission v UK C-382/92 (1994).

Council for Scientific & Industrial Research v Fijen (1996) 17 *ILJ* 18 (A).

County Fair Foods (Pty) Ltd v CCMA & others (2003) 24 *ILJ* 355 (LAC).

Cycad Construction (Pty) Ltd v CCMA and others (1999) J891/98 (LAC).

De Jager v Minister of Labour & others [2006] 7 BLLR 654 (LC).

Dell v Seton (Pty) Ltd & others [2009] 2 BLLR 122 (LC).

Denel (Pty) Ltd v Vorster (2004) 25 *ILJ* 659 (SCA).

Eddels (SA) Ltd v Sewcharan & others (2000) 21 *ILJ* 1344 (LC).

ESKOM v NUMSA obo Galada and others [2000] 7 BALR 812 (IMSSA).

FAWU obo Mbatha & others v SASKO Milling and Baking [2007] 3 BALR 256 (CCMA).

Fedlife Assurance Ltd v Wolfaardt (2001) 12 BLLR 1301 (SCA).

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

Francovich v Italy C- 479/93, ECR (1995) 3843.

Frampton v Central Ind. Gas Co. (1973) 297N.E.2d 425 (Ind).

Fraser v Caxton Publishers [2005] 3 BALR 323 (CCMA).

Friedlander v Hodes (1944) CPD 169.

Gabaraane v Maseco Systems Integrators (Pty) Ltd [2000] 11 BALR 1231 (CCMA).

Hamata & another v Chairperson, Peninsula Technikon Disciplinary Committee & others (2002) 23 *ILJ* 1531 (SCA).

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

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

Highveld District Council v CCMA & others (2003) 24 *ILJ* 517 (LAC).

Hlope & others v Minister of Safety & Security & others [2006] 3 BLLR 297 (LC).

Hospersa obo Metwa v Department of Health [2003] 11 BALR 1232 (BC).

IMATU v Rustenburg Transitional Council (2000) 21 *ILJ* 337 (LC).

JDG Trading (Pty) Ltd v Brundson (2000) *ILJ* 501 (LAC).

Johannesburg Municipality v O'Sullivan (1923) AD 201.

Key Delta v Marriner (1998) 6 BLLR 647 (E).

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

Kinemas Ltd v Berman (1932) AD 246.

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

Le Roux v GWK Ltd (2004) 25 *ILJ* 1366 (BSA).

Lefu & Others v Western Areas Gold Mine (1985) 6 *ILJ* 307 (IC).

Leonard Dingler (Pty)Ltd v Ngwenya (1999) 20 *ILJ* 1711 (LAC).

Lucas v Brown & Root Inc. (1984) 736 F.2d 894 (8th Cir).

Madikane v Personnel Consultants [1998] 3 BALR 283 (CCMA).

Majola v MEC, Department of Public Works, Northern Province & others (2004) 25 ILJ 131 (LC).

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

Mckenzie v Multiple Admin cc (2001) 22 *ILJ* 2753 (CCMA).

MEC Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani (2004) 25 *ILJ* 2311 (SCA).

Mhlambi v Matjhabeng Municipality (2003) 24 *ILJ* 1659 (O).

Mahlangu v CIM Deltak (1986) 7 *ILJ* 357(IC).

MITUSA obo Clarke v National Ports Authority [2006] 9 BALR 861 (TOKISO).

Mogorosi v Northern Cape Bus Services CC [2000] 5 BALR 604 (IMSSA).

Mohala v Citibank (2003) 24 *ILJ* 417 (LC).

Molope v Mbha NO & others [2005] 3 BLLR 267 (LC).

Monge v Beebe Rubber Co. (1974) 316 A.2d 549 (N.H.).

Moropane v Gilbeys Distillers & Vintners (Pty) Ltd (1998) 19 *ILJ* 635 (LC).

Murray v Minister of Defence (2006) 27 *ILJ* 1607 (C).

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

NAAWU v Pretoria Precision Castings (Pty) Ltd (1985) 6 *ILJ* 369 (IC).

Nasionale Parkeraad v Terblanche (1999) 20 *ILJ* 1520 (LAC).

Nees v Hocks (1975) 536 P.2d 512 (Or).

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

NEHAWU v University of Cape Town [2003] 5 BLLR 409 (CC).

NEHAWU v University of Cape Town and others (2006) 24 *ILJ* 95 (CC).

Ngutshane v Ariviakom (Pty) Ltd t/a Arivia.kom & others [2009] 6 BLLR 541 (LC).

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

Ntshangane v Speciality Metals cc (1998) *ILJ* 584 (LC).

NUM obo Mathete v Robbies Electrical [2009] 2 BALR 182 (CCMA).

NUM v Buffelsfontein Gold Mining Co Ltd (1988) 9 *ILJ* 341 (IC).

NUM & another v Kloof Gold Mining Co (1986) 7 *ILJ* 375 (IC).

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

NUMSA obo Thomas V M & R Alucast [2008] 2 BALR 134 (MEIBC).

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

Old Mutual Life Assurance Co SA Ltd v Gumbi [2007] 8 BLLR 699 (SCA).

OTK Operating Company Ltd v Mahlanga [1998] 6 BLLR 556 (LAC).

Payne v Western & Atlantic. (1884) R.R.81 Tenn 507 (Tenn).

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

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

Phillips v Fieldstone Africa (Pty) Ltd & another (2004) 25 *ILJ* 1005 (SCA).

Potchefstroom Municipal Council v Bouwer (1958) (4) SA382 (T).

Prakash Bissoon v Lever Brothers (Pty) Ltd and Gavin Ward (2003) D242/03 (LC).

Price Busters Brick Company (Pty) Ltd v Mbileni and others (1985) 6 *ILJ* 369 (IC).

Rand Water Board v CCMA (2005) 26 *ILJ* 2028 (LC).

Riekert v CCMA and others [2006] 4 BLLR 353 (LC).

Rust Andre Francois v Royal Yard Holdings II and others (2001) Case number J4380/01 (LC).

SA Boilermakers, Shipbuilders & Welders Society & others v Roll Up South African (Pty) Ltd [2005] 10 BLLR 957 (LC).

SACWU obo Gabela & another v Afrox Ltd [2009] 4 BALR 333 (NBCCI).

SACCAWU v Diskom Discount Stores [1997] 6 BLLR 819 (CCMA).

SACCAWU obo Sekgopi v Kimberley Club [2000] 4 BALR 413 (CCMA).

SAPU & another v National Commissioner of the South African Police Services & another [2006] 1 BLLR 42 (LC).

Semenya & Others v CCMA & others [2006] 6 BLLR 521 (LAC).

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

Shoprite Checkers (Pty) Ltd v CCMA and others Case number J852/97 (1998) (LC).

Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC).

Sikhosana & others v Sasol Synthetic Fuels (2000) 21 *ILJ* 649 (LC).

Simela & Others v MEC for Education Eastern Cape & another [2001] 9 BLLR 1085 (LC).

Silicon Smelters (Pty) Ltd v NUMSA obo Makhobotloane [2000] 4 BALR 468 (IMSSA).

Smit v Workmen's Compensation Commissioner (1979) (1) SA 51 (A).

Steyn v Muscle Moose Health Bar [1998] 8 BALR 24 (CCMA).

TGWU obo Joseph and others v Grey Security Services (Western Cape)(Pty) Ltd [2004] 6 BALR 698 (CCMA).

Toerien v Stellenbosch University (1996) 17 *ILJ* 56 (C).

Transnet Ltd & others v Chirwa [2007] 1 BLLR (SCA).

Trustees for the Time Being of the National Bioinformatics Network Trust v Jacobson & others [2009] 8 BLLR 883 (LC).

Van Zyl v O'Okiep Copper Co Ltd. (1983) 4 *ILJ* 2053 (LC).

Venture Holdings Ltd t/a Williams Hunt Delta v Biyana & others (1998) 19 *ILJ* 1266 (LC).

Visser v Standard Bank of SA Ltd (2003) 24 *ILJ* 890 (CCMA).

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

Whitfield v Inyati Game Lodge [1995] 1 BLLR 118 (IC).

Wyeth SA (Pty) Ltd v Manqele & others [2005] 6 BLLR 523 (LAC).

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

TABLE OF STATUTES, CHARTERS AND CONVENTIONS

1. South African Statutes

Basic Conditions of Employment Act 75 of 1997.

Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Constitution of South Africa 108 of 1996.

Employment Equity Act 55 of 1998.

Industrial Conciliation Act 11 of 1924.

Labour Relations Act 28 of 1956.

Labour Relations Act 66 of 1995.

Mine Health and Safety Act 29 of 1996.

Occupational Health and Safety Act 6 of 1993.

Unemployment Insurance Act 63 of 2001.

2. Netherlands Statutes

Buitengewoon Besluit Arbeidsverhoudingen van 1944.

Burgerlijke Wetboek van 1945.

3. United Kingdom Statutes

Employment Act 2002.

Employment Relations Act 1999.

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

Equal Pay Act 1970.

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

4. United States of America Statutes

Age Discrimination in Employment Act of 1967.

Americans with Disabilities Act of 1990.

Civil Rights Act of 1964.

Equal Pay Act 1963.

Family and Medical Leave Act of 1993.

National Labour Relations Act (Wagner Act) 1935.

Race Relations Act 1976.

Sex Discrimination Act 1975.

Wrongful Discharge from Employment Act 1987.

5. Charters and Conventions

EU Charter on Fundamental Rights 2000.

European Constitution 2004.

ILO Convention C158.

ILO Termination and Employment Recommendation R166 1982.

SADC Charter on Fundamental Social Rights 2003.

ANNEXURE 1

CODE OF GOOD PRACTICE: DISMISSAL

1 Introduction

(1) 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 circumstances. For example, the number of employees employed in an establishment may warrant a different approach.

(2) This 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.

(3) 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.

2 Fair reasons for dismissal

(1) 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. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below.

(2) This Act recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the employee, the capacity of the employee, and the operational requirements of the employer's business.

(3) This Act provides that a dismissal is automatically unfair if the reason for the dismissal is one that amounts to an infringement of the fundamental rights of employees and trade unions, or if the reason is one of those listed in section 187. The reasons include participation in a lawful strike, intended or actual pregnancy and acts of discrimination.

(4) In cases where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.

3 Misconduct

Disciplinary procedures prior to dismissal

(1) All employers should adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business. In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules or standards maybe so well established and known that it is not necessary to communicate them.

(2) The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.

(3) 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 best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

Dismissals for misconduct

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross

insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

4 Fair procedure

(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

(2) 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.

(3) If the employee is dismissed, the employee should be given the reason 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.

(4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

5 Disciplinary records

Employers should keep records for each employee specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

6 Dismissals and industrial action

(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-

(a) the seriousness of the contravention of this Act;

(b) attempts made to comply with this Act; and

(c) whether or not the strike was in response to unjustified conduct by the employer

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

7 Guidelines in cases of dismissal for misconduct

Any person who is determining whether a dismissal for misconduct is unfair should consider-

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

8 Incapacity: Poor work performance

Probation

(1) *(a)* An employer may require a newly-hired *employee* to serve a period of probation before the appointment of the *employee* is confirmed.

(b) The purpose of probation is to give the employer an opportunity to evaluate the ***employee's*** performance before confirming the appointment.

(c) Probation should not be used for purposes not contemplated by this Code to deprive *employees* of the status of permanent employment. For example, a practice of dismissing *employees* who complete their probation periods and replacing them with newly-hired *employee*s, is not consistent with the purpose of probation and constitutes an unfair labour practice.

(d) The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the ***employee's*** suitability for continued employment.

(e) During the probationary period, the ***employee's*** performance should be assessed. An employer should give an *employee* reasonable evaluation, instruction, training, guidance or counselling in order to allow the *employee* to render a satisfactory service.

(f) If the employer determines that the ***employee's*** performance is below standard, the employer should advise the *employee* of any aspects in which the employer considers the *employee* to be failing to meet the required performance standards. If the employer believes that the *employee* is incompetent, the employer should advise the *employee* of the respects in which the *employee* is not competent. The employer may either extend the probationary period or dismiss the *employee* after complying with subitems *(g)* or *(h*), as the case may be.

(g) The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.

(h) An employer may only decide to dismiss an *employee* or extend the probationary period after the employer has invited the *employee* to make representations and has considered any representations made. *A trade union* representative or fellow *employee* may make the representations on behalf of the *employee*.

(i) If the employer decides to dismiss the *employee* or to extend the probationary period, the employer should advise the *employee* of his or her rights to refer the matter to a *council* having jurisdiction, or to the Commission.

(j) Any person making a decision about the fairness of a *dismissal* of an *employee* for poor work performance during or on expiry of the probationary period ought to accept reasons for *dismissal* that may be less compelling than would be the case in *dismissals* effected after the completion of the probationary period.

(2) After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has-

(a) given the employee appropriate evaluation, instruction, training, guidance or counselling; and

(b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.

(3) The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.

(4) In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee.

9 Guidelines in cases of dismissal for poor work performance

Any person determining whether a dismissal for poor work performance is unfair should consider-

(a) whether or not the employee failed to meet a performance standard; and

(b) if the employee did not meet a required performance standard whether or not-

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard.

10 Incapacity: Ill health or injury

(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

(2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

(3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

11 Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider-

(a) whether or not the employee is capable of performing the work; and

(b) if the employee is not capable-

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work.

DISCIPLINARY PROCEDURES

CCMA

PURPOSE

The purpose of a disciplinary code and procedure is to regulate standards of conduct and incapacity of employees within a company or organisation. The aim of discipline is to correct unacceptable behaviour and adopt a progressive approach in the workplace. This also creates certainty and consistency in the application of discipline.

PARTIES OBLIGATIONS

The employer needs to ascertain that all employees are aware of the rules and the reasonable standards of behaviour that are expected of them in the workplace.

The employee needs to comply with the disciplinary code and procedures at the workplace. The employee also needs to ensure that he/she is familiar with the requirements in terms of the disciplinary standards in the workplace.

COUNSELING VERSUS DISCIPLINARY ACTION

There is a difference between disciplinary action and counselling. **Counselling** will be appropriate where the employee is not performing to a standard or is not aware of a rule regulating conduct and/or where the breach of the rule is relatively minor and can be condoned.

Disciplinary action will be appropriate where a breach of the rule cannot be condoned, or where counselling has failed to achieve the desired effect.

Before deciding on the form of discipline, management must meet the employee in order to explain the nature of the rule s/he is alleged to have breached. The employee should also be given the opportunity to respond and explain his/her conduct. If possible an agreed remedy on how to address the conduct should be arrived at.

FORMS OF DISCIPLINE

Disciplinary action can take a number of forms, depending on the seriousness of the offence and whether the employee has breached the particular rule before. The following forms of discipline can be used (in order of severity):

- Verbal warning;
- Written warning;
- Final written warning;
- Suspension without pay (for a limited period);
- Demotion, as an alternative to dismissal only; or
- Dismissal.

The employer should establish how serious an offence is, with reference to the disciplinary rules. If the offence is not very serious, informal disciplinary action can be taken by giving an employee a verbal warning. The law does not specify that employees should receive any specific number of warnings, for example, three verbal warnings or written warnings, and dismissal could follow as a first offence in the case of serious misconduct.

Formal disciplinary steps would include written warnings and the other forms of discipline listed above. A final written warning could be given in cases where the contravention of the rule is serious or where the employee has received warnings for the same offence before. An employee can appeal against a final return warning and the employer can hold an enquiry if the employer believes that it is only through hearing evidence that the outcome can be determined.

Written warnings will remain valid for 3 to 6 months. Final written warnings will remain valid for 12 months. A warning for one type of contravention is not applicable to another type of offence. In other words, a first written warning for late-coming could not lead to a second written warning for insubordination.

Employees will be requested to sign warning letters and will be given an opportunity to state their objections, should there be any. Should an employee refuse to sign a warning letter, this **does not** make the warning **invalid.** A witness **will** be requested to sign the warning, stating that the employee reused acceptance of the warning.

Dismissal is reserved for the most serious offences and will be preceded by a fair disciplinary enquiry, unless an exceptional circumstance results in a disciplinary enquiry becoming either an impossibility (e.g. the employee absconded and never returned) or undesirable (e.g. holding an enquiry will endanger life or property).

WHEN CAN AN EMPLOYER HOLD A FORMAL ENQUIRY

An employee may be suspended on full pay pending a hearing especially in instances when the employee's presence may jeopardise any investigation. The employer must also allow the employee to make representations. The employer should give the employee not less than three days notice of the enquiry and the letter should include:

- The date, time and venue of the hearing
- Details of the charges against the employee
- The employee's rights to representation at the hearing by either a fellow employee or shop steward.

Note: If the employer intends disciplining a shop steward, the employer must consult with the union before serving notice to attend the enquiry on the intention to discipline the shop steward including the reasons, date and time.

WHO SHOULD BE PRESENT AT THE ENQUIRY?

- A chairperson
- A management representative
- The employee
- The employee representative
- Any witnesses for either parties
- An interpreter if required by the employee

HOW SHOULD A HEARING BE CONDUCTED?

The employer should lead evidence. The employee is then given an opportunity to respond. The chairperson may ask any witnesses questions for clarification. At the ending, the chairperson decides whether the employee is guilty or not guilty. If guilty, the chairperson must ask both parties to make submissions on the appropriate disciplinary sanction. The chairperson must then decide what disciplinary sanctions to impose and inform the employee accordingly.

The employee should be informed that s/he has right to appeal. If the does not provide for an appeal procedure, the employee must be reminded that he/she could take the case further to the CCMA or bargaining council.

The failure to attend the hearing cannot stop the hearing from continuing except if good cause can be shown for not attending.

Note: This procedure should not substitute disciplinary procedures subject to collective agreements.
Parties can also request, by mutual consent, the CCMA or a bargaining council to appoint an arbitrator to conduct a final and binding disciplinary enquiry. The employer would be required to pay a prescribed fee.

(Labour legislation is not specific in terms of the steps to follow when conducting a disciplinary enquiry. These procedures should therefore merely serve as guidelines for parties).

FOR MORE INFORMATION CONTACT THE CCMA OPERATIONS & INFORMATION DEPARTMENT ON (011) 377-6650 OR YOUR NEAREST CCMA OFFICE

Annexure 2

Annexure 3

C158 Termination of Employment Convention, 1982
Convention concerning Termination of Employment at the Initiative of the Employer (Note: Date of coming into force: 23:11:1985.)
Convention:C158
Place:Geneva
Session of the Conference:68
Date of adoption:22:06:1982
Subject classification: Termination of Employment - Dismissal
Subject: **Employment security**

Status: No conclusions The Working Party on Policy regarding the Revision of Standards could not reach any conclusions regarding Convention No. 158 and Recommendation No. 166.

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and

Noting the existing international standards contained in the Termination of Employment Recommendation, 1963, and

Noting that since the adoption of the Termination of Employment Recommendation, 1963, significant developments have occurred in the law and practice of many member States on the questions covered by that Recommendation, and

Considering that these developments have made it appropriate to adopt new international standards on the subject, particularly having regard to the serious problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries,

Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two the following Convention, which may be cited as the Termination of Employment Convention, 1982:

PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.

2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the

workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms ***termination*** and ***termination of employment*** mean termination of employment at the initiative of the employer.

PART II.

Standard
S OF GENERAL APPLICATION

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

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 5

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 6

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

DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

Article 7

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.

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

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 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the

other circumstances relating to the case and to render a decision on whether the termination was justified.

2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention

ANNEXURE 4
R166 Termination of Employment Recommendation, 1982
RECOMMENDATION CONCERNING TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER
Recommendation:R166
Place:Geneva
Session of the Conference:68
Date of adoption: 22:06:1982
Subject classification: Termination of Employment - Dismissal
Subject: **Employment security**
Display the document in: French Spanish
Status: No conclusions The Working Party on Policy regarding the Revision of Standards could not reach any conclusions regarding Convention No. 158 and Rec

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and

Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Termination of Employment Convention, 1982;

adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two, the following Recommendation, which may be cited as the Termination of Employment Recommendation, 1982:

I. Methods of Implementation, Scope and Definitions

1. The provisions of this Recommendation may be applied by national laws or regulations, collective agreements, works rules, arbitration awards or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.

2.

(1) This Recommendation applies to all branches of economic activity and to all employed persons.

(2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

(3) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements, which as a whole provide protection that is at least equivalent to the protection afforded under the Recommendation.

(4) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

3.

(1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

(2) To this end, for example, provision may be made for one or more of the following:

(a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;

(b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;

(c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

4. For the purpose of this Recommendation the terms ***termination*** and ***termination of employment*** mean termination of employment at the initiative of the employer.

II. Standards of General Application

Justification for Termination

5. In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination:

(a) age, subject to national law and practice regarding retirement;

(b) absence from work due to compulsory military service or other civic obligations, in accordance with national law and practice.

6.

(1) Temporary absence from work because of illness or injury should not constitute a valid reason for termination.

(2) The definition of what constitutes temporary absence from work, the extent to which medical certification should be required and possible limitations to the application of subparagraph (1) of this Paragraph should be determined in accordance with the methods of implementation referred to in Paragraph 1 of this Recommendation.

Procedure Prior to or at the Time of Termination

7. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.

8. The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

9. A worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in Paragraph 1 of this Recommendation.

10. The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.

11. The employer may consult workers' representatives before a final decision is taken on individual cases of termination of employment.

12. The employer should notify a worker in writing of a decision to terminate his employment.

13.

(1) A worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.

(2) Subparagraph (1) of this Paragraph need not be applied in the case of collective termination for the reasons referred to in Articles 13 and 14 of the Termination of Employment Convention, 1982, if the procedure provided for therein is followed.

Procedure of Appeal against Termination

14. Provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against termination of employment.

15. Efforts should be made by public authorities, workers' representatives and organisations of workers to ensure that workers are fully informed of the possibilities of appeal at their disposal.

Time Off from Work during the Period of Notice

16. During the period of notice referred to in Article 11 of the Termination of Employment Convention, 1982, the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties.

Certificate of Employment

17. A worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying only the dates of his engagement and termination of his employment and the type or types of work on which he was employed; nevertheless, and at the request of the worker, an evaluation of his conduct and performance may be given in this certificate or in a separate certificate.

Severance Allowance and Other Income Protection

18.

(1) A worker whose employment has been terminated should be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which should be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

(2) A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in subparagraph (1) (a) of this Paragraph solely because he is not receiving an unemployment benefit under subparagraph (1) (b).

(3) Provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1) (a) of this Paragraph in the event of termination for serious misconduct.

III. Supplementary Provisions concerning Terminations of Employment for Economic, Technological, Structural or Similar Reasons

19.

(1) All parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to

mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.

(2) Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated.

Consultations on Major Changes in the Undertaking

20.

(1) When the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes.

(2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.

(3) For the purposes of this Paragraph the term ***the workers' representatives concerned*** means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

Measures to Avert or Minimise Termination

21. The measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

22. Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice.

Criteria for Selection for Termination

23.

(1) The selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.

(2) These criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

Priority of Rehiring

24.

(1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.

(2) Such priority of rehiring may be limited to a specified period of time.

(3) The criteria for the priority of rehiring, the question of retention of rights-particularly seniority rights-in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

Mitigating the Effects of Termination

25.

(1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned.

(2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.

(3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

26.

(1) With a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.

(2) The competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of this Paragraph, in accordance with national law and practice.

IV. Effect on Earlier Recommendation

27. This Recommendation and the Termination of Employment Convention, 1982, supersede the Termination of Employment Recommendation, 1963.

Cross references

Conventions: C158 Termination of Employment Convention, 1982
Conventions: C142 Human Resources Development Convention, 1975
Recommendations:R150 Human Resources Development Recommendation, 1975
Recommendations:R119 Termination of Employment Recommendation, 1963